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[1]Retired 31 December 2020. [2]Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. [3]Retired 31 December 2020.
[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

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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

THE BROAD STREET CLINIC FOUNDATION, PLAINTIFF
v.
ORIN H. WEEKS, JR., INDIVIDUALLY AND AS TRUSTEE OF THE ORIN H. WEEKS, JR. REVOCABLE LIVING TRUST, PLANTATION VENTURE, LLC, IZORAH, LLC, EDWARD HILL, LLC, ROBERT H., LLC, AND CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION, DEFENDANTS

No. COA19-1033

Filed 18 August 2020

Real Property—transfer fee covenant—subsequent owner—unavailability of equitable relief

Where the individual defendant purchased property for significantly less than its value and agreed to include in the deed a provision that plaintiff-clinic would receive 25% of the proceeds of the first conveyance of the property, the trial court properly granted defendants' motion to dismiss plaintiff's claim for payment in accordance with the 25% provision because the provision was a fee or charge upon the transfer of property and, therefore, constituted an unenforceable transfer covenant under N.C.G.S. Chapter 39A. Although defendant was a covenanting party to the deed, he was also a subsequent purchaser against whom the covenant could not be enforced, and equitable relief was unavailable because Chapter 39A provides that transfer fee covenants are not enforceable in law or equity.

Appeal by plaintiff from order entered 20 May 2019 by Judge George F. Jones in Carteret County Superior Court. Heard in the Court of Appeals 10 June 2020.

Harvell and Collins, P.A., by Wesley A. Collins and Samuel K. Morris-Bloom, for plaintiff-appellant.

Ward and Smith, P.A., by Michael J. Parrish and Alex C. Dale, for defendants-appellees Orin H. Weeks, Jr., individually and as Trustee of The Orin H. Weeks, Jr. Revocable Living Trust, Izorah, LLC, Edward Hill, LLC, and Robert H., LLC.

White & Allen, P.A., by John P. Marshall, and Womble Bond Dickinson (US) LLP, by Michael Montecalvo, for defendant-appellee Plantation Venture, LLC.

Blanco Tackabery & Matamoros, P.A., by Chad A. Archer and Ashley S. Rusher, for defendant-appellee Carteret-Craven Electric Membership Corporation.

ZACHARY, Judge.

Plaintiff The Broad Street Clinic Foundation appeals from the trial court's order granting Defendants' motions to dismiss its claims, asserting that the provision of a deed that Plaintiff seeks to enforce is not an unenforceable transfer fee covenant. After careful review, we affirm.

Background

The relevant factual allegations of Plaintiff The Broad Street Clinic Foundation's (the "Clinic's") complaint, which for purposes of this appeal are taken as true, are as follows: Among other assets, John R. Jones owned three valuable tracts of land, consisting of approximately 60 acres in Carteret County, North Carolina (the "Property"). Upon his death on 23 April 2015, Mr. Jones's 88-year-old wife, Lois B. Jones, inherited the Property.

Shortly after Mr. Jones's death, Mrs. Jones and Orin H. Weeks, Jr., negotiated the sale of the Property to Weeks. Although the Property's tax value exceeded $800,000, Weeks offered Mrs. Jones approximately $200,000; however, he suggested that the deed contain a provision obligating Weeks to give 25% of the proceeds of the first conveyance of the Property to the charitable organization of her choice. Mr. Jones was a dedicated supporter of the Clinic, a non-profit, free health clinic that provides medical care to underserved individuals in Carteret County and the surrounding areas. Accordingly, Mrs. Jones designated the Clinic as the charitable organization to benefit from Weeks's first conveyance of the Property.

Mrs. Jones agreed to accept Weeks's offer of $200,000 for the Property, with the proviso that she retain a life estate in the Property, and that the deed provide that the Clinic would receive 25% of the proceeds of the first conveyance of the Property.

On 21 May 2015, Mrs. Jones conveyed the Property to Weeks, and retained a life estate. On 22 May 2015, the deed was recorded at Book 1509, Page 191, Carteret County Register of Deeds (the "Jones Deed"). The deed, which the Clinic contends was prepared by Weeks's attorneys, also contained the agreed-upon "25% Provision."

> And the party of the second part, [Weeks,] for itself and its successors and assigns, hereby covenants and agrees with the parties of the first part[, Mrs. Jones,] that *upon the first conveyance of the Property from* [*Weeks*] *or its successors or assigns to a party other than Orin H. Weeks, Jr. or an heir or devisee of Orin H. Weeks, Jr.*, [*Weeks*] *or its successor or assign, as the case may be, will pay twenty-five percent (25%) of the gross proceeds less all customary costs (excluding any debt repayment) to be received by* [*Weeks*] *to The Broad Street Clinic Foundation*, or if The Broad Street Clinic Foundation does not then exist, then to Carteret County General Hospital Foundation Corporation, or if Carteret County General Hospital Foundation Corporation does not then exist, then to a similar non-profit organization serving Carteret County and Eastern North Carolina chosen by [Weeks].

(Emphasis added).

Mrs. Jones died later that year. The Clinic alleges that, following Mrs. Jones' death, Weeks "or a presently unknown associate" formed four limited liability companies: Defendant Plantation Venture, LLC; Defendant Izorah, LLC; Defendant Robert H., LLC; and Defendant Edward Hill, LLC.

On 17 August 2017, Weeks recorded a gift deed conveying title to a portion of the Property to Plantation Venture, LLC. On 24 January 2018, Weeks conveyed approximately 10.35 acres of the Property by special warranty deed to Defendant Robert H., LLC; approximately 10.33 acres of the Property by special warranty deed to Defendant Izorah, LLC; and approximately 10.44 acres of the Property by special warranty deed to Defendant Edward Hill, LLC. The revenue stamps on the Robert H., LLC deed, the Izorah, LLC deed, and the Edward Hill, LLC deed indicate that the land was conveyed for no consideration. On 22 February 2018,

Plantation Venture, LLC, used 4.588 acres of the land as collateral for a $750,000 loan from Defendant Carteret-Craven Electric Membership Corporation, and executed a deed of trust and security agreement securing the loan.

The Clinic eventually learned about Weeks's conveyance to Plantation Venture, LLC and, by letter dated 14 June 2018, demanded payment in accordance with the 25% Provision. By letter dated 18 June 2018, Weeks informed the Clinic's counsel that no proceeds had been generated by the conveyance, and that therefore the Clinic was "not entitled to anything."

On 6 November 2018, the Clinic filed its complaint against Defendants and its notice of *lis pendens*. On 16 November 2018, the Clinic filed an amended complaint, adding Defendant Carteret-Craven Electric Membership Corporation as a named party. The amended complaint included two requests for declaratory judgment, as well as a claim to void transfers of trust property, and claims for breach of contract/covenant (Weeks only); breach of fiduciary duty (Weeks only); constructive fraud (Weeks only); interference with prospective advantage (Plantation Venture, LLC; Izorah, LLC; Edward Hill, LLC; and Robert H., LLC only); fraud (excluding Carteret-Craven Electric Membership Corporation); unjust enrichment (excluding Carteret-Craven Electric Membership Corporation); civil conspiracy (excluding Carteret-Craven Electric Membership Corporation); punitive damages (excluding Carteret-Craven Electric Membership Corporation); unfair and deceptive trade practices (excluding Carteret-Craven Electric Membership Corporation); and piercing the limited liability shield (excluding Carteret-Craven Electric Membership Corporation).

On 21 December 2018, Weeks, individually and as Trustee of the Orin H. Weeks, Jr., Revocable Living Trust; Izorah, LLC; Edward Hill, LLC; and Robert H., LLC moved to dismiss the Clinic's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and filed their answer to the Clinic's amended complaint. In their answer, these defendants asserted, *inter alia*, that the Clinic "has no right to bring any claim against" them because, "[t]o the extent that the Jones Deed required the payment of any amount of proceeds to the Clinic upon the sale of any portion of the [Property], such a requirement is void, invalid, and/or unenforceable as a matter of North Carolina law and public policy," in that "[a]ny such requirement is a transfer fee covenant which is specifically prohibited by, and deemed void under, N.C. Gen. Stat. § 39A-1 *et seq*." That same day, Plantation Venture, LLC also moved to

dismiss the Clinic's claims pursuant to Rule 12(b)(6), asserting that the 25% Provision "is an unenforceable 'transfer fee covenant' prohibited by N.C. Gen. Stat. § 39A." Plantation Venture, LLC filed its answer to the Clinic's amended complaint as well. Lastly, on 27 December 2018, Carteret-Craven Electric Membership Corporation moved to dismiss the Clinic's claims pursuant to Rule 12(b)(1) and (6), and moved for attorneys' fees.

On 7 January 2019, Defendants' motions came on for hearing in Carteret County Superior Court before the Honorable George F. Jones. On 20 May 2019, the trial court entered an order granting Defendants' motions to dismiss. The Clinic entered timely notice of appeal.

Discussion

Each of the Clinic's claims is predicated on the enforceability of the 25% Provision. Accordingly, the determinative issue at bar is whether the 25% Provision in the Jones Deed is an unenforceable transfer fee covenant.

I. Standard of Review

A party may move for the dismissal of a claim or claims based on the complaint's "[f]ailure to state a claim upon which relief can be granted[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). "The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "In ruling on the motion[,] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Id.* (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not[.]" *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted).

Dismissal of a claim under Rule 12(b)(6) is proper "(1) when the complaint on its face reveals that no law supports [the] plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 98, 834 S.E.2d 404, 411 (2019) (citation omitted). "However, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim which would entitle the plaintiff to relief." *Id.* (citation and internal quotation marks omitted).

Upon review of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, this Court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief could be granted under some legal theory." *McGuire v. Dixon*, 207 N.C. App. 330, 336, 700 S.E.2d 71, 75 (2010) (citation omitted). In doing so, "this Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Wilson v. Pershing*, 253 N.C. App. 643, 651, 801 S.E.2d 150, 157 (2017) (citation and internal quotation marks omitted).

II. Analysis

On appeal, the Clinic argues that the trial court erred by granting Defendants' motions to dismiss because the 25% Provision is not a transfer fee covenant under Chapter 39A, and if it were, it is nonetheless enforceable.

Transfer fee covenants are prohibited under Chapter 39A of the North Carolina General Statutes. North Carolina's "public policy . . . favors the marketability of real property and the transferability of interests in real property free from title defects, unreasonable restraints on alienation, and covenants or servitudes that do not touch and concern the property." N.C. Gen. Stat. § 39A-1(a). "A transfer fee covenant violates this public policy by impairing the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation and transferability of property, regardless of the duration of the covenant or the amount of the transfer fee set forth in the covenant." *Id.* § 39A-1(b).

In accordance with the public policy enunciated by our General Assembly in Chapter 39A, transfer fee covenants are unenforceable.

> Any transfer fee covenant or any lien that is filed to enforce a transfer fee covenant or purports to secure payment of a transfer fee, *shall not run with the title to real property* and *is not binding on or enforceable at law or in equity* against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise.

Id. § 39A-3(a) (emphases added).

Whether the 25% Provision of the Jones Deed constitutes an unenforceable transfer fee covenant under Chapter 39A is a matter of statutory

interpretation. "Statutory interpretation properly begins with an examination of the plain words of a statute. When a statute is clear and unambiguous, the Court will give effect to the plain meaning of the words without resorting to judicial construction." *McGuire*, 207 N.C. App. at 337, 700 S.E.2d at 75 (citations and internal quotation marks omitted).

A. Transfer Fee Covenant

A transfer fee covenant as defined in Chapter 39A is "a declaration or covenant purporting to affect real property that requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns, upon a subsequent transfer of an interest in real property." N.C. Gen. Stat. § 39A-2(3). Chapter 39A defines a transfer fee, in pertinent part, as:

> a fee or charge payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer.

Id. § 39A-2(2).

The Clinic contends that the 25% Provision is not a fee or charge as defined by *Black's Law Dictionary*, which defines the term "fee" as "[a] charge or payment for labor or services, esp[ecially] professional services," and the term "charge" as "[p]rice, cost, or expense[.]" *Black's Law Dictionary* (10th ed. 2014). In the Clinic's view, the right to a percentage of the proceeds of the first conveyance of the Property is materially different from a fee or charge. A thorough appraisal of Chapter 39A does not support the narrow reading propounded by the Clinic. Upon review of the plain language of the statute, to which this Court must give effect, a charge of 25% of the gross proceeds of the first conveyance, less customary costs, is manifestly "a fee or charge payable upon the transfer of an interest in real property . . . as a percentage of . . . the purchase price, . . . given for the transfer." N.C. Gen. Stat. § 39A-2(2).

In addition, the Clinic asserts that the 25% Provision is not a fee or charge upon transfer under Chapter 39A, but is rather the payment of subsequent additional consideration for the Property. N.C. Gen. Stat. § 39A-2(2)(a)-(j) sets forth several types of fees that "shall not be considered a 'transfer fee' " within the purview of Chapter 39A. *Id.* Subsection (a) exempts from the definition of transfer fee

> [a]ny consideration payable by the grantee to the grantor for the interest in real property being transferred, including any *subsequent additional consideration for the property* payable by the grantee based upon any subsequent appreciation, development, or sale of the property that, once paid, shall not bind successors in title to the property.

Id. § 39A-2(2)(a) (emphasis added).

Weeks's obligation to pay a percentage of the proceeds to the Clinic upon sale of the Property seems consonant with the statutory definition of additional consideration, given the low price Weeks paid for the Property. However, the statute plainly provides that the additional consideration must be payable "by the grantee to the grantor." *Id.* "This language is clear and unambiguous, and we are not at liberty to divine a different meaning through other methods of judicial construction." *Haarhuis v. Cheek*, 261 N.C. App. 358, 366, 820 S.E.2d 844, 851 (2018) (citation and internal quotation marks omitted), *disc. review denied*, 372 N.C. 298, 826 S.E.2d 708 (2019).

In the instant case, the 25% Provision calls for payment by the grantee, Weeks, *to a third party*, the Clinic, rather than to the grantor. Thus, the 25% Provision is not exempt from the definition of a transfer fee, and is instead a fee or charge upon transfer of the Property, as defined in Chapter 39A.

B. Enforceability of a Transfer Fee Covenant

The Clinic also argues that even if the 25% Provision were a transfer fee covenant, it is enforceable against Weeks because Weeks is a covenanting party to the deed rather than a subsequent owner or purchaser of the Property, and against the successor LLCs because they exist merely as the alter ego of Weeks. This argument also lacks merit.

N.C. Gen. Stat. § 39A-3(a) provides that transfer fee covenants are "not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in property." The Clinic correctly states that Weeks was a party to the transfer fee covenant, and that Chapter 39A does not include covenanting parties in the list of those against whom a transfer fee covenant may not be enforced. Nevertheless, Weeks is also a subsequent owner of the Property, taking his interest from Mrs. Jones. Chapter 39A does not exclude subsequent owners who are also covenanting parties from the prohibition on enforcement.

Here, the parties interpret the meaning and significance of the provisions of Chapter 39A differently; that does not, however, render

it ambiguous. Ambiguity exists where the language is "reasonably susceptible" to different interpretations. *See Simmons v. Waddell*, 241 N.C. App. 512, 520, 775 S.E.2d 661, 671 (citation omitted), *disc. review denied*, 368 N.C. 355, 776 S.E.2d 684 (2015). However, "[p]arties can differ as to the interpretation of language without its being ambiguous[.]" *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996).

When Chapter 39A is read and interpreted as a whole, it is evident that the 25% Provision is a transfer fee covenant, and that Weeks is a subsequent owner against whom a transfer fee covenant cannot be enforced. Our legislature has provided that transfer fee covenants "shall not run with the title to real property and [are] not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise." N.C. Gen. Stat. § 39A-3(a). Thus, the Clinic cannot enforce the 25% Provision.

C. Equitable Relief

Finally, the Clinic contends that Defendants are estopped from asserting that the 25% Provision is an unenforceable transfer fee covenant, reminding this Court that "[e]quity serves to moderate the unjust results that would follow from the unbending application of common law rules and statutes." *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991).

Yet Chapter 39A specifically provides that transfer fee covenants are not "enforceable at law or *in equity*," N.C. Gen. Stat. § 39A-3 (emphasis added), and therefore, this Court is not empowered to achieve an equitable result in this matter. As Weeks concedes, he proposed a purchase price of approximately one quarter of the property's tax value, and he "suggested that 25% of any future sales proceeds be given to a charity." Yet, at Weeks's request, his attorneys prepared a deed with an unenforceable transfer fee covenant. Nevertheless, Weeks correctly maintains that our courts have declined to enforce a promise that is in violation of public policy. *See, e.g.*, *Thompson v. Thompson*, 313 N.C. 313, 314-15, 328 S.E.2d 288, 290 (1985) (noting that an attorney's contingency fee agreement in a domestic matter was unenforceable because it was void as against public policy); *Glover v. Insurance Co.*, 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947) (holding that an insurer could not enforce exclusion in fire insurance policy, which deviated from the requisite standard form, as void as against public policy); *Lee v. Oates*, 171 N.C. 717, 721, 88 S.E. 889, 891 (1916) (holding that a provision in a deed prohibiting a life tenant from selling her life estate was void as against public policy).

Lacking the authority to effectuate another outcome, we must agree with Weeks's assertion that "[w]hether to honor [his] promise is a decision that is personal to [him], but is not one that the law may compel[.]"

Conclusion

Accordingly, in that the facts alleged in the Clinic's complaint necessarily defeat its claims, we affirm the trial court's order granting Defendants' motions to dismiss. Because the dispositive issue is whether the 25% Provision constitutes an unenforceable transfer fee covenant, and we have held that it does, we decline to address additional arguments.

AFFIRMED.

Judges BERGER and BROOK concur.

JANE DOE AND JOHN DOE, PLAINTIFFS
v.
CITY OF CHARLOTTE AND G.M. SMITH, OFFICIALLY AND INDIVIDUALLY, DEFENDANTS

No. COA19-497

Filed 18 August 2020

1. Civil Procedure—reconsideration of pretrial order—Rule 59—not appropriate method

In a case involving multiple claims against a police officer and a city including false imprisonment and malicious prosecution, plaintiffs' "Motion to Reconsider" invoking Rule 59 did not toll the time to appeal from an order granting partial summary judgment for defendants, because Rule 59 is not an appropriate method of requesting reconsideration of an interlocutory, pre-trial order. Since plaintiffs did not include the order denying their motion to reconsider in their notice of appeal, their appeal of the summary judgment order—more than thirty days after it was entered—was untimely.

2. Appeal and Error—interlocutory order—Rule 54(b) certification—language not contained in judgment—insufficient to confer appellate jurisdiction

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, plaintiffs' request for certification, pursuant to Rule 54(b) of the Rules of

Civil Procedure, of the trial court's order granting partial summary judgment to defendants was insufficient to invoke the appellate court's jurisdiction where the certification language was not contained in the body of the order being appealed.

3. Appeal and Error—interlocutory order—grounds for substantial rights—inconsistent verdicts—more than mere assertion required

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, plaintiffs' attempt to assert that a substantial right was affected by the trial court's entry of summary judgment for defendants was ineffective where plaintiffs merely stated there was a risk of inconsistent verdicts without providing any explanation of how, in this particular case, different fact-finders might reach results that could not be reconciled with each other.

4. Appeal and Error—jurisdictional defects—writ of certiorari—requirement of filing a petition—issuance by court on own motion

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, despite numerous jurisdictional errors by plaintiffs to invoke appellate jurisdiction (of an order granting partial summary judgment to defendants) and despite plaintiffs' failure to file a petition for writ of certiorari, the Court of Appeals opted, in its discretion, to issue a writ of certiorari, since the case presented important issues of justice and liberty, and plaintiffs' issues on appeal were meritorious.

5. Immunity—law enforcement officer—malicious conduct—genuine issue of material fact

In a case involving multiple claims against a police officer and city including false imprisonment and malicious prosecution, where plaintiffs' evidence raised a genuine issue of material fact regarding whether the officer acted with malice when causing the issuance of a citation for misdemeanor child abuse—despite lack of evidence and eyewitness observations from two other officers who informed the late-arriving officer the conduct was not actionable—the trial court erred by granting summary judgment for defendants based on the public immunity doctrine.

Appeal by plaintiffs from order entered 15 January 2019 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2019.

Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess, for plaintiffs-appellants.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, for defendant-appellee City of Charlotte.

Law Offices of Lori Keeton, by Lori R. Keeton, for defendant-appellee G.M. Smith.

DIETZ, Judge.

Plaintiff Jane Doe got lost while driving her children to a birthday party. She stopped in a parking lot, hopped out of her car, and asked someone nearby for directions. Witnesses said Doe was gone from her car somewhere between one and two minutes.

During that time, Captain G.M. Smith, a law enforcement officer, arrived. According to Doe's evidence, Captain Smith was inexplicably angry and hostile towards Doe for leaving her children in an unattended car. Captain Smith ignored other officers who said Doe had done nothing wrong and ultimately charged Doe with misdemeanor child abuse.

After the State dropped the charges and the police department reprimanded Captain Smith, Doe and her husband sued Smith and his employer, the City of Charlotte. The trial court dismissed a number of their claims based on public official immunity, finding that there was insufficient evidence that Captain Smith acted with malice.

A central issue in this appeal is our authority to hear it at all. As explained below, Plaintiffs made a series of avoidable mistakes that deprived this Court of jurisdiction to hear the case—their appeal was untimely; their Rule 54(b) certification was defective; their statement of the grounds for appellate review is inadequate; and instead of petitioning for a writ of certiorari, they requested that this Court "treat this appeal as writ for certiorari." Nevertheless, because this case raises important issues and Plaintiffs have a meritorious argument, we exercise our discretion to issue a writ of certiorari and address the merits of this appeal.

Reaching the merits, we reverse. Plaintiffs' evidence, viewed in their favor, is sufficient to create a genuine issue of material fact on the issue of malice. We acknowledge that Defendants have their own evidence indicating that Captain Smith acted properly and without malice. But this Court cannot choose between that competing evidence—a jury must do that. Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Facts and Procedural History

The following recitation of facts represents Plaintiffs' version of events, viewed in the light most favorable to them. As the non-movants at the summary judgment stage, Plaintiffs are entitled to have disputed facts resolved in their favor during our appellate review. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). We note that Defendants have their own evidence and witness testimony disputing many of these facts. Under the applicable standard of review, we must ignore Defendants' competing evidence at this stage in the case. *Id.*

Plaintiff Jane Doe[1] got lost while driving her young children to a birthday party inside a large nature preserve in Mecklenburg County. Realizing that she must have missed a turn, Doe pulled into a parking area, hopped out of her car, and asked a nearby park employee for directions. Two Charlotte-Mecklenburg Police Department officers, Aaron Deroba and David Gathings, were on patrol duty in the park and saw Doe drive up, exit her car, and walk toward a wooden fence to ask a park employee for directions.

Doe left her children unattended in her car while she asked for directions. According to a park employee who witnessed these events, it took about sixty seconds for Doe to walk to the fence, get directions, and jog back to her car.

As Doe returned to her car, another Charlotte-Mecklenburg Police Department officer, Captain G.M. Smith,[2] drove into the parking area in his patrol car and saw Doe's children unattended in her car. He then signaled for Officers Deroba and Gathings to come to him. According to Officer Gathings, no more than two minutes passed from the time they saw Doe leave her car to ask for directions and the time they responded to Captain Smith.

As Doe approached her car, Captain Smith ordered her to stop. Captain Smith was visibly angry and confronted Doe for leaving her children unattended in a car with the windows rolled up. Doe explained that she had only been gone for a moment and opened the driver's door to demonstrate that the car was still cool. Captain Smith briefly stuck his arm inside the car and responded, "No, it's not."

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1. We assume that the names of Jane Doe and her husband John Doe are pseudonyms used without objection by Defendants. Jane Doe's real name is redacted in some portions of the record on appeal but appears unredacted in various other portions of the record.

2. The parties' briefing and the record on appeal use varying departmental ranks when referring to Smith. For consistency, we use Captain Smith.

Captain Smith then informed Doe that he was charging her with child abuse. Both Officer Gathings and Officer Deroba told Captain Smith that they had observed Doe and that she had not left her children in the car for a dangerous amount of time. Captain Smith responded, "That doesn't matter." Captain Smith was "angry" and "aggressive" and he "bullied" the other officers on the scene throughout the encounter.

According to an internal police department investigation, Officers Gathings and Deroba spoke outside Captain Smith's presence and agreed that there was no probable cause to arrest Doe. Doe also asked the officers "why Captain Smith was being so mean to her" and Officer Deroba responded that "he did not know why."

Ultimately, Captain Smith instructed Officer Gathings to issue Doe a citation for misdemeanor child abuse. Both Officer Deroba and Officer Gathings believed that Doe had not done anything wrong and told Captain Smith that they did not think there was probable cause to issue a citation. The officers later reported to departmental investigators that "Captain Smith overreacted and wasn't being objective or listening to what we observed." Officer Deroba told investigators, "It didn't seem like Captain Smith wanted to listen to anything I had to say." Because Officer Gathings felt bound to obey a superior officer, he issued Doe the citation for misdemeanor child abuse.

In December 2014, the State dismissed the criminal case against Doe. In 2015, following an investigation, Captain Smith received a written reprimand from the Charlotte-Mecklenburg Police Department for making an arrest that Smith knew, or should have known, was not in accordance with the law or department procedure.

In 2017, Jane Doe and her husband John Doe filed a complaint against Captain Smith in his individual and official capacities and against the City of Charlotte, his employer, alleging claims for negligence, loss of consortium, false imprisonment, malicious prosecution, and claims under 42 U.S.C. § 1983.

Defendants later moved for summary judgment. On 15 January 2019, the trial court entered partial summary judgment, dismissing all claims in the complaint except the Section 1983 claim against Smith.

Plaintiffs then filed a "Motion to Reconsider," citing Rule 59 of the Rules of Civil Procedure. On 4 February 2019, the trial court denied the motion. Several weeks after the trial court denied Plaintiffs' motion to reconsider, Plaintiffs moved to certify the original summary judgment order for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure.

On 1 March 2019, the trial court entered a stand-alone order granting Plaintiffs' motion and stating that the trial court "hereby certifies that its Summary Judgment Order is a final judgment as to all claims against the City of Charlotte and as to the state law claims against Defendant Smith, and that there is no just reason for delay in entering that final judgment."

That same day, 1 March 2019, Plaintiffs appealed the trial court's 15 January 2019 summary judgment order, based on the newly entered Rule 54(b) certification. Plaintiffs' notice of appeal states that it is an appeal from "that Order granting partial Summary Judgment as to less than all claims and less than all parties in this action." The notice of appeal does not mention the 4 February 2019 denial of the motion to reconsider.

Analysis

I. Appellate Jurisdiction

We begin our analysis by addressing Defendants' challenge to this Court's jurisdiction. As explained below, Plaintiffs made a series of avoidable mistakes that deprived this Court of jurisdiction to reach the merits of the appeal. Although this Court frequently excuses ordinary, non-jurisdictional rules violations by litigants, jurisdictional defects are different. This Court cannot excuse a jurisdictional mistake; that mistake "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Because jurisdictional defects compel such severe consequences, we discuss the mistakes that occurred here for the benefit of the parties in this case and for future litigants.

A. Improper use of Rule 59(e) motion to alter or amend a judgment

[1] We begin with Defendants' argument that this appeal is untimely. "A timely notice of appeal is required to confer jurisdiction upon this Court." *Raymond v. Raymond*, 257 N.C. App. 700, 703, 811 S.E.2d 168, 170 (2018). Plaintiffs concede that they did not file their notice of appeal from the summary judgment order within thirty days of entry of that order, the time period that ordinarily applies to appeals from civil rulings. N.C. R. App. P. 3. But they argue that the time to appeal was tolled because they filed what is often called a "post-trial" motion under Rule 59 of the Rules of Civil Procedure and, by doing so, tolled the time to appeal until the trial court ruled on that motion. *See* N.C. R. App. P. 3(c)(3).

Rule 59 cannot be used in this way; under settled precedent from this Court, Rule 59 is not an appropriate means of seeking reconsideration of interlocutory, pre-trial rulings of trial courts. *See*, *e.g.*, *Tetra*

Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 250 N.C. App. 791, 796, 794 S.E.2d 535, 538 (2016). We could end our analysis with this statement of settled law but, because Plaintiffs' mistake stems from continuing confusion among litigants about the effect of so-called "motions to reconsider," we will explain why Rule 59 is an inappropriate vehicle for seeking reconsideration of a pre-trial ruling by a trial court.

As an initial matter, this confusion likely results from there being no mention of a "motion to reconsider" in the North Carolina Rules of Civil Procedure. Thus, litigants seeking to have the trial court reconsider a ruling often search for wording in our procedural rules that permits their motion.

They might rely on Rule 7, which authorizes the use of "motions" as a means to apply "to the court for an order" on some subject, but does not enumerate, or expressly limit, the types of motions that may be made. N.C. R. Civ. P. 7(b).

Or they might rely on Rule 54(b), which states that "any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). This implies that a litigant may ask the trial court to revise any decision in the case until the entry of a final judgment on all claims as to all parties.

But sometimes, litigants searching for the procedural mechanism for a "motion to reconsider" come across Rule 59(e), which it titled "Motion to alter or amend a judgment" and states that "a motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e).

This seems a relatively close fit—after all, most motions to reconsider are, in essence, asking the court to "alter or amend" some ruling by the court. And, importantly, Rule 59 offers a convenient, additional benefit. Ordinarily, when a litigant makes a motion to reconsider, the clock is still ticking on the 30-day deadline to appeal the underlying ruling. N.C. R. App. P. 3(c)(1), (2). But Rule 3 of the Rules of Appellate Procedure states that when a litigant makes a timely motion under Rule 59, "the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion." N.C. R. App. P. 3(c)(3).

The problem with using Rule 59 to seek reconsideration of a pre-trial order is the wording of the rule itself. For ease of reference, we include the relevant portions of Rule 59 below:

Rule 59. New trials; amendment of judgments.

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion; or

(9) Any other reason heretofore recognized as grounds for a new trial.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

. . .

(e) Motion to alter or amend a judgment.—A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment.

N.C. R. Civ. P. 59.

Everything about Rule 59(a), from its introduction governing "new trials," to the nine enumerated grounds, to the concluding text addressing "an action tried without a jury," indicates that this rule applies only after a trial on the merits. And Rule 59(e) expressly states that it applies only to issues for which Rule 59(a) would apply, but for which the moving party seeks to alter or amend the judgment, not to obtain a new trial.

Relying on the plain text of Rule 59, several decisions of this Court have held that Rule 59 does not apply to pre-trial rulings. *See Sfreddo v. Hicks*, 266 N.C. App. 84, 87, 831 S.E.2d 353, 356 (2019); *Tetra Tech Tesoro*, 250 N.C. App. at 796, 794 S.E.2d at 538; *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 76 (2011).

This interpretation of Rule 59(e) is strengthened by contrasting it with the similarly worded provision in Rule 59(e) of the Federal Rules of Civil Procedure. As we have observed, Rule 59(e) of the Federal Rules of Civil Procedure is "broader than our State's counterpart: it permits a motion to 'alter or amend a judgment' generally, unlike the State rule, which limits its application to a 'motion to alter or amend the judgment under section (a) of this rule.' " *Tetra Tech Tesoro*, 250 N.C. App. at 798, 794 S.E.2d at 539.

The North Carolina Rules of Civil Procedure "are modeled after the federal rules." *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 164 (1970). For this reason, when our rules depart from the corresponding language of the federal rules, we must be particularly mindful of that differing language and the intent behind it. *Id.* Here, the drafters of our State's version of Rule 59(e) chose to limit the grounds for a motion to alter or amend a judgment to those listed in Rule 59(a), and we must give meaning to that deliberate choice of language.

Moreover, there are strong policy reasons for interpreting Rule 59 according to its plain text. As we previously have observed, the Rules of Civil Procedure "are enacted by our General Assembly, often following careful review by experts in the Bar. It undermines the purpose of the rules if the appellate courts expand their meaning beyond the written text, forcing litigants to research case law or consult treatises to fully understand the procedures that apply in civil actions." *Tetra Tech Tesoro*, 250 N.C. App. at 799, 794 S.E.2d at 539–40. A plain reading of the grounds listed in Rule 59(a) unambiguously demonstrates that those grounds apply only after trial.

Finally, we note that this interpretation does not leave litigants without a procedural vehicle to seek reconsideration of most pre-trial orders. Rule 54 draws a distinction between final judgments and interlocutory

rulings: "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). The Rule further provides that "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). Thus, in a case like this one involving partial summary judgment, the party seeking reconsideration can move for that relief under Rule 54(b).

Accordingly, we hold that litigants cannot bring a motion under Rule 59(e) to seek reconsideration of a pre-trial ruling by the trial court. Rule 59(e) is available only on the grounds enumerated in Rule 59(a) and they apply only after a trial on the merits. As a result, even if a litigant cites Rule 59 in making a "motion to reconsider" a pre-trial order, that motion will not toll the time to appeal under Rule 3 of the Rules of Appellate Procedure. Applying this holding here, Plaintiffs' time to appeal was not tolled by their mistaken Rule 59 motion and the appeal of the underlying summary judgment order was not timely.[3]

B. The flawed "stand-alone" Rule 54(b) certification

[2] Plaintiffs' mistaken reliance on Rule 59(e) is not the only jurisdictional error they made in this case. Plaintiffs also made a series of mistakes in their attempt to confer appellate jurisdiction over the admittedly interlocutory appeal.

In appeals from final judgments, the appealing party confers jurisdiction on this Court by timely filing a notice of appeal. *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 197, 657 S.E.2d at 365. But the jurisdictional rules are different when litigants appeal from non-final, interlocutory orders because "[a]s a general rule, there is no right of appeal from an interlocutory order." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (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." *Id.*

As a result, interlocutory rulings are subject to a much stricter rule of appealability. In most cases, an interlocutory ruling is immediately appealable "in only two circumstances: (1) if the trial court has certified

3. Plaintiffs could have timely appealed the denial of the motion to reconsider by simply including that order among those listed in the notice of appeal. But, for whatever reason, Plaintiffs chose to appeal only the underlying partial summary judgment order, further limiting the scope of this Court's review.

the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014).

We begin with Plaintiffs' attempt to appeal based on a certification under Rule 54(b). Rule 54(b) provides that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . if there is no just reason for delay *and it is so determined in the judgment*." N.C. R. Civ. P. 54(b) (emphasis added). An order that meets these criteria, and includes the necessary language, is then immediately appealable despite being non-final in nature. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 217, 772 S.E.2d 495, 499, *aff'd per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015).

Importantly, in *Peacock Farm* this Court (and, through a one-word *per curiam* affirmance, our Supreme Court) rejected the notion that a trial court could go back and "certify" a previously entered order as immediately appealable under Rule 54(b). Because the plain text of Rule 54(b) includes the phrase "and it is so determined in the judgment," this Court reasoned that "Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought." *Id.* Thus, a "stand-alone" Rule 54(b) certification included in an order that "did not set out the substantive basis" for the underlying ruling is insufficient to permit an interlocutory appeal. *Id.*

Later cases applying *Peacock Farm* have observed that there is an easy work-around in this situation. As noted above, Rule 54 permits trial courts to change their interlocutory orders at any time before entry of final judgment. N.C. R. Civ. P. 54(b). So, in a case like this one involving partial summary judgment, the trial court simply could "amend the initial order" by entering a new order with the same substantive language as the initial order but with the additional Rule 54(b) certification language added. *See, e.g.*, *Martin v. Landfall Council of Ass'ns, Inc.*, 263 N.C. App. 410, 821 S.E.2d 894, 2018 WL 6613724, at *4 (2018) (unpublished). Then, the aggrieved party can appeal that new order. *Id.*

Unfortunately, Plaintiffs did not follow this guidance from our precedent; instead, they did the one thing that our precedent repeatedly has held will subject the appeal to dismissal. Accordingly, the stand-alone Rule 54(b) certification in this case is ineffective and does not confer appellate jurisdiction over the challenged summary judgment order.

C. Inadequate explanation of the grounds for substantial rights

[3] Plaintiffs also contend that the Rule 54(b) certification was unnecessary because the challenged order affects a substantial right. *See* N.C. Gen. Stat. §§ 7A-27, 1-277. To confer appellate jurisdiction based on a substantial right, "the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019).

Here, Plaintiffs contend that there is a risk of "inconsistent verdicts" sufficient to satisfy the substantial rights doctrine. "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." *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 646, 847 S.E.2d 229, 233 (2020). "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." *Id.*

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*, 264 N.C. App. at 19, 824 S.E.2d at 439 (emphasis added). Importantly, "[t]he mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 80–81, 711 S.E.2d 185, 190–91 (2011). As a result, the appellant cannot meet its burden under the inconsistent verdicts doctrine simply by asserting that "the facts involved in the claims remaining before the trial court may overlap with the facts involved in the claims that have been dismissed." *Id.* Instead, the appellant must explain to the Court how, in a second trial on the challenged claims, a second fact-finder might reach a result that cannot be reconciled with the outcome of the first trial. *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 439.

Plaintiffs did not do so here. They asserted, categorically and in a single sentence, that all the claims in this case involve the "same facts and legal questions" concerning probable cause, without explaining how or why a jury's consideration of those facts in the various state and federal claims in this case could lead to irreconcilable results. In effect, Plaintiffs asked this Court to comb through the record to understand the

facts, research the elements of the various state and federal claims, and then come up with a legal theory that links these separate claims (all with distinct legal elements) to an underlying, determinative question of probable cause. That is not our role; we cannot "construct arguments for or find support for appellant's right to appeal from an interlocutory order." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). The burden is on the appellant to do so, and Plaintiffs did not carry that burden here.

A final observation: Plaintiffs' failure to adequately assert how the challenged order affects a substantial right may be partly explained by Plaintiffs' fixation on a published case that they believed to be controlling. This is a mistake our Court has warned against for years. Whether a particular ruling "affects a substantial right must be determined on a case-by-case basis." *Hamilton*, 212 N.C. App. at 78, 711 S.E.2d at 189. Consequently, outside of a few exceptions such as sovereign immunity, the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant "must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Accordingly, Plaintiffs' statement of the grounds for appellate review is insufficient to establish that the challenged order affects a substantial right.

II. Issuance of a writ of certiorari

[4] As the above analysis demonstrates, this Court lacks appellate jurisdiction to reach the merits of this case for multiple reasons: the appeal is untimely; the Rule 54(b) certification is ineffective; and the statement of grounds for appellate jurisdiction is inadequate. That means there is only one way for us to reach the merits of this case—we would need to issue a writ of certiorari in aid of our jurisdiction. *See* N.C. Gen. Stat. § 7A-32; N.C. R. App. P. 21.

Allowing a petition for a writ of certiorari would be simpler had Plaintiffs actually *filed* a petition for a writ of certiorari. But even in asking this Court to forgive their other mistakes that deprived us of jurisdiction, Plaintiffs made more mistakes. After Defendants moved to dismiss this appeal (putting Plaintiffs on notice of the jurisdictional issues), Plaintiffs did not petition for a writ of certiorari and acknowledge those potential jurisdictional defects. Instead, they opposed the motion to dismiss and filed a separate motion with the Court that asked, in a single sentence, for this Court to "treat this appeal as writ for certiorari if it finds that the appeal was untimely."

The Rules of Appellate Procedure provide a vehicle for requesting that this Court issue a writ of certiorari—that vehicle is a *petition* for a writ of certiorari. *See* N.C. R. App. P. 21. The petition has specific content requirements designed to ensure that the requesting party provides the Court with the facts and argument necessary to assess, in the Court's discretion, whether issuing the writ is appropriate.

To be sure, in the interests of justice this Court has—on rare occasions—construed some other appellate filing such as a brief or motion as a petition for a writ of certiorari and then allowed the petition. *Sood v. Sood*, 222 N.C. App. 807, 813, 732 S.E.2d 603, 608 (2012). But this is truly rare and something that this Court chooses to do on its own initiative; it is not something that a litigant should request. *Id.*; *see also Campbell*, 237 N.C. App. at 7, 764 S.E.2d at 634. Instead, a litigant who seeks issuance of a writ of certiorari should petition for one in the manner described in the Rules of Appellate Procedure. As our Supreme Court has observed, "procedure is essential to the application of principle in courts of justice, and it cannot be dispensed with." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 193, 657 S.E.2d at 362.

Having said all that, we will nevertheless exercise our discretion to issue a writ of certiorari in this case, ignoring Plaintiffs' failure to petition for one. We do so reluctantly and only because this case falls squarely into the category of exceptional cases suitable for certiorari review for two reasons. First, there are wide-reaching issues of justice and liberty at stake in this case. *State v. Hamrick*, 110 N.C. App. 60, 63, 428 S.E.2d 830, 832 (1993). Specifically, the lawsuit alleges serious misconduct and abuse of power by the government in violation of both the U.S. Constitution and our State's common law. Second, as explained below, Plaintiffs' issues on appeal are meritorious. *See State v. Rawlinson*, 262 N.C. App. 374, 820 S.E.2d 132, 2018 WL 5796276, at *1 (2018) (unpublished).

Given the seriousness of the issues in this case, and the merit in Plaintiffs' arguments, we are unwilling to dismiss this appeal for what is, essentially, a pattern of bad lawyering. But this opinion should serve as a warning to future litigants. As our Supreme Court has emphasized, "a jurisdictional default brings a purported appeal to an end before it ever begins." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 198, 657 S.E.2d at 365. Plaintiffs escaped that fate here, but future litigants may not be so lucky.

III. Appeal of the trial court's partial summary judgment order

[5] Having issued a writ of certiorari, we turn to the merits of Plaintiffs' appeal. The trial court entered summary judgment on a number of Plaintiffs' claims after determining that Captain Smith was entitled to public official immunity. That determination, in turn, was based on the trial court's determination that there was insufficient evidence to create a genuine issue of material fact on the question of malice.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "When ruling on a motion for summary judgment, the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Atl. Coast Properties, Inc. v. Saunders*, 243 N.C. App. 211, 214, 777 S.E.2d 292, 295 (2015), *aff'd*, 368 N.C. 776, 783 S.E.2d 733 (2016). Summary judgment should be granted "with caution and only where the movant has established the nonexistence of any genuine issue of fact." *Id.* This Court reviews a grant of summary judgment *de novo*. *Id.*

The trial court's summary judgment rulings were based on the doctrine of public official immunity. That doctrine "is well established in North Carolina: As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 655, 543 S.E.2d 901, 904 (2001). Public official immunity "serves to protect officials from individual liability for mere negligence, but not for malicious or corrupt conduct, in the performance of their official duties." *Id.*

"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." *Id.* at 656, 543 S.E.2d at 905. The law presumes "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008). Accordingly, evidence to overcome this presumption and establish malice "must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Id.*

Applying this standard here, Plaintiffs presented sufficient evidence to create a genuine issue of material fact on the issue of malice. Their evidence (although admittedly disputed) shows that there was no probable cause for Captain Smith to charge Jane Doe with child abuse; that Captain Smith knew there was no probable cause to do so; that Captain Smith's decision to charge Doe was driven by anger and hostility toward her, not by evidence of a crime; and that this anger and hostility stemmed at least in part from racial or socioeconomic biases.

Importantly, Defendants do not assert that the evidence described above is insufficient to establish malice. Instead, Defendants make a series of claims that more closely resemble jury arguments than defenses of a summary judgment ruling. For example, Plaintiffs argue that they presented evidence that, during Captain Smith's encounter with Jane Doe, Smith became angry and hostile toward Doe, began yelling, and acted aggressively without any reasonable basis for doing so. Defendants challenge this argument by repeatedly contending that "in reality" something else occurred, citing other, competing evidence. But this competing evidence only underscores that there is a genuine issue of fact here. Notably, Defendants do not argue that, as a matter of law, evidence that a law enforcement officer is inexplicably angry, hostile, or aggressive is not a factor that could support a finding of malice. They instead argue that their own facts rebutting Plaintiffs' claims are more persuasive. That argument is not one for this Court. *Lopp v. Anderson*, 251 N.C. App. 161, 174–76, 795 S.E.2d 770, 779–81 (2016). If there are competing facts on a potentially determinative issue, the jury must resolve those facts. *Id.*

Likewise, Plaintiffs argue that they presented evidence Captain Smith's actions stemmed at least in part from personal biases about Jane Doe's race or socioeconomic status. This evidence comes largely from Captain Smith's own statements during the internal police department investigation. Again, Defendants respond by asserting that those statements were "after the fact in the Internal Affairs' investigation" and are only relevant "in that context" because Captain Smith was explaining why he acted more aggressively because he believed his fellow officers were "intimidated" by Doe. But as with Defendants' previous arguments, this is not a summary judgment argument—it is a jury one. Defendants do not argue that, as a matter of law, evidence of an officer's bias or prejudice toward an accused cannot support a finding of malice. And as for whether Captain Smith's statements about Doe's race or socioeconomic status were signs of malicious intent or instead were simply observations about other officers, this is, again, a fact question for the jury.

Finally, Plaintiffs presented evidence that Captain Smith ignored other officers who believed there was no probable cause to charge Doe with a crime. Defendants respond by asserting that Plaintiffs "cannot point to a single case where an officer is found to have acted with malice because he chose to act on his own investigation as opposed to relying on the word of other witnesses who did not have all relevant facts."

But again, this argument turns the summary judgment standard on its head by relying solely on the facts favorable to Defendants. *See id.* Plaintiffs' evidence is that two other officers were present and observing the scene before Captain Smith arrived—meaning those officers were the ones who had "all relevant facts." Plaintiffs' evidence further indicates that Captain Smith saw those officers as he arrived and waved them over, that those officers told Captain Smith that Jane Doe had not committed any crime, and that Captain Smith ignored those officers because of some personal anger and hostility toward Jane Doe.

In sum, Plaintiffs presented evidence at the summary judgment stage that (1) there was no probable cause for Captain Smith to arrest Jane Doe; (2) other officers whom Captain Smith knew had more information about the underlying events informed Captain Smith that Jane Doe had done nothing wrong; (3) Captain Smith ignored the views of those other officers; (4) Captain Smith was angry, aggressive, and hostile toward Jane Doe; and (5) that Captain Smith's anger and hostility stemmed from racial or socioeconomic biases. That evidence is sufficient to create a genuine issue of material fact on the question of malice. Accordingly, the trial court erred by granting summary judgment on the ground that there was insufficient evidence of malice to overcome public official immunity.

The parties acknowledge on appeal that the lack of malice was the sole basis for entry of summary judgment on the individual-capacity claims against Captain Smith. Moreover, the parties acknowledge that the entry of summary judgment on the remaining claims challenged in this appeal stemmed from the dismissal of those individual-capacity claims. We therefore reverse the trial court's entry of summary judgment on all claims challenged in this appeal and remand for further proceedings.

Conclusion

After issuing a writ of certiorari to review the merits of this defective appeal, we reverse the trial court's entry of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and ARROWOOD concur.

HENDRIX v. TOWN OF W. JEFFERSON

[273 N.C. App. 27 (2020)]

JAMES H. HENDRIX, PLAINTIFF
v.
TOWN OF WEST JEFFERSON; C/O BRANTLEY PRICE, TOWN MANAGER; MAYOR DALE BALDWIN (IN HIS OFFICIAL CAPACITY); ALDERMEN (IN THEIR OFFICIAL CAPACITIES) BRETT SUMMEY, STEPHEN SHOEMAKER, JOHN REEVES, JERRY MCMILLIAN, CALVIN GREENE, DEFENDANTS

No. COA19-948

Filed 18 August 2020

Libel and Slander—vicarious liability—course and scope of employment—ratification—failure to state a claim

After a newspaper published private text messages in which a town's chief of police suggested that plaintiff lost his job as a police officer years ago for stealing and "smoking" evidence, the trial court properly dismissed plaintiff's lawsuit against the town and its officials (defendants) for failure to state a defamation claim based on vicarious liability. Plaintiff's allegations showed that the chief of police made the defamatory statement during a private conversation and not within the course and scope of his employment, and the law would not hold defendants liable for an employee's statement regarding plaintiff's termination from employment made years after that termination occurred. Further, defendants' failure to investigate or correct the chief of police's statement after its publication did not signal an intent to ratify the statement.

Appeal by Plaintiff from Order entered 17 June 2019 by Judge Edwin Wilson, Jr. in Ashe County Superior Court. Heard in the Court of Appeals 17 March 2020.

James H. Hendrix, plaintiff-appellant, pro se.

Cranfill Sumner & Hartzog LLP, by Ryan D. Bolick, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

James H. Hendrix (Plaintiff) appeals from an Order entered on 17 June 2019, dismissing with prejudice, under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, Plaintiff's Defamation Claim against the Town of West Jefferson (Town); Brantley Price, Town Manager of

West Jefferson, in his official capacity; Dale Baldwin, Mayor of West Jefferson, in his official capacity; and Aldermen Brett Summey, Stephen Shoemaker, John Reeves, Jerry McMillian, and Calvin Greene, in their official capacities (collectively, Defendants). The Record before us—including the allegations in Plaintiff's Complaint, which we take as true for purposes of reviewing an order on a motion to dismiss pursuant to Rule 12(b)(6), *see State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008) (citation omitted)—tends to show the following:

From 1993 to 1997, Plaintiff was employed by the Town as a police officer for the West Jefferson Police Department (WJPD). After leaving WJPD, and through the filing of his Complaint, Plaintiff was employed in leadership roles in both the law enforcement and security fields.

In November of 2016, the Ashe County Sheriff resigned, requiring the Ashe County Board of Commissioners (County Board) to appoint another person to serve out the rest of the resigning-Sheriff's term. At the time, the Chief of Police for WJPD was Jeffery Rose (Chief Rose). Chief Rose also served as a County Commissioner on the County Board. Gary Roark (Roark) was another County Commissioner on the County Board.

After learning of the then-Sheriff's resignation, Plaintiff expressed interest in being considered for the County Sheriff position to Roark, who conveyed this information to Chief Rose. On 30 December 2016, Chief Rose and another candidate for the County Sheriff position, allegedly Terry Buchanan (Buchanan), engaged in the following text-message exchange:

> Person 1: "It's unfortunate to see [Plaintiff] supporting Bucky and the status quo. I believe he knows if I'm appointed he won't have a shot in two years."
>
> Chief Rose: "That is true. I don't think he would anyway. Because I could not vote for him."
>
> Person 1: "He has never had anything good to say about them so why he felt the need them [sic] is strange to say the least."
>
> Person 1: "I would just like to see conservatives support each."
>
> Chief Rose: "Me too and yes he talks about how screwed up they are. I think just trying to play politics."

> Chief Rose: "[Roark] said [Plaintiff] asked him about being selected. I told [Roark] no way is he getting my vote."
>
> Chief Rose: "[Plaintiff is in] the crowd that got gone from [WJPD], For the evidence being used and smoked."

The County Board eventually appointed Buchanan as Sheriff of Ashe County. In April of 2017, a television station in Charlotte filed a public-records request with the County Board, seeking all written communications, including text messages and emails, between the Commissioners of the County Board and Buchanan. Subsequently, on 13 December 2017, the text-message exchange above was published in the *Ashe Post and Times* and again republished on 17 December 2017.

On 14 December 2018, Plaintiff filed his Complaint in the current action, asserting a Defamation Claim against Defendants.[1] Plaintiff alleged Chief Rose's text—"[Plaintiff is in] the crowd that got gone from [WJPD], For the evidence being used and smoked"—was defamatory and caused Plaintiff to "suffer personal humiliation, mental anguish and suffering." In Paragraphs 24 through 28 of his Complaint, Plaintiff alleged Defendants were liable for Chief Rose's defamatory statement for the following reasons:

> 24. The Defendant(s) have employed Chief Rose as the Chief of Police for the Town of West Jefferson. Chief Rose is responsible for the day to day operations of the Police Department as well as being the spokesman for the WJPD when matters of law enforcement issues arise. His statements carry significant weight as he is the top law enforcement officer in his jurisdiction. As such, statements that he makes would lead a reasonable person to conclude that the statements are true and that they have been condoned and approved for release by the Defendant(s).
>
> 25. The Defendant(s) knew or should have known that about the statements Chief Rose made about the Plaintiff in the December 17, 2017 Ashe Post and Times article. A quick search of the Plaintiff's record by the Defendant(s) would have shown the statement to be patently false.

1. Chief Rose is not a party to this action; rather, Plaintiff alleged he served Chief Rose with a separate action for defamation on 2 October 2018.

26. The Defendant(s) had a fiduciary responsibility to the Plaintiff to ensure matters concerning his prior employment for the Defendant(s) be kept private, confidential and factual.

27. The Defendant(s), upon discovery of the libelous and defamatory statements, had a duty to immediately correct the false statement by releasing a statement correcting the record and then requesting their Police Chief, Chief Rose to issue a retraction concerning the false statement. The Defendant(s) failed to do so, even though the statements pertained directly to the Plaintiff's employment with the WJPD.

28. The Plaintiff is not a public official or figure and therefore the Defendant(s) is strictly liable for the Defamation Per Se that has resulted in the impairment of the Plaintiff's reputation and standing in the community, and caused him to suffer personal humiliation, mental anguish and suffering.

On 19 February 2019, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, seeking dismissal of Plaintiff's Complaint because "Plaintiff fails to allege facts that support claims for defamation against these Defendants and failed to file the complaint within the applicable statute of limitations." The trial court held a hearing on Defendants' Motion to Dismiss on 10 June 2019. At this hearing, Defendants argued dismissal of the Complaint was warranted because Plaintiff did not allege any of the Defendants had themselves made a defamatory statement against Plaintiff and, more to the point, Plaintiff had failed to sufficiently allege facts to state a defamation cause of action against Defendants under a theory of respondeat superior. Specifically, Defendants contended Plaintiff's allegations were insufficient to establish respondeat superior liability because there was no allegation: (a) Chief Rose made the statement with Defendants' express authorization; (b) Chief Rose was acting in the course and scope of his employment with WJPD when he made the statement; or (c) Defendants had otherwise ratified the statement. Defendants also briefly asserted Plaintiff's Complaint was barred by the applicable statute of limitations.

For his part, Plaintiff acknowledged his Complaint did not expressly allege Chief Rose was acting in the course and scope of his employment. Instead, Plaintiff argued he had "tried to spell out Chief Rose's chief duties while attempting to equate that to his course and scope of employment."

The trial court orally granted Defendants' Motion to Dismiss, and on 17 June 2019, the trial court entered its Order granting Defendants' Motion to Dismiss under Rule 12(b)(6). In its Order, the trial court concluded Plaintiff's Complaint failed to state a claim upon which relief may be granted. On 19 June 2019, Plaintiff filed timely Notice of Appeal from the trial court's Order.

Issue

The dispositive issue on appeal is whether the allegations in Plaintiff's Complaint are legally sufficient to state a claim for defamation against Defendants to survive a dismissal under Rule 12(b)(6) under the theories Chief Rose made the allegedly defamatory statement in the course and scope of his employment or, alternatively, Defendants ratified Chief Rose's statement.

Analysis

I. Standard of Review

On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003); *see also Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) ("Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." (citation and quotation marks omitted)). This Court views the allegations in the complaint in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994) (citation omitted). Further, this Court considers "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted).

"In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises and must state sufficient allegations to satisfy the substantive elements of at least some recognized claim." *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 319, 677 S.E.2d 182, 186 (2009) (citation omitted). "[D]espite the liberal nature of the concept of notice pleading, [however,] a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is

subject to dismissal under Rule 12(b)(6)." *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (citation omitted); *see also Leasing Corp. v. Miller*, 45 N.C. App. 400, 405, 263 S.E.2d 313, 317 (1980) ("A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim." (citation omitted)).

II. Plaintiff's Defamation Claim

"In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Craven v. SEIU Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citation and quotation marks omitted). Furthermore, as Plaintiff correctly points out, our Courts have long recognized circumstances under which an employer may be held vicariously liable for defamatory statements made by an employee. *See Gillis v. Tea Co.*, 223 N.C. 470, 474-75, 27 S.E.2d 283, 286 (1943) ("The principle that the employer is to be held liable for the torts of his employee when done by his authority, express or implied, or when they are within the course and scope of the employee's authority, is equally applicable to actions for slander." (citations omitted)).

In his Complaint, Plaintiff alleged the text message by Chief Rose, which was published in the *Ashe Post and Times*, was a false, defamatory statement about Plaintiff because it falsely accused him of stealing and smoking evidence while working for WJPD and this statement injured him by impairing his reputation and causing him to suffer personal humiliation and mental anguish. Presuming Plaintiff's allegations are sufficient to allege a defamatory statement by Chief Rose—again, not a party to this action—the question becomes whether Plaintiff's allegations are sufficient to state a claim against Defendants arising from the Town's employment of Chief Rose.[2]

"Generally, employers are liable for torts committed by their employees who are acting within the scope of their employment under the theory of respondeat superior." *Matthews v. Food Lion, LLC*, 205 N.C. App. 279, 281, 695 S.E.2d 828, 830 (2010) (citation omitted). "As a general rule, liability of a principal for the torts of its agent may arise in three situations: (1) when the agent's act is expressly authorized by the

2. No party raises the issue of government immunity, and we therefore do not address this issue.

principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business[;] or (3) when the agent's act is ratified by the principal." *Id.* at 281-82, 695 S.E.2d at 830 (citation omitted).[3] In this case, Plaintiff does not contend Defendants expressly authorized Chief Rose's allegedly defamatory statement; rather, he argues his Complaint should be read to state a claim against Defendants on the basis Chief Rose was acting within the course and scope of his employment or, alternatively, on the basis Defendants ratified Chief Rose's statement.

First, however, as Plaintiff conceded in the trial court, his Complaint does not contain any allegation Chief Rose was acting in the course and scope of his employment when Chief Rose made the allegedly defamatory statement. *See Matthews*, 205 N.C. App. at 281, 695 S.E.2d at 830 ("Generally, employers are liable for torts committed by their employees who are acting *within the scope of their employment* under the theory of respondeat superior." (emphasis added) (citation omitted)); *see also Sanders*, 197 N.C. App. at 319, 677 S.E.2d at 186 (holding to withstand a motion to dismiss, the complaint "must state sufficient allegations to satisfy the substantive elements of at least some recognized claim" (citation omitted)).

Second, our Court has explained: "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988) (citation omitted). "If an employee departs from that purpose to accomplish a purpose of his own, the principal is not [vicariously] liable." *Id.* (citation omitted); *see also BDM Invest. v. Lenhil, Inc.*, 264 N.C. App. 282, 304, 826 S.E.2d 746, 764 (2019) (explaining "liability is not imposed on an employer when an employee engaged in some private matter of his own or outside the legitimate scope of his employment" (citation and quotation marks omitted)).

Here, Plaintiff's allegations establish Chief Rose made the statement regarding the circumstances under which Plaintiff's employment with WJPD ended not in the context of Town or WJPD business but rather

3. A more technical formulation of employer liability limits application of the term "respondeat superior" only to those situations in which an employee is acting within the course and scope of employment. Under this more technical formulation, ratification and authorization still may give rise to employee liability but are simply deemed to arise from traditional agency principles. *See Creel v. N.C. Dep't of Health & Human Servs.*, 152 N.C. App. 200, 202-03, 566 S.E.2d 832, 833 (2002) (citations omitted). For our purposes, however, this distinction is not determinative here, and so, we apply a broader brushstroke.

in the context of his support of a candidate for the appointment of a new County Sheriff by the County Board, on which Chief Rose served. As such, on its face, Plaintiff's Complaint shows Chief Rose's allegedly defamatory text message was not "within the scope of his employment" because he was "engaged in some private matter of his own [and] outside the legitimate scope of his employment[.]" *BDM Invest.*, 264 N.C. App. at 304, 826 S.E.2d at 764 (alteration in original) (citations and quotation marks omitted). Therefore, where the purpose of Chief Rose's defamatory statement was "to accomplish a purpose of his own, the [Defendants are] not [vicariously] liable." *Troxler*, 89 N.C. App. at 271, 365 S.E.2d at 668 (citation omitted).

Moreover, our courts have previously held statements made by an employee regarding a plaintiff's discharge from employment after the plaintiff has been discharged are not made within the course and scope of the employment and are not attributable to the employer. Indeed, close to a century ago and relying on even earlier cases, our Supreme Court in *Strickland v. Kress* explained, "owing to the facility and thoughtless way that such words are not infrequently used by employees, they should not, perhaps, be imported to the company as readily as in more deliberate circumstances; that is, they should not be so readily considered as being within the scope of the agent's employment." 183 N.C. 534, 537, 112 S.E. 30, 31 (1922). In that case, after a store manager fired the plaintiff, the plaintiff's husband asked the manager for an explanation, leading to the manager's defamatory statements, which were overheard by other employees. *Id.* at 538, 112 S.E. at 31. The Supreme Court characterized the incident: "This was clearly a conversation between the two individuals as to an event that had passed, and, as stated, could in no sense be considered as within the course and scope of [the manager's] employment, or as an utterance by authority of the company, either express or implied." *Id.* at 538, 112 S.E. at 31-32.

More recently, our Court has recognized the same principle on at least two occasions. In *Stutts v. Power Co.*, after the plaintiff's discharge, a Duke Power employee made statements the plaintiff was terminated from Duke Power for dishonesty, including falsifying records. 47 N.C. App. 76, 80, 266 S.E.2d 861, 864 (1980). The plaintiff argued the issue of Duke Power's liability for its employee's defamation should be submitted to the jury. *Id.* at 81, 266 S.E.2d at 865. Our Court relied on *Strickland* to hold: "any remarks made by [the employee] in the months after [the] plaintiff's discharge, were, as a matter of law, not made within [the employee's] scope of employment and, consequently, not attributable to Duke Power." *Id.* Then, in *Gibson v. Mutual Life Insurance Co. of New York,* our Court again concluded statements made about a plaintiff

after the plaintiff's termination could not be imputed to the corporate defendant. 121 N.C. App. 284, 288, 465 S.E.2d 56, 59 (1996) ("[A]ll of the statements were made after [the] plaintiff was terminated and therefore, the alleged defamation cannot be imputed to [the corporate defendant]." (citation omitted)). Consequently, in light of this prior precedent, in this case, Plaintiff's allegations of Chief Rose's allegedly defamatory statement made years after Plaintiff's separation from employment with WJPD cannot serve as a basis for the vicarious liability of Defendants because, as a matter of law, this statement was not made in the course and scope of Chief Rose's employment by the Town.

Likewise, Plaintiff's argument he should be permitted to proceed against Defendants on the theory Defendants allegedly ratified Chief Rose's statement also fails. Ratification is "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (citations and quotation marks omitted). Again, Plaintiff's Complaint does not expressly invoke ratification but rather appears to rest on his allegations Defendants owed him a "fiduciary responsibility," including the duty to investigate the truth of Chief Rose's statement and to require a correction or retraction of this statement addressing Chief Rose's opposition to Plaintiff's candidacy for County Sheriff. Plaintiff, however, offers no authority to support the existence of such a duty. Further, the earlier precedent set by *Strickland*, *Stutts*, and *Gibson*, *supra*, runs counter to the existence of such a duty. *See*, *e.g.*, *Strickland*, 183 N.C. at 538, 112 S.E. at 32 (holding statement "could in no sense be considered . . . as an utterance by authority of the company, either express or implied"). Thus, Plaintiff has not alleged any act by Chief Rose "done or professedly done" on Defendants' account. *Espinoza*, 135 N.C. App. at 308, 520 S.E.2d at 111 (citations and quotation marks omitted).

Additionally, ratification requires "(1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." *Equipment Co. v. Anders*, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965) (citations omitted). A failure to act or investigate may provide evidence of an employer's ratification of an employee's wrongful act. *See Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232, 236 (1989) (recognizing "an omission to act" in some circumstances may constitute a "course of conduct on the part of the principal which reasonably tends to show an

intention on his part to ratify the agent's unauthorized acts" (citation and quotation marks omitted)). However, here, in light of our prior caselaw holding statements similar to the one made by Chief Rose outside the course and scope of his employment are not attributable to an employer, and absent any independent duty to investigate or correct the statement, it follows the employer's failure to investigate or correct those statements is not conduct inconsistent with an intent not to ratify. As such, Plaintiff's Complaint is legally insufficient to allege Defendants should be held liable on the basis of ratification.

Thus, Plaintiff's Complaint fails to state a claim against Defendants for defamation based on Chief Rose's statement either under a theory Chief Rose was acting in the course and scope of his employment or that Defendants ratified Chief Rose's statement. Consequently, the trial court did not err in granting Defendants' Motion to Dismiss under Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order granting Defendants' Motion to Dismiss.

AFFIRMED.

Judges STROUD and DIETZ concur.

IN RE I.K.

[273 N.C. App. 37 (2020)]

IN THE MATTER OF I.K.

No. COA19-619

Filed 18 August 2020

1. **Child Abuse, Dependency, and Neglect—permanency planning order—constitutionally protected status as parent—findings and conclusion**

   In a permanency planning review matter, the trial court's conclusion that respondent-parents' actions were inconsistent with their constitutionally protected right to parent the minor child was supported by the court's findings of fact, which were in turn supported by clear and convincing evidence, including of the parents' lack of suitable and safe housing, continued substance abuse, and, regarding respondent-father, unresolved domestic violence issues.

2. **Child Abuse, Dependency, and Neglect—permanency planning order—guardianship granted to grandparent—sufficiency of evidence**

   In a permanency planning review matter, the trial court's decision to grant guardianship of the minor child to her grandmother was supported by sufficient evidence and findings of fact regarding the parents' unresolved issues of inadequate housing, substance abuse, and domestic violence. The court's choice of permanent plan, pursuant to N.C.G.S. § 7B-906.1, which took into account the child's best interest, was not manifestly unsupported by reason and was therefore not an abuse of discretion.

3. **Child Visitation—permanency planning order—mother's visitation—supervised only—evidentiary support**

   In a permanency planning review matter in which the trial court granted guardianship of the minor child to the child's grandmother, the trial court did not abuse its discretion under N.C.G.S. § 7B-905(c) by limiting respondent-mother's visitation with the child to supervised visitation only, based on evidence of respondent's prior behavior during visits as well as recommendations from the child's guardian ad litem and therapist.

4. **Child Visitation—permanency planning order—notice of right to file motion to review visitation—adequacy of notice**

   In a permanency planning review matter in which the trial court granted guardianship of the minor child to the child's grandmother, the trial court did not violate N.C.G.S. § 7B-905.1(d) by failing to

inform respondent-father of his right to file a motion to review the visitation plan, where the court made the parties aware in open court of its ongoing jurisdiction over the matter and that the matter could be brought before the court at any time by filing a motion for review. To the extent the lack of an explicit reference to the statutory right constituted error, respondent failed to show he lost any right or was prejudiced by the lack of notice.

Judge MURPHY concurring in part and dissenting in part.

Appeal by respondents from order entered 22 March 2019 by Judge Samantha Cabe in Orange County District Court. Heard in the Court of Appeals 27 May 2020.

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

Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant mother.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for respondent-appellant father.

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

ARROWOOD, Judge.

Respondent parents appeal from the trial court's Permanency Planning Order establishing a permanent plan of placement for their daughter. For the following reasons, we affirm.

I. Background

This appeal comes after multiple prior proceedings: a 7 November 2017 Permanency Planning Order regarding minor children I.K. ("Iliana") and K.M. ("Kevin"),[1] which ceased reunification efforts between the children and respondents—respondent-mother ("Patty") and respondent-father ("Isaac") (together "respondents")—and awarded guardianship of both children to their maternal grandmother; a 7 August 2018 opinion

1. Pseudonyms are used throughout this opinion to protect the identity of juveniles and for the ease of reading.

from this Court vacating the 7 November 2017 Permanency Planning Order and remanding for further findings to address Respondents' fitness, whether they acted inconsistently with their constitutionally protected status, and why reunification efforts should cease as to Iliana and Kevin; and a 22 March 2019 Permanency Planning Order ("the Order"). Respondents timely appeal the Order as to Iliana.

The background of this case is partially incorporated from the text of our 7 August 2018 opinion, which vacated the 7 November 2017 Permanency Planning Order.

> Iliana was born to Respondents in December 2012. On 10 November 2014, the Rockingham County Department of Social Services received a report that Respondents lived in a "hoarder home" that was unsafe, Respondents sold their food stamps, Kevin was small for his age, there was fighting in the home, and Respondents were smoking marijuana and snorting Percocet. The Rockingham County Department of Social Services investigated this report, but no services were recommended at the time.
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> In 2015, the Orange County Department of Social Services ("DSS") received two reports alleging that Patty had snorted pills while Kevin was in the home, and that Patty and her brother were involved in a domestic dispute that resulted in the brother shaking and hitting Kevin. At that point, Respondents were provided in-home services to address concerns of substance use, mental health, and domestic violence. On 8 January 2016, Patty was sentenced to 45 days in jail for shoplifting and violating her probation. Patty received another 45 day[s in jail] in April 2016 after [she tested positive for cocaine during her probation]. At that time, Respondents placed Iliana with the maternal grandmother[,] . . . [with whom] Kevin had been residing [for the previous five years]. On 5 August 2016, Patty informed a DSS employee that [she and Isaac] were being evicted from their home and were homeless.
>
> Due to concerns regarding Respondents' unstable housing, substance abuse, and lack of engagement in substance abuse treatment services, DSS filed juvenile petitions on 10 August 2016 alleging that Kevin and Iliana were neglected and dependent juveniles. DSS obtained nonsecure custody that same day. Following a 15 September 2016 hearing, the

> trial court entered an order on 13 October 2016 adjudicating the juveniles dependent, keeping temporary legal and physical custody with the maternal grandmother. The order required Respondents to submit to random drug screens, seek substance abuse treatment services, and follow any treatment recommendations. After a permanency planning hearing on 2 March 2017, the trial court entered an order on 27 March 2017 establishing a primary permanent plan of guardianship with the maternal grandmother and a secondary plan of reunification with Respondents. Following a 5 October 2017 permanency planning hearing, the trial court entered a 7 November 2017 order ceasing reunification efforts and awarding guardianship of the children to the maternal grandmother. Respondents timely appealed the 7 November 2017 order.

In re I.K., *K.M.*, 260 N.C. App. 547, 548-49, 818 S.E.2d 359, 361 (2018). Our 7 August 2018 opinion vacated and remanded the trial court's 7 November 2017 Order for the reasons stated therein and required the trial court to "make the required finding that Respondents were unfit or had acted inconsistently with their constitutionally protected status as parents . . . in [order to apply] the best interest of the child test to determine that guardianship with the maternal grandmother was in the children's best interests." *Id.* at 555, 818 S.E.2d at 365.

On 2 November 2018, the trial court again awarded guardianship of Kevin to the maternal grandmother, and respondents did not appeal. That same day, the trial court continued the permanency planning hearing as to Iliana. The trial court conducted a permanency planning hearing on 3 January 2019 and 18 January 2019, in which it heard further testimony from DSS employees, the maternal grandmother, and respondents. On 22 March 2019, the trial court entered the present order finding respondents had acted inconsistently with their constitutionally protected right to parent Iliana, and again awarding guardianship of Iliana to her maternal grandmother.

II. Discussion

Respondents argue that the trial court erred in the Order by: (a) finding that respondents acted inconsistently with their constitutionally protected right to parent Iliana, where such a finding was not supported by clear and convincing evidence; (b) making various findings and conclusions of law required by statute that were not supported by competent evidence; (c) making erroneous findings and conclusions of

law that did not support its award of guardianship to Iliana's maternal grandmother under N.C. Gen. Stat. §§ 7B-906.1, -906.2 (2019); and (d) failing to provide respondents with notice of their right to file a motion to review the visitation plan with the trial court pursuant to N.C. Gen. Stat. § 7B-905.1(d) (2019). For the following reasons, we find no merit to respondents' arguments and affirm the Order.

A. Conduct Inconsistent with Constitutionally Protected Parental Status

[1] Respondents argue that clear and convincing evidence did not support the trial court's relevant findings and conclusion of law that they had acted inconsistently with their constitutionally protected right to parent Iliana, and the trial court accordingly erred by proceeding to place Iliana's best interest at the forefront of its decision. We disagree.

Respondents correctly note that a higher evidentiary standard applies to the present circumstances where the trial court has ordered custody with someone other than a child's natural parent as the permanent plan and concluded concurrent planning involving reunification with the child's parents. *In re B.G.*, 197 N.C. App. 570, 574-75, 677 S.E.2d 549, 552-53 (2009).

> 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 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, which need not rise to the statutory level warranting termination of parental rights, 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.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997) (internal citations omitted).

"There is no bright line beyond which a parent's conduct amounts to action inconsistent with the parent's constitutionally protected paramount status. Our Supreme Court has emphasized the fact-sensitive nature of the inquiry, as well as the need to examine each parent's circumstances on a case-by-case basis. The court must consider both the legal parent's conduct and his or her intentions *vis-à-vis* the child." *In re A.C.*, 247 N.C. App. 528, 536, 786 S.E.2d 728, 735 (2016) (alterations, internal quotations marks and citations omitted).

Analyzing the totality of the circumstances noted in the Order's findings of fact, for the following reasons we hold that the trial court did not err in determining that respondents acted inconsistently with their constitutionally protected status as Iliana's parents.

1. Findings of Fact

In our review of a trial court's findings relevant to its determination that a parent has acted inconsistently with his constitutionally protected status, "[t]he Due Process Clause . . . requires that [such findings] must be supported by clear and convincing evidence." *Id.* at 533, 786 S.E.2d at 733 (footnote and citation omitted). "The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters. Our inquiry as a reviewing court is whether the evidence presented is such that a fact-finder applying that evidentiary standard could reasonably find the fact in question." *Id.* at 533, 786 S.E.2d at 734 (alterations, internal quotation marks, and citations omitted).

In their separate briefs, respondents argue that numerous findings of fact in the Order are not supported by clear and convincing evidence. These findings relate to the court's belief that respondents' historic issues with unsuitable housing, domestic violence, and substance abuse which caused Iliana to be placed with her maternal grandmother still persisted and impeded Iliana's ability to safely return to their parental care.

For example, the trial court found that "[b]oth [respondents] have acted inconsistently with their constitutionally-protected right to parent the minor child." In support of this finding, the trial court made specific findings regarding the respondents' voluntary placement of Iliana with her maternal grandmother due to "[Patty]'s impending incarceration and [Isaac]'s lack of suitable housing and work schedule," the remaining absence of "safe and stable housing appropriate for [Iliana] in the three (3) years the juvenile has been out of their custody," and the respondents' continued acts of domestic violence and illegal drug use. Our analysis focuses on whether clear and convincing evidence was presented to the trial court on the issues of housing, domestic violence, and drug use.

a. Housing

Respondents challenge the trial court's findings to the effect that respondents failed to rectify their housing situation to an extent that Iliana could return to live with them. In particular, the trial court found the following: "the home in which [respondents] were living . . . was deemed not suitable for [Iliana] when RCDSS visited the home in the spring of 2018 and again on 12/12/2018"; "the issues of . . . safe . . . housing are still present"; "[respondents] continue to reside with their infant daughter and [Iliana's] paternal grandmother . . . in a two-bedroom single wide trailer that has holes in the floor that were recently covered with plywood . . . and that has not otherwise been maintained"; "the housing conditions of [respondents] . . . was not safe and appropriate for [Iliana]. Any improvements made between the beginning of th[e] hearing and its conclusion are not indicative of the day-to-day condition of the home"; "[respondents] continue to reside . . . [in a] home [that] is not appropriate at this time for placement of [Iliana]"; and "[respondents] are not making adequate progress [and] . . . have not resolved the issues of . . . instable housing that led to removal of custody."

Ample evidence supported the trial court's findings that the cluttered, crowded, dilapidated single-wide trailer in which respondents resided with their newborn and Isaac's mother was an unsafe and unsuitable place for Iliana to dwell. Jordan Houchins ("Mr. Houchins"), an investigator with Rockingham County Child Protective Services, testified that in the spring of 2018 he visited the trailer and observed clutter "piled up literally to the ceiling", and opined "that [he] would consider [this] a hoarding situation[.]" Mr. Houchins also observed structural issues with the floors of the small trailer. When Mr. Houchins visited the trailer again in December 2018, the same issues remained. Isaac's mother told Mr. Houchins a child could sleep on the pull-out couch in the living room if Iliana lived in the trailer, as a child already lived in the

trailer with respondents and Isaac's mother. Mr. Houchins testified, consistent with the Adjudication Court Report, that he had concern about young children living in a small trailer in that condition. Mr. Houchins noted that a child currently resided at the trailer, but expressed concern with another child coming to live at the trailer, in light of the trailer's size, clutter, condition of the floors, and Isaac's mother's health and mobility difficulties.

Citing only photographs taken during the proceedings on 3 January 2019 showing a slight improvement in the clutter and reinforced plywood flooring, respondents would have us contravene the trial court's finding that "the day-to-day condition of the home" was presently unsafe. Such a contravention would be an improper usurpation of the trial court's credibility judgment between conflicting evidence. These pictures alone, taken after initiation of the instant proceedings once it became apparent that unsafe housing was an area of concern for the trial court, are insufficient to override the court's credibility assessment of the evidence before it concerning the safety and suitability of respondents' current housing situation. The trial court expressly found the reports and testimony presented by the guardian *ad litem* and social workers assigned to the case more credible than respondents' representations as to recent improvements in the condition of the trailer.

"In a nonjury trial, 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. If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000) (internal citations omitted). A trial court's credibility assessments are no basis for relief on appeal in child protection proceedings or otherwise. *See In re A.C.*, 247 N.C. App. at 550 n.8, 786 S.E.2d at 743 n.8 (citation omitted). Here, the trial court acted within its discretion in finding the testimony and reports of the guardian *ad litem* and social workers who had visited the home more credible on the issue of the trailer's current condition than a few photographs taken during the proceedings.

While we may presume that respondents will not remove the reinforced plywood flooring at the termination of these proceedings, the trial court possessed clear and convincing evidence that the remaining issues identified with the trailer related to clutter, living space, and other structural issues remained impediments to Iliana's safe placement within the dwelling. When coupled with the trial court's uncontested finding that "[r]espondent parents indicate they plan to reside with [the

paternal grandmother] in the future despite the ongoing concerns about the safety and appropriateness of the condition of the home[,]" the trial court appropriately found that respondents' failure to furnish safe and suitable housing for Iliana bore upon whether their conduct was inconsistent with their constitutionally protected parental rights.

b. Domestic Violence

Respondents also challenge the Order's findings to the effect that respondents have failed to rectify their issues with domestic violence to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[respondents] continue to engage in domestic violence . . . despite their completion of treatment and classes"; "the issues of . . . domestic violence . . . are still present despite numerous services that have been offered to the family"; "[t]here has not been another identified domestic violence incident between Respondent parents, however there has been domestic violence in the home between [Isaac] and his mother"; "[t]he issues that led to removal of custody, to wit, . . . domestic violence, . . . have not been resolved."

These findings of fact are erroneous as to Patty. The trial court considered evidence that she regularly participated in counseling regarding domestic violence and had not been involved in a domestic violence incident with Isaac since October of 2016. There was no other evidence indicating Patty's past issues with domestic violence persisted.

However, these findings of fact are supported by clear and convincing evidence as to Isaac. The trial court's remaining unchallenged findings of fact establishing respondents' extensive history of domestic violence issues, when coupled with evidence of the most recent domestic disturbance Isaac had with his mother in the same trailer in which he wishes Iliana to reside, support its ultimate finding that he has not resolved his issues with domestic violence to an extent necessary to safely place Iliana in his custody.

Emily Wise ("Ms. Wise"), the DSS "assigned social worker for [Iliana]," testified concerning the respondents' extensive history of domestic violence, which she also detailed in the Adjudication Court Report. In particular, Isaac was convicted of misdemeanor assault on a female as a result of an incident between Patty and him in October 2016.

The Order mischaracterizes the most recent domestic incident as one involving actual physical violence. In fact, the evidence shows that police were called to the residence on 23 August 2018 to respond to reports of a loud verbal disagreement. However, the OCDSS report

characterizes the incident as more than just a simple argument. Rather, Isaac was reportedly being "verbally aggressive . . . and was 'tearing up' the [trailer]." This evidence certainly does not refute the court's continuing concern.

While a trial court may not solely "rely on prior events to find [facts relevant to the current state of matters in issue at a permanency planning hearing], it may certainly consider facts at issue in light of prior events." *In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735 (citing *Cantrell v. Wishon*, 141 N.C. App. 340, 344, 540 S.E.2d 804, 806-807 (2000) ("[T]he trial court erroneously placed *no* emphasis on the mother's past behavior, however inconsistent with her rights and responsibilities as a parent[;] . . . failed to consider the long-term relationship between the mother and her children; . . . and failed to make findings on the mother's role in building the relationship between her children and the [nonparent custodians]."). In light of the trial court's detailed, unchallenged findings establishing Isaac's extensive history of domestic violence and reluctance to complete perpetrator programs except as mandated by the court, the trial court acted within its discretion in characterizing his most recent outburst as an indication that his issues with domestic violence have not been resolved to the extent necessary to place Iliana in his care.

c. Substance Abuse

Finally, respondents challenge the trial court's findings to the effect that respondents have failed to rectify their issues with substance abuse to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[respondents] continue to engage in . . . illegal drug use despite their completion of treatment and classes"; "the issues of substance use . . . and safe, substance-free housing are still present despite numerous services that have been offered to the family"; "[respondents] continue to use marijuana despite substance abuse treatment. [Patty] has sought prescription painkillers from her mother on more than one occasion while [Iliana] has been placed out of the home"; and "[respondents] are not making adequate progress . . . [and] have not resolved the issue[] of substance abuse . . . that led to removal of custody."

Clear and convincing evidence supported these findings of fact as to both respondents. The trial court considered evidence that respondents completed substance abuse treatment on 16 March 2018. Respondents provided hair follicles for a drug screen, and the screen of both respondents on 4 September 2018 indicated marijuana use. The trial court was

also presented with evidence of Patty's continued drug seeking behavior after the 7 November 2017 Permanency Planning Order.

Ms. Wise testified that Patty had engaged in drug seeking behavior after the appeal and remand of the 7 November 2017 Order. Specifically, Patty texted "her mother . . . requesting pain medications on several occasions," including a text message asking "Do you have a couple of pills I can get?" on 10 June 2018, as well as a text message on 10 August 2018 requesting pain medication. Patty's drug seeking behavior is supportive of the trial court's findings of Patty's continued drug use.

The trial court heard evidence that Isaac completed his substance abuse treatment program in March of 2018 and has since tested positive for marijuana on the same day as Patty and exchanged text messages with her seeking to purchase marijuana. Therefore the court had clear and convincing evidence before it that, viewed in light of Isaac's extensive history of substance abuse recognized by the majority, there was legitimate cause to question whether he had overcome this problem such that Iliana could be safely placed within his home. The trial court also found that he intended to continue residing indefinitely with Patty, who continues to exhibit drug-seeking behavior, in the very trailer where they were previously known to snort pills and consume other impairing substances together in front of their children. We therefore uphold the trial court's findings of fact to the effect that respondents have not overcome their substance abuse issues to its satisfaction in deciding whether placement of Iliana in their home would be appropriate.

2. Conclusion of Law

The order's aforementioned findings of fact support the trial court's conclusion of law that respondents' conduct was inconsistent with their constitutionally protected right to parent Iliana. Clear and convincing evidence supported the Order's findings that recent incidents raised serious concerns about their progress in resolving their chronic issues related to unsafe housing, domestic violence, and substance abuse that had precipitated the circumstances in which Iliana was adjudicated dependent and placed with her maternal grandmother in 2014. When considered in light of the order's undisputed findings establishing respondents' extensive history as to each of these chronic issues and their detrimental effect on Iliana, we uphold the trial court's determination that the totality of circumstances relevant to their conduct was inconsistent with their constitutionally protected status as Iliana's parents. Having overcome this constitutional threshold, the trial court appropriately placed Iliana's best interest at the forefront of its decision to grant guardianship to her grandmother as the permanent plan.

B. Analysis Under the Statutory Standard for Permanency Planning

[2] Respondents make the same evidentiary challenges to the trial court's findings of fact in arguing that they fail to satisfy the statutory requirements applicable to an order granting guardianship to a nonparent as the permanent plan over a parent's objections. In essence, they contend that competent evidence does not support the trial court's findings that they have failed to resolve the issues of domestic violence, substance abuse, and instable housing that lead to Iliana's placement with her grandmother three years prior. Having already determined that these findings of fact clear the higher constitutional bar imposed by the Due Process Clause, we hold that the trial court heard competent evidence to support these findings.

In turn, these findings support the statutorily required ultimate findings of fact and the order's conclusions of law with which respondents take issue. "In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re A.C.*, 247 N.C. App. at 532-33, 786 S.E.2d at 733 (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.H.*, 266 N.C. App. 41, 44, 832 S.E.2d 162, 164 (2019) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Pursuant to N.C. Gen. Stat. § 7B-906.1(d), the trial court held that efforts to reunite Iliana with her parents would be unsuccessful or inconsistent with her health, safety, and need for a safe and permanent home within a reasonable period of time.[2] This conclusion rested upon its determination that "[t]he issues that lead to removal of custody . . . have not been resolved." Per N.C. Gen. Stat. § 7B-906.1(e), the trial court also held that it was not possible to place Iliana with her parents within the next six months and doing so was not in her best interest. This conclusion was based upon its continuing concerns with the issues leading to State involvement and respondents' plan to continue residing in the trailer deemed inappropriate for Iliana's placement. For the same reasons, the trial court held that respondents demonstrated a lack of success by not making adequate progress under the secondary plan

2. The trial court made findings of fact speaking to all the requisite criteria in N.C. Gen. Stat. §§ 7B-906.1, -906.2. We address only those challenged by respondents.

of reunification and acting in a manner inconsistent with the health or safety of Iliana, pursuant to N.C. Gen. Stat. § 7B-906.2(d).

The trial court's ultimate findings on each of these matters find ample support in its findings of fact discussed *supra* regarding the trial court's continuing concerns with respondents' domestic violence, substance abuse, and inadequate housing. These ultimate findings in turn support its conclusion that "[t]he best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is implementation of the primary plan of guardianship to . . . [her] maternal grandmother[,]" and that such placement would be in her best interest. The court's decision is not manifestly unsupported by reason. Therefore, the trial court did not abuse its discretion in its permanency planning order granting guardianship of Iliana to her grandmother.

C. Visitation Plan

Respondents respectively challenge the visitation plan within the Order on separate grounds. We find no merit in either argument.

1. Parameters of Visitation Plan

[3] Patty challenges the trial court's visitation order, which limited her to "a minimum of one hour per week of supervised visitation [with Iliana]." "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017) (internal quotation marks and citation omitted). Patty's arguments center on whether visitation should be unsupervised, and she contends the trial court lacked competent evidence to order visitation supervised by Iliana's maternal grandmother.

According to N.C. Gen. Stat. § 7B-905.1(c) (2019),

> 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.

The trial court ordered that "Respondent[s] shall have a minimum of one hour per week of supervised visitation. The guardian has the authority and discretion to allow additional visitation." The trial court's order complied with N.C. Gen. Stat. § 7B-905(c). The trial court also heard testimony that respondents' unsupervised visitation had previously been

rescinded due to separate instances of visitation where respondents "appeared to be under the influence." Iliana's guardian *ad litem* recommended supervised visitation. Iliana's therapist's letter also described concerns with changing the juvenile's routine, and that current treatment involved "the use of structure and predictability" to increase Iliana's ability to "accept care and feel settled and soothed by an adult caregiver as well as increasing [Iliana's] trust in adults to take care of her needs." The trial court's order for supervised visitation as to Patty is not manifestly unsupported by reason, and the trial court did not abuse its discretion.

2. Notice of Right to File Motion to Review Visitation Plan

[4] Finally, Isaac argues that the trial court failed to provide him with notice of his right to file a motion with the court to review the visitation plan established in the Order, as required by N.C. Gen. Stat. § 7B-905.1(d). We find no merit in this argument and otherwise deem any purported error harmless.

"If the court retains jurisdiction" in its dispositional order in a permanency planning case, "all parties shall be informed of the right to file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d). Here, in open court the trial court made the parties aware in a general sense that it would retain continuing jurisdiction and could review any aspect of its permanency planning order upon its own motion or that of a party: "[B]ecause [Iliana] has been placed with her grandmother . . . if something changes at some point, the motions can be made back to this Court if changes need to be made." Furthermore, in its written order the court noted that "[a]ll parties are aware that the matter may be brought before the Court for review at any time by the filing of a motion for review or on the Court's own motion" and "Juvenile Court jurisdiction shall continue."

Assuming *arguendo* Isaac's position that the trial court was required to explicitly reference the parties' right of review under N.C. Gen. Stat. § 7B-905.1(d), any such error was harmless. Isaac has not pointed to any right lost or prejudiced by the trial court's failure to timely provide such notice. Moreover, Isaac's mere assignment of error on this issue indicates that he has since become aware of his right of review under N.C. Gen. Stat. § 7B-905.1(d). We otherwise find no merit in his argument that any purported inadequacy of the notice provided amounts to reversible error.

II. Conclusion

For the foregoing reasons, we affirm the trial court's permanency planning order.

AFFIRMED.

Judge INMAN concurs.

Judge MURPHY concurs in part and dissents in part in separate opinion.

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

The Majority determined that clear and convincing evidence supported the findings relevant to the trial court's determination that Patty and Isaac acted inconsistently with their constitutionally protected right to parent Iliana. Specifically, the Majority held that clear and convincing evidence supported the trial court's findings that Patty and Isaac had failed to resolve issues with housing, domestic violence, and drug abuse to an extent they could reunite with Iliana. I agree that competent evidence supported the trial court's finding that Patty had not resolved *one* of those issues—drug abuse—and so would affirm the Order's finding and conclusion concerning Patty acting inconsistently with her constitutionally protected right to parent Iliana. I also agree with the Majority that "the trial court's order for supervised visitation as to Patty is not manifestly unsupported by reason, and the trial court did not abuse its discretion." However, no competent evidence was presented to the trial court as to Isaac on the issues of housing, domestic violence, and drug abuse, and I would accordingly reverse as to Isaac. I respectfully dissent.

ANALYSIS

A. Challenged Findings in the 22 March 2019 Permanency Planning Order

In their separate briefs, Patty and Isaac challenged the following Findings of Fact in the Order:

> 26. Both [Patty] and [Isaac] have acted inconsistently with their constitutionally-protected right to parent [Iliana]. Specifically, this court finds as follows:
>
> a. [Patty and Isaac] voluntarily placed [Iliana] with her maternal grandmother on [26] April []

2016 because of [Patty]'s impending incarceration and [Isaac]'s lack of suitable housing and work schedule.

b. [Patty and Isaac] have not obtained safe and stable housing appropriate for [Iliana] in the three (3) years [Iliana] has been out of their custody. Though the home in which they were living was found to have met minimum standards by RCDSS on two visits between [2] March [] 2017 and [5] October [] 2017, the home was deemed not suitable for [Iliana] when RCDSS visited the home in the spring of 2018 and again on [12 December 2018].

c. [Patty and Isaac] continue to engage in domestic violence and illegal drug use despite their completion of treatment and classes.

27. When this hearing began on [3] January [] 2019, [Patty and Isaac] were still residing with [Isaac]'s mother in a home that Rockingham County DSS deemed unsuitable for the children as late as [12] December [] 2018.

28. [Patty and Isaac] have made some limited progress to remedy conditions that led to [Iliana] being removed from their home. However, the issues of substance use, domestic violence, and safe, substance-free housing are still present despite numerous services that have been offered to the family since the issues were first identified in 2014.

. . .

30. [Patty] concluded a domestic violence support group at the Compass Center in May 2017. [Isaac] completed a domestic violence perpetrator program at Alamance County DV Prevention in February 2018. There has not been another identified domestic violence incident between [Patty and Isaac], however there has been domestic violence in the home between [Isaac] and his mother[.]

. . .

34. Despite [Isaac] earning a gross income of $46,349.00 per year in a job he has maintained for l0 years and

[Isaac's mother] paying a portion of the household expenses, [Patty and Isaac] continue to reside with their infant daughter and [Isaac's mother] with whom they moved after eviction in 2016 in a two-bedroom single wide trailer that has holes in the floor that were recently covered with plywood at the request of RCDSS, and that has not otherwise been maintained.

. . .

37. At the continuation of this hearing on [18] January [] 2019, [Patty and Isaac] provided photographs of the home that showed somewhat improved conditions from the conditions reflected in the photographs and testimony presented on [3] January [] 2019. [Patty] testified that the new photos were taken after the [3] January [] 2019 beginning of the hearing. The court finds the testimony and documentation of Rockingham County DSS to be credible, and that the housing conditions of [Patty and Isaac] as of [12] December [] 2018 was not safe and appropriate for the minor child. Any improvements made between the beginning of this hearing and its conclusion are not indicative of the day-to-day condition of the home.

. . .

40. The following are relevant pursuant to N.C.G.S. § 7B-906.1(d): . . .

    c. Efforts to reunite [Iliana] with either [Patty or Isaac] would be unsuccessful or inconsistent with [Iliana's] health or safety and need for a safe, permanent home within a reasonable period of time. The issues that led to removal of custody, to wit, substance abuse, domestic violence, and housing, have not been resolved. [Iliana] has resided with her maternal grandmother for over half of her life.

41. The Court finds, pursuant to N.C.G.S. § 7B-906.1(e), it is not possible for [Iliana] to be returned home or placed with Respondent[s] within the next six months. Placement with Respondent[s] is not in [Iliana's] best

interest. In support of this ultimate finding of fact, the court specifically finds the following[1]:

. . .

b. [Patty and Isaac] have been involved with the Department since October 2015 due to concerns about substance use, domestic violence, and unstable housing, and had involvement with Rockingham County DSS in 2014 regarding the same issues that remain unresolved in 2019.

c. [Patty and Isaac] continue to use marijuana despite substance abuse treatment. [Patty] has sought prescription painkillers from her mother on more than one occasion while [Iliana] has been placed out of the home.

d. [Patty and Isaac] continue to reside with [Isaac's mother]. This home is not appropriate at this time for placement of [Iliana].

b. Placement with [Patty] or [Isaac] is unlikely within six months, and:

i. Legal guardianship or custody with a relative should be established. [Patty and Isaac] should retain the right of visitation and the responsibility of providing financial support to [Iliana] by paying regular child support.

ii. Adoption should not be pursued.

iii. [Iliana] should remain in the current placement because it is meeting her needs and in her best interests.

iv. Due to the history of the case and relationship between [respondents] and [the maternal grandmother], the guardian ad litem recommends guardianship to [the maternal grandmother] in [Iliana's] best interest.

c. Since the initial permanency planning hearing, OCDSS has made reasonable efforts to finalize [Iliana's] permanent plans as laid out below.

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1. The tabbing and inclusion of the first "b.," "c.," and "d." before the second "b.", etc., appears in the Order in the Record.

. . .

43. Pursuant to N.C.G.S. § 7B-906.2(d), the following demonstrate a lack of success:

    a. [Patty and Isaac] are not making adequate progress within a reasonable period of time under the secondary plan of reunification. They have not resolved the issues of substance abuse and instable housing that led to removal of custody.

    b. [Patty and Isaac] have partially participated in or cooperated with the plan, the department, and [Iliana's] Guardian ad Litem.

. . .

    d. [Patty and Isaac] have acted in a manner inconsistent with the health or safety of [Iliana] as set forth herein.

44. The best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is implementation of the primary plan of guardianship to a relative, specifically to [the maternal grandmother].

. . .

57. The Court finds pursuant to N.C.G.S. § 7B-906.1(n): . . .

    b. The placement is stable, and continuation of the placement is in her best interest.

In their separate briefs, Patty and Isaac challenged the following Conclusions of Law in the Order:

2. It is in the best interest of [Iliana] that guardianship be granted to [the maternal grandmother].

. . .

4. Implementation of guardianship as a permanent plan for [Iliana] is made within the time prescribed by law, is appropriate and is in [Iliana's] best interest.

. . .

6. [Patty and Isaac] have acted inconsistently with their protected status.

7. [The maternal grandmother] is a fit and proper person to have guardianship of [Iliana] and that it is in the best interest of [Iliana] that guardianship be granted to and continued with [Iliana's maternal grandmother].

8. It is in the best interest of [Iliana] to have supervised visitation with [Patty and Isaac] once per week pursuant to the schedule that [Patty and Isaac] and caretaker have been following for the last several months.

B. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the [R]ecord to support the findings and [whether] the findings support the conclusions of law." *In re S.J.M.*, 184 N.C. App. 42, 47, 645 S.E.2d 798, 801 (2007), *aff'd*, 362 N.C. 230, 657 S.E.2d 354 (2008). Further, "[t]he findings of fact by the trial court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983). "When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (internal citations omitted).

"[T]he . . . right of parents to make decisions concerning the care, custody, and control of their children[]" is fundamental. *Troxel v. Granville*, 530 U.S. 57, 66, 147 L.Ed.2d 49, 57 (2000). "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." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his . . . constitutionally protected status." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)).

We review "the trial court's conclusions that [a parent] has acted in a manner inconsistent with her constitutionally protected paramount status . . . *de novo*." *In re A.C.*, 247 N.C. App. 528, 535, 786 S.E.2d 728,

735 (2016) (internal marks omitted). "[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). "There is no bright line beyond which a parent's conduct amounts to action inconsistent with the parent's constitutionally protected paramount status. Our Supreme Court has emphasized the fact-sensitive nature of the inquiry, as well as the need to examine each parent's circumstances on a case-by-case basis." *In re A.C.*, 247 N.C. App. at 536, 786 S.E.2d at 735 (internal marks and citations omitted).

"[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted). Upon a *proper* finding of unfitness or actions inconsistent with the parent's constitutionally protected status, the trial court determines the best interest of the child. *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). When determining the appropriate permanent plan according to N.C.G.S. § 7B-906.1, "the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail. Thus, in this context, the child's best interests are paramount, not the rights of the parent." *In re T.K.*, 171 N.C. App. 35, 39, 613, S.E.2d 739, 741, *aff'd per curiam*, 360 N.C. 163, 622 S.E.2d 494 (2005) (citations and quotations omitted). "The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion." *In re T.H.*, 832 S.E.2d 162, 164 (N.C. Ct. App. 2019) (quoting *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010)); *see also In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.H.*, 832 S.E.2d at 164 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

C. Findings of Inconsistent Action with Constitutionally Protected Status on Remand

We vacated the 7 November 2017 Permanency Planning Order because the trial court failed to make the required finding that respondents were unfit or had acted inconsistently with their constitutionally protected status as parents. *See In re I.K.*, 260 N.C. App. 547, 550, 818 S.E.2d 359, 362 (2018). We held that, absent such a finding, the trial court erred in reaching a best interest of the child analysis to determine that

guardianship with the maternal grandmother was in the best interest of Iliana and Kevin. *Id.* Our opinion focused on the absence of a necessary *finding*, *Id.* at 550, 555, 818 S.E.2d at 362, 365, and accordingly the bulk of my analysis in this Dissent focuses on the trial court's findings, and whether they were supported by competent evidence. Patty and Isaac only appeal the Order as to Iliana, not as to Kevin, and I examine the trial court's findings and conclusions of law as to Iliana only.

The Order made the findings required by our opinion remanding the 7 November 2017 Permanency Planning Order. In particular, the trial court included Finding of Fact 26 in the Order, finding that "[b]oth [Patty and Isaac] have acted inconsistently with their constitutionally-protected right to parent the minor child." In support of Finding of Fact 26, the trial court made specific findings regarding respondents' voluntary placement of Iliana with her maternal grandmother due to "[Patty]'s impending incarceration and [Isaac]'s lack of suitable housing and work schedule," the remaining absence of "safe and stable housing appropriate for [Iliana] in the three (3) years [Iliana] has been out of [respondents'] custody," and the respondents' continued acts of domestic violence and illegal drug use. My analysis focuses on whether competent evidence was presented to the trial court on the issues of housing, domestic violence, and drug use. The Order also concluded as a matter of law that "[respondents] have acted inconsistently with their protected status."

The Order classifies its findings to comply with the requirements stated in our 7 August 2018 Order remanding the 7 November 2017 Permanency Planning Order for further findings of unfitness or inconsistent action with respondents' constitutionally protected status as parents. However, I note that several findings categorized as findings of fact were, at least partially, conclusions of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and alterations omitted) (holding that "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"); *see also Plott v. Plott*, 313 N.C. 63, 73-74, 326 S.E.2d 863, 869-70 (1985). The trial court's classification of its own determination as a finding or conclusion does not govern this court's analysis. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009); *State v. Burns*, 287 N.C. 102, 110, 214 S.E.2d 56, 61-62 (1975).

Specifically, the trial court's Findings of Fact 40(c), 41(b), and 43 in the Order actually amount to conclusions of law, inasmuch as they declare the following: whether "[e]fforts to reunite [Iliana] with either [Patty or Isaac] would be unsuccessful or inconsistent with [Iliana's] health or safety and need for a safe, permanent home within a reasonable period

of time" under N.C.G.S. § 7B-906.1(d); that "[p]lacement with [respondents] is unlikely within six months" under N.C.G.S. § 7B-906.1(e); and the inadequacy of respondents' progress, participation, and cooperation in the reunification plan, including actions regarding "the health or safety of [Iliana]," under N.C.G.S. § 7B-906.2(d).

While the trial court made findings on remand to comply with the requirements of our 7 August 2018 opinion, I treat the portions of Findings 40(c), 41(b), and 43 requiring exercise of judgment or application of legal principles as conclusions of law and apply the appropriate de novo standard of review. *See Icard*, 363 N.C. at 308, 677 S.E.2d at 826 ("While we give appropriate deference to the portions of [the relevant findings] that are findings of fact, we review de novo the portions of those findings that are conclusions of law.").

The trial court made findings regarding respondents' issues with housing, domestic violence, and drug abuse, and used those findings to support its finding that they acted inconsistently with their constitutionally protected right to parent Iliana. The Majority addressed the issues of housing, domestic violence, and drug abuse in that order. Accordingly, I analyze each of those issues as they relate to respondents in the same order as the Majority.

D. Challenged Findings of Fact

1. Housing

On appeal, respondents challenge the trial court's Findings of Fact 26(b), 27, 28, 34, 37, 40(c), 41(d), 43(a), and 44, which find that respondents failed to rectify their housing situation to an extent that Iliana could return to live with them. In particular, the trial court found the following: "the home in which [respondents] were living . . . was deemed not suitable for [Iliana]"; the home was "deemed unsuitable for the children"; "the issues of . . . safe . . . housing are still present"; "[respondents] continue to reside . . . in a two-bedroom single wide trailer that has holes in the floor that were recently covered with plywood . . . and that has not otherwise been maintained"; "the housing conditions of [respondents] . . . was not safe and appropriate for [Iliana]. Any improvements made between the beginning of this hearing and its conclusion are not indicative of the day-to-day condition of the home[]"; "[t]he issues that led to removal of custody, to wit, . . . housing, have not been resolved[]"; "[respondents] continue to reside . . . [in a] home [that] is not appropriate at this time for placement of [Iliana]"; "[respondents] are not making adequate progress [and] . . . have not resolved the issues of . . . instable housing that led to removal of custody[]"; and "[t]he best plan of care to

achieve a safe, permanent home for [Iliana] within a reasonable period of time is . . . to [place Iliana with] maternal grandmother."

Jordan Houchins ("Houchins"), an investigator with Rockingham County Child Protective Services, testified that, in the spring of 2018, he visited Isaac's mother's home, where respondents lived, and observed clutter "piled up literally to the ceiling." Houchins also observed structural issues with the floors of the small trailer. When Houchins visited the trailer again in December 2018, the same issues remained. Isaac's mother told Houchins a child could sleep on the pull-out couch in the living room if Iliana lived in the trailer, as a child already lived in the trailer with her, Patty, and Isaac. Houchins testified, consistent with the Adjudication Court Report, that he had concern about young children living in a small trailer in that condition. Houchins noted that a child currently resided at the trailer, but expressed concern with another child coming to live at the trailer, in light of the trailer's size, clutter, condition of the floors, and Isaac's mother's health and mobility difficulties.

However, competent evidence did not support the findings of fact concerning respondents' *current* housing situation. I disagree with the Majority's analysis of this issue, particularly its view that we would usurp the trial court's role in making a credibility determination between conflicting evidence by contravening the finding of unsafe day-to-day housing conditions in light of the photographs provided by respondents showing their housing situation had clearly changed. The trial court did not merely consider evidence that, in October 2017, respondents' housing situation had somewhat stabilized, or that "Rockingham County DSS [] visited [Isaac's mother's] home . . . and determined that it [met] minimum standards." Importantly, respondents provided pictures of floor reinforcements to that home at the 18 January 2019 hearing. Specifically, pictures 2, 7, 8, 10, 11, and 12 show sheets of plywood on the floor and are evidence that respondents improved the floors of the residence to improve the flooring problems described by Houchins. Pictures 1-9 show two bedrooms, a dining room, and a kitchen; each space is small and cluttered, but space is visible on the floors, beds, dresser, counter tops, table, and stove. These pictures contradicted the trial court's finding concerning "the day-to-day condition of the home," particularly that respondents resided in "housing conditions . . . not safe and appropriate for [Iliana]," as well as the conclusions that the "extremely cluttered . . . ho[a]rding" observed in the spring of 2018 and on 12 December 2018 and lack of space in the trailer continued. The pictures respondents provided of floor reinforcements at the 18 January 2019 hearing contradicted

the trial court's finding that "the day-to-day condition of the home" *continued* to be unsafe, as the pictures did not show the holes in the floor, the hoarding observed in the spring of 2018 and 12 December 2018, or the continuation of a lack of space in the trailer. These pictures provided objective proof of a change in circumstance as to respondents' housing, making the trial court's finding of fact incorrect. Instead of a credibility determination weighing the believability of contradictory evidence, the trial court's finding regarding respondents' housing situation disregarded objective facts established by photographic evidence.

Competent evidence did not support the trial court's findings that respondents' housing situation continued to be unsafe and too small for Iliana, which the trial court used to support its finding that respondents acted inconsistently with their constitutionally protected status as parents. In light of that lack of competent evidence to support the trial court's findings regarding respondents' housing, I would set aside Findings of Fact 26(b), 27, 28, 34, 37, 40(c), 41(d), 43(a), and 44 to the extent they find respondents had failed to rectify their housing situation to an extent that Iliana could not return to live with them.

2. Domestic Violence

On appeal, respondents challenge the trial court's Findings of Fact 26(c), 28, 30, 40, 41(b), and 44, which find that respondents had failed to rectify their issues with domestic violence to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[respondents] continue to engage in domestic violence . . . despite their completion of treatment and classes[]"; "the issues of . . . domestic violence . . . are still present [with respondents] despite numerous services that have been offered to the family[]"; "[t]here has not been another identified domestic violence incident between [respondents], however there has been domestic violence in the home between [Isaac] and his mother"; "[t]he issues that led to removal of custody, to wit, . . . domestic violence, . . . have not been resolved[]"; "[respondents] have been involved with the Department since October 2015 due to concerns about . . . domestic violence, . . . and . . . the same issues . . . remain unresolved in 2019[]"; and "[t]he best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is . . . to [place Iliana with] maternal grandmother."

Emily Wise ("Wise"), the DSS "assigned social worker for [Iliana,]" testified concerning respondents' history of domestic violence, which she also detailed in the Adjudication Court Report. In particular, Isaac was convicted of misdemeanor assault on a female as a result of an

incident between Patty and him in October 2016. Wise also testified, to her knowledge, no additional domestic violence incidents had occurred between respondents since October 2016. She testified that police had been called to a domestic disturbance at Isaac's mother's house on 23 August 2018. Isaac testified that he was yelling at his mother during the incident, and Isaac's mother "reported it had been a family disagreement." "There were no criminal charges related to" the 23 August 2018 incident.

Competent evidence did not support the trial court's findings of fact concerning respondents' issues with domestic violence listed above. *No* known additional domestic violence incidents have occurred between respondents since October 2016. While the trial court found that domestic violence has occurred between Isaac and his mother in the home respondents live in, the evidence in the Record does not support that violence actually occurred. In fact, the only evidence before the court described the incident as an argument, not as a violent or physical confrontation. I would not speculate about the hyperbolic statements in a 911 call log that Isaac was " 'tearing up' the [trailer]" during this argument, particularly when no charges arose from the incident. Further, the trial court considered evidence that Patty regularly participated in counseling regarding domestic violence, and Isaac engaged in a perpetrator-related domestic violence program.

The evidence does not support the trial court's Findings of Fact that "[respondents] continue to engage in domestic violence," "the issues of . . . domestic violence . . . are still present [with respondents]," "there has been domestic violence in the home between [Isaac] and his mother" since 2017, or that respondents' issues with domestic violence remain unresolved. I agree with the Majority that the trial court's findings regarding Patty and domestic violence were erroneous, but disagree with its characterization of the evidence regarding Isaac and domestic violence. Competent evidence did not support the trial court's findings that respondents have not resolved their issues with domestic violence, which the trial court used to support Finding of Fact 26 that respondents acted inconsistently with their constitutionally protected status as parents. In light of that lack of competent evidence to support the trial court's findings regarding respondents and domestic violence, I would set aside Findings of Fact 26(c), 28, 30, 40, 41(b), and 44 to the extent they find respondents had failed to rectify their issues with domestic violence to an extent that Iliana could not return to live with them.

3. Drug Abuse

On appeal, respondents challenge the trial court's Findings of Fact 26(c), 28, 40(c), 41(b), 41(c), 43(a), and 44, which find that Patty and Isaac had failed to rectify their issues with drug abuse to an extent that Iliana could return to live with them. In particular, the trial court found the following: "[Patty and Isaac] continue to engage in . . . illegal drug use despite their completion of treatment and classes[]"; "the issues of substance use . . . and safe, substance-free housing are still present despite numerous services that have been offered to the family"; "[t]he issues that led to removal of custody, to wit, substance abuse . . . have not been resolved[]"; "[Patty and Isaac] have been involved with the Department since October 2015 due to concerns about substance use, . . . and . . . the same issues [] remain unresolved in 2019[]"; "[Patty and Isaac] continue to use marijuana despite substance abuse treatment. [Patty] has sought prescription painkillers from her mother on more than one occasion while [Iliana] has been placed out of the home[]"; "[Patty and Isaac] are not making adequate progress . . . [and] have not resolved the issue[] of substance abuse . . . that led to removal of custody[]"; and "[t]he best plan of care to achieve a safe, permanent home for [Iliana] within a reasonable period of time is . . . to [place Iliana with] maternal grandmother."

The trial court considered evidence that respondents completed substance abuse treatment on 16 March 2018. Wise testified that respondents provided hair follicles for a drug screen, and the screen of both respondents on 4 September 2018 indicated marijuana use. The trial court was also presented with evidence of Patty's continued drug seeking behavior after the 7 November 2017 Permanency Planning Order.

Wise testified that Patty had engaged in drug seeking behavior after the appeal and remand of the 7 November 2017 Order; specifically, Patty texted "her mother[] requesting pain medications on several occasions," including a text message asking "Do you have a couple of pills I can get?" on 10 June 2018, as well as a text message on 10 August 2018 requesting pain medication. Patty's drug seeking behavior is supportive of the trial court's findings of Patty's continued drug use. Since competent evidence supported the trial court's findings that Patty *continued* to abuse drugs, I agree with the Majority and would not set aside the challenged findings concerning Patty's issues with drug abuse.

However, the Record does not contain such evidence of continued drug seeking behavior as related to Isaac. Unlike evidence of Patty's continued drug seeking behavior after the appeal and remand of the

7 November 2017 Order, the only evidence since February 2017 of Isaac participating in drug use is a hair follicle sample from 4 September 2018 indicating marijuana use. The Majority also mentions a text message exchange *between respondents* about marijuana on 4 April 2018, which did not constitute the same drug seeking behavior as Patty in her text messages to other individuals asking for drugs. The trial court was not presented with any other evidence showing Isaac's participation in drugs, or drug abuse, since February 2017, other than the 4 September 2018 test. Competent evidence did not support the trial court's findings that Isaac *continued* to abuse drugs, which the trial court used to support its finding that Isaac acted inconsistently with his constitutionally protected status as Iliana's parent. In light of that lack of competent evidence to support the trial court's findings regarding Isaac and continued drug abuse, I would set aside findings 26(c), 28, 40(c), 41(b), 41(c), 43(a), and 44 to the extent they find Isaac had failed to rectify his issues with drug abuse to an extent that Iliana could not return to live with him. Additionally, to the extent Finding of Fact 26 relied on findings that Isaac had failed to rectify his issues with housing, domestic violence, and drug abuse, I would set aside that Finding of Fact that Isaac had acted inconsistently with his constitutionally protected right to parent Iliana.

E. Challenged Conclusion of Law 6

The trial court relied on the unsupported portions of Findings of Fact 26(b), 26(c), 27, 28, 30, 34, 37, 40, 41(b), 41(c), 41(d), 43(a), and 44 regarding respondents' housing, domestic violence, and drug abuse to support its Conclusion of Law 6 that respondents acted inconsistently with their constitutionally protected right to parent Iliana. *See In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735. Specifically, I would review whether the remaining findings of fact support Conclusion of Law 6 in light of my previous analysis that competent evidence only supported the trial court's findings that *Patty* continued to abuse drugs. *See In re A.A.S.*, 258 N.C. App. 422, 429, 812 S.E.2d 875, 881 (2018); *see also In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015).

Clear and convincing evidence of Patty's continued drug seeking behavior supported the trial court's Conclusion of Law 6 that Patty acted inconsistently with her constitutionally protected right to parent Iliana. Patty's text messages to her mother seeking drugs were clear and convincing evidence that supported Conclusion of Law 6. However, the same conclusion does not necessarily follow for Isaac. Unlike evidence in the Record of Patty's continued drug seeking behavior when she texted her mother seeking drugs, the Record only contains evidence of one instance since February 2017 linking Isaac to participating in

marijuana use, aside from his text message exchange about marijuana with Patty.

Evidence that respondents participated in efforts to correct the issues that led to Iliana's removal from their home regarding domestic violence, sobriety, and housing stability, and maintained involvement with Iliana, does not support the trial court's Conclusion of Law 6. Competent evidence did not support findings that Isaac "continue[s] to engage in . . . illegal drug use," particularly since a marked lack of evidence exists in the Record concerning continued drug seeking behavior by Isaac. Limited marijuana usage, without more, is not conduct inconsistent with one's constitutionally protected parental rights. Since "[t]he clear and convincing standard requires evidence that should fully convince," *In re A.C.*, 247 N.C. App. at 533, 786 S.E.2d at 734, and the Record lacks evidence that fully convinces or supports Conclusion of Law 6, the trial court erred in concluding that Isaac acted inconsistently with his parental rights. Finding of Fact 26 that Isaac acted inconsistently with his parental rights is not supported by competent evidence, should be set aside, and does not support the trial court's Conclusion of Law 6 that Isaac acted inconsistently with his parental rights.

Competent evidence of Patty's continued drug seeking behavior supported the trial court's findings regarding Patty's drug abuse, including Finding of Fact 26 that Patty acted inconsistently with her constitutionally protected right to parent Iliana. These findings supported Conclusion of Law 6 that Patty acted inconsistently with her constitutionally protected right to parent Iliana. Accordingly, I concur with the Majority that we should affirm the trial court's ruling as to Patty.

However, the Record does not contain competent evidence supporting the trial court's findings that Isaac's housing situation, domestic violence, or drug abuse prevented Iliana from returning to live with him. In particular, Finding of Fact 26 that Isaac acted inconsistently with his constitutionally protected right to parent Iliana was unsupported by competent evidence, and the findings did not support Conclusion of Law 6. I acknowledge that further findings would be necessary on remand concerning Iliana's placement with Isaac, as Patty resides with Isaac and continues to exhibit drug seeking behavior.

CONCLUSION

The trial court's Finding of Fact 26 and Conclusion of Law 6 concerning Patty acting inconsistently with her constitutionally protected right to parent the minor child were not erroneous, as the Record contained

competent evidence of Patty's continued drug use, and the findings concerning continued drug use supported Conclusion of Law 6.

However, the trial court's Finding of Fact 26 and Conclusion of Law 6 concerning Isaac acting inconsistently with his constitutionally protected right to parent the minor child were erroneous, as the Record did not contain competent evidence of Isaac's continued drug use to the extent inconsistent with his constitutional rights to parent his child, domestic violence, or unsafe housing conditions, and the findings did not support Conclusion of Law 6.

The trial court did not abuse its discretion in its visitation order concerning Patty, as the Order complied with the requirements of N.C.G.S. § 7B-905.1(c).

Unlike the Majority, I would remand this matter for further findings concerning Iliana's placement with Isaac without placing her with Patty. Accordingly, I respectfully dissent.

IN THE MATTER OF J.T.C.

No. COA19-252

Filed 18 August 2020

Termination of Parental Rights—grounds for termination—willful abandonment—best interests—sufficiency of evidence

Although the trial court did not distinguish between its adjudicatory and dispositional findings of fact or between its findings of fact and conclusions of law, the court properly terminated respondent-father's parental rights to his son on the basis of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the evidence established that, for longer than the six-month dispositive period, respondent had no contact with his child, made no attempts to communicate with him, and paid no support of any kind. Further, the trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in the child's best interest after appropriate consideration of the factors contained in N.C.G.S. § 7B-1110(a).

Judge MURPHY concurring in the result in part and dissenting in part.

IN RE J.T.C.

[273 N.C. App. 66 (2020)]

Appeal by Respondent from order entered 4 September 2018[1] by Judge John M. Britt in Nash County District Court. Heard in the Court of Appeals 27 May 2020.

Mark L. Hayes for petitioner-appellee.

Leslie Rawls for respondent-appellant.

ARROWOOD, Judge.

Respondent-father, father of "Jeffrey,"[2] appeals from the trial court's order granting the petition filed by Jeffrey's mother ("Petitioner") for the termination of his parental rights. For the following reasons, we affirm.

I. Background

Jeffrey was born in Nash County, North Carolina, in November 2010. Petitioner and Respondent-father never married but lived together with Jeffrey for a period after his birth.

On 8 June 2011, Petitioner obtained a domestic violence protective order ("DVPO") against Respondent-father after he threatened her and choked her until she lost consciousness. The trial court found Jeffrey had been exposed to the violence and granted Petitioner temporary custody for the duration of the DVPO, which expired on 7 June 2012.

Petitioner and Respondent-father temporarily reunited. Respondent-father was subsequently incarcerated. Following his release from prison in November 2014, Respondent-father engaged in additional domestic violence against Petitioner resulting in the entry of a second DVPO on 6 January 2015. The DVPO granted Petitioner temporary custody of Jeffrey until 7 April 2015 and expired on 7 July 2015. Petitioner and Respondent-father did not resume their relationship thereafter. Petitioner arranged any visits between Respondent-father and Jeffrey after the expiration of that DVPO. At Petitioner's invitation, Respondent-father came to Jeffrey's birthday party in November 2015, visited Jeffrey

1. The record contains two versions of the trial court's order, both file-stamped on 31 August 2018. The first order was signed on the trial judge's behalf by an assistant clerk of court on 31 August 2018; the second was signed by the judge on 4 September 2018, four days after the purported filing date. Because N.C. Gen. Stat. § 1A-1, Rule 58 (2019) provides that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[,]" we deem the order entered on the date that all three requirements were satisfied. We also note Respondent-father's amended notice of appeal is timely given the 7 September 2018 date of service of the termination order.

2. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

around Christmas at Wal-Mart in December 2015, and attended a birthday party in April 2016 for one of Jeffrey's friends for approximately three hours.

On 12 December 2016, Petitioner filed a petition in Nash County District Court to terminate Respondent-father's parental rights pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes. After a hearing on 12 April 2018, the trial court adjudicated grounds for termination existed based on Respondent-father's neglect and willful abandonment of Jeffrey under N.C. Gen. Stat. § 7B-1111(a)(1) and (7) (2019). The court held a dispositional hearing on 2 August 2018 and further determined that terminating Respondent-father's parental rights was in Jeffrey's best interest. Respondent-father gave timely notice of appeal from the termination of parental rights order ("the termination order").

II. Discussion

A. Standard of Appellate Review

We employ a familiar two-part framework on appeal from an order terminating parental rights. "We review a trial court's adjudication under N.C. [Gen. Stat.] § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *Matter of E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "We review *de novo* whether a trial court's findings support its conclusions." *Matter of Z.D.*, 258 N.C. App. 441, 443, 812 S.E.2d 668, 671 (2018). With regard to disposition, " '[w]e review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard.' " *Matter of A.H.*, 250 N.C. App. 546, 565, 794 S.E.2d 866, 879 (2016) (quoting *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007)). The trial court's dispositional findings under N.C. Gen. Stat. § 7B-1110(a) need only be supported by competent evidence. *See id.* at 565, 794 S.E.2d at 879-80; *see also In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841, *remanded for reconsideration on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001).

For purposes of appellate review, findings of fact to which no exception is taken are binding. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Furthermore, "erroneous findings unnecessary to the determination do not constitute reversible error" where the trial court's remaining findings independently support its conclusions of law. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

B. Respondent-father's Arguments on Appeal

1. Findings of Fact

Respondent-father challenges the following two findings of fact as not supported by the evidence:

> 21. Respondent[-father] has not shown adequate interest with regard to raising and supporting the minor child.
>
> 22. Respondent[-father] has not declared or shown love for the minor child throughout this proceeding.

He contends the hearing "transcript directly contradicts and undermines these findings."

Initially, we note the trial court's order does not divide or otherwise distinguish its adjudicatory findings from its dispositional findings. Moreover, the court purports to make all of its findings "based on clear, cogent, and convincing evidence[.]"

From our examination of the order, it appears the trial court arranged its findings of fact sequentially. Findings 1-8 establish the basis for the trial court's jurisdiction in the cause. Findings 9-12 are adjudicatory in nature, addressing Petitioner's asserted grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) and (7). Findings 13-25 are dispositional, addressing the statutory criteria in N.C. Gen. Stat. § 7B-1110(a)(1)-(6) as a basis for determining Jeffrey's best interest. It thus appears the trial court did not rely on Findings 21 and 22 to support its adjudications, only its disposition.

Regardless of whether the contested findings are adjudicatory or dispositional, we find ample evidence to support Finding 21. At the adjudicatory hearing,[3] Petitioner testified Respondent-father had paid nothing toward Jeffrey's support in the preceding three years and had no contact with Jeffrey since attending an event at a skating rink at Petitioner's invitation in April 2016.

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3. Findings made in support of an adjudication under N.C. Gen. Stat. § 7B-1111(a) must be based on evidence adduced at the adjudicatory stage of the proceeding. *See* N.C. Gen. Stat. § 7B-1109(e) (2019). Dispositional findings under N.C. Gen. Stat. § 7B-1110 may be based on evidence presented at either the adjudicatory or dispositional stage of the hearing. *See In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001) ("Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage."); *see also In re R.B.B.*, 187 N.C. App. at 643-44, 654 S.E.2d at 518 (noting "a trial court may combine the N.C. [Gen. Stat.] § 7B-1109 adjudicatory stage and the N.C. [Gen. Stat.] § 7B-1110 dispositional stage into one hearing, so long as the trial court applies the correct evidentiary standard at each stage").

Petitioner described Respondent-father's conduct while they lived together with Jeffrey as follows:

> There was a lot of domestic violence. [Respondent-father] had a lot of drug issues. He was always using. He was never really home. I cannot really say that he supported his child. Even though we did stay in the same house. He was there (inaudible). He was not a good father figure to his child.

Petitioner also testified that although the initial DVPO issued in 2011 provided Respondent-father with the right to visit Jeffrey, Respondent-father did not exercise his visitation rights. Likewise, after the second DVPO expired on 7 July 2015, Respondent-father made no attempt to contact Petitioner to see Jeffrey or to provide support for the child. Respondent-father saw Jeffrey on just three occasions after 7 July 2015: at Jeffrey's birthday party in November 2015, on Christmas of 2015, and at the skating rink in April 2016. On each occasion, it was Petitioner who reached out to Respondent-father and invited him to see his son. Respondent-father did not bring any gifts for Jeffrey to these events or pay any amount toward the scheduled activities.

Petitioner affirmed Respondent-father had not seen Jeffrey or made any attempt to contact or provide support for the child in the eight months that preceded her filing of the petition in this cause on 12 December 2016. Although Respondent-father's relatives contacted Petitioner asking to see Jeffrey after she filed her petition, they did not mention Respondent-father. Respondent-father's wife also attempted to contact Petitioner on Facebook, saying she and Respondent-father wanted to see Jeffrey, but did so only "a full seven months" after the petition was filed.

Respondent-father, his wife, and his aunt testified at the adjudicatory hearing and disputed aspects of Petitioner's testimony. It is well-established, however, that "[c]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness." *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988) (citation omitted).

Moreover, Respondent-father acknowledged not having seen Jeffrey since April 2016 at the skating rink and having neither provided support for, nor "filed for custody" of, Jeffrey. Respondent-father's explanations for his inaction were belied by his own testimony and that of his witnesses. When asked why he had never sought custody of

Jeffrey, for example, Respondent-father claimed he had no money for an attorney "[b]ecause at the time [he] didn't have a job." He later testified that he had been employed in his current full-time job for "[a]bout two years"—well before Petitioner filed to terminate his parental rights. Respondent-father also claimed he had been unable to contact Petitioner about Jeffrey because he did not know where she lived, and because she frequently changed her phone number. He then testified that his "cousin actually stays two doors down from [Petitioner]." Respondent-father's wife subsequently described making "numerous" phone calls to Petitioner despite her changing phone number, as follows:

> Q. . . . [H]ow can you talk to her numerous times but you can't reach her because her phone number always changes?
>
> A. There is -- because when we would get the new number I would call. And no, she didn't really want to talk to me but you know, (*inaudible*) and wanted to be in his children's life -- and that -- so you know what, I'm going to call it. I'm going to ask to see [Jeffrey]. She did not particularly like the call but she was going to get it.

Respondent-father's exception to Finding 21 is overruled.

Respondent-father also challenges Finding 22, which states he "has not declared or shown love for the minor child through this proceeding." The hearing transcript shows Respondent-father expressly testified in reference to Jeffrey, "I love my son." While we construe the term "this proceeding" in Finding 22 as referencing the entire period since Petitioner filed her petition on 12 December 2016, we agree with Respondent-father that the trial court's finding is erroneous in light of his testimony. Nevertheless, because the trial court's remaining findings independently support its conclusions of law, we find no reversible error and disregard this finding for purposes of our review. *See In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240.

2. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(7)

Respondent-father claims the evidence and the trial court's findings of fact do not support its adjudication of grounds to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), which authorizes termination when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C. Gen. Stat. § 7B-1111(a)(7). Our Supreme Court has provided the following guidance for applying this provision:

> We have held that [a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Matter of E.H.P., 372 N.C. at 393, 831 S.E.2d at 52 (first alteration in original) (internal citations and quotation marks omitted).

The dispositive six-month period in this case is 12 June 2016 to 12 December 2016. The trial court made the following findings relevant to its adjudication under N.C. Gen. Stat. § 7B-1111(a)(7):[4]

> 10. Petitioner has proven through clear, cogent, and convincing evidence that, pursuant to [N.C. Gen. Stat.] §[ ]7B-1111(a)(7), the Respondent[-father] has willfully neglected and abandoned the minor child for at least six (6) consecutive months immediately preceding the filing of the Petition.
>
> 11. Respondent[-father] has had no contact with the minor child since an April 9, 2016 birthday party at Sky-Vue Skateland in Rocky Mount and has not provided any form of support whether in cash or in kind, medical, or otherwise for the child since at least December 26, 2015.
>
> 12. In the six months immediately preceding the filing of the Petition, the Respondent[-father] did [not] have any contact or communication with the minor child nor did he directly attempt to contact the minor child or provide the minor child any care, supervision, support, discipline, gift, card, or letter; Respondent[-father] has not met any need of the minor child and

4. Respondent-father asserts that "Findings of fact ## 18, 19, 20, 21, and 22 are . . . insufficient to support an adjudication of abandonment." As previously discussed, we believe these findings were made for dispositional purposes under N.C. Gen. Stat. § 7B-1110(a) in assessing whether terminating Respondent-father's parental rights is in Jeffrey's best interest. Therefore, we do not consider them in reviewing the court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(7). *Cf. Matter of A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) ("[W]e limit our review of challenged findings to those that are necessary to support the district court's determination that this ground [for termination] existed . . . .").

> has been absent from the minor child's life since on or about December 26, 2015.

To the extent Respondent-father does not except to the trial court's findings of fact, specifically Findings 11 and 12, they are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384.

We agree with Respondent-father that Finding 10 amounts to a conclusion of law, inasmuch as it declares Petitioner's success in establishing the statutory ground for termination in N.C. Gen. Stat. § 7B-1111(a)(7) under the applicable burden of proof in N.C. Gen. Stat. § 7B-1109(f). *See Matter of Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997) (reasoning that a "determination of neglect requires the application of the [relevant] legal principles . . . and is therefore a conclusion of law."); *see also In re S.Z.H.*, 247 N.C. App. 254, 261-62, 785 S.E.2d 341, 347 (2016) (characterizing adjudication of abandonment under (a)(7) as a conclusion of law). The trial court's classification of its own determination as a finding or conclusion does not govern our analysis. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (treating as conclusions of law those findings of fact which resolved a question of law). We treat Finding 10 as a conclusion of law and apply the appropriate *de novo* standard of review. *See id.* ("While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review de novo the portions of those findings that are conclusions of law.").

Based on its findings of fact, the court reached the following conclusions of law:

> 3. The Respondent[-father] . . . through testimony and evidence presented at this proceeding, is determined to have willfully abandoned the minor child, [Jeffrey], for at least six consecutive months immediately preceding the filing of the petition pursuant to N.C. [Gen. Stat.] § 7B-1111(a)(7).
>
> 4. Respondent[-father]'s conduct manifests a willful determination to forego all parental duties and obligations toward said minor child.
>
> 5. There is sufficient, clear, cogent and convincing evidence to terminate the parental rights of [Respondent-father] to [Jeffrey] pursuant to N.C. [Gen. Stat.] § 7B-1111.

As with ostensible Finding 10, we view Conclusion 4 as more in the nature of a finding of fact. Our courts have held the willfulness of

parent's conduct to be a question of fact rather than law. *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). Conclusion 4 thus amounts to an ultimate finding by the trial court, based on inferences drawn from the evidence and Respondent-father's objective behavior toward Jeffrey. Because Respondent-father has challenged Conclusion 4 on appeal, we review it under the appropriate standard. *See State v. Burns*, 287 N.C. 102, 110, 214 S.E.2d 56, 61-62 (1975).

Respondent-father takes no exception to the trial court's statements in Findings 11 and 12 that he had no contact with Jeffrey after 9 April 2016; that he provided no support of any kind for Jeffrey "since at least December 26, 2015"; and that he did not "directly attempt to contact [Jeffrey] or provide the minor child any care, supervision, support, discipline, gift, card, or letter . . . and has been absent from the minor child's life since on or about December 26, 2015." We find the evidence, as reflected in these findings, further supports the trial court's ultimate finding in Conclusion 4 that Respondent-father's conduct during the critical six months evinces a "willful determination to forego all parental duties and obligations toward [Jeffrey]." Taken together, these findings in turn support the trial court's conclusion of law that Respondent-father "willfully abandoned the minor child, [Jeffrey], for at least six consecutive months immediately preceding the filing of the petition pursuant to N.C. [Gen. Stat.] §[ ]7B-1111(a)(7)." *See Matter of E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53 (upholding adjudication of willful abandonment where, "[b]y his own admission, respondent had no contact with his children during the statutorily prescribed time period . . . [and] made no effort to have any form of involvement with the children for several consecutive years following the entry of the Temporary Custody Judgment" awarding custody to the petitioner).

Unlike the cases cited by Respondent-father, the evidence shows no effort by Respondent-father during the relevant six-month period to have any form of contact or communication with Jeffrey, or to provide for his support in any manner. In *In re S.Z.H.*, "respondent called Sally during roughly half of the relevant six-month period . . . and asked petitioner if he could attend Sally's birthday party[.]" 247 N.C. App. at 261, 785 S.E.2d at 346. "[E]ven during the last half of the six-month period, the evidence tended to show that respondent attempted to communicate with Sally but petitioner stopped allowing him to contact her." *Id.* at 261, 785 S.E.2d at 346-47. Similarly in *Matter of D.M.O.*, the trial court's findings were held insufficient to support an adjudication of abandonment because they failed to resolve conflicts in the evidence about "whether and to what extent respondent-mother called, texted, and mailed letters during the relevant period; whether and to what extent

respondent-mother was able to participate in exercising parental duties on account of her periodic incarceration at multiple jails; and whether and to what extent petitioner-father hindered respondent-mother from communicating with [the juvenile] or exercising visitation[.]" 250 N.C. App. 570, 580, 794 S.E.2d 858, 866 (2016). The facts *sub judice* show no similar efforts by Respondent-father toward Jeffrey and no hindrance to Respondent-father akin to the respondent-parent's incarceration in *Matter of D.M.O.* during the six months at issue.

We are not persuaded by Respondent-father's suggestion that the efforts made by his wife and relatives to contact Petitioner foreclose an adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). Where, as here, a parent has the means to undertake personal efforts toward maintaining a relationship with his child, he will not be absolved of his parental responsibilities by the efforts of third parties. The evidence shows Respondent-father had the ability to contact Petitioner directly about Jeffrey but made no effort to do so. Respondent-father also provided no financial support for Jeffrey despite having full-time employment throughout the six-month period from 12 June 2016 to 12 December 2016. Accordingly, we hold the trial court properly adjudicated grounds for terminating Respondent-father's parental rights based on willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7).

Because we affirm the trial court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(7), we need not review the second ground for termination found by the court under N.C. Gen. Stat. § 7B-1111(a)(1). *Matter of E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53.

C. Disposition under N.C. Gen. Stat. § 7B-1110(a)

Respondent-father also claims the trial court abused its discretion at the dispositional stage of the proceeding by concluding that termination of his parental rights is in Jeffrey's best interest. " 'A ruling committed to a trial court's discretion . . . 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 S.C.R.*, 198 N.C. App. 525, 536, 679 S.E.2d 905, 911-12 (2009) (emphasis in original) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

"Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child." *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010) (citing *In re Mills*, 152 N.C. App. 1, 7, 567 S.E.2d 166, 169-70 (2002)). Under N.C. Gen. Stat. § 7B-1110(a),

> The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2019). Although the court must consider each of these factors, written findings are required only "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the trial court[.]' " *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (quoting *In re D.H.*, 232 N.C. App. 217, 221 n.3, 753 S.E.2d 732, 735 n.3 (2014)).

The trial court made the following findings under N.C. Gen. Stat. § 7B-1110(a)(1)-(6):

> 13. The minor child is seven (7) years old . . . .
>
> 14. The likelihood that the minor child will be adopted is good; Petitioner's husband's testimony indicates his desire to adopt the minor child and the minor child indicated that he wished to be adopted by Petitioner's husband.
>
> 15. That the termination of parental rights will aid in the accomplishment of the permanent plan for the minor child; the adoption of the minor child by Petitioner's husband will provide needed emotional and financial stability and ensure the juvenile's continued positive growth and development that has been fostered in the juvenile's current home setting with Petitioner and her husband.

16. That the bond between the minor child and the Respondent[-father] is poor, with the minor child having very little recollection of Respondent[-father].

17. The quality of the relationship between the minor child and the proposed adoptive parent is good; the minor child and the proposed adoptive parent have a strong familial bond, enjoy similar activities, and spend a great deal of time together; the proposed adoptive parent has provided the minor child with continued emotional and financial support in a parental role over approximately the last two (2) years.

18. The Respondent[-father] has a lengthy history of assaultive behavior against the Petitioner Mother.

19. The Respondent[-father] has been involved in criminal activity for the majority of the minor child's life and has a lengthy criminal record including current pending criminal charges.

20. Both Respondent[-father] and his wife have numerous current positive references to alcohol and drugs in their social media postings.

21. Respondent[-father] has not shown adequate interest with regard to raising and supporting the minor child.

22. Respondent[-father] has not declared or shown love for the minor child throughout this proceeding.

23. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for said minor child, be terminated based on the foregoing findings of fact.

Having previously addressed Respondent-father's challenges to Findings 21 and 22, we disregard Finding 22 to the extent it fails to account for Respondent-father's testimony that he loves Jeffrey. There is ample support in the trial court's remaining findings to support its conclusions of law, such that the trial court's ruling was not "so *arbitrary* that it could not have been the result of a reasoned decision." *In re S.C.R.*, 198 N.C. App. at 536, 679 S.E.2d at 911-12 (emphasis in original) (citation and internal quotation marks omitted). Accordingly, the trial court did not abuse its discretion. We further note Finding 23 is actually a conclusion of law, and review it accordingly. *See Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (internal citations omitted) ("any determination requiring

the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.").

Respondent-father does not dispute the evidentiary support for Findings 13-20, which address each of the factors in N.C. Gen. Stat. § 7B-1110(a). He contends a portion of Finding 15 is erroneous because it refers to Jeffrey's "permanent plan"—a feature only of proceedings initiated by a county director of social services under Article 4 of Chapter 7B. *See* N.C. Gen. Stat. §§ 7B-401.1, -906.1, -906.2 (2019). We agree that Jeffrey has no "permanent plan" as that term is defined in N.C. Gen. Stat. § 7B-906.2, and that portion of Finding 15 is thus erroneous. Nevertheless, we do not believe this amounts to an abuse of discretion.

In viewing the trial court's order as a whole, it becomes clear that the one-time mention of a permanent plan appears to simply be an oversight. Other than in Finding 15, the trial court makes no reference to the existence of a permanent plan or the involvement of DSS. In addition, while Finding 15 begins with a brief mention of a permanent plan, the bulk of it is devoted to a discussion of the benefits of adoption of the minor child by petitioner's husband, which the trial court is allowed to consider as "any relevant consideration" in determining the best interests of the minor child. *See* N.C. Gen. Stat. § 7B-1110(a)(6). This Court has said that "erroneous findings unnecessary to the determination do not constitute reversible error" where the trial court's remaining findings independently support its conclusions of law. *In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240. *See also In re B.W.*, 190 N.C. App. 328, 333, 665 S.E.2d 462, 465 (2008) (disregarding the trial court's erroneous finding because "we d[id] not believe that the court's unsupported finding on this issue was necessary to its disposition."). As with Finding 22, in light of the ample support in the trial court's remaining findings which support its conclusions of law, we find no abuse of discretion.

Finally, Respondent-father's assertion that Findings 18-20 do not support the trial court's adjudication of neglect or abandonment under N.C. Gen. Stat. § 7B-1111(a) has no bearing on our review of the court's dispositional determination under N.C. Gen. Stat. § 7B-1110(a). We are satisfied Respondent-father's history of domestic violence toward Jeffrey's mother, his lengthy criminal record and pending charges, and his ongoing use of impairing substances with his current wife constitute "relevant consideration[s]" for purposes of N.C. Gen. Stat. § 7B-1111(a)(6).

III. Conclusion

We thus find no abuse of discretion by the trial court in concluding Jeffrey's best interests will be served by termination of

Respondent-father's parental rights. The trial court's findings show its consideration of the statutory factors in N.C. Gen. Stat. § 7B-1110(a) and provide sound reasons for its ultimate decision. Although Respondent-father attested to his desire to establish a relationship with Jeffrey, a reasonable fact-finder could conclude Jeffrey's well-being is better served by freeing him to be adopted by his stepfather. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judge INMAN concurs.

Judge MURPHY concurs in the result in part and dissents in part by separate opinion.

MURPHY, Judge, concurring in the result in part and dissenting in part.

Respondent-father appeals from the trial court's order granting the petition for termination of his parental rights. As a result of an erroneous finding of fact and a misapprehension of law, we should vacate the trial court's order and remand for further dispositional proceedings consistent with that holding.

BACKGROUND

Jeffrey was born in Wilson County in 2010. Petitioner and Respondent-father never married but lived together with Jeffrey for a period after his birth.

On 8 June 2011, Petitioner obtained a domestic violence protective order ("DVPO") against Respondent-father after he threatened her and choked her until she lost consciousness. The DVPO found Jeffrey had been exposed to the violence and granted Petitioner temporary custody for the duration of the DVPO, which expired on 7 June 2012.

Petitioner and Respondent-father temporarily reunited. Respondent-father was subsequently incarcerated. On 6 January 2015, following Respondent-father's release from prison in November 2014, a second DVPO was entered based on an additional incident of domestic violence against Petitioner. The DVPO granted Petitioner temporary custody of Jeffrey until 7 April 2015 and expired on 7 July 2015. Petitioner and Respondent-father did not resume their relationship thereafter. Petitioner arranged any visits between Respondent-father and Jeffrey

after the expiration of that DVPO. At Petitioner's invitation, Respondent-father came to Jeffrey's birthday party in November 2015, visited Jeffrey at a Christmas visit at Wal-Mart in December 2015, and attended a birthday party in April 2016 for one of Jeffrey's friends for approximately three hours.

On 12 December 2016, Petitioner filed in Nash County District Court to terminate Respondent-father's parental rights pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes. *See, e.g.*, N.C.G.S. §§ 7B-1100-1104 (2017). After a hearing on 12 April 2018, the trial court adjudicated grounds for termination based on Respondent-father's neglect and willful abandonment of Jeffrey under N.C.G.S. § 7B-1111(a)(1)and (a)(7). The trial court held a dispositional hearing on 2 August 2018 and determined that terminating Respondent-father's parental rights was in Jeffrey's best interest. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father gave timely notice of appeal from the termination of parental rights order ("the termination order").

ANALYSIS

A. Standard of Review

"A termination of parental rights proceeding consists of two phases. In the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C.[G.S.] § 7B-1111 exists." *In re J.W.*, 173 N.C. App. 450, 470-71, 619 S.E.2d 534, 548 (2005) (quoting *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)), *aff'd*, 360 N.C. 361, 625 S.E.2d 780 (2006). "Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *Id.* at 471, 619 S.E.2d at 548 (quoting *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997)). "We review whether the trial court"s findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law." *Id.* (quoting *Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602). "We review *de novo* whether a trial court's findings support its conclusions." *In re Z.D.*, 258 N.C. App. 441, 443-44, 812 S.E.2d 668, 671 (2018).

With regard to disposition, "[w]e review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard." *In re A.H.*, 250 N.C. App. 546, 565, 794 S.E.2d 866, 879 (2016) (quoting *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007)). "All dispositional orders of the trial court in abuse, neglect and dependency hearings must contain findings

of fact based upon the credible evidence presented at the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal." *In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841, *remanded for reconsideration on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001) (internal citation omitted).

For purposes of appellate review, findings of fact to which no exception are taken are binding. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007); *see also In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 54 (2019) (holding that when "Respondent [did] not challenge[certain] findings, . . . they are therefore binding on appeal"). However, "we are not at liberty to speculate as to the precise weight the trial court gave to [erroneous findings of fact]." *In re L.C.*, 253 N.C. App. 67, 79, 800 S.E.2d 82, 91 (2017) (internal marks and citations omitted). Further, "our inability to determine the weight that the trial court assigned to . . . erroneous findings of facts" may require reversal and remand when considering the trial court's "use of these [erroneous] findings to support the apparent conclusions of law[.]" *Id.* (quoting *Alvarez v. Alvarez*, 134 N.C. App. 321, 327, 517 S.E.2d 420, 424 (1999)).

B. Respondent-father's Arguments on Appeal

1. Findings of Fact

I agree with the Majority that, as an initial matter, the termination order does not divide or otherwise distinguish its adjudicatory findings from its dispositional findings. Moreover, the trial court purports to make all of its findings "based on clear, cogent, and convincing evidence[.]"

As the Majority notes, after examining the termination order, the trial court arranged its findings of fact sequentially. I agree with the Majority that Findings of Fact 1 through 8 establish the basis for the trial court's jurisdiction in the cause and that Findings of Fact 9 through 12 are adjudicatory in nature, addressing Petitioner's asserted grounds for termination under N.C.G.S. § 7B-1111(a)(1) and (a)(7). Findings of Fact 13 through 22 are dispositional, addressing the statutory criteria in N.C.G.S. § 7B-1110(a)(1)-(6) as a basis for determining Jeffrey's best interest.

However, I disagree with the Majority's characterization of Findings of Fact 21, 24, and 25. In its initial characterization of the findings, the Majority does not characterize Finding of Fact 23 as a conclusion of law, which it is, but does so in its analysis of the trial court's disposition. Unlike the Majority's categorization of Finding of Fact 21 as only dispositional in nature, Finding of Fact 21 was also adjudicatory in nature,

again addressing Petitioner's asserted grounds for termination under N.C.G.S. § 7B-1111(a)(1) and (a)(7). Further examination of the termination order shows the trial court relied on Finding of Fact 21 to support its adjudication, as well as its disposition. I address Findings of Fact 23 to 25, which actually amount to Conclusions of Law, later in my analysis.

In addition to other challenges addressed throughout this opinion, Respondent-father challenges the following two Findings of Fact as not supported by clear and convincing evidence:

> 21. [Respondent-father] has not shown adequate interest with regard to raising and supporting [Jeffrey].
>
> 22. [Respondent-father] has not declared or shown love for [Jeffrey] throughout this proceeding.

He contends the hearing "transcript directly contradicts and undermines these findings."

Regardless of whether the contested findings are adjudicatory or dispositional, I agree with the Majority that there is ample evidence to support Finding of Fact 21. At the adjudicatory hearing,[1] Petitioner testified Respondent-father had paid nothing toward Jeffrey's support in the preceding three years and had no contact with Jeffrey since attending an event at a skating rink at Petitioner's invitation in April 2016.

Petitioner described Respondent-father's conduct while they lived together from 2010 to 2015 with Jeffrey as follows:

> There was a lot of domestic violence. [Respondent-father] had a lot of drug issues. He was always using. He was never really home. I cannot really say that he supported his child. Even though we did stay in the same house. He was there (inaudible). He was not a good father figure to his child.

While this testimony provided some evidence concerning whether Respondent-father "neglected the juvenile" as to adjudication under

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1. As the Majority correctly states, findings made in support of an adjudication under N.C.G.S. § 7B-1111(a) must be based on evidence adduced at the adjudicatory stage of the proceeding. *See* N.C.G.S. § 7B-1109 (2019). Dispositional findings under N.C.G.S. § 7B-1110 may be based on evidence presented at either the adjudicatory or dispositional stage of the hearing. *See In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001); *see also In re R.B.B.*, 187 N.C. App. 639, 643-44, 654 S.E.2d 514, 518 (2007) (noting "a trial court may combine the N.C.G.S. § 7B-1109 adjudicatory stage and the N.C.G.S. § 7B-1110 dispositional stage into one hearing, so long as the trial court applies the correct evidentiary standard at each stage").

N.C.G.S. § 7B-1111(a)(1), the time period discussed in the testimony did not fall into the applicable date range to determine whether Respondent-father "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion" under N.C.G.S. § 7B-1111(a)(7). N.C.G.S. § 7B-1111(a)(7) (2019).

The trial court reviewed conflicting evidence concerning Respondent-father's attempts to see Jeffrey during the applicable time period before the petition in this cause on 12 December 2016. Petitioner testified that, although the initial DVPO, issued in 2011, provided Respondent-father with the right to visit Jeffrey, Respondent-father did not exercise his visitation rights, and made no attempt to contact Petitioner to see Jeffrey or to provide for his support after the second DVPO expired on 7 July 2015. However, Respondent-father testified to attempting to contact Petitioner through his family members to avoid conflict. Respondent-father also testified that Petitioner's invitations to visit with Jeffrey came with very short notice, and that "every time [Petitioner] invited me and I could be there I was there." At Petitioner's invitation, Respondent-father saw Jeffrey on three occasions after 7 July 2015: at Jeffrey's birthday party in November 2015, during Christmas of 2015, and at the skating rink in April 2016.

The testimony of Petitioner evidenced that Respondent-father had not seen Jeffrey or made any attempt to contact or provide support for the child in the eight months that preceded her filing of the petition in this cause on 12 December 2016. However, Respondent-father testified that, prior to the filing of that petition, he attempted to contact Petitioner to set up a visit with Jeffrey in the months prior to 12 December 2016. Petitioner acknowledged that Respondent-father's relatives contacted her asking to see Jeffrey, but that they did not mention Respondent-father. Respondent-father's wife also attempted to contact Petitioner on Facebook, saying she and Respondent-father wanted to see Jeffrey, but did so after the petition was filed.

Respondent-father, his wife, and his aunt testified at the adjudicatory hearing and disputed aspects of Petitioner's testimony. Despite the dispute, "[c]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness." *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988).

Further, Respondent-father acknowledged both not having seen Jeffrey since April 2016 at the skating rink and not having provided support for Jeffrey. Respondent-father's explanations for his inaction

were at times contradicted by his own testimony and that of his witnesses. When asked why he had never sought custody of Jeffrey, for example, Respondent-father claimed he had no money for an attorney "[b]ecause at the time [he] didn't have a job." At the hearing on 12 April 2018, Respondent-father testified that he had been employed in his current full-time job for "[a]bout two years"—well before Petitioner filed to terminate his parental rights on 12 December 2016. Respondent-father also claimed he had experienced difficulty contacting Petitioner about Jeffrey because he did not know where she lived, and because she frequently changed her phone number. He also testified that "if I tried to get in touch with her every time I do talk to her she threatens to call the law on me or tries to put me in jail." He then testified that his "cousin actually stays two doors down from [Petitioner]," but that he didn't "know where she lives . . . [b]ecause . . . I ain't never been to his house." On cross examination, Respondent-father's wife subsequently described making "numerous" phone calls to Petitioner despite her changing phone number, as follows:

> [Petitioner's Attorney:] . . . [H]ow can you talk to her numerous times but you can't reach her because her phone number always changes?
>
> [Respondent-father's wife:] There is -- because when we would get the new number I would call. And no, she didn't really want to talk to me but you know, (inaudible) and wanted to be in his children's life -- and that -- so you know what, I'm going to call it. I'm going to ask to see [Jeffrey]. She did not particularly like the call but she was going to get it.

Finding of Fact 21 is based on competent evidence.

Since I treat Finding of Fact 22 as dispositional in nature, I address Finding of Fact 22 in my analysis of the trial court's disposition under N.C.G.S. § 7B-1110(a).

2. Adjudication of Neglect

Instead of conducting an analysis of the trial court's adjudication of abandonment under N.C.G.S. § 7B-1111(a)(7), as the Majority did, I would conduct an analysis of Respondent-father's neglect of Jeffrey under N.C.G.S. § 7B-1111(a)(1). Respondent-father claims the evidence and the trial court's findings of fact do not support its adjudication of grounds to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), which authorizes termination when "[t]he parent has . . . neglected the juvenile . . . within the meaning of [N.C.]G.S. [§] 7B-101." N.C.G.S

§ 7B-1111(a)(1) (2019). N.C.G.S. § 7B-101(15) defines a neglected juvenile as "[a]ny juvenile less than 18 years of age . . . whose parent . . . does not provide proper care, supervision, or discipline[,] or who has been abandoned[.]" N.C.G.S. § 7B-101(15) (2019).

The trial court made the following findings relevant to its adjudication under N.C.G.S. § 7B-1111(a)(1):[2]

> 9. Petitioner has proven through clear [] and convincing evidence that, pursuant to [N.C.]G.S. [§]7B-1111(a)(1), [Respondent-father] has neglected [Jeffrey] in accordance with [N.C.]G.S. [§]7b-101 inasmuch as, [Respondent-father] has not provided any care, supervision, support, or discipline for [Jeffrey] since on or about [26 December 2015.]
>
> 11. [Respondent-father] has had no contact with [Jeffrey] since an [9 April 2016] birthday party at Sky-Vue Skateland in Rocky Mount and has not provided any form of support whether in cash or in kind, medical, or otherwise for [Jeffrey] since at least [26 December 2015].
>
> 12. In the six consecutive months immediately preceding the filing of the Petition, [Respondent-father] did [not] have any contact or communication with [Jeffrey] nor did he directly attempt to contact [Jeffrey] or provide [Jeffrey] any care, supervision, support, discipline, gift, card, or letter; [Respondent-father] has not met any need of [Jeffrey] and has been absent from [Jeffrey's] life since on or about [26 December 2015].

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2. Respondent-father asserts that "Findings of [Fact] 18, 19, 20, 21, and 22 are . . . insufficient to support an adjudication of abandonment," as well as neglect. Finding of Fact 18 stated "[Respondent-father] has a lengthy history of assaultive behavior against [Petitioner]." Finding of Fact 19 stated "[Respondent-father] has been involved in criminal activity for the majority of [Jeffrey's] life and has a lengthy criminal record including current pending criminal charges." Finding of Fact 20 stated "Both [Respondent-father] and his wife have numerous current positive references to alcohol and drugs in their social media postings." Findings of Fact 21 and 22 are listed above. As per my previous analysis above, Findings of Fact 18, 19, 20, and 22 were made for dispositional purposes under N.C.G.S. § 7B-1110(a) in assessing whether terminating Respondent-father's parental rights is in Jeffrey's best interest. Therefore, I do not consider them in reviewing the court's adjudication under N.C.G.S. § 7B-1111(a)(1) or (a)(7). *Cf. In re A.R.A.*, 373 N.C. 190, 195, 835 S.E.2d 417, 421 (2019) (holding that "we limit our review of challenged findings to those that are necessary to support the [D]istrict [C]ourt's determination that this ground [for termination] existed"). However, Finding of Fact 21 was made for both adjudicatory and dispositional purposes, and I consider it in reviewing the court's adjudication under N.C.G.S. § 7B-1111(a)(1).

Respondent-father claims that Finding of Fact 9 was actually a conclusion of law. I agree that Finding of Fact 9 is, at least partially, a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and alterations omitted) (holding that "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"); *see also Plott v. Plott*, 313 N.C. 63, 73-74, 326 S.E.2d 863, 869-70 (1985). The trial court's classification of its own determination as a finding or conclusion does not govern this court's analysis on appeal. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009); *State v. Burns*, 287 N.C. 102, 110, 214 S.E.2d 56, 61-62 (1975).

However, the classification of Finding of Fact 9 as, at least partially, a conclusion of law does not affect my review of whether clear and convincing evidence supported the trial court's adjudication of neglect under N.C.G.S. § 7B-1111(a)(1). To the extent Respondent-father does not except to the trial court's findings of fact, specifically Findings of Fact 11 and 12, they are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384; *see also In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 54 (holding that when "Respondent [did] not challenge[certain] findings, . . . they are therefore binding on appeal."). Findings of Fact 11 and 12 establish Respondent-father's lack of contact with, support of, communication with, and provision for Jeffrey.

Additionally, Finding of Fact 21 was supported by competent evidence, as discussed above. Finding of Fact 21 found that "Respondent-father has not shown adequate interest with regard to raising and supporting [Jeffrey]."

Based on its findings of fact, the trial court reached the following conclusions of law:

> 2. [Respondent-father], through testimony and evidence presented at this proceeding, is determined to have neglected [Jeffrey] within the meaning of N.C.G.S. § 7B-101(b) and pursuant to N.C.G.S. § 7B-1111(a)(1).
>
> . . .
>
> 5. There is sufficient, clear [] and convincing evidence to terminate the parental rights of [Respondent-father] to [Jeffrey] pursuant to N.C.G.S. §7B-1111.

Findings of Fact 11 and 12 are binding on appeal, and Finding of Fact 21 is supported by competent evidence. Findings of Fact 11, 12, and 21 support the trial court's Conclusions of Law 2 and 5. The trial court's

adjudication under N.C.G.S. § 7B-1111(a)(1) that Respondent-father neglected Jeffrey, and that Respondent-father's parental rights to Jeffrey should be terminated, was supported by clear and convincing evidence.

3. Adjudication of Abandonment

Respondent-father claims the evidence and the trial court's findings of fact do not support its adjudication of grounds to terminate his parental rights pursuant to N.C.G.S. § 7B-1111(a)(7), which authorizes termination when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S § 7B-1111(a)(7) (2019). However, because I would affirm the trial court's adjudication under N.C.G.S. § 7B-1111(a)(1), there is no need to review the second ground for termination found by the trial court, and affirmed by the Majority, under N.C.G.S. § 7B-1111(a)(7). *In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53-54.

4. Disposition

Respondent-father also claims the trial court abused its discretion at the dispositional stage of the proceeding by concluding that termination of his parental rights is in Jeffrey's best interest. "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

"Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child." *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010). Under N.C.G.S. § 7B-1110(a),

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019); *see also In re D.R.F.*, 204 N.C. App. at 141-42, 693 S.E.2d at 238-39. While the statute seems to require findings concerning the relevant six listed factors, we have read the statute differently in past decisions. According to these decisions, although a court must consider each of these factors, written findings are required only "if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the trial court[.]' " *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (quoting *In re D.H.*, 232 N.C. App. 217, 222 n.3, 753 S.E.2d 732, 735 n.3 (2014)).

I do not share the Majority's confidence that the trial court's ruling did not constitute an abuse of discretion. Even under our past reading of the statutory requirements, it appears the trial court did not make the necessary findings and abused its discretion in this matter—Finding of Fact 22 is unsupported by the evidence, and the findings are deficient under N.C.G.S. § 7B-1110(a)(1)-(6).

The trial court made the following findings of fact under N.C.G.S. § 7B-1110(a)(1)-(6):

13. [Jeffrey] is seven (7) years old . . . .

14. The likelihood that [Jeffrey] will be adopted is good; Petitioner's husband's testimony indicates his desire to adopt [Jeffrey] and [Jeffrey] indicated that he wished to be adopted by Petitioner's husband.

15. That the termination of parental rights will aid in the *accomplishment of the permanent plan* for [Jeffrey]; the adoption of [Jeffrey] by Petitioner's husband will provide needed emotional and financial stability and ensure [Jeffrey's] continued positive growth and development that has been fostered in [Jeffrey's] current home setting with Petitioner and her husband.

16. That the bond between [Jeffrey] and [Respondent-father]is poor, with [Jeffrey] having very little recollection of [Respondent-father].

17. The quality of the relationship between [Jeffrey] and the proposed adoptive parent is good; [Jeffrey] and the proposed adoptive parent have a strong familial bond, enjoy similar activities, and spend a great deal of time together; the proposed adoptive parent has provided [Jeffrey] with continued emotional and financial support in a parental role over approximately the last two (2) years.

18. [Respondent-father] has a lengthy history of assaultive behavior against [Petitioner].

19. [Respondent-father] has been involved in criminal activity for the majority of [Jeffrey's] life and has a lengthy criminal record including current pending criminal charges.

20. Both [Respondent-father] and his wife have numerous current positive references to alcohol and drugs in their social media postings.

21. [Respondent-father] has not shown adequate interest with regard to raising and supporting [Jeffrey].

22. [Respondent-father] has not declared or shown love for [Jeffrey] throughout this proceeding.

23. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] be terminated based on the foregoing findings of fact.

24. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] be terminated as Petitioner's husband has a current, loving, fatherly bond with [Jeffrey] whom he wishes to adopt.

25. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] be terminated as [Jeffrey] deserves the opportunity to have a normal life and an opportunity for someone else to father him and to stand in for [Respondent-father], who has exhibited inadequate interest in participating in the life of or the support of [Jeffrey].

(Emphasis added).

The trial court also included Conclusion of Law 6 concerning Jeffrey's best interest:

> 6. It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] be terminated, and that [Jeffrey's] custody remain exclusively with the Petitioner.

Findings of Fact 13 to 22, though inadequately, track with the required findings under N.C.G.S. § 7B-1110(a)(1)-(6).

I agree with the Majority that Finding of Fact 23 is actually a conclusion of law, but would also include Findings of Fact 24 and 25 in that category. Findings of Fact 23 through 25, each of which begin "It is in the best interest of [Jeffrey] that the parental rights of [Respondent-father] for [Jeffrey] . . . be terminated . . ." actually amount to conclusions of law, inasmuch as they declare Petitioner's success in establishing the statutory ground for termination in N.C.G.S. § 7B-1111(a)(1) or (a)(7) under the applicable burden of proof in N.C.G.S. § 7B-1109(f). *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (internal citations and alterations omitted) (holding that "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"); *see also In re S.Z.H.*, 247 N.C. App. 254, 261-62, 785 S.E.2d 341, 347 (2016) (characterizing finding of fact under (a)(7) as a conclusion of law). The trial court's classification of its own determination as a finding or conclusion does not govern our analysis. *See State v. Icard*, 363 N.C. at 308, 677 S.E.2d at 826; *State v. Burns*, 287 N.C. at 110, 214 S.E.2d at 61-62. In addition to Finding of Fact 23, I would treat Findings of Fact 24 and 25 as conclusions of law and apply the appropriate de novo standard of review. *See Icard*, 363 N.C. at 308, 677 S.E.2d at 826 ("While we give appropriate deference to the portions of [the relevant findings] that are findings of fact, we review de novo the portions of those findings that are conclusions of law.").

a. Impact of Erroneous Finding of Fact 22

Respondent-father challenges Finding of Fact 22, which states he "has not declared or shown love for [Jeffrey] throughout this proceeding." I agree with the Majority that the term "this proceeding" in Finding of Fact 22 referenced the entire period since Petitioner filed her petition on 12 December 2016, but I would also construe "this proceeding" to include the six-month period prior to the filing of the petition examined under N.C.G.S § 7B-1111(a)(7). I examine whether the trial court was presented with evidence that Respondent-father declared or demonstrated his love for Jeffrey.

The hearing transcript shows Respondent-father expressly testified that he loved his son, Jeffrey. Respondent-father testified as follows:

[Respondent-father's Attorney:]	But you wanted to see your son more?
[Respondent-father:]	Yeah. I wanted to see my son.
. . .	
[Respondent-father's Attorney:]	Now are you bonded? Are you close? Does he seem to have a bond?
[Respondent-father:]	Yes, sir. *I love my son.*

(Emphasis added). The trial court was presented with Respondent-father's express testimony that he loved Jeffrey, and that he wanted to see Jeffrey more, during the proceeding referred to in Finding of Fact 22.

Further, Petitioner admitted that she knew Respondent-father wanted to spend time with Jeffrey. In her testimony, Petitioner admitted that Respondent-father's wife sent her a message that "[Respondent-father] . . . would really like to see [Jeffrey.]" This message came after Petitioner filed her petition. In light of Petitioner's admission that she received a message that Respondent-father wanted to spend time with Jeffrey, the trial court was presented with evidence that Respondent-father demonstrated his love for Jeffrey during this proceeding.

The trial court's Finding of Fact 22 is erroneous in light of testimony from Respondent-father and Petitioner. "A district court . . . necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 382 (1990). I agree with Respondent-father that Finding of Fact 22 was clearly erroneous, as the trial court was presented with evidence that Respondent-father declared and showed love for Jeffrey during the proceeding. Finding of Fact 22 failed to account for Respondent-father's testimony that he loves Jeffrey, or Petitioner's testimony that she was aware Respondent-father wanted to spend time with Jeffrey. Finding of Fact 22 not only lacks evidentiary support, but rather is overtly false.

In light of Respondent-father's express testimony that he loved Jeffrey, made before the trial court, Finding of Fact 22 constitutes arbitrariness to the point of an abuse of discretion. *See White*, 312 N.C. at 777, 324 S.E.2d at 833. I would not merely disregard Finding of Fact 22, as the Majority does in reviewing the trial court's disposition. Instead, I would consider an overtly false finding, which characterized Respondent-father

as failing to state or show love to Jeffrey when the evidence established the contrary, as a clear example of arbitrariness. I am concerned that the trial court's erroneous Finding of Fact 22 affected the reasoning underlying its conclusions of law in Findings of Fact 23 to 25 and Conclusion of Law 6—that termination of Respondent-father's parental rights was in Jeffrey's best interest. The trial court based its Findings of Fact 23 to 25 and Conclusion of Law 6 on dispositional Findings of Fact 13 to 22 tracking the required findings under N.C.G.S. § 7B-1110(a)(1)-(6). The required dispositional findings under N.C.G.S. § 7B-1110(a)(1)-(6) included the erroneous Finding of Fact 22 that "[Respondent-father] has not declared or shown love for [Jeffrey] throughout this proceeding." The trial court based its decision that terminating Respondent-father's parental rights was in Jeffrey's best interest, at least in part, "on a clearly erroneous assessment of the evidence," which constitutes an abuse of discretion. *Cooter & Gell*, 496 U.S. at 405, 110 L. Ed. 2d at 382.

b. Deficient Dispositional Findings—Finding of Fact 15

Respondent-father does not dispute the evidentiary support for Findings of Fact 13-20, which address each of the factors in N.C.G.S. § 7B-1110(a), at least in part. However, he contends a portion of Finding of Fact 15 is erroneous because it refers to Jeffrey's "permanent plan"—a feature only of proceedings initiated by a *county director* of social services under Article 4 of Chapter 7B. *See* N.C.G.S. §§ 7B-404.1, -906.1, -906.2 (2019). I agree that Jeffrey has no "permanent plan" as that term is considered in N.C.G.S. §§ 7B-404.1, -906.1, and -906.2. The trial court acknowledged "read[ing] the petition" filed by *Petitioner* at the outset of the trial. As the Majority mentions, and I also discussed above, Finding of Fact 15 was part of the trial court's order that followed the required findings in N.C.G.S. § 7B-1110(a)—specifically, N.C.G.S. § 7B-1110(a)(3). While the Majority categorizes the reference to a permanent plan as an oversight, the trial court's erroneous finding concerning a permanent plan that did not exist constituted a misapprehension of the law and was an abuse of discretion. *See, e.g.*, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990). "A trial court by definition abuses its discretion when it makes an error of law." *In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013). When a "judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light." *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959). The trial court's consideration of this case as one involving a permanent plan, when Petitioner initiated the proceeding and no permanent plan existed, meant the trial court did not consider the case in its true legal

light. *Id.* I would remand for another hearing where this case is considered in its true legal light. *Id.*

CONCLUSION

The trial court based its disposition on two erroneous findings—Findings of Fact 22 and 15. Finding of Fact 22 found that Respondent-father did not declare or show love to Jeffrey throughout this proceeding, which was clearly erroneous in light of testimonial evidence. Finding of Fact 15, which tracked N.C.G.S. § 7B-1110(a)(3), found that a permanent plan existed even though Petitioner initiated the proceedings, which was a misapprehension of law. The trial court's erroneous finding and misapprehension of law constituted an abuse of discretion in concluding Jeffrey's best interest will be served by termination of Respondent-father's parental rights. Accordingly, we should vacate the trial court's order and remand for further dispositional proceedings not inconsistent with this holding. I respectfully dissent.

SRINIVAS JONNA, PLANTIFF
v.
SUDHA YARAMADA, DEFENDANT

No. COA18-1046

Filed 18 August 2020

1. Child Custody and Support—child support—calculation—retroactive—Child Support Guidelines

The trial court did not err in a child custody dispute by using the Child Support Guidelines Worksheet to calculate the retroactive child support owed by the father, because the Guidelines specifically authorize the practice.

2. Child Custody and Support—child support—calculation—retroactive—findings—health insurance

Because the trial court's finding of fact regarding the father's past expenses for his child's health insurance coverage was not supported by competent evidence, the child support order was remanded for appropriate findings and recalculation of the father's retroactive child support obligation.

3. Child Custody and Support—child support—calculation—retroactive—childcare expenses—Child Support Guidelines

The Court of Appeals rejected a father's argument that daycare expenses incurred by the mother should not have been included in calculating the father's retroactive child support obligation (because, the father argued, his parents were willing to care for the child free of charge) where both parents were employed, the mother incurred the daycare cost due to her employment, and the father did not request that the the trial court deviate from the Child Support Guidelines. The trial court was not required to find that the costs were reasonably necessary because the support obligation was calculated in accordance with the Guidelines.

4. Child Custody and Support—child support—trial court's authority—parties to share W-2s

The trial court did not exceed its authority by ordering the parents in a child custody and support dispute to exchange their W-2s every year.

5. Civil Procedure—Rule 59(a) motion—irregularity—allegedly inadmissible evidence—no prejudice

The Court of Appeals rejected a father's argument that there was an irregularity in his child custody case warranting a new trial pursuant to Civil Procedure Rule 59(a). The police reports that were allegedly improperly admitted were not prejudicial where they were used to corroborate the mother's testimony about domestic violence (to which the father did not object).

6. Civil Procedure—Rule 59(a) motion—accident or surprise—child custody—opposing party's request for primary custody

The Court of Appeals rejected a father's argument that there was a surprise in his child custody case warranting a new trial pursuant to Civil Procedure Rule 59(a). The mother's request for sole custody was not a surprise where the mother's answer and counterclaim stated that she sought "primary physical and legal care, custody and control" of the child. Further, the mother's agreement to share custody temporarily until a full hearing was not a waiver of her claim for primary custody.

7. Civil Procedure—Rule 59(a) motion—newly discovered evidence—accessible—due diligence

The Court of Appeals rejected a father's argument that newly discovered evidence warranted a new trial pursuant to Civil Procedure Rule 59(a). A recording stored on the father's computer

and "drop-off" records from his child's daycare were both known to exist and accessible before trial—the father merely failed to exercise due diligence to obtain them.

8. Child Custody and Support—sanctions—post-hearing motions—sufficient factual and legal bases—no improper purpose

The trial court erred in a child custody dispute by imposing Rule 11 sanctions against a father for filing three post-hearing motions for relief (a pro se motion, a Rule 59 motion by a new attorney, and an amended Rule 59 motion by the new attorney) where there existed sufficient factual and legal bases for the motions (the father did not misrepresent the facts to his new attorney, and he acted upon the attorney's advice) and there was no improper purpose in filing the motions (the father wanted to present more evidence to the court and obtain equally shared custody).

9. Appeal and Error—timeliness of appeal—after Rule 59 motion—tolling of 30-day period

The Court of Appeals had jurisdiction to review a child custody order where the father's Rule 59 motion, which was ultimately unsuccessful, tolled the 30-day period for filing his appeal and the father timely filed his appeal after the trial court's ruling on the Rule 59 motion.

10. Child Custody and Support—child custody—findings of fact—challenged on appeal—weight of evidence and credibility

The trial court's findings of fact in a child custody order—related to the father's behavior, travel to India, and the minor child's care—were supported by competent evidence, and the Court of Appeals rejected the father's arguments on appeal, which went to the weight of the evidence and credibility determinations.

11. Child Custody and Support—child support—calculation—Worksheet B—extended international travel

To determine whether the use of Worksheet B was proper for calculating the father's prospective child support obligations, the child support order was vacated and remanded for additional findings on whether five-week trips to India were extended visitation or whether the custodial arrangement involved a true sharing of expenses.

Appeal by plaintiff from orders entered 31 March 2017, 20 November 2017, and 8 December 2017 by Judge Lori Christian in Wake County

District Court. Appeal by defendant by writ of certiorari from order entered 20 November 2017 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 6 February 2020.

Plaintiff-appellant Srinivas Jonna, pro se.

Blanco Tackabery & Matamoros, P.A., by Chad A. Archer, for defendant-appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock, court-appointed amicus curiae.

ZACHARY, Judge.

Plaintiff-Appellant Srinivas Jonna ("Plaintiff-Father") appeals from several orders entered in the parties' domestic matter. He argues that the trial court erred by (1) incorrectly calculating his child support obligation; (2) denying his motions for a new trial; (3) sanctioning him under Rule 11 of the North Carolina Rules of Civil Procedure; and (4) granting Defendant-Mother primary physical custody of their minor child. Defendant-Appellee Sudha Yaramada ("Defendant-Mother") petitions this Court to issue a writ of certiorari so that we may review whether the trial court correctly applied the North Carolina Child Support Guidelines (the "Guidelines").

For the reasons that follow, we vacate the 20 November 2017 child support order and remand for further proceedings. We reverse that part of the trial court's 8 December 2017 order imposing sanctions on Plaintiff-Father. The 31 March 2017 custody order and that part of the 8 December 2017 order denying Plaintiff-Father's Rule 59 motions are affirmed.

I. Background

The parties are Indian citizens and residents of Wake County, and the parents of one child, who was born in 2013. They were married in 2009, and separated in December 2015.

On 10 December 2015, Plaintiff-Father filed an "*Ex Parte* Complaint/Motion for Temporary Custody and Injunctive Relief." In support of his request for an *ex parte* order for custody, he alleged that

> Plaintiff[-Father] and Defendant[-Mother] agreed to separate for several days after [Defendant-Mother] attempted to strike [Plaintiff-Father] . . . . That [Defendant-Mother]

> has over the last year of the marriage exhibited irrational behavior to include; an attempted suicide, threats to "kill" [Plaintiff-Father], [Defendant-Mother] has force[ ] fed the minor child to the point of vomiting, continues to display bouts of anger and has threatened to leave the country and return to India with the minor child against [Plaintiff-Father's] wishes and in direct derogation of his parental rights.

Plaintiff-Father sought "an immediate Protective Order granting [him] the temporary exclusive care, custody and control of the minor child," together with an injunction prohibiting Defendant-Mother from having any contact with him or the child. That day, the trial court entered a protective order, but declined to grant Plaintiff-Father the relief he sought, instead restraining both parties from removing the child from the State of North Carolina.

On 16 December 2015, the parties executed a Memorandum of Judgment/Order, which the trial court entered. The order provided, *inter alia*, that Defendant-Mother would have primary physical custody of the minor child, Plaintiff-Father would have secondary physical custody, and the parties would share legal custody, pending a full hearing on the matter. The parties agreed to alternate actual physical custody of the minor child on a weekly basis.

On 16 February 2016, Defendant-Mother filed an answer and counterclaim seeking temporary and permanent legal and physical custody of the parties' minor child. On 1 September 2016, the trial court entered a consent order executed by the parties, allowing Plaintiff-Father to care for the minor child while Defendant-Mother traveled to India, and providing that Defendant-Mother could exercise "make up" time with the child upon her return, with the regular custodial arrangement then resuming.

On 26 January 2017, the custody case came on for hearing. Both the parties were represented by counsel and presented evidence.

Defendant-Mother testified that Plaintiff-Father's allegations in his *ex parte* complaint/motion for temporary custody and injunctive relief concerning her mental instability and other issues were baseless. She also testified that she lives in a three-bedroom apartment with a roommate and that the minor child had his own room when he stayed with her, whereas Plaintiff-Father's home was not suitable for the minor child. In addition, Defendant-Mother offered into evidence police reports of an incident of domestic violence and photographs of the injuries she sustained when Plaintiff-Father assaulted Defendant-Mother. According to

Defendant-Mother, Plaintiff-Father would become aggressive at times, and "punch the walls and doors" when he lost his temper, as well as assault her.

Defendant-Mother also testified that Plaintiff-Father has a "controlling attitude." For example, in 2015, Defendant-Mother and the minor child visited India, and the child was scheduled to visit India with Plaintiff-Father immediately afterward. Because each flight from the United States to India takes 22 to 30 hours, and the minor child was an infant, Defendant-Mother tried to arrange for the minor child to stay in India for three days with his paternal grandparents until Plaintiff-Father arrived. Plaintiff-Father refused, insisting that the minor child return to the United States with Defendant-Mother, only to return to India with him 72 hours later. Defendant-Mother explained that Plaintiff-Father "wants to have his way or no way."

The parties also disagreed on whether to have the minor child attend daycare. Defendant-Mother thought it was in the child's best interest; Plaintiff-Father wanted the child to be cared for by his parents, who live with him in his home.

Despite his allegations, Plaintiff-Father repeatedly stated at trial that the current shared custody arrangement was working well. He testified that his parents care for the minor child while he works, as well as when he plays cricket. Plaintiff-Father also testified about an ongoing legal issue in India between him and Defendant-Mother, in which he did not want the minor child involved, but said that he did not have any objection to either parent traveling with the minor child. When asked what action he wanted the trial court to take with regard to custody of the minor child, Plaintiff-Father stated, "I think the current arrangement [alternating weeks] is working very well, and we both communicate well about the child."

At the conclusion of the hearing, the trial court announced that "physical custody primarily is going to be with [Defendant-Mother]. [Plaintiff-Father] is going to have the child every other week from Thursday night to Monday night." In addition, the trial court stated that the child would continue to attend daycare.

Although Plaintiff-Father was represented by counsel, on 6 February 2017, he filed a *pro se* "Motion to Open Evidence" prior to the trial court's entry of the child custody order. In response, on 15 February 2017, Defendant-Mother filed a "Motion for Rule 11 Sanctions." On 22 March 2017, counsel for Plaintiff-Father withdrew from the case.

By order entered 31 March 2017, the trial court concluded that it would be in the best interest of the child for the parties to share legal custody, with Defendant-Mother having primary physical custody and Plaintiff-Father having secondary physical custody. As relevant to this appeal, the order provided that: (1) "[t]he minor child shall stay in daycare until he starts school for at least a half day, each weekday"; (2) "either parent may take the minor child to India for up to five consecutive weeks each year until he is in school"; (3) after the child starts school, "either parent may take the minor child to India for up to five consecutive weeks each year during summer break . . . or up to two consecutive weeks at any time during the year"; and (4) "[i]f a parent cho[o]ses not to travel to India with the child, he or she shall have two uninterrupted weeks' vacation within the United States" with the minor child.

On 11 April 2017, Defendant-Mother filed a motion for prospective and retroactive "child support consistent with the North Carolina Child Support Guidelines."

Through new counsel,[1] Plaintiff-Father filed a Rule 59 motion, and on 22 May 2017, Plaintiff-Father filed his "Amended Motion in the Cause" pursuant to Rule 59, seeking a new trial on the grounds of irregularity at trial, fraud, surprise, and newly discovered evidence. On 9 June 2017, Defendant-Mother responded to Plaintiff-Father's amended Rule 59 motion with her motion for Rule 11 sanctions and a motion to dismiss.

A hearing was held on 13 June 2017, at which the trial court addressed Plaintiff-Father's amended Rule 59 motion for a new trial and Defendant-Mother's motion for sanctions. After hearing the arguments of counsel, the trial court stated, "I don't find any grounds under Rule 59; quite frankly, I find that this is frivolous, and I am going to find that pursuant to Rule 11, [Plaintiff-Father] is going to pay the attorney's fees for [Defendant-Mother]."

On 25 July 2017, the trial court held the child support hearing. Plaintiff-Father proceeded *pro se*, and Defendant-Mother was represented by counsel. On 20 November 2017, the trial court entered its child support order, requiring, *inter alia*, that Plaintiff-Father (1) contribute $680.39 per month to the support of the parties' minor child beginning 1 August 2015; (2) pay arrearages of $5,539.18 to Defendant-Mother at the rate of $230.80 per month; and (3) pay 45% of the minor child's uninsured health care expenses. The trial court also ordered that

1. It is unclear from the record when Plaintiff-Father retained another attorney in the matter.

the parties exchange copies of their W-2s and other evidence of their income annually.

By order entered 8 December 2017, the trial court denied Plaintiff-Father's motion for a new trial and imposed sanctions on him. The trial court found that Plaintiff-Father "ha[d] not forecast[ ] evidence that would change" its prior custody ruling, and that "[t]here [wa]s no basis for the Rule 59 motion filed by Plaintiff[-Father]."

On 15 December 2017, Plaintiff-Father filed notice of appeal to this Court. On appeal, Plaintiff-Father challenges certain aspects of the child support order, the order denying his motion for a new trial and imposing sanctions, and the child custody order. On 25 November 2019, Defendant-Mother petitioned this Court to issue a writ of certiorari, in order to review the child support order. We address each issue in turn.

II. Child Support Order

A. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation omitted). "Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Biggs v. Greer*, 136 N.C. App. 294, 296-97, 524 S.E.2d 577, 581 (2000) (citation omitted). "Where a party asserts an error of law occurred, we apply a de novo standard of review." *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007) (italics omitted).

B. Child Support Obligation

Plaintiff-Father first argues that the trial court erred in calculating his retroactive child support obligation, and in ordering the parties to exchange financial information annually.

1. Use of the Guidelines

[1] Plaintiff-Father contends that the "[t]rial court erred as a matter of law by using the Child Support Guidelines Worksheet to calculate the Retroactive Child support from December 2015 to April 11, 2017." We disagree.

Child support awarded for that period of time prior to the date on which a party files a complaint or motion for child support "is properly

classified as retroactive child support." *Respess v. Respess*, 232 N.C. App. 611, 628, 754 S.E.2d 691, 702 (2014) (citation omitted). Effective 1 January 2015, the Guidelines specifically authorize trial courts to use the Guidelines for calculating a retroactive child support obligation:

> In a direct response to *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), the 2014 General Assembly amended G.S. 50-13.4(c1) to provide that the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations, *including retroactive support obligations*[.]
>
> In cases involving a parent's obligation to support his or her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent's fair share of actual expenditures for the child's care.

Guidelines, Ann. R. 2 (emphasis added) (revised 1 January 2015 and left unchanged as of 2019); *see also* N.C. Gen. Stat. § 50-13.4(c1) ("Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations, *including retroactive support obligations*, of each parent as provided in Chapter 50 or elsewhere in the General Statutes . . . ." (emphasis added)).

Thus, Plaintiff-Father's assertion that the trial court erred by utilizing the Guidelines to calculate his retroactive child support obligation is meritless.

2. Finding of Fact 9: Health Insurance Expense

[2] Plaintiff-Father also specifically challenges finding of fact 9, which provides, in pertinent part: "For the period December[ ] 2015 to January 2017 . . . [Plaintiff-Father] incurred an average of $156 per month for [health insurance coverage] expense[ ] for the minor child." Plaintiff-Father argues that "[t]here is no competent evidence to support [the] [t]rial court's finding," and that "there is uncontroverted evidence" in the record that he paid $220 per month in 2015, and $231 per month in 2016, and $156 per month in 2017 to maintain health insurance coverage for the minor child. We agree.

At the child support hearing, Plaintiff-Father testified as follows:

> THE COURT: How much are you paying for your child's day -- healthcare?
>
> [Plaintiff-Father]: In the last three years, it's been fluctuating, Your Honor, so I request that average be considered. So in 2015, I was paying $231; in 2016, I was paying $220; and this year I've been paying $156.
>
> THE COURT: It's going down?
>
> [Plaintiff-Father]: It's strange, it actually went down this -- and that's why I said it's fluctuating; it may go up next year, I don't know.
>
> THE COURT: It's 156 a month --
>
> [Plaintiff-Father]: $156 --
>
> THE COURT: -- or per pay period?
>
> . . . .
>
> [Plaintiff-Father]: I think it's per month. And that's why I'm pretty sure it will go up next year.

In addition, Plaintiff-Father presented the trial court with written verification of the 2015 and 2016 cost of maintaining health insurance coverage for the minor child. Thus, the trial court's finding in this regard was not supported by competent evidence.

Accordingly, we remand the child support order to the trial court for appropriate findings of fact and a recalculation of Plaintiff-Father's retroactive child support obligation, in which he is given proper credit for the expense of providing health insurance coverage for the minor child.

3. Work-Related Child Care Costs

[3] Plaintiff-Father next maintains that it was not "reasonably necessary" for Defendant-Mother to send the child to daycare during the period prior to February 2017, and that the trial court erred by including this expense in the calculation of his retroactive child support obligation. We disagree.

The Guidelines provide that "[r]easonable child care costs that are . . . paid by a parent due to employment . . . are added to the basic child support obligation and prorated between the parents based on their respective incomes." *Guidelines*, Ann. R. 4. Moreover, "[w]hen the

court does not deviate from the Guidelines, an order for child support in an amount determined pursuant to the Guidelines is conclusively presumed to meet the reasonable needs of a child . . . and specific findings regarding a child's reasonable needs . . . are therefore not required." *Guidelines*, Ann. R. 1.

Here, the minor child's attendance at daycare was a point of contention at trial. Defendant-Mother asserted that the child benefited from attendance, while Plaintiff-Father claimed that the expense was unnecessary when his parents were willing and able to care for the child free of charge. However, it was undisputed that both parents were employed and that Defendant-Mother incurred the child care cost due to her employment, and Plaintiff-Father did not request that the trial court deviate from the Guidelines.

The trial court found in its child support order that since the date of separation, both parents have been employed, and that "[f]or the period December[ ] 2015 to January 2017 . . . the parties shared equal custodial time. Furthermore, during this period . . . Defendant[-Mother] incurred an average of $700 per month for work-related day care expenses for the minor child[.]" Father has not raised any challenge to these findings of fact on appeal.

Having found that Defendant-Mother incurred child care costs due to her employment, the trial court properly included this work-related child care expense in the calculation of Plaintiff-Father's child support obligation. As explicitly provided in the Guidelines, when the child support obligation is calculated in accordance with the Guidelines, "specific findings regarding a child's reasonable needs . . . are . . . not required." *Guidelines*, Ann. R. 1. Thus, in light of the trial court's other findings, it was not required to make a specific finding of fact that the work-related child care expense was necessary.

Accordingly, the trial court did not abuse its discretion by including Defendant-Mother's work-related child care expense in its retroactive child support calculation. This argument is overruled.

C. Exchange of W-2 Forms

[4] Lastly, Plaintiff-Father maintains that the trial court "exceeded its authority in ordering the [p]arties to exchange their W[-]2s every year." This argument is without merit.

First, Plaintiff-Father fails to furnish this Court with a legitimate argument as to why this portion of the order exceeded the trial court's authority. Nor does he set forth any argument as to why this constitutes

an abuse of the trial court's discretion. It was Plaintiff-Father's duty "to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to create an appeal for Plaintiff-[Father], [or] to supplement an appellant's brief with legal authority or arguments not contained therein." *Lasecki v. Lasecki*, 257 N.C. App. 24, 47, 809 S.E.2d 296, 312 (2017) (citations and internal quotation marks omitted). Thus, this argument is abandoned.

In addition, ordering the parties to a child support action to exchange financial information annually is well within the inherent authority of the court to administer justice. The Guidelines "are based on the 'income shares' model[.]" *Guidelines*, Ann. R. 2. "The income shares model is based on the concept that child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the child's parents lived together." *Guidelines*, Ann. R. 2. Because it is necessary to have the parties' financial information in order to determine the parental support obligation, it is not uncommon for North Carolina courts to order that parties periodically exchange financial information. Plaintiff-Father's argument lacks merit.

D. Summary

The trial court erred in calculating Plaintiff-Father's retroactive child support obligation. Accordingly, we vacate the 20 November 2017 child support order, and remand to the trial court for additional findings of fact regarding the cost of health insurance coverage for the minor child, and a recalculation of Plaintiff-Father's retroactive child support obligation.

III. Rule 59(a) Motion

In the present case, Plaintiff-Father moved the trial court for a new trial pursuant to Rule 59(a)(1), (2), (3), and (4). On appeal, he argues that the trial court erred in denying his motion for a new trial under Rule 59(a)(1), (3), and (4), asserting that (1) there was an "irregularity" at trial because "[i]nadmissible and prejudicial hearsay evidence" was used by the trial court in reaching its conclusions of law; (2) he "and his attorney were 'surprised' and 'shocked' to hear [Defendant-Mother] completely contradicting her statement in the Consent Order . . . and asking for sole custody and making various false allegations" at trial; and (3) he is now in possession of evidence to which he did not have access prior to trial. After careful review, we conclude that the trial court's denial of Plaintiff-Father's Rule 59(a) motion does not "amount[ ] to a substantial

miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

A. Standard of Review

A party may move the trial court for a new trial, or to alter or amend a judgment, under one or more of the nine grounds found in Rule 59(a). N.C. Gen. Stat. § 1A-1, Rule 59(a). For motions brought under Rule 59(a)(1)-(6) and (9), "a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 371, 649 S.E.2d 14, 25 (2007) (citation omitted). A trial court's discretion regarding a motion under Rule 59 is "practically unlimited." *Pearce v. Fletcher*, 74 N.C. App. 543, 544, 328 S.E.2d 889, 890 (1985) (citation omitted). "Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

B. Irregularity at Trial

[5] Plaintiff-Father argues that the admission into evidence of what he describes as inadmissible and prejudicial hearsay amounted to an irregularity depriving him of a fair trial.

Rule 59(a)(1) states that a new trial may be granted for "[a]ny irregularity by which any party was prevented from having a fair trial[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(1). Although the language of Rule 59(a)(1) is broad, "[n]ew trials are not awarded because of technical errors. The error must be prejudicial." *Sisk v. Sisk*, 221 N.C. App. 631, 635, 729 S.E.2d 68, 71 (2012) (citation omitted), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013). Moreover, "[t]he party asserting the error must demonstrate that he has been prejudiced thereby." *Id.* (citation omitted).

Here, Plaintiff-Father fails to demonstrate an error by which he was prejudiced. Plaintiff-Father argues on appeal that he "was prejudiced from having a fair trial by admitting these hearsay [police] reports into evidence, which misled the [t]rial [c]ourt[.]" However, Plaintiff-Father also maintains that the "[p]olice reports were produced to corroborate the purported domestic violence." His contention makes the point that because Defendant-Mother testified without objection to the domestic violence, as well as the injuries she suffered, the admission of the police reports cannot have prejudiced his case to the point where he could not have a fair trial. Assuming, *arguendo*, that the police reports were

improperly admitted, Defendant-Mother's testimony was itself ample substantive evidence of the acts, and thus, would not constitute an irregularity warranting a new trial.

In addition, Plaintiff-Father makes no argument that he was prejudiced by the admission of the photographs. "It is not the duty of this Court to peruse . . . the record, constructing an argument for appellant." *Id.* at 635, 729 S.E.2d at 72 (citation omitted).

This argument therefore lacks merit.

C. Accident or Surprise

[6] Plaintiff-Father also claims that he is entitled to a new trial on the basis of Rule 59(a)(3), which provides that a new trial may be granted for "[a]ccident or surprise which ordinary prudence could not have guarded against[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(3). He asserts that he was not prepared for the evidence introduced by Defendant-Mother at trial in support of her efforts to gain primary physical custody, as he was under the impression that the parties agreed to share joint legal and physical custody of the parties' child. He argues that he and "his attorney were 'surprised' and 'shocked' to hear . . . Defendant[-Mother] completely contradicting her statement in the Consent Order . . . and asking for sole custody and making various false allegations."

We note, however, that in her answer and counterclaim for child custody, Defendant-Mother specifically alleged that it was "in the best interest of said minor child that his care, custody and control be placed" with her, and she sought the "primary physical and legal care, custody and control of the said minor child." She also testified at trial that she wanted primary legal and physical custody of the parties' child because she "ha[d] been the primary caregiver of the child ever since he was born." Defendant-Mother's agreement to share custody on a temporary basis, pending a full hearing on custody, did not constitute a waiver of her express claim for primary custody.

That Defendant-Mother sought primary legal and physical custody of the parties' minor child at the custody trial was not "surprise which ordinary prudence could not have guarded against[.]" *Id.* Plaintiff-Father is not entitled to relief on the basis of this argument.

D. Newly Discovered Evidence

[7] Finally, Plaintiff-Father argues that a new trial is warranted under Rule 59(a)(4), because he has "[e]vidence that could not be procured prior to trial."

Rule 59(a)(4) provides that a new trial may be granted on the grounds of "[n]ewly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial[.]" *Id.* § 1A-1, Rule 59(a)(4). Plaintiff-Father concedes that the evidence to which he refers was not newly discovered after trial, but asserts that it was inaccessible prior to trial. He maintains that it therefore "satisfie[s] the requirements of Rule 59(a)(4) for [n]ew trial."

The first item addressed by Plaintiff-Father is a recording that was stored on his computer hard drive, which he alleges would tend to show that Defendant-Mother threatened him and the child, and that she was abusive. Plaintiff-Father does not dispute Defendant-Mother's contention that he knew that the information was on his computer, and simply waited until after trial to hire an expert to access that information. Hence, the recording was not newly discovered evidence, nor was it inaccessible.

The second item of evidence at issue was daycare "drop off" records, which Plaintiff-Father alleges on appeal would tend to show that he dropped the child off at daycare 74% of the time.[2] Plaintiff-Father asserts that he requested the daycare records, but that Defendant-Mother would not allow the daycare to release the information to him until after trial.

Although Defendant-Mother may have told the daycare not to respond to Plaintiff-Father's requests for information, he does not address the fact that the information he sought from the child's daycare could have been obtained by subpoena prior to trial. The daycare records were not newly discovered and were not inaccessible, and Plaintiff-Father's failure to subpoena the daycare records evidences a lack of due diligence.

It is undisputed that the evidence was not newly discovered; it is also evident that it was not inaccessible prior to trial. *See Ar-Con Constr. Co. v. Anderson*, 5 N.C. App. 12, 20, 168 S.E.2d 18, 23 (1969) ("There was no showing that appellant did not have full knowledge of the facts referred to in its motion at the time of the hearing on the plea in bar, and no showing as to why, in the exercise of due diligence, appellant had failed to present evidence concerning such facts at the time of that hearing.").

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2. He alleged in his amended Rule 59 motion that the daycare records would show that Defendant-Mother did not have the child in daycare full-time starting in mid-December 2016.

Plaintiff-Father has failed to demonstrate the existence of newly discovered material evidence that he could not have discovered and produced at the custody hearing.

Thus, the trial court properly denied a new trial on this ground as well.

E. Summary

Plaintiff-Father failed to establish that the trial court abused its discretion in denying his Rule 59(a) motion. Accordingly, we affirm that part of the trial court's 8 December 2017 order denying Plaintiff-Father's Rule 59(a) motion.

IV. Rule 11 Sanctions

[8] Plaintiff-Father next contends that the trial court erred in imposing Rule 11 sanctions against him for filing three post-hearing motions that he maintains were a proper attempt to obtain appropriate post-trial relief from the custody order pursuant to Rule 59. After careful consideration, we conclude that the trial court erred in sanctioning Plaintiff-Father for filing these motions.

A. Standard of Review

Our standard of review for Rule 11 sanctions is well established: "The trial court's decision to impose or not to impose mandatory sanctions under . . . Rule 11(a) is reviewable de novo as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (italics omitted). "[A]n appellate court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment." *Johns v. Johns*, 195 N.C. App. 201, 206, 672 S.E.2d 34, 38 (2009) (citation omitted). "If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under . . . Rule 11(a)." *Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

> In reviewing a trial judge's findings of fact, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting

> *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

Auto. Grp., LLC v. A-1 Auto Charlotte, LLC, 230 N.C. App. 443, 447, 750 S.E.2d 562, 566 (2013).

B. Analysis

Rule 11 of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction[.]

N.C. Gen. Stat. § 1A-1, Rule 11(a).

Appellate review "of sanctions under Rule 11 consists of a three-pronged analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Auto. Grp.*, 230 N.C. App. at 447, 750 S.E.2d at 566 (citation and internal quotation marks omitted). "A violation of any one of these prongs requires the imposition of sanctions." *Id.* For each prong, the trial court must make findings of fact and conclusions of law. *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

To assess the sufficiency of the factual basis of a pleading, this Court must determine "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (citation omitted). An appraisal of the legal sufficiency of a pleading requires that we look "first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law." *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992) (citation and internal quotation marks omitted). Lastly, to evaluate the improper purpose prong, we must review the evidence to ascertain whether the pleading was filed for "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and internal quotation marks omitted).

It must be noted, however, that "just because a plaintiff is eventually unsuccessful in [his] claim, does not mean the claim was inappropriate or unreasonable." *Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000).

In the instant case, after the trial court announced its decision to grant Defendant-Mother primary physical custody of the parties' child, Plaintiff-Father filed a *pro se* motion to "open evidence." Defendant-Mother responded with a motion for sanctions. The trial court allowed Plaintiff-Father's trial attorney to withdraw, and Plaintiff-Father hired second counsel who promptly filed a Rule 59 motion, and soon thereafter, an amended Rule 59 motion, on essentially the same grounds as alleged by Plaintiff-Father in his *pro se* motion. Plaintiff-Father then took a dismissal of his *pro se* motion. Defendant-Mother responded to the amended Rule 59 motion by filing a second motion for sanctions, asserting that Plaintiff-Father was improperly seeking to introduce evidence that he never provided in discovery or during trial, and that his motions were not well grounded in fact, were not filed in good faith, and were interposed for an improper purpose. Defendant-Mother alleged that Plaintiff-Father was "merely upset with the [trial c]ourt's decision."

The trial court agreed with Defendant-Mother, finding that Plaintiff-Father's three motions were "not supported by the facts or the law," and "were filed in bad faith." Concluding that "[t]his is a frivolous action under the meaning of Rule 11 of the North Carolina Rules of Civil

Procedure," the trial court assessed Plaintiff-Father $3,131.00 in attorney's fees, payable to Defendant-Mother.

On appeal, Plaintiff-Father maintains that he acted in good faith with regard to all three motions, and through counsel with regard to the Rule 59 and amended Rule 59 motions. Plaintiff-Father asserts that he was properly attempting to obtain relief from the trial court's custody order in each motion by (1) convincing the trial court that it erred in the admission of evidence over his objection, to his prejudice, (2) exposing Defendant-Mother's misrepresentations to the trial court, and (3) bringing newly discovered evidence to the trial court's attention.

1. Sufficiency of the Factual and Legal Bases

The evidence does not support the trial court's assessment of sanctions against Plaintiff-Father on the ground that his post-trial motions had no basis in fact or law.

Plaintiff-Father first filed his *pro se* motion to open evidence, which Defendant-Mother's counsel describes as essentially asserting the same facts as in the Rule 59 and amended Rule 59 motions filed by his second attorney. There is no dispute that Plaintiff-Father sought the same relief in his *pro se* motion as in the Rule 59 motions. At the Rule 59 hearing, Plaintiff-Father's second attorney told the trial court that Plaintiff-Father came to her and asked that she help him. She then "spoke to him . . . at length," went "through all the evidence," and took "a bit of time on this and . . . looked at the order." Presumably, Plaintiff-Father's second attorney considered those facts, determined that the facts were sufficient to warrant a legally sound motion under Rule 59, and then drafted, signed, and filed the Rule 59 and amended Rule 59 motions. Thereafter, Plaintiff-Father dismissed his *pro se* motion. There are no allegations that Plaintiff-Father misled his attorney regarding the facts or circumstances of his case.

In light of the substantial similarity of Plaintiff-Father's dismissed *pro se* motion, the Rule 59 motion, and the amended Rule 59 motion, we will focus our analysis on the Rule 59 motions.

It is well established that "a represented party may rely on his attorney's advice as to the legal sufficiency of his claims[.]" *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337. Where Plaintiff-Father did not misrepresent the facts to his counsel, it was not unreasonable for Plaintiff-Father to believe, on the basis of his attorney's superior knowledge and skill, together with her willingness to undertake the pursuit of the Rule 59 motion on his behalf, that his motions were well grounded in fact and in law.

This Court addressed a similar issue in *Grubbs v. Grubbs*, 252 N.C. App. 265, 796 S.E.2d 822, 2017 WL 892564 (2017) (unpublished). In *Grubbs*, the defendant sought Rule 11 sanctions for allegedly improper motions interposed in a domestic matter. *Grubbs*, 2017 WL 892564, at *7. The trial court concluded that the verified motions were "not well grounded in fact, and not warranted by existing law and [were interposed] for an improper purpose," and imposed Rule 11 sanctions against the plaintiff as well as her attorney. *Id.* at *11. We determined that, absent an improper motive, Rule 11 sanctions should not be assessed against a client who relies in good faith on the advice of counsel:

> It is the rare client who understands the strategy and tactics of domestic litigation, as it is practiced in District Court. The [d]efendant asks us to impute the knowledge of the effects of these motions to [the attorney's] client, [the p]laintiff. It is more likely [the attorney] prepared the affidavit for his client and she signed it on advice of counsel. . . . . Without a specific finding from the court which shows [the p]laintiff had knowledge of the effect of signing the motion would have on court proceedings and took this action to gain some temporary tactical advantage, we are unpersuaded that a signature alone would support Rule 11 sanctions against a client acting on an attorney's advice.

Id. at *15.

Grubbs is an unpublished opinion and is not, therefore, binding legal authority. *See* N.C.R. App. P. 30(e)(3). Nevertheless, we find its reasoning persuasive, and we hereby adopt it.

In that Plaintiff-Father acted on the advice of counsel, and there is no evidence that he misled counsel as to the relevant facts or posture of the case, the assessment of sanctions against him on the grounds that his motions were not well grounded in fact or were not warranted by existing law is not merited. Therefore, in the present case, the trial court's findings do not support the imposition of Rule 11 sanctions on these bases against Plaintiff-Father.

2. Improper Purpose

Nonetheless, a violation of any one of the three prongs under a Rule 11 analysis will support the imposition of sanctions. *Williams*, 127 N.C. App. at 423, 490 S.E.2d at 240-41. Thus, we now review the improper purpose prong of the Rule 11 analysis.

An improper purpose is "any purpose other than one to vindicate rights or to put claims of right to a proper test." *Persis Nova Constr. Inc. v. Edwards*, 195 N.C. App. 55, 63, 671 S.E.2d 23, 28 (2009) (citation omitted). Our Supreme Court has determined that "[p]arties, as well as attorneys, may be subject to sanctions for violations of the improper purpose prong of Rule 11." *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. "[A] represented party . . . will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay." *Id.* at 663, 412 S.E.2d at 337.

The existence of an improper purpose is determined from the totality of the circumstances. *See Mack*, 107 N.C. App. at 93-94, 418 S.E.2d at 689. "[T]he relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Id.* at 93, 685 S.E.2d at 689. The burden is on the movant to prove, by a preponderance of the evidence, that the pleading has been interposed for an improper purpose. *Auto. Grp.*, 230 N.C. App. at 447-48, 750 S.E.2d at 566-67.

In the present case, Defendant-Mother asserted that Plaintiff-Father filed the *pro se* motion, and later the Rule 59 and amended Rule 59 motions, because he was "merely upset with the [trial c]ourt's decision[.]" This is usually the case in the wake of a custody trial and, standing alone, does not constitute an improper purpose. Indeed, it is likely that at least one party in any custody trial, if not both, will be unhappy with the trial court's decision. It is not uncommon for counsel to then file a Rule 59 motion seeking to present additional evidence. *See*, *e.g.*, *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 431-32, 610 S.E.2d 237, 239-40 (2005); *Senner v. Senner*, 161 N.C. App. 78, 84-85, 587 S.E.2d 675, 679 (2003). Here, Defendant-Mother offered no evidence to the trial court that Plaintiff-Father interposed his motions "to gain some temporary tactical advantage," to cause unnecessary expense or delay, or to advance some other improper motive. *Grubbs*, 2017 WL 892564 at *15. As the parties seem to agree, Plaintiff-Father's purpose was to get more evidence before the trial court and obtain equally shared physical custody of the parties' minor child, rather than to personally or financially injure Defendant-Mother or to delay the proceedings.

Defendant-Mother had the burden of proving that the motions were filed for an improper purpose in violation of Rule 11, which she failed to satisfy. Therefore, the evidence does not support the finding of fact that Plaintiff-Father filed the motions in bad faith.

Accordingly, that part of the trial court's 8 December 2017 order imposing sanctions is reversed.

V. Child Custody Order

Plaintiff-Father next argues that "[t]he trial court erred as a matter of law in awarding primary custody of the child to . . . Defendant[-Mother]," and challenges several of the trial court's findings of fact. Specifically, he asserts that findings of fact 9, 10, 15, 17, 18, 19, 20, 21, 24, and 27 are not supported by competent evidence.

A. Appellate Jurisdiction

[9] As a threshold matter, we must determine whether this Court has jurisdiction to review the child custody order. Although the child custody order was entered on 31 March 2017, Plaintiff-Father filed notice of appeal to this Court on 15 December 2017—well beyond the ordinary period within which an appeal may be timely filed. *See* N.C.R. App. P. 3(c)(1). However, for the following reasons, the appeal is properly before this Court.

"Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action . . . may take appeal by filing notice of appeal with the clerk of superior court[.]" N.C.R. App. P. 3(a). The notice of appeal must be filed "within thirty days after entry of judgment." N.C.R. App. P. 3(c)(1). "Failure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) (per curiam).

Nevertheless, where a party files a timely Rule 59 motion requesting a new trial, "the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order[.]" N.C.R. App. P. 3(c)(3). A motion for a new trial pursuant to Rule 59 "shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(b).

Entry and service of judgments are governed by Rule 58. "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]" *Id.* § 1A-1, Rule 58. After entry, a copy of the judgment shall be served "upon all other parties within three days." *Id.* § 1A-1, Rule 58. The trial judge may designate one of the parties to "serve a copy of the judgment upon all other parties within three days after the judgment is entered." *Id.* Moreover, "[a]ll time periods within which a party may further act pursuant to . . . Rule 59 *shall be tolled for the duration of any period of noncompliance with*

this service requirement," provided, however, that "no time period under . . . Rule 59 shall be tolled longer than 90 days from the date the judgment is entered." *Id.* (emphasis added). Service and proof of service must comply with Rule 5 of the North Carolina Rules of Civil Procedure. *Id.*

In the present case, the trial court tasked Defendant-Mother's attorney with drafting the order at the conclusion of the custody hearing. Between the date of the hearing and the date on which the order was entered, the trial court permitted Plaintiff-Father's attorney to withdraw from the case. Thus, Defendant-Mother should have served the custody order on Plaintiff-Father, as he was not represented by counsel when the order was entered. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b) (providing that "all pleadings subsequent to the original complaint and other papers required or permitted to be served[ ]" shall be served on the party "[i]f the party has no attorney of record"). However, on 31 March 2017, Defendant-Mother's counsel served a copy of the order on Plaintiff-Father's former counsel. Plaintiff-Father received notice of the judgment on 10 April 2017, by first class mail from his former counsel.

Defendant-Mother failed to abide by the service requirements of Rule 58 by serving the custody order on Plaintiff-Father's former attorney rather than on Plaintiff-Father. Because "[a]ll time periods within which a party may further act pursuant to . . . Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement," the deadline for Plaintiff-Father to serve his motion for a new trial on Defendant-Mother's counsel was tolled until ten days after Plaintiff-Father's receipt of the custody order on 10 April 2017, rather than ten days after entry of the custody order. *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 225, 713 S.E.2d 140, 145 (2011) (citation omitted) (concluding that, after defendants' failure to serve the plaintiff with the judgment, the ten-day period within which the plaintiff could serve its motion for new trial was not triggered until ten days after the plaintiff's receipt of the judgment from the county courthouse, plus three days for service by mail).

In the case at bar, Plaintiff-Father served his Rule 59 motion for a new trial on 12 April 2017, two days after receiving a copy of the order. Thus, his motion was timely served. Moreover, we conclude that although Plaintiff-Father's motion was ultimately unsuccessful, it was nevertheless sufficient to toll the thirty-day period for noticing an appeal. Because the trial court entered its order on Plaintiff-Father's Rule 59 motion and sanctions on 8 December 2017, his appeal to this Court on 15 December 2017 was timely.

B. Standard of Review

On review of a child custody matter,

> the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact. Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.

Carpenter v. Carpenter, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citation omitted).

"Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record[.]" *Huml v. Huml*, 264 N.C. App. 376, 388, 826 S.E.2d 532, 541 (2019) (citation omitted).

C. Child Custody Order

[10] In the instant case, Plaintiff-Father contends that the following findings of fact are not supported by competent evidence: 9, 10, 15, 17, 18, 19, 20, 21, 24, and 27.

> 9. Plaintiff[-Father] filed a complaint seeking emergency custody in this case in 2015 with an allegation that Defendant[-Mother] threatened to kill herself and other allegations against her. However, he took the stand during this hearing and testified there were no problems and that the parties should share joint custody. The court finds this troubling and that if the allegations in the complaint were of a real concern to Plaintiff[-Father], he would have testified as such and attempted to convince the court that Defendant[-Mother] is a problem. Therefore, the [c]ourt finds that Plaintiff[-Father's] claims in the complaint about Defendant[-Mother are] not credible.
>
> 10. Plaintiff[-Father] committed acts of domestic violence against Defendant[-Mother], including one incident where he left a scar on her forearm. He also punched holes in the wall.

. . . .

15. . . . Plaintiff[-Father] spends significant time playing cricket. The [c]ourt has no issue with Plaintiff[-Father] enjoying himself and blowing off steam; however, if he is going to be out seven or eight hours playing cricket or some other activity, the child should be with his mother if she is available to provide care.

. . . .

17. Defendant[-Mother] was the primary caretaker of the child prior to the parties' separation.

18. Since the separation, . . . Defendant[-Mother] has taken care of the child while in her care and it is unclear to the [c]ourt whether Plaintiff[-Father] or his parents have been the primary caretaker while in his care.

19. The court is concerned about . . . Plaintiff[-Father's] request for emergency custody. The [c]ourt signed an ex-parte emergency custody order primarily to address the alleged threat that Defendant[-Mother] would remove the child from the country. Plaintiff[-Father] alleged that Defendant[-Mother] could telecommute from India, which was untrue and the [c]ourt also finds that . . . Plaintiff[-Father] continued with his façade in the Emergency complaint that he is spending or wants to spend as much time with the child as possible. There is also no credible evidence presented at the trial of this matter that Defendant[-Mother] was a flight risk with the minor child. In fact, Defendant[-Mother] traveled to India with the child in 2015 and brought him back to North Carolina.

20. Plaintiff[-Father] alleged family tensions and a property dispute in India as the reasons the minor child should not be allowed to be taken to India. The [c]ourt does not find this concern to be credible. They both traveled to India separately with the child in 2015. They both have family in India. Plaintiff[-Father] did not allege during the trial that he had any concern that Defendant[-Mother] would attempt to keep the minor child in India and not return [the child] to the United States.

21. The [c]ourt is concerned that Plaintiff[-Father's] mother and father may be a source of tension in . . .

> Plaintiff[-Father's] home. The [c]ourt finds Defendant[-Mother's] contention credible that the child's paternal grandparents are more hostile than the maternal grandparents.
>
> . . . .
>
> 24. In Plaintiff[-Father's] home, the minor child has either been sleeping on the floor in [the] hallway or with Plaintiff[-Father's] parents in their bed. Plaintiff[-Father's] arrangement in his home is not suitable for a continued fifty-fifty physical custody schedule.
>
> . . . .
>
> 27. While there is this litigious issue going on in India over real property there, the court does not find that there is any weight to the concern expressed by Plaintiff[-Father] . . . of this child being exposed to that. In fact, the [c]ourt believes that the child cannot be any more exposed to it than he already is living with the paternal grandparents in Plaintiff[-Father's] home. There should be no restrictions on either parent's ability to travel to India with their minor child.

A review of the record and trial transcript reveals that each of these findings is supported by competent evidence. We group the challenged findings by their underlying subject-matter.

1. Findings Related to Plaintiff-Father's Behavior

Findings of fact 9, 10, 15, and 19 focus on Plaintiff-Father's behavior, and each was supported by competent evidence at trial.

Plaintiff-Father challenges findings of fact 9 and 19, regarding the veracity and sincerity of Plaintiff-Father's allegations in support of his request for emergency custody. These findings were amply supported by competent evidence at trial. Plaintiff-Father's fear that Defendant-Mother was suicidal, along with the other very troubling allegations of his complaint, was not consonant with his testimony that he was seeking "50-50 custody[ ] moving forward," or his failure to testify regarding those allegations at trial.

In addition, Plaintiff-Father's concern that Defendant-Mother would flee to India with the child and telecommute was not supported by the evidence at trial. Plaintiff-Father did not dispute Defendant-Mother's testimony that she could not telecommute from India. Indeed, in

Plaintiff-Father's opening statement, his counsel affirmatively explained that Plaintiff-Father's "concern, at least as he set out in his discovery responses, was not that [Defendant-Mother] would keep the child in India. That's not the concern. It's not a flight issue."

The trial court's finding of fact 10, that Plaintiff-Father had committed acts of domestic violence, was also supported by competent evidence. Plaintiff-Father contends that this finding was based on erroneously admitted police reports. Assuming, *arguendo*, that the police reports were admitted into evidence in error, this finding was supported by ample other evidence at trial. Defendant-Mother testified that Plaintiff-Father punched the wall and hit her on a number of occasions, and that at least one of those acts of domestic violence occurred in the minor child's presence. Plaintiff-Father did not testify to the contrary.

Plaintiff-Father also challenges finding of fact 15, in which the trial court found that he "spends significant time playing cricket," during which time Defendant-Mother should be permitted to care for the child rather than a third party. The parties both provided competent evidence to support this finding. Although he argues on appeal that "he spent less than 1% of his Custodial time in playing Cricket," Plaintiff-Father testified that cricket matches can last anywhere from three to seven hours. Defendant-Mother and another witness also testified to the substantial amount of time that Plaintiff-Father spends playing cricket.

In short, each of these challenged findings was supported by competent evidence.

2. Findings Related to Travel to India

Findings of fact 20 and 27 address Plaintiff-Father's concerns about "family tensions and a property dispute in India as the reasons the minor child should not be allowed to be taken to India." Each finding was supported by competent evidence at trial.

On appeal, Plaintiff-Father argues that, in not finding his concerns to be credible, the "[t]rial court's reasoning here is defective," because the trial court improperly judged "the credibility of [his] concern" and did not afford the affidavits he submitted from the tenants in India the weight to which he thinks they were entitled. However, while the tenants attested to the maternal grandmother's verbal abuse of them in the presence of the child, Plaintiff-Father testified that *he was not concerned* about Defendant-Mother traveling with the child to India.

"Although a party may disagree with the trial court's credibility and weight determinations, those determinations are solely within the

province of the trial court." *Kabasan v. Kabasan*, 257 N.C. App. 436, 471, 810 S.E.2d 691, 713 (2018) (citation omitted). Accordingly, both of these findings are supported by competent evidence.

3. Findings Related to the Minor Child's Care

Findings of fact 17, 18, 21, and 24 deal with the child's care and living situation, and each finding was supported by competent evidence at trial.

The trial court found that Defendant-Mother cares for the child when he is in her physical custody, but that it was unclear whether Plaintiff-Father or his parents care for the child when he is in Plaintiff-Father's physical custody. Defendant-Mother testified at trial that Plaintiff-Father's parents were caring for the minor child more than Plaintiff-Father was admitting: Plaintiff-Father is not "taking care of the baby by himself. Even now, he is depending on his parents. So I doubt if he can put that extra effort as a single parent to take care of [the child] because he didn't do it on his own . . . for about a year now," since his parents moved to the United States. Finding of fact 18 is supported by competent evidence.

Defendant-Mother's testimony also supports finding of fact 21, that the paternal grandparents "may be a source of the tension in [Plaintiff-Father's] home." The trial court explicitly stated that it found Defendant-Mother's "contention credible that the child's paternal grandparents are more hostile than the maternal grandparents." This is the trial court's prerogative. *See id.* at 440, 810 S.E.2d at 696. Thus, this finding is supported by competent evidence.

Plaintiff-Father also challenges finding of fact 24, regarding the minor child's sleeping arrangements while in the physical custody of Plaintiff-Father. He and his parents live in a 1,000 square foot, one-bedroom apartment, and his parents sleep in the bedroom. When questioned about the minor child's sleeping arrangements, Plaintiff-Father testified that "we sleep in the bedroom, and sometimes we sleep in the hall." He explained that he would make a separate bed for the minor child if they were to sleep in the hall, but that most of the time the child stays in the bedroom and shares the bed with Plaintiff-Father's parents. Plaintiff-Father asserted in his Rule 59 motion—as well as on appeal—that "hall" in Indian culture actually refers to a living room. However, he failed to correct his testimony at the hearing, or to explain why that was materially different than sleeping in the hall. Hence, this finding is supported by competent evidence.

Finally, although Plaintiff-Father's challenge to finding of fact 17, that Defendant-Mother has been the primary caretaker for the child, appears

to have been abandoned, it was supported by Defendant-Mother's testimony that she "ha[d] been the primary caregiver of the child ever since he was born." This finding is supported by competent evidence.

4. Summary of Challenged Findings

Each of the challenged findings of fact is supported by competent evidence. Indeed, many of the findings are based directly on Plaintiff-Father's testimony. In sum, Plaintiff-Father generally contends that the trial court erred by overlooking evidence that he presented at trial, or by making a credibility determination with which he disagrees. These arguments go to the weight to be given to the evidence, and to evaluations of credibility which are within the discretion of the trial court. "[W]here the trial court's findings of fact are supported by competent evidence, and the findings of fact, in turn, support the trial court's conclusions of law, the decision of the trial court will be affirmed. *This Court will not reweigh the evidence*." *Id.* (citation omitted) (emphasis added). Plaintiff-Father's challenges to these findings of fact must therefore fail.

VI. Child Support Guidelines

Lastly, we return to the child support order, in which the trial court found it "reasonable to use 125 overnights for [Plaintiff-Father] and 240 overnights for [Defendant-Mother] for purposes of calculations under the child support guidelines." Defendant-Mother asserts that the trial court erred in using Worksheet B to calculate Plaintiff-Father's prospective child support obligation. More specifically, she argues that "there was no evidence presented from which the trial court could find that 125 overnights [with Plaintiff-Father] was a reasonable number of overnights to use" in determining Plaintiff-Father's child support obligation.

A. Appellate Jurisdiction

This matter is properly addressed by cross-appeal, in that Defendant-Mother "seek[s] affirmative relief in the appellate division[,]" *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 739, 407 S.E.2d 819, 826 (1991), from a child support order that she contends was entered in error. *See Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002) ("[T]he proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal.").

Although Defendant-Mother failed to timely cross-appeal from the child support order, this Court has the discretion to issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments

and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action," N.C.R. App. P. 21(a)(1), including review of the merits of a cross-appeal. *See Ehrenhaus v. Baker*, 243 N.C. App. 17, 32, 776 S.E.2d 699, 709 (2015). Defendant-Mother petitioned for writ of certiorari, and has shown good and sufficient cause for this Court to issue the writ. Accordingly, in our discretion, we allow the writ.

B. Standard of Review

A trial court's child support order is "accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. To support a reversal, an appellant must show that the trial court's actions were manifestly unsupported by reason." *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (internal quotation marks and citations omitted). "Failure to follow the [Child Support G]uidelines constitutes reversible error." *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992).

C. Child Support Guidelines

[11] It is well settled that "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines. The Guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent." *Hart v. Hart*, 268 N.C. App. 172, 182, 836 S.E.2d 244, 251 (2019) (citations and internal quotation marks omitted). The Guidelines provide that Worksheet A is to be used "when one parent . . . has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for 243 nights or more during the year"; the use of Worksheet B is appropriate when both "[p]arents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent." *Guidelines*, Ann. R. 5.

Here, Defendant-Mother contends that the trial court erred in using Worksheet B to calculate Plaintiff-Father's prospective child support obligation. She challenges finding of fact 10 as not being supported by competent evidence at trial:

> 10. For the period February 2017 to July 2017 based upon the custody order entered by the [c]ourt, the court finds it reasonable to use 125 over nights for the [Plaintiff-Father]

> and 240 overnights for the [Defendant-Mother] for purposes of calculations under the child support guidelines.

Defendant Mother argues that "the evidence presented suggested that the correct number of overnights was 261 for [Defendant-Mother] and 104 for [Plaintiff Father]."

The child custody order served as the basis for the trial court's use of Worksheet B in calculating the prospective child support obligation. To accommodate the parties' commitment to regularly travel to India with the minor child, the order permits each parent to have physical custody of the child for five weeks of uninterrupted international travel per year. Plaintiff-Father argued at the child support hearing that the use of Worksheet B to calculate his child support obligation was proper because of the annual five-week extended visitation period. Including the five-week extended visitation, Plaintiff-Father calculated that he had 128 days in 2017, 129 days in 2018, and 124 days in 2019. However, the parties' extensive travel plans do not necessarily justify the use of Worksheet B.

It is not appropriate to use Worksheet B in cases involving extended visitation. The explicit instructions set forth on Worksheet B[3] address the issue of extended visitation: "Worksheet B should be used only if both parents have custody of the child(ren) for at least one-third of the year *and the situation involves a true sharing of expenses*, *rather than extended visitation* with one parent that exceeds 122 overnights." Form AOC-CV-628, Side Two, Rev. 1/15 (emphases added).[4] If the trips to India are extended visitation, rather than a "situation involv[ing] a true sharing of expenses" as contemplated by the instructions for Worksheet B, that travel time should not be included in determining the number of overnights the child would stay with each parent.

Accordingly, we vacate the child support order, and remand for the trial court to make additional findings as to whether the number of overnights that the minor child has with Plaintiff-Father exceeds 122 overnights, and if so, whether that is the result of extended visitation or whether the custodial arrangement is a "situation involv[ing] a true sharing of expenses." Whether additional evidence or a hearing is necessary,

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3. This Court has previously referenced the instructions on Worksheet B in determining whether its use was appropriate. *See*, *e.g.*, *Scotland Cty. Dep't of Soc. Servs. v. Powell*, 155 N.C. App. 531, 539, 573 S.E.2d 694, 699 (2002).

4. The identical language remains in the January 2019 iteration of Worksheet B.

or whether the case may be decided based on the existing record, is in the discretion of the trial court.

Conclusion

For the reasons stated herein, we vacate the 20 November 2017 child support order and remand for further proceedings consistent with this opinion. We also reverse that part of the 8 December 2017 order imposing Rule 11 sanctions. The remainder of the 8 December 2017 order and the 31 March 2017 custody order are affirmed.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

MARVIN N. McFADYEN, Plaintiff

v.

NEW HANOVER COUNTY; NEW HANOVER COUNTY BOARD OF ELECTIONS; NORTH CAROLINA STATE BOARD OF ELECTIONS; JOSHUA B. HOWARD, in his official capacity; RHONDA K. AMOROSO, in her official capacity; JOSHUA D. MALCOLM, in his official capacity; PAUL J. FOLEY, in his official capacity; and MAJA KRICKER, in her official capacity, Defendants

No. COA18-840

Filed 18 August 2020

Elections—State Board of Elections—termination of county director of elections—judicial review—jurisdiction

A county superior court lacked jurisdiction to consider a county director of elections' appeal of his purported termination where, pursuant to statute (N.C.G.S. § 163-22(l)), only the Superior Court of Wake County had jurisdiction to review the termination decision made by the State Board of Elections.

Judge DIETZ concurring with separate opinion.

Appeal by Plaintiff from order entered 29 March 2018 by Judge Charles H. Henry and from orders entered 12 April 2018 and 26 April 2018 by Judge Joshua W. Willey, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 14 March 2019.

Shipman & Wright, L.L.P., by W. Cory Reiss, for plaintiff-appellant.

Sumrell Sugg, P.A., by Scott C. Hart, for defendant-appellee New Hanover County.

Knott and Boyle, PLLC, by W. Ellis Boyle, for defendant-appellee New Hanover County Board of Elections.

Attorney General Joshua H. Stein, by Deputy Solicitor General Ryan Y. Park, Special Deputy Attorney General James Bernier, Jr., and Solicitor General Fellow Matt Burke, for the State defendants-appellees.

MURPHY, Judge.

N.C.G.S. § 163-22(l) requires that any appeal from the State Board of Elections ("SBE") be filed in the Superior Court of Wake County. Failure to comply with this statutory requirement deprives any other court of jurisdiction to hear the dispute. Where a court lacks jurisdiction over a case, any action made by the court related to that case is void ab initio and a nullity, leaving any appeal based on the court's void actions moot. Here, Marvin McFadyen ("McFadyen"), appealed his purported termination as a county director of elections ("county director") by the SBE in the Superior Court of New Hanover County, in contravention of N.C.G.S. § 163-22(l). As a result, the Superior Court of New Hanover County was without jurisdiction, and all of its actions related to the case are void and vacated, rendering McFadyen's appeal moot. We dismiss without prejudice to Defendant's ability to refile in the Superior Court of Wake County.

BACKGROUND

Plaintiff, McFadyen, was nominated and appointed as County Director of the New Hanover County Board of Elections ("NHCBE") in 2011. The procedures for appointing a county director were established under N.C.G.S. § 163-35 (2014).[1] The General Assembly created a three-step process across three entities for appointing and supervising a county director. First, the county board of elections nominates an eligible individual for the county director position and submits that

1. For all relevant times described herein, the statute was N.C.G.S. § 163-35. N.C.G.S. § 163-35 has since been updated and recodified at N.C.G.S. §§ 163A-774-775.

nomination to the Executive Director of the SBE. Second, the Executive Director issues a letter of appointment. Third, once the new county director is appointed, the county board of elections determines the county director's responsibilities and delegated authority. The county director is then compensated by the county through its Board of County Commissioners. *Id.*

The origins of McFadyen's purported termination began "[i]n the wake of a political shift that occurred in the 2012 elections . . . ." A new governor appointed new members to the SBE who then appointed John Ferrante ("Ferrante") as Chairman of NHCBE in July 2013. McFadyen claims that Ferrante "immediately expressed his personal dislike for" McFadyen and was "openly critical of and condescending toward" him, "including in front of employees whom . . . McFadyen was to oversee and direct . . . ." As a result, McFadyen further alleges that, despite not having received performance evaluations from NHCBE, as was "past practice," NHCBE conducted closed-door interviews with other employees to discuss him and evaluate his performance.

Further, unless marked "confidential," New Hanover County had a policy of automatically making emails to and from county department heads available to the public. During the November 2014 election, military ballots and voter registration applications that were emailed to McFadyen's NHCBE email address were released to the public. These emails should not have been released. McFadyen claims he was unaware "that the county followed an unwritten or informal policy making all inbound emails to department heads available to the public without a public records request unless they were labeled 'confidential' or otherwise marked for non-dissemination."

After this incident, NHCBE held a closed session regarding McFadyen's employment. Ferrante gave McFadyen the option of resigning and advised him that, if he refused, then NHCBE would begin formal termination proceedings.

To terminate a county director, "the county board of elections may, by petition signed by a majority of the board, recommend to the Executive Director of the [SBE] the termination of the employment of the [county director]." N.C.G.S. §163-35(b) (2014). After receiving the petition, the Executive Director forwards a copy of the petition to the county director facing termination, who may then reply to the petition. *Id.* Finally, upon receiving the county director's reply or the expiration of a set time period,

> the State Executive Director [of the SBE] shall render a decision as to the termination or retention of the [county director]. The decision of the Executive Director of the [SBE] shall be final unless the decision is, within 20 days from the official date on which it was made, deferred by the [SBE]. If the [SBE] defers the decision, then the [SBE] shall make a final decision on the termination after giving the [county director] an opportunity to be heard and to present witnesses and information to the [SBE], and then notify the Executive Director of its decision in writing.

Id. As a link in this termination chain, the State Executive Director of the SBE[2] has the initial decision of whether to fire the county director. *Id.* This statute did not contemplate what to do if this link is broken, such as when the Executive Director recuses herself due to a conflict of interest and fails to "render a decision as to the termination or retention of the [county director]." *Id.*

This termination process began after McFadyen declined Ferrante's ultimatum. The NHCBE voted 2-1 to submit a petition to the SBE recommending that McFadyen be terminated from his position as County Director of the NHCBE. In its petition, NHCBE alleged cause for termination based on various reasons including that McFadyen's employment "create[d] substantial and unacceptable risk of liability" for "Employment Practices Liability, the area of law dealing with, sexual harassment; retaliation; discrimination based on sex, race/color or disability; abuse and intimidation, and infliction of emotional distress"; that McFadyen "knowingly failed to meet his duty to safeguard and protect . . . Confidential Voter Information"; and that McFadyen "intended either to deflect responsibility or to mislead the [NHCBE]" about how the Confidential Voter Information was released to the public.

At the time the SBE received the petition recommending termination, Kimberly Strach ("Strach") was the Executive Director of the SBE. She informed the SBE Chairman that she had a conflict of interest that prevented her from acting on the petition. The SBE Chairman sanctioned Strach's recusal, but the statute did not address how to proceed with a

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2. "[T]he [SBE] shall appoint an Executive Director [of the SBE] for a term of four years . . . [who] shall serve, unless removed for cause, until his successor is appointed. Such Executive Director shall be responsible for staffing, administration, execution of the [SBE]'s decisions and orders and shall perform such other responsibilities as may be assigned by the [SBE]. In the event of a vacancy, the vacancy shall be filled for the remainder of the term." N.C.G.S. § 163-27 (2014).

termination petition when the Executive Director recuses. In response to this situation and purportedly "to preserve the procedural approach set out by statute," the SBE Chairman appointed the Deputy Director of the SBE, Amy Strange ("Strange"),[3] to act in place of the Executive Director to address the petition for McFadyen's termination.

Strange moved to the next link in the termination chain. Strange sent McFadyen a copy of the petition for termination. McFadyen replied to the petition and denied its allegations. Strange reviewed the petition and McFadyen's responses and purported to issue a decision concluding that there were two grounds for termination. Strange first concluded that McFadyen "fail[ed] to follow State and federal laws and county policies" when he failed "to protect confidential voter information, including voted ballots, from being displayed for public view constitut[ing] an inexcusable breach of public trust and lead[ing] to a lack of confidence in the elections process." She stated that the "County's policies and procedures [timeframe] for safeguarding e-mails with confidential content is at least a decade old, and was in place from the first day that Mr. McFadyen was employed as Elections Director" and that "[i]t would clearly be the responsibility of Mr. McFadyen to appropriately flag items in his own email folders." Second, Strange concluded that McFadyen "provid[ed] false or misleading information regarding a serious breach of State and federal laws . . . ." Acting as though she was the Executive Director of the SBE under the statute, Strange purported to grant the petition on 4 February 2015.

In accordance with his rights under the statute, McFadyen wrote the SBE to challenge Strange's purported decision. He argued that "the delegation of duties to Amy Strange[,]" as a hired employee rather than an appointed member of the SBE, "does not seem to be within the statutory authority of [N.C.G.S. §] 163-35." Over two weeks later, the SBE informed McFadyen that "no deferral will be had and that [McFadyen] can move forward with whatever subsequent legal action [he and his counsel] might find appropriate." The SBE did not have the votes to defer Strange's decision and McFadyen's purported termination was effectively final.

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3. Strange had been "hired by the [Executive Director]," Strach, to be Deputy Director for Campaign Finance and Operations. She applied for the job via an advertised position through the State Office of Human Resources. Strach hired Strange after she interviewed and accepted an offer. Strange's job included reviewing accounting transactions for compliance with state laws, approving financial transactions on behalf of the agency, ensuring compliance with internal review and internal controls for the SBE, supervising campaign finance staff and operations staff, and serving as a liaison between various state offices.

McFadyen began legal action in New Hanover County Superior Court. Asserting claims under both state and federal law, McFadyen sued NHCBE, New Hanover County, and the SBE and its individual members. Defendants jointly filed a notice of removal to the U.S. District Court for the Eastern District of North Carolina on the basis of federal question jurisdiction given McFadyen's claim against the SBE under 42 U.S.C. § 1983. In that claim, McFadyen alleged that the SBE violated his constitutional right to due process during termination proceedings and sought injunctive relief and attorney fees under 42 U.S.C. § 1988. McFadyen's federal claims were dismissed,[4] and the District Court declined to exercise supplemental jurisdiction over remaining state law claims.

Upon return to the New Hanover County Superior Court, the trial court dismissed McFadyen's claims against New Hanover County for unjust enrichment and conversion. The remaining claims against each respective Defendant were disposed of at summary judgment. The trial court entered orders granting summary judgment in favor of Defendants on all claims. On appeal, McFadyen challenges the trial court's orders dismissing and granting summary judgment in favor of Defendants.

ANALYSIS

Although McFadyen was a county employee, the county had no legal power to terminate him; that decision rested solely with the SBE. *See* N.C.G.S. § 163-35(b) (2014). There is a statutory procedure for that termination and it expressly identifies when the SBE's action becomes a final agency decision. *Id.* Decisions of the SBE related to the performance of its duties are subject to judicial review exclusively in the Superior Court of Wake County. *See* N.C.G.S. § 163-22(l) (2014) ("Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the [SBE] rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file his petition in the Superior Court of Wake County."). McFadyen seeks judicial review of a decision "rendered in the performance of [SBE's] duties . . . under [Chapter 163]" as this controversy arises out of the purported termination of McFadyen as a county director. *See* N.C.G.S.

4. The U.S. District Court held: "Because [McFadyen] has not pleaded facts demonstrating that the SBE [D]efendants can be held responsible for the publication of false charges that allegedly stigmatized his reputation, [McFadyen's] § 1983 claim, the second claim, fails to state a claim upon which relief can be granted. [[McFadyen's] sixth claim for attorney fees under § 1988 is tied to [[McFadyen's] § 1983 claim, and cannot stand alone. Accordingly, it too must be dismissed." *McFadyen v. New Hanover County*, No. 7:15-CV-132-FL, 2016 WL 183486, at *6 (E.D.N.C. Jan. 14, 2016).

§ 163-35(b) (2014) ("The county board of elections may, by petition signed by a majority of the board, recommend to the Executive Director of the [SBE] the termination of the employment of the county board's director of elections. . . . [T]he State Executive Director shall render a decision as to the termination or retention of the county director of elections.").

McFadyen could have challenged the SBE's action by appealing to the Superior Court of Wake County according to the judicial review process established by law, but he instead filed his *Complaint* in New Hanover County. The failure to exhaust the administrative and judicial review process bars a later collateral attack on the SBE's decision. *Frazier v. N.C. Cent. Univ., ex rel. Univ. of N.C.*, 244 N.C. App. 37, 44, 779 S.E.2d 515, 520 (2015). The law does not permit litigants to challenge a state agency decision by bypassing judicial review and suing the administrative agency and third parties whose actions "happen to stem from decisions of an administrative agency." *Vanwijk v. Prof'l Nursing Servs., Inc.*, 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011). McFadyen's failure to properly appeal through the judicial review process established by statute means the Superior Court of New Hanover County lacked jurisdiction to hear the matter.

McFadyen argues that, under *Nanny's Korner Day Care Ctr., Inc. v. N.C. DHHS*, 264 N.C. App. 71, 825 S.E.2d 34, *app. dism., rev. denied*, 831 S.E.2d 89 (2019) (*Nanny's Korner II*), he was not required to exhaust administrative remedies before filing this action. We disagree.

"When the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts." *Jackson ex rel. v. N.C. Dept. of Human Res. Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903-04 (1998). "Nevertheless, the exhaustion of administrative remedies doctrine is inapplicable when the remedies sought are not considered in the administrative proceeding." *Nanny's Korner II*, 264 N.C. App. at 78, 825 S.E.2d at 40. "Under those circumstances, 'the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court.' " *Id.* (quoting *Johnson v. First Union Corp.*, 128 N.C. App. 450, 456, 496 S.E.2d 1, 5 (1998).

In *Nanny's Korner Care Ctr. v. N.C. DHHS - Div. of Child Dev.*, 234 N.C. App. 51, 758 S.E.2d 423 (2014) (*Nanny's Korner I*), the petitioner appealed a superior court order affirming the final agency decision of the respondent North Carolina Department of Health and Human Services

("DHHS"), in which DHHS issued a written warning to the petitioner's child care center and prohibited the petitioner's husband from being on the child care center's premises while children were on site. The petitioner contended that the superior court erred in concluding that DHHS could rely on a substantiation of abuse made by a local Department of Social Services ("DSS"), instead of conducting its own independent investigation, to invoke its disciplinary authority under N.C.G.S. § 110-105.2(b). *Id.* at 57, 758 S.E.2d at 427. We vacated the trial court's order and remanded the matter to the trial court for further remand to DHHS with instructions to conduct an independent investigation to determine whether there was substantial evidence of abuse and for any needed additional administrative action in accordance with the statute. *Id.* at 64-65, 758 S.E.2d at 431.

The childcare center then filed an action in superior court, alleging a violation of its due process rights under Article 1, Section 19 of the North Carolina Constitution, and seeking monetary damages. *Nanny's Korner II*, 264 N.C. App. at 75, 825 S.E.2d at 38. The action was dismissed because it fell outside the three-year statute of limitations for constitutional claims. *Id.* at 76, 825 S.E.2d at 38-39. On appeal, the plaintiff contended the exhaustion of administrative remedies doctrine required the plaintiff to exhaust its remedies through the claim under the NCAPA before the plaintiff's right to bring a constitutional claim arose. *Id.* at 78, 825 S.E.2d at 40. We disagreed, holding the statute of limitations was not tolled while the petitioner pursued administrative remedies in *Nanny's Korner I* because monetary damages were not a remedy available through the NCAPA in that action. *Id.* at 79, 825 S.E.2d at 40.

Here, McFadyen alleges he "has suffered damages stemming from his loss of employment, lost wages, lost opportunities, and stigmatized reputation." Unlike in *Nanny's Korner I*, remedies for those damages–including a hearing, reinstatement to his position, and back pay–are available in an administrative proceeding under the NCAPA in this case. McFadyen's argument thus lacks merit.

"An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986). "[A] void judgment 'is in legal effect no judgment,' as '[i]t neither binds nor bars any one, and all proceedings founded upon it are worthless.' " *Boseman v. Jarrell*, 364 N.C. 537, 557, 704 S.E.2d 494, 507 (2010) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). The trial court's orders in this case were issued without jurisdiction

where under N.C.G.S. § 163-22(l) only the Superior Court of Wake County had jurisdiction to hear the matter; therefore, the orders are void and without legal effect.

> If there be a defect, e. g., a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion, stay, quash, or dismiss the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment . . . so, (out of necessity) the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceedings.

Stroupe v. Stroupe, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981) (citing *Lewis v. Harris*, 238 N.C. 642, 646, 78 S.E.2d 715, 717-18 (1953)) (internal marks omitted). We vacate the orders of the trial court due to the trial court lacking jurisdiction over this dispute. Since the underlying orders are vacated, we dismiss this appeal.

CONCLUSION

N.C.G.S. § 163-22(l) requires any appeal taken from a decision of the SBE to be filed in the Superior Court of Wake County. McFadyen's failure to comply with this statutory requirement means the Superior Court of New Hanover County, where McFadyen filed his appeal, was without jurisdiction. The trial court's orders were void ab initio because the trial court did not have jurisdiction over the dispute; therefore, we vacate the trial court's orders in this case and dismiss this appeal.

VACATED AND DISMISSED.

Judge COLLINS concurs.

Judge DIETZ concurring with separate opinion.

DIETZ, Judge, concurring.

There is a lot going on in this case, all of which can be traced back to the General Assembly's failure to anticipate a conflict of interest by the director of the State Board of Elections. The legislature later amended the statute and inserted a fix. But that fix does not answer all the messy questions about whether the State Board, in this case, complied with the statute that existed at the time. One thing is certain, however—these are questions of statutory law, not contract law.

McFadyen was terminated by the State Board of Elections through a statutory termination process. That decision unquestionably was a "dispute between an agency and another person that involves the person's rights, duties, or privileges" and thus is subject to the Administrative Procedure Act. N.C. Gen. Stat. § 150B-22(a). The General Assembly can exempt agency decisions from APA review and, indeed, it has done so with some decisions of the State Board of Elections. *See id.* § 150B-1(c)(6) (repealed 2018).

But not this one. Moreover, the statute governing termination of a county director carefully identifies when, in the various possible outcomes, the decision of the State Board becomes a "final" agency decision. *Id.* § 163-35(b). That language has special meaning in the APA context and the General Assembly's use of that particular language reinforces that our legislature intended for these decisions to be subject to APA review. Likewise, the General Assembly provided that "judicial review" of any decision by the State Board must occur in Wake County Superior Court. *Id.* § 163-22(l). As with the reference to a "final" agency decision, the use of the term "judicial review," which has a special meaning in the administrative context, suggests that the General Assembly believed decisions of the State Board were subject to settled principles of administrative and judicial review.

McFadyen's assertion that he can bypass this judicial review process through a civil breach-of-contract action would throw the State Board's termination procedure into chaos by removing the finality that the General Assembly created in the process. Under McFadyen's reasoning, if aggrieved county employees subject to this statutory termination process are unhappy with the agency decision, they need not address the issue immediately through judicial review. They can wait years—as long as the statute of limitations for their contract claims provides—and then sue both the State and the county to litigate the State's (not the county's) actions. This sort of litigation, as this case demonstrates, can stretch on for long after that. The General Assembly required timely administrative and judicial review of these impactful termination decisions precisely because they are too important to delay for years, while scheduled elections continue to take place.

And there is yet another wrinkle. With statutory law, one cannot argue "no harm, no foul." Here, for example, McFadyen reasons that, as a matter of statutory law, the deputy director of the State Board could not conduct the statutory review process because the statute says only the director can do it. Thus, he argues, his termination was improper because the State Board failed to precisely follow the requirements of the statute.

But that is not how contract law works. In contract law, you are not always entitled to *exactly* what the contract provides. You are entitled to the benefit of the bargain. *First Union Nat. Bank of N. Carolina v. Naylor*, 102 N.C. App. 719, 725, 404 S.E.2d 161, 164 (1991). That is why contract law examines questions such as whether there has been a *material* breach, whether there was *substantial* performance of the contract's terms, and so on. *See, e.g.*, *Cator v. Cator*, 70 N.C. App. 719, 722, 321 S.E.2d 36, 38 (1984).

In other words, the failure of the State to follow the precise letter of the law might not equate to a breach of the contract by the county. Here, for example, the director of the State Board had an obvious conflict of interest—she was once in a dating relationship with McFadyen that ended badly and there was evidence that McFadyen threatened to kill her. The deputy director stepped in to eliminate this conflict.

What the State Board did is certainly closer to the spirit of the parties' bargain than having an official whom McFadyen allegedly harassed and threatened handle the matter instead. And from there, all the impartial layers of review created by statute still were present. The members of the State Board had the opportunity to review the deputy director's decision, and McFadyen had the opportunity to challenge the Board's final decision through further administrative and judicial review. In short, even if McFadyen had a common law contract right to be terminated only through the statutory review process, a violation of that statute would not necessarily mean there was a breach of contract.

All of these complications underscore why this isn't a contract case. The statutory procedures that govern termination of state employees are complex and often exceedingly bureaucratic. Our General Assembly created these administrative procedures and layers of judicial review precisely because that statutory process does not lend itself to review under traditional, civil breach-of-contract principles in a separate lawsuit years later.

Thus, the issues raised in this case should have been pursued through the APA and ultimately brought before the Wake County Superior Court as a challenge to the State Board's final agency decision—not as a civil breach-of-contract case in New Hanover County Superior Court. Accordingly, the trial court properly dismissed the contract claims because they are an impermissible attempt to bypass mandatory judicial review required by statute. That judicial review process also afforded McFadyen ample due process and an opportunity to rebut the allegations contained in the petition from the county board of elections. Thus, the trial court properly dismissed the accompanying due process claims asserted in this action as well.

LUON NAY, EMPLOYEE, PLAINTIFF
v.
CORNERSTONE STAFFING SOLUTIONS, EMPLOYER, AND STARNET INSURANCE COMPANY, CARRIER (KEY RISK MANAGEMENT SERVICES, ADMINISTRATOR), DEFENDANTS

No. COA19-262

Filed 18 August 2020

Workers' Compensation—average weekly wages—employment at staffing agency—no definite end date—Method 3

The Industrial Commission erred in a workers' compensation case by applying Method 5 to calculate plaintiff's average weekly wages where plaintiff was employed by an employment staffing agency and was injured while on a work placement that had no definite, specific end date with a landscaping company. Even if Method 5 may have been more fair, Method 3 was fair and therefore was the correct method to use.

Judge ARROWOOD concurring in the result only.

Appeal by Plaintiff from an Opinion and Award filed 22 February 2019 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 2 October 2019.

Kathleen G. Sumner, David P. Stewart, and Jay A. Gervasi, Jr. for plaintiff-appellant.

Joy H. Brewer for defendants-appellees.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics, and Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for North Carolina Advocates for Justice, amicus curiae.

MURPHY, Judge.

Where the application of Method 3 of N.C.G.S. § 97-2(5) to calculate a plaintiff's average weekly wages would produce fair results for both an employee and an employer, the Full Commission errs in applying Method 5 to calculate a plaintiff's average weekly wages.

BACKGROUND

Plaintiff Luon Nay ("Nay") worked as an employee of Defendant Cornerstone Staffing Solutions ("Cornerstone"), which is an

employment staffing agency. A significant percentage of Cornerstone's employees seek work placement with companies that offer the possibility of "full-time, long-term employment with the idea of going permanent at that client company." In the staffing industry, these positions are called "temp-to-perm." Thomas Chandler, the owner, founder, and CEO of Cornerstone, estimated at least 95% of the positions filled by Cornerstone are temp-to-perm positions.

Nay began working for Cornerstone on 25 August 2015. On 24 November 2015, Nay injured his back while performing work in a placement with FieldBuilders as an employee of Cornerstone. After the 24 November 2015 injury, Nay returned to work and obtained a placement with another company for approximately three weeks in June and July of 2016 as an employee of Cornerstone. On 21 July 2017, Nay filed a Form 33 hearing request, alleging disagreement over the unilateral modification of Nay's Temporary Total Disability ("TTD") benefits by Cornerstone and Starnet Insurance Company, Carrier (Key Risk Management Services, Administrator) (collectively "Defendants"). Defendants filed a Form 33R, contending Nay had been provided with all benefits to which he was due under the Workers' Compensation Act. Nay earned $5,805.25 from Cornerstone during his time as Cornerstone's employee prior to his injury. Following a hearing, the Deputy Commissioner filed an Opinion and Award on 7 June 2018. In relevant part, the Deputy Commissioner concluded Nay's average weekly wages should be calculated pursuant to Method 5 of N.C.G.S. § 97-2(5) by dividing Nay's gross wages from Cornerstone of $5,805.25 by 52 weeks, yielding average weekly wages of $111.64 and a compensation rate of $74.43.

N.C.G.S. § 97-2(5) calculates an injured worker's average weekly wages according to the following 5 method hierarchical approach:

> [Method 1:] 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52;
>
> [Method 2:] [I]f the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> [Method 4:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (2019) (paragraph spacing added for ease of reading).

Nay appealed to the Full Commission ("the Commission") and argued that his average weekly wages should be calculated according to Method 3, not Method 5. The parties stipulated to the following in the Commission's 22 February 2019 Opinion and Award:

> 1. The parties are properly before the Industrial Commission, and that the Industrial Commission has jurisdiction over this matter.
>
> 2. That all parties have been correctly designated, and there are no questions as to misjoinder or non-misjoinder of parties.
>
> 3. [Cornerstone] employs greater than three full time employees and is therefore subject to the Act.
>
> 4. An employment relationship existed between [Nay] and [Cornerstone] at the time of [Nay's] injury.
>
> 5. Insurance coverage existed on [the] date of injury.

6. [Nay] sustained a compensable injury to his low back on [24 November 2015] while loading equipment and filed a Form 18 on [8 March 2016].

7. Defendants filed a Form 63 on [25 March 2016] and began directing medical care and paying temporary total disability benefits to [Nay].

8. [Nay] contends his average weekly wage is $419.20, yielding a compensation rate of $279.48.

9. Defendants contend [Nay's] average weekly wage is $111.64, yielding a compensation rate of $74.43.

10. [Nay] was paid compensation consisting of $258.03 in weekly TTD benefits from [1 December 2015] to [5 July 2016].

11. Defendants filed a Form 62 on [19 December 2016] and [7 July 2017] modifying [Nay's] average weekly wage to $111.64, yielding a compensation rate of $74.43.

12. [Nay] has received compensation consisting of $74.43 in weekly TTD benefits beginning [21 June 2017] to the present and ongoing.

The following findings of fact are unchallenged on appeal:

1. This matter arises out of an admittedly compensable [24 November 2015] injury by accident resulting in injury to [Nay's] lower back.

2. [Nay] began working for [Cornerstone], a staffing agency, on [25 August 2015].

3. At the time of his compensable [24 November 2015] injury by accident, [Nay] was working on assignment performing landscaping work with FieldBuilders. [Nay's] assignment with FieldBuilders involved cutting grass, patch/repair work, and general landscaping tasks. He generally worked from 7:00 a.m. through 4:00 p.m. for a total of eight hours per day. However, he also would occasionally work as few as 6 hours and as many as 9-10 hours in a given day. [Nay] worked 4-5 days per week, on average, and earned $11.00 per hour.

. . .

> 5. On [21 June 2017, Nay] was written out of work due to his compensable back injury. [Nay] has remained out of work since [21 June 2017] and continues to receive [TTD] benefits.
>
> 6. In controversy is the correct calculation of [Nay's] average weekly wage. [Nay] contends his average weekly wage is $419.70, yielding a weekly compensation rate of $279.48. Defendants contend [Nay's] average weekly wage is $111.64, yielding a weekly compensation rate of $74.63.
>
> 7. Defendants initially paid [Nay] a compensation rate of $258.03, based upon an average weekly wage of $387.02. Defendants based [Nay's] initial average weekly wage on a Form 22 *Statement of Days Worked and Earnings of Employee* which reflected [Nay's] earnings of $5,805.25 over 15 weeks between [25 August 2015] through [7 December 2015]. On [19 December 2016] and [7 July 2017], Defendants filed a Form 62 *Notice of Reinstatement of Modification of Compensation* modifying [Nay's] average weekly wage from $387.02 to $111.64 and modified [Nay's] weekly [TTD] payments to $74.43 on [21 June 2017].

"Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) (citing *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)).

On 22 February 2019, the Commission filed its Opinion and Award concluding: Nay's average weekly wages cannot be calculated via Method 1 or Method 2 of N.C.G.S. § 97-2(5); calculation of Nay's average weekly wages via Method 3 does not yield results that are fair and just to both parties; Nay's average weekly wages cannot be calculated pursuant to Method 4; exceptional reasons exist in this case, so Nay's average weekly wages should be calculated based upon Method 5, concluding this is the only method which would accurately reflect Nay's expected earnings but for his work injury; using Method 5 produces results that are fair and just to both parties; and Nay's average weekly wages should be calculated pursuant to Method 5 by dividing Nay's gross wages of $5,805.25 by 52 weeks, which yields average weekly wages of $111.64 and a compensation rate of $74.43.

Nay filed Notice of Appeal to this Court on 27 February 2019.

ANALYSIS

The sole disputed issue on appeal is whether the Commission erred in calculating the average weekly wages according to Method 5, or whether Method 3 should have been used in calculating Nay's average weekly wages pursuant to N.C.G.S. § 97-2(5). *See* N.C. R. App. P. 28(b)(6) (2019).

On appeal, Nay challenges Findings of Fact 4 and 8 through 17. For the purposes of this appeal, we focus on two relevant challenged findings of fact—Findings of Fact 13 and 15.

> 13. Use of [Method 3] in this claim would produce an inflated *average weekly wage that is not fair* to Defendants because [Nay] was employed in a temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal. Thus, [Method 3] would not take into account that [Nay] was on a temporary assignment that in all likelihood would not have approached 52 weeks in duration.
>
> . . .
>
> 15. The [Commission] finds that exceptional reasons exist, and [Nay's] average weekly wage should be calculated pursuant to [Method 5]. . . . Thus, [Nay's] total earnings of $5,805.25 should be divided by 52 weeks, which yields an average weekly wage of $111.64 and compensation rate of $74.43. The figure of $111.64 is an *average weekly wage that is fair* and just to both sides in this claim. It takes into account that [Nay] was working a temporary assignment that most likely would have ended once he worked 520 hours, and it annualizes the total wages that [Nay] likely could have expected to earn in the assignment.

(Emphasis added).

Nay also challenges Conclusions of Law 3 through 7. For the purposes of this appeal, we focus on two relevant challenged conclusions of law—Conclusions of Law 3 and 5. In Conclusion of Law 3, the Commission concluded that "[f]or the reasons stated above, calculation of [Nay's] average weekly wage via [Method 3] *does not yield results that are fair* and just to both parties."[1] (Emphasis added). In the conclusion

1. The Commission's Opinion and Award included two Conclusions of Law 3. The Conclusion of Law 3 quoted above is the first Conclusion of Law 3 to appear in the Opinion

of law named Conclusion of Law 5, the Commission concluded that "[u]sing [Method 5] of calculating [Nay's] average weekly wage pursuant to N.C.[G.S.] § 97-2(5) *produces results that are fair* and just to both parties." (Emphasis added).

Methods 3 and 5 are the two methods under N.C.G.S. § 97-2(5) applicable to this case.

> . . .
>
> [Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> . . .
>
> [Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (2019). On appeal, both parties stipulate that Methods 1, 2, and 4 are inapplicable. Although Nay's brief challenges Finding of Fact 13, which addresses the application of Methods 1, 2, and 3, Finding of Fact 14, which addresses Method 4, and Finding of Fact 15, which addresses Method 5, we only address his challenge to those findings of fact relating to Methods 3 and 5 in light of the stipulation that Methods 1, 2, and 4 were inapplicable in this matter.

A. Standard of Review

"The determination of [a] plaintiff's average weekly wages requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (internal marks and citation omitted). "We therefore review the Commission's calculation of [Nay's] average weekly wages

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and Award. The second Conclusion of Law 3 states, "[d]ue to the lack of sufficient evidence of similarly situated employees, [Nay's] average weekly wage cannot be calculated pursuant to [Method 4] of [N.C.G.S. § 97-2(5).]"

de novo." *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 173, 767 S.E.2d 98, 102 (2014). Additionally,

> [o]ur review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and *whether the findings of fact justify the conclusions of law*. . . .
>
> Average weekly wages are determined by calculating the amount the injured worker would be earning but for his injury. The calculation is governed by N.C.G.S. § 97-2(5), which sets out five distinct methods for calculating an injured employee's average weekly wages. The five methods are ranked in order of preference, and each subsequent method can be applied *only if* the previous methods are inappropriate.

Id. at 173-74, 767 S.E.2d at 101-02 (emphasis added) (internal citations omitted) (internal marks omitted).

"[T]he calculation of an injured employee's average weekly wages is governed by N.C.[G.S.] § 97-2(5)." *Conyers v. New Hanover Cnty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008). "The dominant intent of [N.C.G.S. § 97-2(5)] is to obtain results that are fair and just to both employer and employee." *Id.* at 256, 654 S.E.2d at 748. In making this calculation, N.C.G.S. § 97-2(5) does "not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured." *McAninch v. Buncombe Cnty. Sch.*, 347 N.C. 126, 134, 489 S.E.2d 375, 380 (1997).

The Commission's Findings of Fact 13 and 15 are actually conclusions of law to the extent that they declared a particular method of calculating Nay's average weekly wages to be fair or unfair. The Commission's classification of its own determination as a finding or conclusion does not govern our analysis. *See Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 14, 613 S.E.2d 715, 724, *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005). Accordingly, we review de novo the Commission's declaration that a Method 3 calculation of Nay's average weekly wages under N.C.G.S. § 97-2(5) was unfair in Finding of Fact 13, and that a Method 5 calculation of Nay's average weekly wages under N.C.G.S. § 97-2(5) was fair in Finding of Fact 15. *See Tedder*, 238 N.C. App. at 173, 767 S.E.2d at 102.

B. Fairness

"Results fair and just, within the meaning of [N.C.G.S. § 97-2(5)], consist of such average weekly wages as will most nearly approximate

the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (internal marks omitted). We turn first to determine whether Method 3 was fair as applied in calculating Nay's average weekly wages. If we determine Method 3 to be fair, we need not consider Method 5.[2] *See Tedder*, 238 N.C. App. at 174, 767 S.E.2d at 102.

To be consistent with the rule for determining fairness as to average weekly wages from *Liles*, we must consider "the amount which [Nay] *would be earning* were it not for the injury, in the employment [of Cornerstone] in which he was working at the time of his injury." *Id.* Nay was earning $11.00 per hour at the time of his compensable back injury and would have continued earning $11.00 per hour but for the compensable back injury he suffered. *See id.* Nay was in the employ of Cornerstone at the time of his compensable back injury, and whether he would have later transitioned to FieldBuilders or another employer is irrelevant.

In considering whether a Method 3 calculation of Nay's average weekly wages would be fair, the lack of a definite employment end date for Nay with Cornerstone is important. Although the goal was for Nay to obtain full-time employment with FieldBuilders, this was not guaranteed, and did not occur. Calculating Nay's average weekly wages according to what he earned from Cornerstone over the number of weeks he worked for the staffing agency fairly approximates what he would have earned but for the injury. The fact that a calculation of Nay's average weekly wages according to Method 3 produces wages to Nay that exceed Cornerstone's typical long-term payments to employees does not make Method 3 unfair, despite Cornerstone's arguments to the contrary. Nay continued his relationship with Cornerstone after his injury and could have continued to earn money from Cornerstone indefinitely. Whether Method 5 could create a calculation of Nay's average weekly wages that is *more fair* than Method 3, such as by calculating Nay's chances of obtaining full-time employment with FieldBuilders or another client of Cornerstone, does not determine whether Method 3 is fair. Calculating Nay's average weekly wages according to Method 3 is fair under our caselaw, as Cornerstone was Nay's employer at the time of the injury, and Method 3 averages Nay's earnings over the course of his employment at

2. *See Wilkins v. Buckner*, 272 N.C. App. 696, 845 S.E.2d 207 (2020) (COA19-567) (unpublished). Although *Wilkins* "is an unpublished opinion and is not controlling legal authority, N.C. R. App. P. 30(e)(3), we find its reasoning persuasive and we hereby adopt it." *State v. Gardner*, 227 N.C. App. 364, 368, 742 S.E.2d 352, 355 (2013).

Cornerstone, not a hypothetical 52 week period. Regardless of whether Method 5 could be *more fair* than Method 3, Nay's average weekly wages calculated under Method 3 are fair.

This case is not like *Tedder*, where we determined a Method 3, and even a Method 5, calculation of the plaintiff's average weekly wages according to the amount earned divided by the number of weeks worked was unfair. *Tedder*, 238 N.C. App. at 175, 767 S.E.2d at 103. In *Tedder*, the plaintiff was hired "to fill in for one of its full-time delivery drivers who was scheduled to undergo surgery . . . [and] would be absent for seven weeks on medical leave." *Id.* at 172, 767 S.E.2d at 100. After one week on the job earning $625.00 per week, the plaintiff suffered a compensable injury. *Id.* at 172, 767 S.E.2d at 101. In determining that a Method 3 calculation was unfair, we emphasized that the plaintiff "would have earned that $625[.00] wage for no more than seven weeks, until his temporary job ended." *Id.* at 175, 767 S.E.2d at 103. Here, however, Nay's employment relationship with Cornerstone, like most at-will employment in this State, did not have a definite, specified end date, whereas the plaintiff's employment period in *Tedder* was definite in light of being hired to work for the defendant temporarily for a specified, limited period of seven weeks. *See id.* at 172, 767 S.E.2d at 101. Regardless of whether Nay or Cornerstone anticipated Nay would be hired by FieldBuilders, such a hire was not definite or guaranteed.

CONCLUSION

In our de novo review of the Record, we determine that a calculation of Nay's average weekly wages under Method 3 of N.C.G.S. § 97-2(5) would be fair and just—appropriate under *Tedder* and the definitions from our caselaw. Accordingly, the Commission erred in Conclusions of Law 3 and 5 in concluding that Method 3 was unfair and reaching Method 5 to calculate Nay's average weekly wages. "We therefore reverse the [22 February 2019 Opinion and Award] of the Full Commission and remand for entry of an Award in accordance with this opinion." *Conyers*, 188 N.C. App. at 261, 654 S.E.2d at 752.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in the result only.

STATE v. JENKINS

[273 N.C. App. 145 (2020)]

STATE OF NORTH CAROLINA
v.
TABITHA RENEE JENKINS, DEFENDANT

No. COA19-944

Filed 18 August 2020

1. Appeal and Error—nonjurisdictional defect—substantial or gross—notice of appeal—no proof of service

Defendant's appeal from an order revoking her probation was not dismissed, where her failure to include proof of service upon the State in her notice of appeal—in violation of Appellate Rule 4(a)(2)—did not deprive the Court of Appeals of jurisdiction to review the merits, did not frustrate the adversarial process (the State was informed of defendant's appeal and was able to timely respond), and was neither substantial nor gross under Appellate Rules 25 and 34.

2. Constitutional Law—right to counsel—knowing, intelligent, and voluntary waiver—statutory inquiry

At a probation revocation hearing, defendant's waiver of counsel was knowing, intelligent, and voluntary where the trial court adequately conducted the inquiry required under N.C.G.S. § 15A-1242 and defendant subsequently executed a written waiver of counsel form. Notably, defendant's waiver was upheld on appeal where the trial court's inquiry strongly resembled the inquiry given in another case that satisfied the statutory mandate in section 15A-1242.

Appeal by Defendant from judgment entered 13 May 2019 by Judge Walter H. Godwin, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State.

Edward Eldred for defendant-appellant.

MURPHY, Judge.

Even when objected to, a defendant's failure to indicate service on the State in violation of N.C. R. App. P. 4(a)(2) does not require dismissal of the appeal as it does not deprive the court of jurisdiction. Despite Defendant's failure to indicate service on the State with notice of appeal, we have jurisdiction and may reach the merits.

A defendant's waiver of counsel must comply with N.C.G.S. § 15A-1242 and be knowing, intelligent, and voluntary. Where a trial court informs a defendant of the right of assistance of counsel and ensures the defendant understands the consequences of a decision to proceed pro se, with a supporting written waiver of counsel, the waiver of counsel is considered knowing, intelligent, and voluntary. Where a trial court's inquiry into a defendant's waiver of counsel is substantially similar to the inquiry in *Whitfield*, we must uphold the waiver. *State v. Whitfield*, 170 N.C. App. 618, 621, 613 S.E.2d 289, 291 (2005). Here, we find the trial court's inquiry to be substantially similar to the inquiry in *Whitfield*, and therefore it satisfies the statutory mandate. We affirm.

BACKGROUND

On 21 February 2017, Defendant, Tabitha Jenkins, pleaded guilty to second-degree kidnapping and simple assault. The trial court entered a consolidated judgment imposing a suspended sentence of 23 to 40 months and placing Defendant on supervised probation for 36 months. On 15 March 2019, a probation officer filed a violation report alleging Defendant absconded "by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer."

On 13 May 2019, Defendant appeared for her probation revocation hearing at which time she had the following exchange with the trial court:

> [STATE]: Tabitha Jenkins. She needs to be advised, Your Honor.
>
> THE COURT: All right, Miss Jenkins, you can come around please, ma'am.
>
> Miss Jenkins, you're up here for an alleged probation violation. If it's found that your violation is a willful one, you could be required to serve the suspended sentence that was heretofore given to you which is not less than 23, no more than 40 months in the Department of Corrections. You got the right to remain silent. Anything you say can and will be used against you. You got the right to represent yourself, hire an attorney of your own choosing and if you feel you cannot hire an attorney, I'll

review an affidavit to determine if you so qualify.

What's your desire about a lawyer?

DEFENDANT: I guess I can for myself.

THE COURT: All right. Sign the waiver please, ma'am.

(Defendant executed waiver.)

Defendant executed a written waiver of counsel form, AOC-CR-227, and the trial court then heard testimony regarding the probation violation. Defendant admitted violating her probation and explained that she was unable to make appointments with the probation officer because of "problems going on at home . . . ." The trial court found Defendant had violated the conditions of her probation willfully and without valid excuse. The trial court revoked Defendant's probation and activated her underlying sentence on the basis that she absconded supervision.

Defendant, pro se, timely filed a handwritten note indicating a desire to appeal, which did not include proof of service upon the State. The State argues the appeal is subject to dismissal for failure to comply with the requirements for written notice of appeal under Rule 4(a)(2). N.C. R. App. P. 4 (2019). Defendant argues a violation of "[Rule 4(a)(2)] does not deprive the Court of jurisdiction," and does not warrant dismissal of the appeal. N.C. R. App. P. 4(a)(2) (2019).

As to the merits, Defendant argues that her exchange with the trial court was insufficient to constitute a knowing, voluntary, intelligent waiver of her right to counsel and asserts that she did not understand or appreciate the consequences of waiving counsel or the nature of the charges and proceedings, as required by N.C.G.S. § 15A-1242. The State argues the exchange was sufficient and notes the similarity to *State v. Whitfield* where we found a similar exchange to be sufficient under N.C.G.S. § 15A-1242. *Whitfield*, 170 N.C. App. at 622, 613 S.E.2d at 292.

ANALYSIS

A. Jurisdiction

[1] " '[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930)). "Compliance with the rules, therefore, is mandatory." *Id.* at 194, 657 S.E.2d at 362. However, "noncompliance with the appellate

rules does not, ipso facto, mandate dismissal of an appeal. Whether and how a court may excuse noncompliance with the rules depends on the nature of the default." *Id.* at 194, 657 S.E.2d at 363 (internal citation omitted). "[D]efault under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of *nonjurisdictional requirements*." *Id.* (emphasis added).

"[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198-99, 657 S.E.2d at 365-66; *see, e.g.*, *Hicks v. Kenan*, 139 N.C. 337, 338, 51 S.E. 941, 941 (1905) (observing our Supreme Court's preference to hear merits of the appeal rather than dismiss for noncompliance with the rules). Only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate, as "every violation of the rules does not require dismissal of the appeal or the issue." *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007).

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. . . . [W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Dogwood, 362 N.C. at 200-01, 657 S.E.2d at 366-67.

> To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2019).

The State contends that "Defendant's handwritten note does [sic] comply with the requirements for written notice of appeal under Rule 4. The appeal is subject to dismissal on this basis." The State relies on *State v. McCoy*, which dismissed "[the] defendant's appeal for failure to give notice of appeal within fourteen days from the entry of the order holding him in contempt as required by Rule 4(a)(2)[.]" 171 N.C. App. 636, 637, 615 S.E.2d 319, 320 (2005). Here, unlike *McCoy*, Defendant's notice of appeal was timely, but failed to include proof of service.

Defendant relies on *State v. Golder* to assert that lack of service on the State, while in violation of Rule 4(a)(2), does not deprive us of jurisdiction. In *Golder*, we held that "the State waived the required service of [the d]efendant's notice by participating in [the] appeal *without objection*." *State v. Golder*, 257 N.C. App. 803, 806, 809 S.E.2d 502, 505 (2018) (emphasis added), *aff'd as modified by* 374 N.C. 238, 839 S.E.2d 782 (2020). Here, the State objected and requests dismissal. However, "[i]t is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal." *Id.* at 804, 809 S.E.2d at 504 (citing *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010)).

In *Lee v. Winget Rd., LLC*, we addressed a Rule 3[1] violation where appellees argued for dismissal of the appeal because appellants failed to serve the non-appealing plaintiffs and the previously dismissed defendants.

> As plaintiff-appellants have failed to comply with Rule 3, we must now consider whether the appeal must be dismissed pursuant to [*Dogwood*]. If the failure to comply with Rule 3 created a jurisdictional default[,] we would be required to dismiss the appeal. In fact, *Dogwood* noted lack of notice of appeal in the record or failure to give timely notice of appeal as examples of jurisdictional defects. However, *Dogwood* did not address the situation we have here, where a notice of appeal is properly and timely filed, but not served upon all parties. Pursuant to *Hale* . . . we find that this violation of Rule 3 is a nonjurisdictional defect.
>
> *Dogwood* states that a nonjurisdictional failure to comply with appellate rules normally should not lead to

1. Rule 3 is the civil equivalent to Rule 4, and the rationale in *Lee* is applicable to our criminal jurisprudence as well. *See Golder*, 257 N.C. App. at 804, 809 S.E.2d at 504 (applying *Lee* to a Rule 4 situation); *see also* N.C. R. App. P. 3 (2019); N.C. R. App. P. 4 (2019).

> dismissal of the appeal. Neither dismissal nor other sanctions under North Carolina Rules of Appellate Procedure 25 or 34 should be considered unless the noncompliance is a substantial failure to comply with the Rules or a gross violation of the Rules. This Court is required to make a fact-specific inquiry into the particular circumstances of each case mindful of the need to enforce the rules as uniformly as possible. Dismissal is appropriate only for the most egregious instances of nonjurisdictional default. To determine the severity of the rule violation, this Court is to consider: (1) whether and to what extent the noncompliance impairs the court's task of review, (2) whether and to what extent review on the merits would frustrate the adversarial process, and (3) the court may also consider the number of rules violated.

Lee v. Winget Rd., LLC, 204 N.C. App. 96, 102, 693 S.E.2d 684, 689-90 (2010) (emphasis omitted) (citations omitted) (internal marks omitted) (internal alterations omitted). In *Lee*, the noncompliance with Rule 3 impaired our review, and we held "review on the merits would frustrate the adversarial process[,] . . .[b]ecause two of the parties to [that] case were never informed of the fact that there was an appeal which affect[ed] their interests, [and we] ha[d] no way of knowing the positions [those] parties would have taken in [that] appeal." *Id.* at 102-03, 693 S.E.2d at 690.

Applying *Lee* and *Golder*, Defendant's failure to indicate service on the State with notice of appeal is a nonjurisdictional defect in violation of Rule 4(a)(2). Unlike in *Lee*, our review is not impaired by Defendant's noncompliance with Rule 4(a)(2). "A notice of appeal is intended to let all parties to a case know that an appeal has been filed by at least one party." *Lee*, 204 N.C. App. at 102-03, 693 S.E.2d at 690. Here, the State was informed of the appeal and was able to timely respond. We know the position of both parties on appeal, and Defendant's violation of Rule 4(a)(2) has not frustrated the adversarial process.

Defendant's failure to indicate service of notice of appeal on the State is a nonjurisdictional defect, and it is neither substantial nor gross under Rules 25 and 34. We proceed to the merits.

B. Waiver of Counsel

[2] "Prior cases addressing waiver of counsel under N.C.[G.S.] § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*." *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011).

A defendant "is entitled to be represented by counsel" during a probation revocation hearing. N.C.G.S. § 15A-1345(e) (2019). "Implicit in [a] defendant's constitutional right to counsel is the right to refuse the assistance of counsel" and proceed pro se. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981).

> A defendant may be permitted . . . to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant: (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) Understands and appreciates the consequences of this decision; and (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (2019). "The provisions of N.C.[G.S.] § 15A-1242 are mandatory where the defendant requests to proceed *pro se*." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). Before a defendant in a probation revocation hearing is allowed to represent herself, the trial court must comply with the requirements of N.C.G.S. § 15A-1242. *See id.* at 316, 569 S.E.2d at 675 (holding the trial court failed to determine whether the defendant's waiver of counsel was knowing, intelligent, and voluntary by omitting the second and third inquiries required by N.C.G.S. § 15A-1242 at a probation revocation hearing).

A written waiver is important evidence to show a defendant wishes to act as her own attorney. "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, "[a] written waiver is something in addition to the requirements of N.C.[G.S.] § 15A-1242, not an alternative to it." *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675 (internal marks omitted).

Defendant argues it was not clear her waiver was "intelligent" and the trial court's inquiry "did not ensure that [she] understood and appreciated 'the consequences' of a decision to proceed pro se." Defendant further argues "[n]o part of the trial court's inquiry is aimed at the inquiry's second prong." Finally, Defendant argues she did not understand the nature of the proceedings.

The State argues *Whitfield* is controlling, where the defendant argued the trial court failed to comply with N.C.G.S. § 15A-1242 regarding

whether the waiver of counsel was knowing, intelligent, and voluntary. *Whitfield*, 170 N.C. App. at 621, 613 S.E.2d at 291. In *Whitfield*, we found the following inquiry sufficient:

> THE COURT: All right. Ms. Whitfield, do you understand that you have possibly 11 to 15 months hanging over your head?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: You understand that?
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: If your probation is revoked, you may very well have your sentence activated, have to serve that time. You're entitled to have an attorney to represent you. Are you going to hire an attorney to represent you, represent yourself, or ask for a court appointed attorney[?] Of those three choices, which choice do you make?
>
> DEFENDANT: Represent myself.
>
> THE COURT: Put your left hand on the Bible and raise your right hand.
>
> (The Defendant was sworn by the Court)
>
> THE COURT: That is what you want to do, so help you God?
>
> DEFENDANT: Yes, ma'am.

Id. We held the trial court, and the preceding inquiry, satisfied all three requirements as set forth in N.C.G.S. § 15A-1242.

> [The trial court] informed [the] defendant of the right of assistance of counsel, including the right to a court-appointed attorney if [the] defendant was entitled to one. The trial [court] also made sure that [the] defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve eleven to fifteen months in prison. Cognizant of these facts, [the] defendant verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel. Later, [the]

> defendant signed a document indicating that she waived her right to counsel and wanted to appear on her own behalf. Therefore, we have no doubt that [the] defendant intended to and did in fact waive her right to counsel.

Id.

Based on our prior holding in *Whitfield*, where we found a similar inquiry adequate under N.C.G.S § 15A-1242, here we hold the inquiry of Defendant to satisfy the statutory mandate.

First, the trial court informed Defendant of her right to assistance of counsel, including the right to a court-appointed attorney if entitled to one by stating, "[y]ou got the right to represent yourself, hire an attorney of your own choosing and if you feel you cannot hire an attorney, I'll review an affidavit to determine if you so qualify." The trial court in *Whitfield* informed the defendant, "[y]ou're entitled to have an attorney to represent you. Are you going to hire an attorney to represent you, represent yourself, or ask for a court appointed attorney[?] Of those three choices, which choice do you make?" *Whitfield*, 170 N.C. App. at 621, 613 S.E.2d at 291. Here, the content of the trial court's statement is substantially similar to the trial court's statement in *Whitfield* and is therefore sufficient to meet the first requirement of N.C.G.S. § 15A-1242.

Second, the trial court ensured Defendant understood her probation could be revoked, her sentence could be activated, and she could serve an active sentence. The trial court stated, "you're up here for an alleged probation violation. If it's found that your violation is a willful one, you could be required to serve the suspended sentence that was heretofore given to you which is not less than 23, no more than 40 months in the Department of Corrections." The trial court in *Whitfield* stated, "[a]ll right, Ms. Whitfield, do you understand that you have possibly 11 to 15 months hanging over your head? . . . You understand that?" *Id.* The defendant responded, "[y]es ma'am" to each question. *Id.* This inquiry was sufficient to ensure that the defendant understood the consequences of her decision. *Id.* The inquiry conducted here is just as clear as the inquiry in *Whitfield*. The trial court clearly stated why Defendant was in court, and the possible sentence length if it was found that Defendant had in fact violated her probation. Not only did Defendant choose to represent herself after hearing the range of her potential sentence should the probation be revoked, Defendant also completed the written waiver of counsel form.

Finally, we hold that Defendant comprehended the nature of the charges, proceedings, and the range of permissible punishments. The

trial court in *Whitfield* held that, "[c]ognizant of [the] facts, [the] defendant verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel." *Id*. On appeal, Whitfield argued that "she was confused about her right to counsel," as she raised questions "[w]hen the prosecutor asked [her] to admit or deny the charges." *Id*. However, the court found that since "[the] defendant's statement came *after* she waived her right to counsel verbally[] . . . [the] defendant was aware of the consequences of representing herself and made her decision without hesitation." *Id*. at 622, 613 S.E.2d at 291-92.

Here, when presented with the information about her sentence and the potential length of that sentence, as well as her right to counsel, Defendant was asked, "[w]hat's your desire about a lawyer?" Defendant responded, "I guess I can for myself[,]" and executed the written waiver of counsel form. Defendant answered all of the trial court's questions clearly and without hesitation, even though she had been informed that she had "the right to remain silent." Defendant was aware of the charges, proceedings, and the range of permissible punishments, just like the defendant in *Whitfield*. Defendant then verbally gave a knowing, intelligent, and voluntary waiver of her right to counsel. Defendant expressed her comprehension of the nature of the charges, proceedings, and the range of permissible punishments when she chose to waive her right to counsel. The trial court conducted an adequate inquiry and Defendant's waiver of counsel was knowing, intelligent, and voluntary under N.C.G.S. § 15A-1242.

CONCLUSION

Defendant's waiver of counsel was knowing, intelligent, and voluntary, and the trial court did not err by allowing Defendant to proceed pro se.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE v. LEMUS

[273 N.C. App. 155 (2020)]

STATE OF NORTH CAROLINA
v.
DAVID LEMUS, DEFENDANT, AND 1ST ATLANTIC SURETY COMPANY, SURETY

No. COA19-876

Filed 18 August 2020

Bail and Pretrial Release—bond forfeiture—"release" as statutory precondition—undocumented immigrant—detained and deported after posting bond

After the trial court conditioned the pretrial release of an undocumented immigrant (defendant) charged with a felony on the execution of a $100,000 secured bond, the court erred by entering a bond forfeiture and later declining to set it aside where, although defendant and his surety posted the bond, the State continued to detain him under an agreement with federal immigration authorities until federal agents took custody of him and deported him, causing him to miss his state criminal trial. The bond forfeiture statutes, by their plain terms, apply only to a "defendant who was released" from the State's custody, and therefore the court had no statutory authority to enter a forfeiture in defendant's case.

Appeal by surety from order entered 11 June 2019 by Judge Becky Holt in Granville County Superior Court. Heard in the Court of Appeals 17 March 2020.

Tharrington Smith, LLP, by Stephen G. Rawson and Colin Shive, for appellee Granville County Board of Education.

Ragsdale Liggett, PLLC, by Amie C. Sivon, Mary M. Webb, and Kimberly N. Dixon; and Hill Law, PLLC, by M. Brad Hill, for surety-appellant.

DIETZ, Judge.

In 2018, David Lemus was charged with a felony and jailed pending trial. The trial court conditioned Lemus's pretrial release on the execution of a $100,000 secured bond. Two weeks later, Lemus and his surety, 1st Atlantic Surety Company, executed and filed a $100,000 bond, at which point the law required the State to immediately "effect the release" of Lemus.

That did not happen. Instead, the State continued to detain Lemus under an agreement with federal immigration authorities until the federal government arrived, took custody of Lemus, and ultimately deported him to Mexico.

After Lemus failed to appear at his state criminal trial (because the State chose to hand him over the federal government, which then deported him), the trial court forfeited Lemus's $100,000 bond. Lemus's surety moved for relief from the forfeiture judgment, arguing that the bond forfeiture statutes apply only if the "defendant was released" and Lemus was never released. The trial court rejected that petition for relief.

We reverse. As explained below, under the plain language of the bail statutes, the trial court cannot enter a bond forfeiture unless, once the defendant has satisfied the conditions placed upon his release and there is no other basis in state law to retain custody of the defendant, the State sets the defendant free. This plain reading of the statute also enables the bond forfeiture laws to serve their intended purpose—to ensure that defendants report to court for their scheduled criminal proceedings.

Here, the State knew Lemus would not be at his criminal trial because the State handed him over for deportation. The federal government even offered to coordinate with the State so that Lemus could be returned for trial, but the State declined.

Interpreting the bail statutes to permit forfeiture in these circumstances conflicts with those statutes' plain language, does nothing to serve their statutory purpose, and ultimately harms undocumented immigrants and their families—some of the poorest, most vulnerable people in our society—for absolutely no reason.

Accordingly, we hold that Lemus was never "released" as that term is used in the bail statutes, and the trial court had no statutory authority to enter a forfeiture. The trial court therefore abused its discretion when it declined to grant relief from that forfeiture. We reverse the trial court's order and remand with instructions to grant relief from the final forfeiture judgment.

Facts and Procedural History

In April 2018, law enforcement officers arrested David Lemus for a felony assault charge. On 14 April 2018, the trial court conditioned Lemus's pretrial release upon execution of a $100,000 secured bond. On 25 April 2018, Lemus and his surety, 1st Atlantic Surety Company, posted a $100,000 secured bond.

After learning that Lemus satisfied the conditions for release by posting that secured bond, the State chose not to release him. Instead, the State held Lemus for around twenty-four hours, until agents from U.S. Immigration and Customs Enforcement arrived and deputies from the Granville County Sheriff's Office handed over Lemus directly into ICE custody. On 18 May 2018, ICE sent a letter to the Granville County Clerk of Superior Court, informing the State that ICE intended to enforce an order of removal against Lemus and deport him from the country. The letter provided contact information so that, if the State still has an interest in prosecuting Lemus for state crimes, "appropriate arrangements can be made for him or her to be returned to your jurisdiction." The State did not request that Lemus be returned to North Carolina for trial.

Lemus remained in federal custody for a month until, on 26 May 2018, the federal government deported Lemus to his home country of Mexico. As a result, Lemus failed to appear in Granville County Superior Court on 23 July 2018 for his scheduled criminal trial.

The day after Lemus missed his court date, the trial court entered a bond forfeiture order in favor of the State and against Lemus and his surety. In some early procedural maneuvering, Lemus's surety moved to set aside that forfeiture. The State did not appear in that proceeding, but the Granville County Board of Education, represented by a private law firm, entered an appearance and opposed the surety's motion.

The surety later sought to withdraw that motion, and the school board moved for sanctions against the surety. The trial court permitted the surety to withdraw its motion and denied the school board's motion for sanctions. The school board appealed the denial of its sanctions motion to this Court, but the Court rejected the board's arguments and affirmed the trial court's order. *State v. Lemus*, __ N.C. App. __, 838 S.E.2d 204 (2020) (unpublished).

Then, on 15 March 2019, Lemus's surety filed a petition for remission of forfeiture after judgment under N.C. Gen. Stat. § 15A-544.8(b)(2), arguing that Lemus was never released but instead handed over directly to federal immigration agents. Therefore, the surety asserted, there were "extraordinary circumstances" warranting relief from the bond forfeiture. The school board once again appeared and opposed the petition and also moved for sanctions. The trial court denied the surety's petition, and the surety timely appealed.

Analysis

The surety asserts a number of arguments in this case but we need only address the statutory argument, which can be summarized as this: The bond forfeiture statutes apply only to "a defendant who was released" under those statutes. Lemus was never released. Therefore, the trial court had no authority to conduct a forfeiture proceeding and should have granted the petition to set aside the forfeiture for that reason.

We agree. The statutory provisions governing this issue all are codified in the same section of our General Statutes, in an article titled "Bail." *See* N.C. Gen. Stat. § 15A-531 *et seq*. These provisions are further subdivided into two parts, with the titles "General Provisions" and "Bail Bond Forfeiture."

The first part governs when and under what conditions a defendant charged with a crime and in State custody may be given "pretrial release." *See*, *e.g.*, N.C. Gen. Stat. §§ 15A-533, 15A-534. For defendants like Lemus, having conditions of pretrial release determined is mandatory, not optional: "A defendant charged with a noncapital offense *must* have conditions of pretrial release determined." *Id.* § 15A-533(b) (emphasis added). Similarly, once the conditions of this release are satisfied, the State must immediately release the defendant. This is, again, mandatory, not optional:

> [A]ny judicial official *must* effect the release of that person upon satisfying himself that the conditions of release have been met. In the absence of a judicial official, any law-enforcement officer or custodial official having the person in custody *must* effect the release upon satisfying himself that the conditions of release have been met . . . . Satisfying oneself whether conditions of release are met includes determining if sureties are sufficiently solvent to meet the bond obligation . . . .

Id. § 15A-537(a) (emphasis added).

Unlike this first part of the bail statutes, which addresses many different means by which a defendant can be released before trial, the second part of these statutes deals exclusively with release under a bail bond and the forfeiture of that bond. *See id.* § 15A-544.1 *et seq*. It contains a series of procedural requirements to forfeit a bail bond, to request that a bond forfeiture be set aside, to enter a final judgment of forfeiture, and to obtain relief from a final judgment of forfeiture. *Id.* But, importantly, all of these forfeiture provisions turn on an initial precondition established in the statute:

> (a) If a defendant *who was released* under Part 1 of this Article 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.

Id. § 15A-544.3(a) (emphasis added).

This case thus presents us with a straightforward but critical question of statutory interpretation: what is the meaning of the term "released" in the bail statutes? Our task in statutory construction is to "determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.* But, if the statutory language is "clear and unambiguous," then the statutory analysis ends and the court gives the words in the statute "their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005).

We therefore begin with the plain language of the bail statutes and, in particular, the meaning of the words "release" and "released" as they appear throughout these statutes. There is a definitional section at the beginning of this series of statutes, but it does not contain a definition of either "release" or "released." N.C. Gen. Stat. § 15A-531. Those words therefore "must be given their common and ordinary meaning." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019).

The word "release" is defined as "[t]o set free from confinement, restraint, or bondage" or "[a]n authoritative discharge, as from an obligation or from prison." *Release*, *Webster's II New College Dictionary* (1995). Similarly, the term bail itself is understood as meaning a security given for the appearance of the accused to obtain his release from confinement. 8A Am. Jur. 2d *Bail & Recognizance* § 1 (1997). Thus, the ordinary understanding of the word release in this context is to be physically set free from custody and confinement.

Although this case presents a question of first impression, this plain-language interpretation implicitly has been adopted in cases from this Court and our Supreme Court that addressed the responsibilities of bail agents. Those cases emphasize that release occurs when the State hands over custody of the defendant to the bail agent and that, upon posting the bond, the physical custody of the defendant transfers from the State to the bail agent. *See*, *e.g.*, *State v. Mathis*, 349 N.C. 503, 509, 509 S.E.2d

155, 159 (1998); *State v. Vikre*, 86 N.C. App. 196, 199–200, 356 S.E.2d 802, 805 (1987).

In addition, this plain-language interpretation explicitly has been adopted by courts in other jurisdictions confronted with the issue raised in this case. For example, the Colorado Court of Appeals held that a bond forfeiture was invalid because "the defendant was not released into the legal custody of his surety. The record shows that he was transferred directly from the Adams County Sheriff's Department into the custody of the INS [the U.S. Immigration and Naturalization Service]." *People v. Gonzales*, 745 P.2d 263, 264 (Colo. App. 1987). Thus, the court reasoned, "because defendant was not released into the custody of his sureties, he was not released within the meaning of § 16-4-109(2)," the Colorado statute governing the pretrial "release" of a defendant who posts a bond. *Id.* at 264–65.

We agree with the Colorado Court of Appeals' reasoning and interpretation of the word "release." Here, when Lemus and his surety satisfied the conditions placed upon his release, and there was no other basis for the State to retain custody of Lemus, the State was required to immediately effect his release. N.C. Gen. Stat. §§ 15A-534, 15A-537. That didn't happen. Instead, despite Lemus having posted the required bond, the State continued to detain him, under an agreement with federal immigration authorities, until federal agents could arrive. At that point, the State transferred Lemus directly from State custody to federal custody. At no point was Lemus set free, and thus, he was never "released" from the State's custody.

The school board responds to this argument in two ways: with procedural arguments and with policy ones. First, the school board argues that Section 15A-544.5 of the bail forfeiture statutes provides that there "shall be no relief from a forfeiture except as provided in this section" and then lists a series of enumerated grounds for relief. *Id.* § 15A-544.5(a)–(b). Similarly, the school board argues that Section 15A-544.8, which governs relief from a final judgment of forfeiture, contains an even narrower list of enumerated grounds for relief. *Id.* § 15A-544.8(a)–(b). Thus, the school board argues, the trial court properly denied the surety's request for relief because none of the enumerated grounds for relief under either statute apply in this case.

We reject this argument. All of the enumerated grounds for either setting aside a forfeiture or granting relief from a forfeiture judgment—such as the underlying charges being dropped, or the defendant being arrested and jailed somewhere else, or the surety never receiving notice

of the forfeiture—presuppose that the trial court had statutory authority to enter a valid forfeiture to begin with. *Id.* §§ 15A-544.5(b)(1)–(7), 15A-544.8(b). Here, the trial court did not have that authority. The statutory authority to forfeit a bail bond exists only for a defendant "who was released" and, as explained above, Lemus was never released. *Id.* § 15A-544.3(a). Thus, the surety properly could move the trial court for relief from the forfeiture judgment on the ground that the court had no legal authority to enter it at the outset.

The school board also makes a series of policy arguments against this interpretation. But in doing so, the board inadvertently underscores why its arguments fail: although the school board indeed makes "policy" arguments, those arguments have nothing to do with the policy underlying bail bond forfeiture, which furthers the State's interest in ensuring that criminal defendants released on bond appear at their criminal trials.

For example, much of the school board's policy arguments focus on framing Lemus's surety as a bad actor, asserting that "the burden should not be on the State to assist the surety in its own commercial enterprise." But this argument is a giant non sequitur. The surety's actions have nothing to do with whether the State complied with the necessary precondition of a bond forfeiture—the obligation to release the defendant.

The school board also contends that this Court's interpretation of the word "release" would make it difficult, or impossible, for the State to cooperate with other law enforcement agencies or governments seeking custody of a defendant. This is simply wrong. Nothing prevents the State from alerting federal agencies, or law enforcement in other states, or anyone else, of the time and place at which the State will release a defendant who has satisfied the conditions of release. Even if a defendant released on bond walks out of a county jail and is immediately taken into custody by federal immigration authorities, that defendant was "released" under our State's bail statutes because he was set free from State custody.

But in this scenario, many other people can be waiting outside that county jail as well—most importantly, the defendant's family or the bail agent. This, in turn, permits the bail statutes to function as intended. The defendant's family or bail agent will know that some other government or agency detained the defendant for some other reason. The family or bail agent then can take various steps established in the statutes to keep track of the defendant's whereabouts and status and, if necessary, seek to change the conditions of pretrial release or terminate the bond obligation altogether. *See generally* N.C. Gen. Stat. §§ 15A-534, 15A-538,

15A-544.5. The State deprived Lemus, his family, and the surety of this opportunity by continuing to detain Lemus after he posted the bond and then handing him over to federal agents without first releasing him.

The school board next argues that this Court's interpretation of the statute would make it harder for undocumented immigrants to be released on bond. Again, this is simply wrong. The State is required by law to set reasonable conditions of pretrial release for every criminal defendant. *Id.* § 15A-533. If those conditions are satisfied, the State must release the defendant. Our opinion has no impact on this mandatory statutory process.

Finally, we note that our interpretation is fully consistent with the actual policy underlying our bond statutes—to protect the State's interest in releasing criminal defendants before trial while ensuring that those defendants return to court for their criminal proceedings. *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804; *State v. Robinson*, 145 N.C. App. 658, 661, 551 S.E.2d 460, 462 (2001). Here, the State had no interest in Lemus appearing at his criminal trial in North Carolina anymore. We know this because it was *the State* that chose to hand Lemus over to federal immigration authorities so that he could be permanently deported from the United States, making it impossible for him to appear at a state criminal trial. And, even after those federal authorities offered the State an opportunity to bring Lemus back to North Carolina for trial, the State declined to take it.

Simply put, this was never a case in which the $100,000 secured bond served any purpose other than to exploit Lemus and his family. After all, as the parties acknowledged at oral argument, these bail bonds require a large up-front premium by the defendant (or, frequently, the defendant's family). These bail bonds also often require that the defendant or family members offer up other property as collateral or agree to be liable for the bond amount if it is forfeited. So in a case like this one, where the State turned the defendant over to the federal government for deportation with no intention of actually trying the defendant for the alleged crimes, the bail bond functions only as a tax on undocumented immigrants and their families—often among the poorest and most vulnerable people in our State. It is exceedingly rare for this Court to ignore a statute's plain language, even if we felt it would produce a better outcome. We certainly will not do so here, where departure from the plain language victimizes some of the most marginalized people of our State.

In sum, we hold that the bond forfeiture statutes, by their plain terms, apply only to "a defendant who was released." N.C. Gen. Stat § 15A-544.3. Lemus satisfied the conditions set by the trial court for his

release, but he was not released. Instead, the State continued to detain him, despite the bond he posted, until he could be transferred to the custody of federal immigration authorities for deportation. Because the State never released Lemus, the trial court erred by entering a bond forfeiture and further erred by declining to set that forfeiture aside. We therefore reverse the trial court's order.

Conclusion

For the reasons stated above, we reverse the trial court's order and remand with instructions to grant relief from the final forfeiture judgment.

REVERSED AND REMANDED.

Judges STROUD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JOHNNY LINDQUIST

No. COA19-368

Filed 18 August 2020

Satellite-Based Monitoring—lifetime—efficacy—basis of trial court's order—unclear

An order subjecting defendant to lifetime satellite-based monitoring was vacated and remanded for clarification where it was unclear which of two "California studies" the trial court relied upon in determining the efficacy of satellite-based monitoring (one "California study" was admitted into evidence and a different one was referenced in the order).

Appeal by defendant from order entered 8 November 2018 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

ZACHARY, Judge.

Defendant Johnny Lindquist appeals from the order subjecting him to lifetime satellite-based monitoring upon his release from imprisonment. After careful review, we vacate the satellite-based monitoring order and remand to the trial court.

Background

In 2014, Defendant was convicted of taking indecent liberties with a child. While on parole for that offense, on 1 November 2018, Defendant pleaded guilty to second-degree forcible rape and second-degree forcible sex offense before the Honorable Claire V. Hill in Cumberland County Superior Court.

After entering judgment upon Defendant's guilty plea, the trial court held a satellite-based monitoring hearing. The trial court considered as evidence the factual basis of Defendant's plea and the evidence presented by the State at the satellite-based monitoring hearing. The State presented the testimony of Scott Payne and three exhibits: (1) a study concerning the effectiveness of GPS monitoring of sex offenders, referred to as "the California Study"; (2) a certified copy of Defendant's plea transcript, indicating that in 2014 he pleaded guilty to the charge of taking indecent liberties with a child; and (3) Defendant's STATIC-99 assessment. On 8 November 2018, after considering the evidence presented and the arguments of counsel, the trial court entered its order subjecting Defendant to lifetime satellite-based monitoring upon his release from prison. Defendant timely filed written notice of appeal from the satellite-based monitoring order.

Discussion

Our General Statutes provide for a " 'sex offender monitoring program that uses a continuous satellite-based monitoring system designed to monitor' the locations of individuals who have been convicted of certain sex offenses." *State v. Gordon* ("*Gordon II*"), 270 N.C. App. 468, 469, 840 S.E.2d 907, 909, *temp. stay allowed*, 374 N.C. 430, 839 S.E.2d 351 (2020) (quoting N.C. Gen. Stat. § 14-208.40(a) (2019)). "The present satellite-based monitoring program provides 'time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.' " *Id.* (quoting N.C. Gen. Stat. § 14-208.40(c)(1)).

"The United States Supreme Court has determined that the monitoring of an individual under North Carolina's [satellite-based monitoring]

program constitutes a continuous warrantless search of that individual." *State v. Gambrell*, 265 N.C. App. 641, 642, 828 S.E.2d 749, 750 (2019) (citing *Grady v. North Carolina* ("*Grady I*"), 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015)). As a warrantless search, any order subjecting an individual to satellite-based monitoring is subject to analysis under the Fourth Amendment to the United States Constitution. "[T]he trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program." *Gordon II*, 270 N.C. App. at 469, 840 S.E.2d at 909 (citing *Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462).

In *State v. Grady* ("*Grady III*"), 372 N.C. 509, 831 S.E.2d 542 (2019), our Supreme Court conducted the balancing test prescribed by the United States Supreme Court:

> The balancing analysis that we are called upon to conduct here requires us to weigh the extent of the intrusion upon legitimate Fourth Amendment interests against the extent to which the [satellite-based monitoring] program sufficiently promotes legitimate governmental interests to justify the search, thus rendering it reasonable under the Fourth Amendment. In this aspect of the balancing test, we consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it.

Grady III, 372 N.C. at 538, 831 S.E.2d at 564 (internal citation and quotation marks omitted) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 660, 132 L. Ed. 2d 564, 574, 579 (1995)).

In *State v. Griffin* ("*Griffin II*"), 270 N.C. App. 98, 840 S.E.2d 267, *temp. stay allowed*, 374 N.C. 267, 838 S.E.2d 460 (2020), this Court applied the *Grady III* analysis, listing the three factors to be balanced in determining the constitutionality of the search, under the totality of the circumstances:

> (1) the nature of the defendant's legitimate privacy interests in light of his status as a registered sex offender[;] (2) the intrusive qualities of [satellite-based monitoring] into the defendant's privacy interests[;] and (3) the State's legitimate interests in conducting [satellite-based] monitoring and the effectiveness of [satellite-based monitoring] in addressing those interests[.]

Griffin II, 270 N.C. App. at 103, 840 S.E.2d at 271 (citations omitted).

We also highlighted the emphasis in *Grady III* on efficacy when conducting such an analysis, noting that our Supreme Court "wrote that a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the *efficacy of the solution* need to be demonstrated by the government." *Id.* at 103, 840 S.E.2d at 272 (emphasis added) (citation and internal quotation marks omitted). Although evidence that satellite-based monitoring is effective is merely one factor to be considered, "[t]he State's inability to produce evidence of the efficacy of the lifetime [satellite-based monitoring] program in advancing any of its asserted legitimate State interests *weighs heavily against* a conclusion of reasonableness[.]" *Id.* at 105, 840 S.E.2d at 273 (citation omitted).

Here, we are unable to determine the basis of the trial court's decision to subject Defendant to lifetime satellite-based monitoring, particularly with regard to the efficacy of satellite-based monitoring, because of a discrepancy between the study admitted into evidence as State's Exhibit #1 and the study referenced in the trial court's order as State's Exhibit #1.

During the satellite-based monitoring hearing, the State called Scott Payne, an employee of the Department of Public Safety Sex Offender Management Office, as a witness. In addition to testifying to his work in the field of sex offender management, Payne testified concerning a 2015 study titled "Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees," which addressed the efficacy of satellite-based monitoring of sex offenders. The parties and the trial court continued to reference "the California Study" for the remainder of the hearing, and a copy of the California Study was admitted into evidence without objection as State's Exhibit #1.

In fact, there are two California studies at issue in the case at bar: "Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report" (the "2012 California Study"), and "Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees" (the "2015 California Study"). At the satellite-based monitoring hearing, the 2012 California Study was not discussed; however, the 2015 California Study was discussed at length, and a copy of the study was admitted into evidence as State's Exhibit #1:

> [THE STATE]: . . . Your Honor, if I could mark what we commonly refer to as the California study as State's Exhibit 1. May I approach?

> THE COURT: Yes. Any objection?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: All right. It is admitted. State's Exhibit 1 as being the California study -- it's titled --
>
> (Whereupon State's Exhibit 1 was marked into evidence.)
>
> [THE STATE]: "*Does GPS improve recidivism among high-risk offenders, outcomes for California's GPS pilot for high-risk sex offenders/parolees*." May I approach again?
>
> THE COURT: Yes. It is admitted without objection.

(Emphasis added).

The trial court's satellite-based monitoring order, however, refers to the 2012 California Study as State's Exhibit #1:

> In ruling on this motion the [c]ourt considered the following evidence and testimony: *State's Exhibit 1 – Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation[ ]of the California Supervision Program Final Report (2012)*.

(Emphasis added).

It is manifest that the trial court relied on "the California Study's" findings regarding the efficacy of satellite-based monitoring in making its determination that Defendant should be subject to lifetime satellite-based monitoring. Three of the trial court's findings of fact specifically refer to the study:

> 1. In ruling on this motion the [c]ourt considered the following evidence and testimony: *State's Exhibit 1 – Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation[ ]of the California Supervision Program Final Report (2012)*. State's Exhibit 2 – Certified Copy of Defendant's Conviction of Taking Indecent Liberties With a Child case no. 13CRS 52182 in Sampson County. State's Exhibit 3 – The Static 99 the Static 99 [sic] risk reporting statement of the Defendant Lindquist. Also the testimony of Scott Payne from the Sex Offender Management Office of Department of Public Safety.
>
> . . . .

> 6. The [c]ourt has also considered *The California Study*, *which has been admitted as State's Exhibit 1*. In the conclusions for *The California Study*, it was found that the GPS parolees were overall: 1. Less likely to receive a violation for a new crime; 2. The subjects in the GPS group had better outcomes in terms of sex-related violations and new arrests; 3. Reduced absconding and registration failures with the use of GPS is an important finding in that the whereabouts of sex offenders is a critical component of effectively monitoring them in the community; 4. Finding that the comparison group parolees were more likely to be guilty of a parole violation for a criminal offense, may indicate that the GPS deterred criminal behavior among sex offenders who would have otherwise committed a new offense.
>
> 7. *The California Study* found that the GPS monitoring of sex offenders has demonstrated benefits. That study found that offenders monitored by GPS "demonstrate significantly better outcomes for both compliance and recidivism."

(Emphases added). It is unclear, however, on which "California Study" the trial court relied in reaching its ultimate decision in this case.

In light of the uncertainty surrounding a material basis of the trial court's decision and the significant Fourth Amendment interests at stake, we decline to review this matter without resolution of the question of upon which "California Study" the trial court relied.

Conclusion

Accordingly, we vacate the satellite-based monitoring order and remand this matter to the trial court for the limited purpose of amending the order to clarify upon which study the trial court relied in making its determination that Defendant should be subject to lifetime satellite-based monitoring.

VACATED AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

STATE v. PALMER

[273 N.C. App. 169 (2020)]

STATE OF NORTH CAROLINA
v.
KIMBERLY RENEE PALMER, DEFENDANT

No. COA19-970

Filed 18 August 2020

Drugs—possession of controlled substance on jail premises—jury instructions—unlawful possession

In a case involving possession of a controlled substance on jail premises, the trial court properly denied defendant's request for a jury instruction that required the State to prove illegal possession of the substance and that defined "illegal possession" as not having a valid prescription for the controlled substance. The crime of possession of a controlled substance on jail premises does not include an element requiring the State to prove unlawful possession and lawful possession is a defense that must be raised and proven by the defendant.

Appeal by Defendant from judgment entered 13 February 2019 by Judge William R. Bell in Haywood County Superior Court. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.

Stephen G. Driggers for defendant-appellant.

MURPHY, Judge.

Defendant, Kimberly Renee Palmer, was convicted of violating N.C.G.S. § 90-95(e)(9), felony possession of a controlled substance on jail premises. At trial, she requested the jury be provided a special instruction requiring the State to prove lawful possession of a controlled substance as an element of N.C.G.S. § 90-95(e)(9). Our plain reading of Chapter 90 reveals lawful possession of a controlled substance is not an element of the statute but rather an exception, per N.C.G.S. § 90-113.1(a). Defendant requested lawful possession be instructed as an element rather than an exception, which would have erroneously shifted the burden of proof from herself to the State. The trial court did not err in denying Defendant's requested jury instruction.

BACKGROUND

Defendant was indicted for felony possession of a controlled substance on jail premises, misdemeanor possession of a Schedule II controlled substance, misdemeanor possession of drug paraphernalia, and for attaining habitual felon status. These charges arose out of an incident that began as a domestic dispute with Defendant later being found to have Oxycodone on her person during her intake following arrest. At trial, in lieu of N.C.P.I.–Crim. 260.12, Defendant requested the following jury instruction:

> The Defendant has been charged with *illegally possessing* oxycodone, a controlled substance, on the premises of a local confinement facility. For you to find the defendant guilty of this offense, the state must prove two things beyond a reasonable doubt: First, that the defendant knowingly and illegally possessed oxycodone. Oxycodone is a controlled substance. A person knowingly possesses a controlled substance when a person is aware of its presence, and has both the power and intent to control the disposition or use of that substance. *Illegal possession of a controlled substance is possession of that substance when a person does not have a valid prescription for that controlled substance*. And Second, that the defendant was on the premises of a local confinement facility at the time of the defendant's knowing and illegal possession of the controlled substance. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant knowingly and illegally possessed oxycodone and that the defendant was on the premises of a local confinement facility at that time, it would be your duty to return a verdict of guilty. If you do not find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty. (Emphasis added).

The trial court denied this request. At no point during trial did Defendant request an instruction on the defense of lawful possession.[1] Defendant

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1. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1) (2019). "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed

was found guilty on all charges and sentenced to 103 to 136 months in prison. She gave notice of appeal on 11 February 2019.

ANALYSIS

On appeal, Defendant contends the trial court erred in failing to give her requested instruction to the jury defining illegal possession of a controlled substance as possession without a prescription. We disagree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[W]hen a request is made for a specific instruction which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions . . . must charge the jury in substantial conformity to the prayer." *State v. Clark*, 324 N.C. 146, 160-161, 377 S.E.2d 54, 63 (1989) (internal quotations omitted). "Whether evidence is sufficient to warrant an instruction is a question of law." *State v. Smith*, 263 N.C. App. 550, 558, 823 S.E.2d 678, 684 (2019) (alterations omitted). "[W]here the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (internal quotations omitted).

"[I]t is unlawful for any person . . . [t]o possess a controlled substance." N.C.G.S. § 90-95(a)(3) (2019). Oxycodone is a Schedule II controlled substance. N.C.G.S. § 90-90(1)(a)(14) (2019). Further, "[a]ny person who violates [N.C.]G.S. [§] 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C.G.S. § 90-95(e)(9) (2019). "The State must prove beyond a reasonable doubt every essential element of the crime charged, and it is incumbent upon the trial judge to so instruct the jury." *State v. Logner*, 269 N.C. 550, 553, 554, 153 S.E. 2d 63, 66 (1967). However,

> [i]t shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

N.C.G.S. § 90-113.1(a) (2019).

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preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2019). At no point on appeal does Defendant argue it was plain error for the trial court to exclude an instruction on the defense of lawful possession. Thus, any such consideration is not a part of this appeal.

After denying Defendant's requested instruction, the trial court instead provided N.C.P.I.--Crim. 260.12:

> [Defendant] has been charged with possessing Oxycodone, a controlled substance, on the premise [sic] of a local confinement facility. For you to find [Defendant] guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that [Defendant] knowingly possessed Oxycodone. Oxycodone is a controlled substance. A person possesses Oxycodone when a person is aware of its presence and has both the power and intent to control its disposition or use. And second, that [Defendant] was on the premises of a local confinement facility at the time of [Defendant's] possession of the Oxycodone.

N.C.P.I.–Crim. 260.12 (2019).

On appeal, Defendant argues N.C.G.S. § 90-101(c)(3), in conjunction with N.C.G.S. § 90-95(a)(3) and N.C.G.S. § 90-95(e)(9), provide an element of the offense of possession of a controlled substance on jail premises and should therefore have been part of the jury instruction. N.C.G.S. § 90-101(c)(3) (2019) ("The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article . . . [a]n ultimate user or person in possession of any controlled substance pursuant to a lawful order of a practitioner."). We disagree.

A plain reading of the statute in question does not require the State to prove unlawful possession of a controlled substance as an element which the State bears the burden of proving. N.C.G.S. § 90-95(e)(9) (2019) ("Any person who violates [N.C.]G.S. [§] 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony."). Moreover, N.C.G.S. § 90-113.1(a) clearly states that where an exemption or exception is requested, the burden of proof shall be upon the party claiming such exception, in this case Defendant. N.C.G.S. § 90-113.1(a) (2019). Defendant argues on appeal, like she did at trial, that lawful possession is an element of N.C.G.S. § 90-95(e)(9), not a defense. She contends that "[t]he proposed instruction incorporated into the elements of the offense the exception for prescription holders under [N.C.G.S.] § 90-101(c)(3) rather than presenting the exception as a separate defense instruction, as suggested by the State." By Defendant's own words, the proposed instruction constituted an "exception," clearly addressed by N.C.G.S. § 90-113.1(a), for which the burden of proof would have fallen on Defendant, not the State. As lawful possession of a controlled substance is

an exception, rather than an element, the trial court did not err in denying Defendant's request for a special jury instruction.

Defendant also argues, in the alternative, that if not an element, the question of lawful possession is a subordinate issue. "[I]nstructions as to the significance of evidence which do not relate to the elements of the crime itself or [D]efendant's criminal responsibility" are considered subordinate issues. *State v. Hunt*, 283 N.C. 617, 624, 197 S.E.2d 513, 518 (1973). "In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case." *State v. Lester*, 289 N.C. 239, 243, 221 S.E.2d 268, 271 (1976). However, upon receiving such a request, "when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976).

We hold Defendant's requested instruction was not correct in law, as it mischaracterized an exception as an element of N.C.G.S. § 90-95(e)(9), in contravention of N.C.G.S. § 90-113.1(a). Therefore, we need not consider whether the request was supported by evidence and find that even if the instruction were deemed a subordinate issue, the trial court nevertheless did not err in denying Defendant's request for the special jury instruction.

CONCLUSION

The trial court did not err in denying Defendant's request for a special jury instruction on lawful possession of a controlled substance where the requested instruction improperly characterized an exception as an element.

NO ERROR.

Chief Judge McGEE and Judge BROOK concur.

STATE OF NORTH CAROLINA
v.
MITCHELL ANDREW TUCKER, DEFENDANT

No. COA19-715

Filed 18 August 2020

1. Domestic Violence—violation of protective order—knowledge of order—sufficiency of the evidence

Where defendant was aware of a prior domestic violence order that expired the day before he broke into the victim's apartment and had been served a notice of hearing to determine whether a second DVPO would be issued, but defendant did not attend the hearing and did not receive notice of the issuance of the second DVPO because notice was served at the county jail—his last known address and he was no longer incarcerated—the trial court erred in denying defendant's motion to dismiss the charge of violating a domestic violence protective order while in possession of a deadly weapon. The evidence was insufficient to show a willful violation of the DVPO because there was no direct evidence that defendant had knowledge of the second DVPO and the circumstantial evidence of his knowledge of the order was tenuous at best.

2. Burglary and Unlawful Breaking or Entering—domestic violence protective order—insufficient evidence of knowledge of order—felony breaking or entering—jury instructions—plain error

Where there was insufficient evidence that defendant had knowledge of the issuance of a domestic violence protective order, the trial court committed plain error by instructing the jury it could find defendant guilty of felonious breaking or entering, if defendant did so in violation of a valid domestic violence protective order, and defendant's conviction for felony breaking or entering was reversed.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from judgments entered 30 May 2018 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Guy J. Loranger for defendant-appellant.

YOUNG, Judge.

Where the evidence, taken in the light most favorable to the State, did not permit the jury to infer that defendant knew of the terms of the protective order, the trial court erred in denying defendant's motion to dismiss. Where the evidence did not permit the jury to find that defendant knew of a protective order, it did not permit the jury to find defendant guilty of breaking and entering in violation of a protective order, and the trial court committed plain error in instructing the jury on that theory of guilt. We reverse.

I. Factual and Procedural Background

Mitchell Andrew Tucker (defendant), a 61-year-old homeless man, met Deanna Pasquarella (Pasquarella), also homeless, in August of 2016. They stayed together in a tent for some time, but in October of 2016, defendant assaulted Pasquarella and threatened her with a knife, after which she moved out of his tent. This incident went unreported. By June of 2017, Pasquarella had turned her life around and was living in an apartment and working at a job. Pasquarella still saw defendant occasionally, and he would periodically spend the night.

In August of 2017, however, defendant again assaulted Pasquarella. This time, police were involved, and defendant was arrested. Pasquarella also filed for and received an *ex parte* domestic violence protective order (the first DVPO) against defendant. This order expired on 6 September 2017. Defendant was served with the first DVPO on 28 August 2017, while defendant was in jail. Defendant was also served with a notice of hearing to be held on 6 September 2017, at which time it would be determined if another DVPO would be entered. Defendant failed to attend the hearing, and on 6 September 2017, a year-long domestic violence protective order (the second DVPO) was entered against defendant. Notice of the second DVPO was placed in the mail on 7 September 2017 and sent to defendant's known address, the Mecklenburg County Jail. Defendant was not residing at the jail when notice was mailed there.

On the morning of 7 September 2017, defendant went to Pasquarella's home. Pasquarella, on seeing defendant through the peephole, fled to a closet and called police. While on the phone, Pasquarella heard defendant break into her apartment. Defendant dragged Pasquarella through the apartment and threatened her with a knife. At this point,

police officers entered the apartment and heard defendant exclaim "I'm going to kill you." Officers separated defendant from Pasquarella and restrained defendant.

The Mecklenburg County Grand Jury indicted defendant for violating a civil DVPO while in possession of a deadly weapon, felonious breaking or entering, assault with a deadly weapon, and assault on a female. The Grand Jury subsequently also indicted defendant for attaining the status of an habitual breaking and entering felon. At trial, at the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges against him. In addition to general motions to dismiss, defendant specifically alleged that the State had failed to prove that defendant had knowledge of the second DVPO. The trial court denied these motions.

The jury returned verdicts finding defendant guilty of violating a protective order while in possession of a deadly weapon, felonious breaking or entering in violation of the second DVPO, assault with a deadly weapon, and assault on a female. Defendant pleaded guilty to the habitual felon charge. The trial court entered findings in aggravation and mitigation, and found that the latter outweighed the former. The court then consolidated the felony charges of breaking and entering, violating a protective order with a deadly weapon, and habitual felon, and sentenced defendant to a minimum of 95 months and a maximum of 126 months in the custody of the North Carolina Department of Adult Correction. The court separately sentenced defendant to 60 days for assault with a deadly weapon, and 30 days for assault on a female, also to be served in the custody of the North Carolina Department of Adult Correction. These sentences were to run consecutively.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motions to dismiss. We agree.

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). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451,

455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

At trial, defendant moved to dismiss the charges against him, alleging, *inter alia*, that he had no notice of the second DVPO, and therefore that he could not be found to have willfully violated it. The trial court denied these motions, and on appeal, defendant contends that this was error. Defendant limits his argument to the charge of violating a domestic violence protective order while in possession of a deadly weapon, and accordingly, we will likewise limit our analysis.

Our General Statutes provide that "any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order . . . shall be guilty of a Class H felony." N.C. Gen. Stat. § 50B-4.1(g) (2019). The indictment on this charge specifically states, in relevant part, that defendant "did unlawfully, willfully, and feloniously violate a valid protective order . . . issued on September 6, 2017[.]" However, defendant contends that there was no evidence that he knew of the second DVPO, and therefore no evidence that his violation thereof was knowing.

Our Supreme Court has held that knowledge may be proved "by circumstantial evidence from which an inference of knowledge might reasonably be drawn." *State v. Boone*, 310 N.C. 284, 295, 311 S.E.2d 552, 559 (1984), *superseded on other grounds*, *State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 574 (2012). In support of its case, the State noted that, although defendant was not present for the hearing that resulted in the second DVPO and did not receive notice of the entry of the second DVPO, defendant did receive a summons and notice of the 6 September 2017 hearing. The summons provided that "[i]f you fail to answer the complaint, the plaintiff will apply to the Court for relief demanded in the complaint." The State also presented the testimony of officer James McCarty (Officer McCarty), who responded to Pasquarella's call. The State played a recording for the jury, taken from Officer McCarty's body camera. On the recording, as Officer McCarty pulled defendant and Pasquarella apart, Pasquarella commented, "That's why I got a court

order," and defendant replied, "I know, I know." This evidence is somewhat tenuous, but the State nonetheless contends that, taken together, this evidence shows that (1) a hearing would be held on 6 September 2017 to determine whether Pasquarella was entitled to a protective order, (2) if defendant failed to attend that hearing, a protective order would indeed be entered, and (3) by his comment "I know, I know," defendant was aware of the entry of the second DVPO.

Defendant argued at trial, and argues on appeal, that his statement, "I know, I know," could refer to the first DVPO, which expired on 6 September 2017, the day before he broke into Pasquarella's apartment. He further argues that although the summons provided that "plaintiff will apply to the Court for relief demanded in the complaint," there was no guarantee that the second DVPO would in fact be granted, or what its terms would entail. As such, defendant contends that any purported evidence of his knowledge of the second DVPO was insufficient.

Considering the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference, the evidence shows that defendant was aware of the first DVPO. The record demonstrates that a sheriff's deputy read the *ex parte* order to defendant while defendant was in jail, and "left the service copy with the defendant." This evidence supports a finding that defendant was aware of the terms of the first DVPO, including the requirement to stay away from Pasquarella. However, the State presented no evidence that defendant received notice or was otherwise aware of the second DVPO.

The State argued at trial that the second DVPO was a continuation of the first, and does so likewise on appeal. Indeed, this Court has held that, where a DVPO was continuously in effect for a period of time and a defendant made statements suggesting his awareness thereof, the fact that the defendant may have failed to attend a hearing to renew it does not preclude a jury from inferring that the defendant possessed knowledge of the order. For example, in *State v. Hairston*, 227 N.C. App. 226, 741 S.E.2d 928 (2013) (unpublished), a DVPO had been entered and renewed twice, although the defendant argued that he was not present at the renewal hearing. The defendant, when confronted by an officer, made comments suggesting his awareness of a court order. This Court held that this evidence, taken in the light most favorable to the State, "constituted substantial circumstantial evidence from which the jury could infer that defendant knowingly violated the DVPO." *Id.* *Hairston* is not the only case of this nature. *See*, *e.g.*, *State v. Elder*, 206 N.C. App. 763, 699 S.E.2d 141 (2010) (unpublished) (DVPO had been continuously in place for several years, and evidence showed that defendant had been

told an order was in place). However, it is worth noting that in both of these cases, this Court recognized that there was also evidence that each defendant was present for their respective renewal hearings.

These cases, however, are unpublished, and thus not binding upon this Court. And while it is true that defendant, in the instant case, received notice of the 6 September 2017 hearing, there is no evidence that he was aware that the second DVPO was issued as a result of that hearing prior to his conduct. Nor is there any evidence, unlike in *Hairston* and *Elder*, that defendant was present for the renewal hearing.

The State also notes defendant's statement, while attacking Pasquarella, that he was aware of a court order. And while the State argues that defendant's statement could have been a reference to the second DVPO, this evidence is simply too tenuous to form a basis for a reasonable inference by the jury.

Because there was no direct evidence that defendant had knowledge, constructively or in fact, of the second DVPO, and because any circumstantial evidence of his knowledge was tenuous at best, we hold that the State failed to show knowledge of the DVPO, an essential element of the charge against him. We therefore hold that trial court erred in denying defendant's motion to dismiss.

III. Jury Instructions

[2] In his second argument, defendant contends that the trial court committed plain error in its instructions to the jury. We agree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably

would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

At trial, the trial court instructed the jury that it could find defendant guilty of felonious breaking or entering if it found that defendant did so in violation of the second DVPO. Defendant now contends that this instruction was in error. Because defendant did not object to this instruction at trial, we review this argument for plain error.

Defendant contends that the jury was instructed in the disjunctive, that defendant could be found guilty of felony breaking and entering either because he possessed the intent to violate the second DVPO while in possession of a deadly weapon, or because he possessed the intent to commit assault with a deadly weapon with intent to kill. He contends further that where a jury is instructed on alternative theories of guilt, one of which is unsupported by the evidence, and it cannot be discerned from the record which theory or theories the jury relied on to reach its verdict, a defendant is entitled to a new trial.

However, it is patently obvious which theory the jury relied upon to arrive at its verdict. The jury, in its verdict sheet, specifically found defendant "guilty of felonious breaking or entering in violation of a valid domestic violence protective order issued September 6, 2017[.]" It is plain and unambiguous that the jury found defendant guilty on the basis of intent to violate the second DVPO.

As we held above, the State did not present sufficient evidence of defendant's knowledge of the second DVPO. Accordingly, it was error for the trial court to permit the jury to convict on that basis. It is clear that, had the trial court not instructed the jury that it could find defendant guilty based on knowing violation of the second DVPO, the jury would not have found him guilty on that basis. As the jury probably would have reached a different result, defendant has shown that this instruction constituted plain error. Accordingly, we must reverse defendant's conviction for felonious breaking or entering.

IV. Conclusion

The trial court erred in denying defendant's motions to dismiss the charge of violation of a protective order while in possession of a deadly weapon, as the State failed to present sufficient evidence of defendant's knowledge of the second DVPO. Additionally, the trial court committed plain error in instructing the jury that it could find defendant guilty of felonious breaking or entering on the basis of violation of a valid

protective order. The remaining two charges, assault with a deadly weapon and assault on a female, are unaffected by these errors. We therefore reverse defendant's convictions for violation of a valid protective order while in possession of a deadly weapon and felonious breaking or entering. Because these charges formed the basis for defendant's habitual felon plea, we must vacate that plea.

REVERSED IN PART, VACATED IN PART.

Judge COLLINS concurs.

Judge MURPHY concurs in part and dissents in part in separate opinion.

MURPHY, Judge, concurring in part, dissenting in part, and concurring in the judgment.

When the State presents only speculative evidence that a defendant knew of the existence of a protective order, a trial court commits error when it denies a motion to dismiss charges of knowingly violating that protective order. Additionally, a trial court commits plain error when it issues a disjunctive jury instruction that includes an alternative theory unsupported by the evidence, and the Record does not contain information allowing a reviewing court to discern which theory or theories the jury relied on in arriving at its verdict. While I disagree with the Majority's reliance on two unpublished opinions in its analysis, and would also sanction the State for misleading comments in its brief, I concur in part, including in the judgment.

BACKGROUND

In the present case, the victim obtained a domestic violence protective order ("DVPO") on 28 August 2017, after an *ex parte* hearing in the District Court, and the Mecklenburg County Sheriff's Office served the 28 August 2017 order on Defendant at the Mecklenburg County jail. The *Notice of Hearing on Domestic Violence Protective Order* stated that

> the attached Ex Parte Order has been issued against you. If you violate the Order, you are subject to being held in contempt or being charged with the crime of violating this Ex Parte Order. A hearing will be held before a district court judge at the date, time and location indicated below. At that hearing it will be determined *whether* the Order will be continued.

(Emphasis added). The *Civil Summons Domestic Violence* form stated that "[i]f [Defendant] fail[s] to answer the complaint, the [P]laintiff will *apply* to the Court for the relief demanded in the complaint." (Emphasis added).

The 28 August 2017 DVPO expired on 6 September 2017, the same day an afternoon hearing was scheduled. Defendant did not appear at the 6 September 2017 hearing. Additionally, the 6 September 2017 order was a separate order from, and not a continuation of, the 28 August 2017 order. *See Hensey v. Hennessy*, 201 N.C. App 56, 66, 685 S.E.2d 541, 548 (2009) (holding that the "defendant [was] incorrect in his argument that the [one-year] DVPO [was] dependent upon a valid ex parte DVPO. The two orders are independent of one another, and in some situations, a DVPO . . . is entered properly even though an ex parte order may have been denied or was never requested").

The 6 September 2017 order was mailed to Defendant's last known address, the Mecklenburg County jail. The District Court entered the 6 September 2017 order in the afternoon, and, according to its daily "mailing process," the clerk's office did not mail the order until the next day, 7 September 2017. Regardless, Defendant no longer resided at the jail, and did not receive the mailed order.

Defendant went to the victim's apartment the morning of 7 September 2017. The victim testified that Defendant knocked on her door right after she awoke, while she "was getting ready for work." She called 911 at 8:18 a.m. and ran to her closet, locking herself inside. Defendant broke the victim's living room window, climbed inside the apartment, and opened the door to the victim's closet. Defendant pulled the victim into the living room, produced a knife from his backpack, and threatened her.

When the responding officer arrived at the victim's apartment, he overheard the victim tell Defendant, "[t]hat's why I got *a* court order." (Emphasis added). Defendant responded to the victim's reference to *a* court order with "I know, I know." The observing officer did not know to which order Defendant or the victim referred.

At the close of the State's evidence, Defendant moved to dismiss charges because they required evidence beyond speculation that Defendant knew the 6 September 2017 DVPO existed. The trial court denied Defendant's motion to dismiss. Defendant renewed his motion to dismiss at the close of all evidence on the same ground. The trial court denied Defendant's renewed motion to dismiss.

Further, at trial, Defendant did not object to the trial court's disjunctive instruction that included the following theories for the jury to find

Defendant guilty of felonious breaking or entering: (1) that Defendant possessed the intent to violate the 6 September 2017 DVPO while in possession of a deadly weapon, or (2) that Defendant possessed the intent to commit assault with a deadly weapon with intent to kill.

The jury found Defendant "guilty of felonious breaking or entering in violation of a valid domestic violence protective order issued [6] September [] 2017." The jury made no specific finding concerning whether Defendant intended to kill the victim at the time of the alleged felonious breaking or entering, or whether he knew of the existence of the 6 September 2017 DVPO.

ANALYSIS

A. Motion to Dismiss

1. Standard of Review

We review the "trial court's denial of [Defendant's] motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "[W]e must view the evidence in the light most favorable to the [S]tate and allow the [S]tate every *reasonable* inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980) (emphasis added). "Contradictions and discrepancies are for the jury to resolve[.]" *Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925.

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

State v. Angram, 839 S.E.2d 865, 868 (N.C. Ct. App. 2020) (alterations and quotations omitted). The trial court should grant a motion to dismiss when evidence "only . . . raise[s] a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of" the offense; such evidence is insufficient to survive a motion to dismiss. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

2. Insufficient Evidence

A proper conviction for the offense of violating a DVPO while in possession of a deadly weapon requires the State to present sufficient evidence that the defendant "*knowingly* violate[d] a valid protective order[.]" N.C.G.S. § 50B-4.1(g) (2019). Only the knowing violation element is at issue in this case.

We have held that " 'knowingly' . . . means that [the] defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." *State v. Williams*, 226 N.C. App. 393, 399, 741 S.E.2d 9, 14 (2013) (quoting *State v. Aguilar-Ocampo*, 219 N.C. App. 417, 428, 724 S.E.2d 117, 125 (2012)). Knowledge can be inferred from circumstantial evidence, but the inference *must be reasonable*. *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989); *see also State v. Boone*, 310 N.C. 284, 294-95, 311 S.E.2d 552, 559 (1984), *superseded by statute on other grounds as stated in State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012).

In this case, even in the light most favorable to it, the State did not provide evidence demonstrating that Defendant knew of the 6 September 2017 DVPO. Accepting that Defendant received notice that the 6 September 2017 *hearing* would occur, no evidence in the Record demonstrates Defendant knew the 6 September 2017 protective *order* existed. The *Notice of Hearing on Domestic Violence Protective Order* and *Civil Summons Domestic Violence* did not include language threatening Defendant with arrest if he did not appear at the 6 September 2017 hearing; in fact, the *Civil Summons Domestic Violence* did not even contain the date of the hearing. Further, the entrance of the 6 September 2017 DVPO was not a foregone conclusion, even if Defendant did not appear at the hearing. The clerk's office mailed a copy of the 6 September 2017 DVPO on 7 September 2017 to a place where Defendant no longer resided, the same morning Defendant arrived at the victim's apartment.

The Majority cites two unpublished opinions to advance its analysis regarding inferring knowledge to a defendant, but I do not find either to be persuasive. *State v. Hairston*, 227 N.C. App. 226, 741 S.E.2d 928 (2013) (unpublished); *State v. Elder*, 206 N.C. App. 763, 699 S.E.2d 141 (2010) (unpublished), *supra* at 178-79. *See generally* Hon. Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 Campbell L. Rev. 333, 352-54, 356 (2015).

As per *Williams*, the State needed to present evidence of Defendant's knowledge of the 6 September 2017 DVPO's existence; without evidence of Defendant's knowledge of such a fact, the State could not show a knowing violation. *Williams*, 226 N.C. App. at 399, 741 S.E.2d at 14.

However, the State did not provide evidence of Defendant's knowledge of the 6 September 2017 DVPO beyond conjecture and speculation. As a result of the lack of actual evidence showing Defendant's knowledge of the 6 September 2017 DVPO, the only reasonable inference from Defendant saying "I know, I know" in response to the victim's reference to a DVPO's existence would be that it constituted further evidence of Defendant's knowledge of the then expired 28 August 2017 DVPO's existence. Without any evidence to the contrary, it is not reasonable to infer that Defendant knew what he was about to do, namely act in violation of the existing 6 September 2017 DVPO at issue; without such knowledge, he could not knowingly proceed to violate the DVPO. *Id.* at 399, 741 S.E.2d at 14. The lack of evidence of a knowing violation of the 6 September 2017 DVPO required the trial court to grant Defendant's motion to dismiss. The trial court's denial of Defendant's motion to dismiss must be reversed. However, that is not the end of our inquiry in this matter.

B. Plain Error

Defendant argues that the trial court's disjunctive instruction was plain error, because one of the theories of guilt—that Defendant possessed the intent to violate the 6 September 2017 DVPO while in possession of a deadly weapon—was unsupported by the evidence, and the Record does "not indicate which theory the jury relied on[.]"

1. Standard of Review

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding" of the defendant's guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotations omitted). We "apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (reaffirming the plain error standard from *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334); N.C. R. App. P. 10(a)(4). Plain error review is typically limited to "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). One element of plain error is the alleged error "must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Thompson*, 254 N.C. App. 220, 224, 801 S.E.2d 689, 693 (2017) (internal citation omitted). "[P]lain error is to be applied cautiously and only in the exceptional case." *Maddux*, 371 N.C. at 564, 819 S.E.2d at 371 (quoting *Lawrence*,

365 N.C. at 518, 723 S.E.2d at 334). Although Defendant did not object to the trial court's disjunctive instruction at trial, Defendant argues on appeal that the disjunctive instruction included a theory unsupported by the evidence and amounted to plain error. We review for plain error.

2. Alternative Theory of Guilt

A trial court's instruction containing alternative theories of guilt is plain error when one of the alternative theories "is not supported by the evidence . . . and . . . it cannot be discerned from the [R]ecord upon which theory or theories the jury relied in arriving at its verdict." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). A defendant is entitled to a new trial when such error occurs and has a "probable impact on the jury's verdict." *State v. Martinez*, 253 N.C. App. 574, 582, 801 S.E.2d 356, 361 (2017) (emphasis omitted).

In this case, the trial court's instruction to the jury was disjunctive and included one theory not supported by the evidence, namely the theory that Defendant "intended to commit the felony of violation of a domestic violence protective order entered on [6] September [] 2017, while in possession of a deadly weapon." Such a theory required the jury to find Defendant knowingly violated a domestic violence DVPO, specifically the 6 September 2017 DVPO, and the State presented insufficient evidence to support that theory. As discussed in Section A above, this was erroneous.

In addition to the erroneous instruction, the jury returned a guilty verdict that did not specify which theory it relied on in convicting Defendant. In examining the trial court's instruction to the jury, the trial court spent twice as long instructing the jury concerning knowing violation of the 6 September 2017 DVPO (4 paragraphs), with multiple reiterations, as it did instructing the jury regarding assault with a deadly weapon with intent to kill (2 paragraphs). Further, the only applicable verdict sheet included in the Record contained "Guilty of Felonious Breaking or Entering in Violation of a Valid Domestic Violence Protective Order," but did not include any reference to the alternative theory of assault with a deadly weapon with intent to kill referenced by the trial court in its instructions. After examining the Record, and noting the error that allowed the jury to speculate concerning Defendant's knowledge of the 6 September 2017 DVPO, the trial court's disjunctive jury instruction containing one theory unsupported by the evidence was plain error.

C. Sanctions Against the State

In an attempt to bolster its argument concerning Defendant's alleged knowledge of the 6 September 2017 DVPO, the State's brief incorrectly

claims through a false reference to the Record that "the notice also indicated that if Defendant failed to appear that judgment *would be entered* for a Domestic Violence Protective Order ("DVPO") against Defendant as requested by [the victim]" and that the " 'relief demanded by the complaint' *would be granted*." (Emphasis added).

However, the documents accompanying the 28 August 2017 DVPO, and even the 28 August 2017 DVPO itself, did not include language of such certitude communicating that a second, 6 September 2017 DVPO would be entered if Defendant did not attend the 6 September 2017 hearing. The *Civil Summons Domestic Violence* accompanying the 28 August 2017 DVPO included language regarding what Plaintiff would do in the event Defendant did not attend the hearing—"[i]f [Defendant] fail[s] to answer the complaint, the [P]laintiff will *apply* to the Court for the relief demanded in the complaint." (Emphasis added). The *Notice of Hearing on Domestic Violence Protective Order* included language describing the 28 August 2017 DVPO provisions, that a future hearing would occur, and what that future hearing would decide—

> The attached Ex Parte Order has been issued against you. If you violate the Order, you are subject to being held in contempt or being charged with the crime of violating this Ex Parte Order. A hearing will be held before a district court judge at the date, time and location indicated below. At that hearing it will be determined *whether* the Order will be continued.

(Emphasis added). Even the *Notice to Parties* at the bottom of the 28 August 2017 DVPO only included information regarding weapon possession, storage, and return to Defendant, as well as provisions for what Plaintiff could do with the DVPO—make copies; could not change the terms of the DVPO, as only the trial court could change the terms; and contact law enforcement and the Clerk of Court if Defendant violated the DVPO.

The comments quoted above from the State's brief are misleading, and I would sanction the State by imposing triple costs. N.C. R. App. P. 34(a)(3) (2020).

CONCLUSION

The trial court erred when it denied Defendant's motion to dismiss all charges related to the violation of a valid domestic violence protective order issued 6 September 2017. The trial court committed plain error when it gave the disjunctive jury instruction that included a theory

of guilt predicated on Defendant's knowledge of the 6 September 2017 DVPO, which was not supported by the evidence. I concur in part, and in the judgment, but would sanction the State for misleading comments in its brief, and would not rely on or bother to distinguish the two unpublished and nonbinding opinions cited by the Majority.

STATE OF NORTH CAROLINA
v.
MICHAEL EUGENE WRIGHT, DEFENDANT

No. COA19-863

Filed 18 August 2020

1. Larceny—felonious larceny—felonious possession of stolen goods—sufficiency of evidence—value of goods

In a prosecution for felonious larceny and felonious possession of stolen goods, in which defendant was charged with stealing a propane tank, the trial court properly denied defendant's motion to dismiss both charges where the State presented sufficient evidence of the tank's fair market value to send the issue to the jury and place the jury's determination of the tank's value "beyond speculation." Whether excluding the costs of fuel and regulators for the tank (which defendant was not indicted for stealing and, when included, would give the tank a value of $1,300) placed the tank's value below the statutory threshold of $1,000 was a question best left to the jury.

2. Larceny—felonious—jury instruction—stolen property not specified—plain error analysis

In a prosecution for felonious larceny, where defendant was specifically charged with stealing a "propane tank" and where the State presented evidence that the tank, its two regulators, and the propane itself would have a total value of $1,300, the trial court did not commit plain error by instructing the jury—pursuant to the North Carolina Pattern Jury Instructions—to find defendant guilty if it found defendant took and carried away another person's "property" worth more than $1,000. Defendant could not show that the trial court's failure to specify the property stolen prejudiced him because there was sufficient evidence for the jury to find the tank alone was worth over $1,000, and nothing in the record indicated that the jury considered the other items when reaching its verdict.

3. Larceny—sentencing—simultaneous conviction for possession of stolen goods—based on same property

The trial court erred in sentencing defendant for both larceny and possession of stolen goods where both charges involved the same stolen property. Because the trial court consolidated the two charges for judgment, the judgment was vacated and remanded with instructions to arrest the possession of stolen goods charge and enter judgment only upon the larceny charge.

Judge COLLINS concurring in separate opinion.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from judgment entered 26 April 2019 by Judge Carla Archie in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 2020.

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

Mary McCullers Reece for defendant-appellant.

YOUNG, Judge.

Where the State presented sufficient evidence to permit the jury to determine the value of stolen goods, the trial court did not err in denying defendant's motion to dismiss. Where the jury did not consider alternative theories of guilt not permitted by the indictment, defendant cannot show prejudice, and the trial court did not commit plain error in its jury instruction. Where the trial court sentenced defendant on both the charges of felonious larceny and felonious possession of the goods stolen during the larceny, the trial court erred. We vacate the judgment and remand for arrest of one conviction and resentencing.

I. Factual and Procedural Background

In December of 2017, Jeff Crotts, owner of Knob Creek Orchards, discovered that a 120-gallon propane tank was missing from his property, and reported it to the sheriff's office. On 25 January 2018, Amy Lail, a sergeant with the Cleveland County Sheriff's Office (Sgt. Lail), received information that the missing tank was located on the property of Peggy Hudson Canipe (Canipe), fiancée of Michael Wright (defendant), and that defendant was a suspect in the theft. Shortly after Sgt.

Lail arrived on Canipe's property, defendant himself arrived. Sgt. Lail informed defendant that the tank was stolen, and defendant responded that he had purchased it "many miles" away, and claimed he was able to load the tank into the back of his Chevy Blazer, which Sgt. Lail found "absurd." Sgt. Lail also noted that the tank had been spray-painted, and that the same paint color had been used "in other locations around the house[.]" Nelson Speagle (Speagle), a propane manager with Carolina Energies who serviced the propane tanks at Knob Creek Orchards, was able to identify this tank as the stolen tank by its serial number, and testified that it was valued at "roughly $1,330[.]"

The Cleveland County Grand Jury indicted defendant for felonious larceny and felonious possession of stolen goods, namely a "240lb propane tank" worth $2,000. At the close of the State's evidence, the State moved to amend the indictment to remove the size of the propane tank, and indicate that the value of the propane tank was in excess of $1,000. Defendant did not object, and the trial court allowed the motion. At the close of all the evidence, defendant moved to dismiss based upon insufficient evidence. The trial court denied this motion.

The jury returned verdicts finding defendant guilty of felonious larceny and felonious possession of stolen goods. The trial court consolidated the charges for judgment, and sentenced defendant to a minimum of 20 months and a maximum of 36 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

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). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most

favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

The charges of both felonious larceny and felonious possession of stolen goods require, as an essential element of the charge, that the value of the stolen property exceed $1,000. N.C. Gen. Stat. § 14-72(a) (2019). On appeal, however, defendant contends that there was insufficient evidence before the trial court that the stolen tank was worth more than $1,000.

In support of his argument, defendant notes that, when asked to value the tank, Speagle stated that enough propane to fill the tank would be worth $300, and that the two regulators that accompany the tank would be worth $90 each. Combining the costs of the regulators, the fuel, and the tank, Speagle determined that the total value was "probably at $1,300, 1,330-something." However, defendant further notes that, when asked how much fuel was left in the tank, Speagle responded that he didn't "have a clue how much." Moreover, defendant was indicted for stealing a propane tank, not for stealing a propane tank and two regulators. Defendant argues that, removing the $300 for the cost of fuel, plus $180 for the two regulators, Speagle's valuation of roughly $1,300 drops below the $1,000 threshold necessary for a felony charge. As a result, defendant contends that this testimony was insufficient to support convictions for either felonious larceny or felonious possession of stolen goods.

However, the State "is not required to produce 'direct evidence of ... value' to support the conclusion that the stolen property was worth over $1,000.00, provided that the jury is not left to 'speculate as to the value' of the item." *State v. Davis*, 198 N.C. App. 146, 151-52, 678 S.E.2d 709, 714 (2009) (quoting *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987)). Rather, the State is merely required to present some competent evidence of the fair market value of the stolen property, which the jury may then consider.

In *Davis*, the State presented evidence that a stolen Panasonic DVD player had been purchased for over $1,300, that it was in substantially the same condition as when purchased, and that the only Panasonic dealer in the area marketed the same DVD player for over $1,300. This Court held that, viewed in the light most favorable to the State, the reasonable selling price of the DVD player, at the time and place of the

theft and in the condition in which it was when stolen – the measure of fair market value – was over $1,300. *Id.* at 152, 678 S.E.2d at 714. The defendant argued that the DVD player could not be worth over $1,000 because it was not functional without its electronic brain, but this Court held that argument failed, noting that "[t]he State did not have to prove that a DVD player without its brain was worth over $1,000.00, as long as the State provided some evidentiary basis that placed the jury's determination of its value beyond 'speculat[ion].' " *Davis*, 198 N.C. App. at 152, 678 S.E.2d at 714 (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). We held that the issue of whether the DVD player, without its brain module, was nonetheless worth $1,000 was "properly before the jury for resolution." *Id.* at 153, 678 S.E.2d at 714; *see also State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (holding that "[a]ny contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal").

In the instant case, the State presented evidence, namely the testimony of Speagle, that the stolen propane tank was worth $1,300, more than the requisite $1,000 threshold. Whether the absence of fuel or regulators put that valuation below the $1,000 threshold was a question "properly before the jury for resolution," and did not warrant dismissal. In viewing the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, the State presented sufficient evidence of the value of the propane tank to take the issue beyond "speculation" and permit its consideration by the jury. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

III. Jury Instruction

[2] In his second argument, defendant contends that the trial court committed plain error in its jury instructions. We disagree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably

would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

The trial court, in its jury instructions, informed the jury that it could find defendant guilty of felonious larceny if it found that defendant "took and carried away another person's property[,]" and that said property "was worth more than $1,000[.]" This instruction was lifted verbatim from the North Carolina Pattern Jury Instructions, N.C.P.I.-Crim 216.10, with the consent of the parties. On appeal, defendant contends that this instruction improperly permitted the jury to find defendant guilty under an alternate theory not charged in the indictment. Because defendant failed to object to this instruction at trial, we review this argument for plain error.

Defendant was initially indicted for the theft and possession of "a 240lb propane tank." Subsequently, the State moved to amend the indictment to remove the size of the propane tank, and the trial court allowed the motion. However, defendant notes that he was not charged with taking any other property aside from the tank itself, and contends that the trial court's overly broad instruction – that defendant carried away "another person's property" instead of "a propane tank" – permitted the jury to find him guilty of felonious larceny based on the value of additional items not included in the indictment. Indeed, our Supreme Court has held that, where instructions permit the jury to convict on grounds other than those charged in the indictment, those instructions are error, and also plain error. *State v. Tucker*, 317 N.C. 532, 536, 346 S.E.2d 417, 420 (1986).

Notwithstanding this rule, however, defendant fails to show that he was in fact prejudiced by this instruction, in that the jury would otherwise have reached a different result. Defendant contends that, had the jury been "specifically instructed to consider the value of the propane tank, they would not have found that the tank alone was worth more than $1,000," and that absent the over-broad instruction, the jury could not have found defendant guilty of felonious larceny. However, as we have held above, this assertion is inaccurate. There was sufficient evidence for the jury to find the value of the propane tank to be in excess of $1,000. Defendant's mere assertion that there was not sufficient evidence of value does not, therefore, establish prejudice. Nor does defendant suggest that he was in fact found guilty of the theft of any property aside from the tank itself; he merely alleges that the tank did not possess the requisite value. Indeed, in reviewing the evidence before the trial

court, we cannot find any reason to assume that the jury based its verdict on any consideration other than the value of the tank alone.

Accordingly, while we recognize that the better practice may have been to designate the specific property taken, we do not agree that defendant has shown that the jury considered, or was permitted to consider, an improper theory based on the instruction given. We therefore hold that the trial court did not err in instructing the jury, pursuant to the Pattern Jury Instructions, that defendant could be found guilty of stealing "property" as opposed to some more specific term.

IV. Sentencing

[3] In his third argument, defendant contends that the trial court erred in sentencing him for both larceny and possession of stolen property. We agree.

A. Standard of Review

"Whether multiple punishments were imposed contrary to legislative intent presents a question of law, reviewed *de novo* by this Court." *State v. Hendricksen*, 257 N.C. App. 345, 809 S.E.2d 391, 393, *review denied*, 371 N.C. 114, 812 S.E.2d 856 (2018).

B. Analysis

Defendant contends, and the State concedes, that it is a violation of legislative intent to convict a defendant of both stealing property and possessing that same property. Indeed, our Supreme Court has held that, while "[l]arceny and possession of property stolen in the larceny are separate crimes[,]" it is inappropriate for the trial court to punish an individual for both when the same property is involved. *State v. Perry*, 305 N.C. 225, 234, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010). Specifically, the Court held that "the Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E.2d at 816. When the trial court enters judgment on both larceny and the possession of property stolen in the larceny, our remedy is to vacate the conviction for the latter. *See State v. Stroud*, 252 N.C. App. 200, 797 S.E.2d 34 (2017). Because the trial court consolidated the two charges for judgment, we therefore vacate the judgment entirely, and remand this matter to the trial court, with instructions to arrest the charge of possession of stolen property and enter judgment only upon the charge of larceny, and to resentence defendant accordingly.

NO ERROR IN PART, NO PLAIN ERROR IN PART, VACATED AND REMANDED IN PART.

Judge COLLINS concurs in separate opinion.

Judge MURPHY concurs in part and dissents in part in separate opinion.

COLLINS, Judge, concurring.

I concur in the majority opinion. I write separately to add additional analysis to the discussion of the second issue involving the jury instruction.

The trial court, in its jury instructions, informed the jury that it could find defendant guilty of felonious larceny if it found that defendant "took and carried away another person's property[,]" and that said property "was worth more than $1,000[.]" On appeal, defendant contends that this instruction was plainly erroneous as it improperly permitted the jury to find defendant guilty under an alternate theory not charged in the indictment.

"It is the rule in this State that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment, and that where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory." *State v. Litchford*, 78 N.C. App. 722, 727, 338 S.E.2d 575, 578 (1986) (internal quotation marks and citation omitted).

Here, Defendant was initially indicted for the theft and possession of "[a] 240LB propane tank." Subsequently, the State moved to amend the indictment to remove the size of the propane tank, and the trial court allowed the motion. The evidence presented a trial shows that Speagle, a propane manager with Carolina Energies, identified the propane tank by its serial number. Speagle testified that the propane tank "had been sprayed over, camouflaged a little bit" and he called his office to confirm that the propane tank's serial number matched the "serial number connected to" the propane tank stolen from Crotts' labor camp. Speagle then explained how he recovered and removed the tank from the property and that "the value of the tank" was approximately $1330. Through Speagle's testimony, the State established that the propane tank stolen from Crotts was the exact propane tank recovered from the Canipe's

property. The State provided no evidence of any other property that Defendant was alleged to have taken.

While "[t]echnically, it would have been better for the trial court to have charged the jury that it had to find" that Defendant took and carried away a propane tank, "[s]uch a misstatement by the trial court . . . does not amount to submitting to the jury a possible theory of conviction which is neither supported by the evidence nor the indictment." *Id.* at 728, 338 S.E.2d at 579. There is no fatal variance here where both the indictment and the evidence show that Defendant stole a propane tank, the trial court charged the jury that it could find Defendant guilty if he "took and carried away another person's property," and there is no evidence from which the jury could determine that Defendant had stolen property other than a propane tank. *See State v. Pringle*, 204 N.C. App. 562, 567, 694 S.E.2d 505, 508 (2010) (determining "no error, much less plain error," where "the trial court's instruction was in accord with the material allegations in the indictment and the evidence presented at trial"). We discern no plain error in the trial court's instructions on felonious larceny because it cannot be said that the instructional mistake "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citation omitted).

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

While I concur fully with the improper sentencing under both larceny and possession of stolen property issue, I concur in outcome only as to the jury instruction issue. However, I respectfully dissent as to the Defendant's motion to dismiss. According to the language of the indictment, the jury should only have considered the value of the propane tank in determining if Defendant stole property worth more than $1,000.00, elevating the larceny from a misdemeanor to a felony. Therefore, the evidence of the propane tank's value presented by the State was insufficient to support a conviction of felonious larceny because there was no testimony as to the value of the propane tank alone and the only testimony on value was in reference to the combined value of the propane tank, an unknown amount of propane gas within the tank, the regulator attached to it, and the regulator attached to the building. Further, any determination by the jury as to the value of the propane tank alone would be speculative due to the impossibility of subtracting the value of an unknown amount of propane gas from the combined value to deduce the value of the propane tank.

BACKGROUND

The indictment states, "[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Defendant] named above unlawfully, willfully, and feloniously did steal, take and carry away A 240LB PROPANE TANK[.]" The indictment was later properly amended to "a propane tank with a value in excess of a thousand dollars."

At trial, the value of the propane tank was described in many different ways, each time by Nelson Speagle ("Speagle"). Speagle worked as a propane manager for Carolina Energies with almost 19 years of experience at the time of his testimony. Speagle, on behalf of Carolina Energies, had provided propane gas, regulators, and propane tanks to the victim in this case. Speagle estimated the value of the tanks three times, in the following ways:

> [State:] Are you familiar with how much these tanks are worth?
>
> [Speagle:] Right – With the tank *and the gas and regulators*, it's roughly $1,330, somewhere in that ballpark.
>
> [State:] Are you talking about the tanks pertaining to [the victim]?
>
> [Speagle:] Yes.
>
> . . .
>
> [State:] And based on your training and experience and your job duties, were you able to give -- or were you able to come up with a fair market value of how much this tank was?
>
> [Speagle:] Just the tank?
>
> [State:] No. *Total. Everything in it.*
>
> [Speagle:] Total? You're probably at $1,300, 1,330 something.
>
> [State:] And that's *including the regulators* that are on the tank?
>
> [Speagle:] That's the tank, *the regulators, and the fuel.*
>
> . . .

> [State:] So just to be clear, it's your opinion that on the date of January 25th the value of the tank that you received was approximately $1,330?
>
> [Speagle:] Yeah.

(Emphasis added). Regarding the regulators and their value, Speagle testified:

> [State:] Okay. And when you noticed this tank, did you notice that the regulators were with it?
>
> [Speagle:] One was and the other wasn't. It was laying, I think, in the yard or on the ground there.
>
> [State:] And normally are these regulators attached to the propane tank?
>
> [Speagle:] We've got one that the regulator attaches to the tank and one regulator that attaches to the house or structure, wherever we put the tank.
>
> [State:] And how much would a regulator cost?
>
> [Speagle:] Roughly $90.

Speagle also testified that he did not know how much propane gas was in the propane tank at the time he retrieved it, and the last time he checked the tank, at an unknown date, it was full. In terms of the value of the propane gas, he testified

> [State:] So would you say that the gas was about $500 worth of gas in this particular tank, or are you just saying that's –
>
> [Speagle:] The gas that was in it fits 96 gallons. You're looking at roughly $300 for gas.

At the close of all evidence, Defendant moved to dismiss all charges, and the trial court denied the motion. Defendant was found guilty of felonious larceny and felonious possession of stolen goods. This Dissent focuses on Defendant's argument that "[t]he trial court erred in failing to dismiss the charges where the evidence of value was insufficient to support convictions for felonious larceny and felonious possession of stolen goods."

ANALYSIS

Although this Dissent focuses only on the issue of whether the State presented sufficient evidence to support a value of more than $1,000.00

justifying a charge of felonious larceny,[1] it is important to clarify that Defendant's indictment includes only the "propane tank." The evidence at trial discussed the combined value of the propane tank, propane gas, and regulators, the value of the regulators, and what the value of the propane gas could be. However, no evidence at trial ever valued the propane tank alone, nor can that value be deduced from the evidence presented at trial.

A. Larceny Indictments

"Generally, the same degree of certainty must be used to describe the goods in indictments for obtaining property by false pretenses as in indictments for larceny." *State v. Ricks*, 244 N.C. App. 742, 752, 781 S.E.2d 637, 643 (2016) (citing *State v. Reese*, 83 N.C. 637, 639 (1880)). "The principle that the item obtained in a false pretense crime and the thing stolen in larceny must be described with the same degree of certainty was reaffirmed in 1915. . . . The item must be described with 'reasonable certainty' and 'by the name or term usually employed to describe it.' " *Id.* at 752, 781 S.E.2d at 644 (quoting *State v. Gibson*, 169 N.C. 318, 85 S.E. 7, 8 (1915)). This principle was once more reaffirmed in 2014 when our Supreme Court stated "[a]dditionally, 'it is the general rule that the thing obtained by the false pretense must be described with reasonable certainty, and by the name or term usually employed to describe it.' " *State v. Jones*, 367 N.C. 299, 307, 758 S.E.2d 345, 351 (2014) (quoting *Gibson*, 169 N.C. at 320, 85 S.E. at 8) (internal alterations omitted).

Applying the same indictment rules regarding the description of goods to larceny and obtaining property by false pretenses, I conclude that when describing the stolen item in indictments for larceny, the item "must be described with reasonable certainty and by the name or term usually employed to describe it." *Ricks*, 244 N.C. App. at 752, 781 S.E.2d at 644 (internal marks and citations omitted). In this case, the indictment only stated "a propane tank." According to our precedent, "propane tank" must refer only to the object that it names or usually describes. *Id.* Obviously, this includes the propane tank in this case. However, nothing in the indictment describes with reasonable certainty the regulators, or the propane gas within the propane tank. Indeed, the term that would normally refer to these items is not "propane tank." In fact, the only terms ever used by the State, the victim in this case, Jeff

1. While Defendant was also found guilty of felonious possession of stolen goods, I will focus on the conviction of felonious larceny because the analysis applies with equal force to both charges because both charges were based on the same evidence and I agree with the parties and the Majority that it was improper to sentence Defendant to both possession of stolen goods and larceny.

Crotts ("Crotts"), Sergeant Amy Lail, and an expert in the field, Speagle, to refer to the regulators were "regulator," or "regulators." The only terms used by the State, Crotts, Speagle, and Defense Counsel to refer to the propane gas were "gas," "fuel," and "propane." Also, throughout the Record there are distinctions made between the tank, the regulators, and the propane gas. The usage of these words throughout the trial demonstrates the usual terms that describe regulators and propane gas are "regulator," and "propane," "gas," or "fuel" respectively.

As a result, the indictment did not charge Defendant with larceny of the two regulators attached to the propane tank or the propane gas within the tank. Instead, it simply charged Defendant with larceny of the propane tank.[2] Based on the indictment, the jury should only have considered the value of the propane tank in determining if the value of the stolen property exceeded $1,000.00, making Defendant guilty of felonious larceny. N.C.G.S. § 14-72(a) (2019). Based on the evidence presented at trial, if we were to calculate the value of the propane tank alone, then we would subtract the value of the two regulators, worth $90.00 each, and the value of the propane gas, worth somewhere between $0.01 and $300.00, from the combined value testified to by Speagle, $1,330.00. This is the same as subtracting somewhere between $0.01 and $300.00 from $1,150.00, which would leave us with a value for the propane tank alone being somewhere between $850.00 and $1,149.99. However, this is not the end of the inquiry as to the validity of Defendant's convictions.

B. The Motion to Dismiss

1. Standard of Review

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

2. General Principles

Defendant argues that the trial court erred in not granting his motion to dismiss for insufficient evidence. Specifically, he argues the State

2. Making legal distinctions between an object and an item attached to it is not novel. Our Supreme Court similarly distinguished between an item and its attachment in *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365, (1976). In *Greene*, our Supreme Court held that, although the defendant was found in possession of a set of disk boggs that had been attached to a tractor, the doctrine of recent possession did not extend to the tractor that the disk boggs had been attached to in part because of its ability to be removed from the tractor. *Id.* at 581-583, 223 S.E.2d at 367-369. Although the issue before us is not governed by the doctrine of recent possession, *Greene* supports making a legal distinction between an attachment and the item it was attached to. The logic underlying this distinction is equally applicable to an object and its contents when those contents are typically removed and replaced.

failed to present sufficient evidence to establish the propane tank had a value exceeding $1,000.00 as required in charges of felonious larceny and felonious possession of stolen goods. N.C.G.S. § 14-72(a) (2019). No other element of the crime is challenged.

> Upon [D]efendant'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 [D]efendant's being the perpetrator of such offense. If so, the motion is properly denied. . . .
>
> *If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense* or the identity of the defendant as the perpetrator of it, *the motion should be allowed.* . . . This is true even though the suspicion so aroused by the evidence is strong. . . .
>
> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. . . .
>
> The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. . . . When the motion calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of [D]efendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Powell, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980) (internal citations and marks omitted) (emphasis added).

Here, the only relevant essential element of felonious larceny relates to the value of the property stolen. "Larceny of goods of the value of more than one thousand dollars ($1,000[.00]) is a Class H felony." N.C.G.S. § 14-72(a) (2019).

3. *State v. Davis* and *State v. Parker*

Relying on *State v. Davis*, the Majority holds that the State presented sufficient evidence of value to withstand Defendant's motion to dismiss. *State v. Davis*, 198 N.C. App. 146, 678 S.E.2d 709 (2009). The Majority relies on *Davis* to reach the conclusion that Defendant's motion to dismiss was properly denied because "the State presented evidence, namely the testimony of Speagle, that the stolen propane tank was worth $1,300[.00], more than the requisite $1,000[.00] threshold. Whether the absence of fuel or regulators put that valuation below the $1,000[.00] threshold was a question 'properly before the jury for resolution,' and did not warrant dismissal." *Supra* at 192. The Majority bases this conclusion on the proposition from *Davis* that the State "is not required to produce 'direct evidence of . . . value,' provided that the jury is not left to 'speculate as to the value' of the item." *Id.* at 151-52, 678 S.E.2d at 714 (quoting *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986) *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987))). The Majority's reliance on *Davis* is misplaced.[3]

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3. Our Supreme Court will not be bound by *Davis*. *State v. Alonzo*, 373 N.C. 437, 440, 838 S.E.2d 354, 356 (2020) ("We are not bound by the Court of Appeals' decision in *Lark*"). Therefore, while not critical to the proper outcome, I include this observation of *Davis* insofar as it misapplied *Holland* and our prior decision in *Parker*. In *Davis*, we held "the jury could have reasonably concluded that the value of the DVD player deck [the] defendant possessed was worth over $1,000.00 based on [the vendor's] testimony that the entire system retails in his store for over $1,300.00." *Davis*, 198 N.C. App. at 152, 675 S.E.2d at 714. We even went on to say "the jury could have reasonably concluded that the DVD player was worth $1,300.00 and was merely missing a necessary component, similar to a car missing its engine or a watch missing its batteries." *Id.* at 153, 678 S.E.2d at 715. It is unclear to me how a jury could do anything other than speculate as to the value of a used, non-functional half of a two-part system if the only information it had before it regarding value was that a new, fully-functional complete system was worth $1,300.00. Additionally, it is unclear how it could ever be reasonable for a jury to find that the fair market value of a non-functioning item without its other essential component could remain the same as the fully-functional item with both components. *Davis* is even more clearly illogical when it is applied to what we claimed was similar to the facts of *Davis*—a car missing its engine. *Id.* The *Davis* holding would suggest that it is reasonable for a jury to conclude that a new car worth $25,000.00 was worth the same as a car in "like-new condition" that is "merely . . . missing its engine." *Id.* at 152-153, 678 S.E.2d at 714-715.

Additionally, *Davis* holds that "[t]he State is not required to produce 'direct evidence of . . . value' to support the conclusion that the stolen property was worth over $[]1,000.00, provided that the jury is not left to 'speculate as to the value' of the item." *Id.* at 151-152, 678 S.E.2d at 714, (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). This paraphrasing of *Holland* was not an accurate representation of the cited language's meaning. In context, the full language referred to is:

> Although the State offered *no direct evidence of the Cordoba's value*, there is in the record evidence tending to show that the victim owned two automobiles and that the 1975 Chrysler Cordoba was his favorite

The Majority's reliance on *Davis* is misplaced because the proposition cited to support its conclusion that the State presented sufficient evidence, by its own terms, does not apply here. That proposition is only appropriately applied when "the jury is not left to 'speculate as to the value' of the item." *Id.* (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). This is precisely the situation we have here. To determine the value of the propane tank, the jury would have to determine the value of the propane gas within the propane tank when it was picked up by Speagle, and then subtract it and the value of the regulators from $1,330.00. Since the regulators were worth $180.00 and there was no evidence presented of how much propane gas was in the propane tank, the jury necessarily had to speculate as to whether the propane tank had a value as low as $850.00 or as high as $1,149.99. This is particularly significant because to be convicted of felonious larceny the required value of the stolen property must be greater than $1,000.00. The jury was asked to blindly guess how much gas was in the tank to determine the value of the propane tank.

Davis also inaccurately describes *State v. Parker*. *Davis* states that in *Parker* "the State produced no evidence at all of the value of the stolen property." *Id.* at 152, 678 S.E.2d at 714. Upon further reading of *Parker*, the State presented evidence about the value of all of the victims' stolen items, including those that were alleged to be stolen by the defendant and some that were not, the resale value of some of the items

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> one of which he took especially good care, always keeping it parked under a shed, and that a picture of this automobile was exhibited to the jury for the purpose of establishing the location of the automobile when discovered after its theft. The State contends that this evidence is sufficient to support the jury's finding that the automobile's value at the time of the theft exceeded four hundred dollars. We are not convinced and find that the substantiality of the evidence is insufficient for presentation of the issue of value to the jury. *The jury may not speculate as to the value.* Although the trial court properly instructed the jury as to the difference between misdemeanor and felony possession, the evidence was not such as would justify the jury in finding that the value of the Cordoba exceeded four hundred dollars.

Holland, 318 N.C. at 610, 350 S.E.2d at 61 (emphasis added). In context, it is clear that our Supreme Court in *Holland* was not holding "[t]he State is not required to produce 'direct evidence of . . . value' to support the conclusion that the stolen property was worth over $[]1,000.00," but was instead simply rejecting the State's argument that the indirect evidence presented was sufficient evidence of value to justify submitting the issue to the jury. *Davis*, 198 N.C. App. at 151-152, 678 S.E.2d at 714. In fact, the first time such a reading of *Holland* occurred was in *Davis*. I would encourage our Supreme Court to overrule *Davis*. *Routten v. Routten*, 843 S.E.2d 154, 158-159 (N.C. 2020) ("However, the *Moore* court misapplied our decision in *Petersen*. . . . We also expressly overrule *Moore v. Moore*").

alleged to be stolen by the defendant, and the amount of money loaned to the defendant when he traded stolen items with a pawn store. *State v. Parker*, 146 N.C. App. 715, 716, 555 S.E.2d 609, 610 (2001). In *Parker*, when discussing *Holland* and applying it to the facts of the case, we said:

> [O]ur Supreme Court vacated the defendant's conviction for felonious possession of stolen property where the State failed to present direct evidence of the value of the stolen vehicle. There, the State presented evidence tending to show that the vehicle was a 1975 Chrysler Cordoba; it was the owner's favorite vehicle and he took especially good care of it; and the owner always parked the vehicle under a shed. [Citing *Holland*]. The State also introduced a photograph of the vehicle.
>
> The State maintained that such evidence was sufficient to establish the value of the vehicle exceeded $400.00, the statutory minimum applicable at that time. *Id.* The Supreme Court rejected the argument, stating that "the substantiality of the evidence is insufficient for presentation of the issue of value to the jury. *The jury may not speculate as to the value*." *Id.* It concluded that such evidence "was not such as would justify the jury in finding that the value of the Cordoba exceeded four hundred dollars." *Id.* The court therefore vacated the defendant's conviction for felonious possession of stolen property and remanded for pronouncement of a judgment of guilty of misdemeanor possession of stolen property and for resentencing. *Id.*
>
> In this case, the State likewise failed to introduce sufficient evidence of the value of the stolen goods in [the] defendant's possession. The trial court instructed the jury that [the] defendant's charge was based upon his possession of "a Magnavox VCR, cameras, and photography equipment." Although Goodman testified that the total estimated value of all stolen items was $5,000.00, there is simply no evidence regarding the total value of the items contained in the trial court's charge. The only evidence relating to these items was Hayes' testimony that she loaned [the] defendant $40.00 for a Magnavox VCR based on her estimate that she could resell it for $80.00, and Mitchell's testimony that she loaned [the] defendant $80.00 for two cameras and some photography equipment. Such evidence is not

> sufficient evidence from which a jury could determine to any certainty the value of the VCR, cameras, and photography equipment. The jury must not be left to speculate about the value of these items. *See Holland*, 318 N.C. at 610, 350 S.E.2d at 61. We therefore vacate [the] defendant's conviction for felonious possession of stolen property in 99CRS011124. We remand that matter to the trial court for entry of a judgment of guilty of misdemeanor possession of stolen property, and for re-sentencing accordingly.

Id. at 717-718, 555 S.E.2d at 610-611 (emphasis added).

Parker is controlling here, and, based on *Parker*, the trial court should have granted Defendant's motion to dismiss. In *Parker*, "[the d]efendant was charged with [and convicted of] felonious possession of stolen property . . . [b]ased on his pawning of [some of] the stolen goods." *Id.* at 716, 555 S.E.2d at 610. The defendant challenged the conviction for felonious possession of stolen goods and "argue[d] the State failed to present evidence from which the jury could conclude the value of the items stolen by [the] defendant was over $1,000.00." *Id.* at 717, 555 S.E.2d at 610. At trial in *Parker*, the State introduced evidence regarding the value of all items stolen from the property owners; however, the defendant was only charged with having stolen some of the missing property and "there [was] simply no evidence regarding the total value of the items contained in the trial court's charge." *Id.* at 718, 555 S.E.2d at 611. Although there was some testimony as to the value of the items the defendant was charged with stealing, "[t]he only evidence relating to these items was [a witness's] testimony that she loaned [the] defendant $40.00 for a Magnavox VCR based on her estimate that she could resell it for $80.00, and [another witness's] testimony that she loaned [the] defendant $80.00 for two cameras and some photography equipment." *Id.* Relying on *Holland*, we held that "[s]uch evidence [was] not sufficient evidence from which a jury could determine to any certainty the value of the [property the defendant was charged with stealing]. The jury must not be left to speculate about the value of these items." *Id.* (citing *Holland*, 318 N.C. at 610, 350 S.E.2d at 61). We then "vacate[d the] defendant's conviction for felonious possession of stolen property . . . [and] remand[ed] . . . for entry of a judgment of guilty of misdemeanor possession of stolen property, and for re-sentencing accordingly." *Id.* (citing *Holland*, 318 N.C. at 610, 350 S.E.2d at 61).

4. Application to These Facts

Applying the general principles controlling motions to dismiss, and applying *Parker* to this case, there was insufficient evidence of value to

submit the issue to the jury. I would vacate Defendant's conviction for felonious larceny and felonious possession of stolen goods, and remand for entry of judgment of misdemeanor larceny or possession of stolen goods and resentencing accordingly.

a. The Combined Value of the Propane Tank, Propane Gas, and Two Regulators

In the light most favorable to the State, the value of the propane tank, the two regulators, and any propane gas within the tank was $1,330.00. Speagle provided an estimate of the value of these items three times. Although Speagle provided a range of values from $1,300.00-$1,330.00 the second time he estimated the combined value of these three items, his initial and ultimate valuations were that these items together were worth $1,330.00. Viewing this evidence in the light most favorable to the State, we must take the higher values given as opposed to the lower values, leaving us with $1,330.00 as the combined value of the propane tank, any propane gas within the tank, and the two regulators.[4]

Although the combined value of the propane tank, the propane gas within it, and the regulators is $1,330.00, as stated above, Defendant was only charged with larceny of the propane tank. The only value the trial court could have properly considered to determine the motion to dismiss as to the felony enhancement of larceny was the value of the propane tank alone. To find the value of the propane tank, we must subtract Speagle's estimated value of the two regulators and propane gas from his testimony of their $1,330.00 combined value.

b. The Value of the Propane Tank without the Regulators and Propane Gas

According to Speagle's testimony, the value of each regulator was $90.00. One regulator was attached to the propane tank while another was attached to the building, meaning the total value of the regulators was $180.00. Additionally, it is clear that Speagle's valuation of $1,330.00 included both regulators, as he twice stated "regulators" when he described what he was including in his valuation. When the value of the two regulators ($180.00) is removed from the value provided by Speagle for everything ($1,330.00), we find that the value of the propane tank and any propane gas within the tank was $1,150.00.

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4. I come to this conclusion based only on logical reasoning and application of our general jurisprudence as my exhaustive research has discovered no applicable case-law regarding the issue of how the light most favorable standard interacts with ranges of values.

At the time the propane tank was stolen, there was up to $300.00 worth of propane gas in the tank. However, we cannot assume that Speagle was approximating the value of the propane tank absent any propane gas. Speagle consistently included the "gas" or "fuel" when he described what he was including in calculating his value of $1,330.00. Speagle's estimate included the value of an unclear amount of gas, with a maximum value of $300.00. There was no evidence presented as to how much gas Speagle was including in his estimate of the combined value of the propane tank, propane gas, and regulators. Although he was basing his valuation on the assumption there was gas within the propane tank when he identified it at and removed it from Defendant's residence, he explicitly stated "I don't have a clue how much [fuel was in the propane tank]." Any decision as to how much gas there was in the tank and its corresponding value is entirely speculative, and the jury could not have properly decided this value in calculating the value of the tank without the fuel.

That being said, to recreate the jury's only legally acceptable path to deducing the value of the propane tank, we are faced with the impossible task of determining the value of an unknown amount of gas, ranging from $0.01-$300.00. The amount of propane gas that the jury determined to be within the propane tank was dispositive of whether Defendant was convicted of felonious or misdemeanor larceny because after removing the value of the regulators the value of the propane tank and the propane gas within it was $1,150.00. If the jury were to determine the propane gas was worth anywhere between $0.01-$149.99, then when it would have removed this value it would have been left with a value exceeding $1,000.00 for the propane tank, satisfying the requirement of felonious larceny; however, if the jury were to determine the propane gas was worth anywhere between $150.00-$300.00, then when it would have removed this value it would have been left with a value of $1,000.00 or less for the propane tank satisfying only the requirement of misdemeanor larceny. This impossible task is the exact hurdle required of the jury in this case if it was to properly determine the value of the tank alone from the testimony presented at trial, and it is the type of speculation that the law prohibits.

Like in *Parker*, in this case there is an estimate of multiple items of stolen property—a propane tank, the regulators, and the propane gas within it—not all of which Defendant was charged with stealing, but "there is simply no evidence regarding the . . . value of the" item Defendant was charged with stealing, the propane tank. *Parker*, 146 N.C. App. at 718, 555 S.E.2d at 611. Although there is testimony on the value

of the regulators, and the maximum potential value of the propane gas, it is impossible to extrapolate the value of the propane tank from this testimony because there is nothing in the Record to suggest how much propane gas was being included in Speagle's combined estimate of the propane tank, the propane gas, and the regulators. This evidence "is sufficient only to raise a suspicion or conjecture as to . . . the commission of" felonious larceny because any determination of how much propane gas was in the tank for the purposes of the estimate would be conjecture, and thus any corresponding determination of the value of the propane tank would also be conjecture. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. Here, like in *Parker*, there was no evidence for the jury to determine "to any certainty the value of the" propane tank that Defendant was charged with stealing, and allowing the jury to speculate about the value of the propane tank was improper. *Parker*, 146 N.C. App. at 718, 555 S.E.2d at 611. The trial court should have granted Defendant's motion to dismiss as to the charge of felonious larceny and felonious possession of stolen goods. I would vacate the conviction for felonious larceny and felonious possession of stolen goods and remand for entry of judgment for misdemeanor larceny or misdemeanor possession of stolen goods and resentencing accordingly.

CONCLUSION

The indictment here only refers to the "propane tank," so only the value of the propane tank is considered to determine if Defendant should have been convicted of felonious or misdemeanor larceny. The State presented evidence that required the jury to speculate as to the value of the propane tank. It was impossible to determine, and therefore impossible to remove without speculation, the value of the propane gas included in the combined estimate of the propane tank, any propane gas within the tank, and the regulators attached to the tank and the building. When the evidence requires the jury to speculate as to the value of stolen property, a motion to dismiss should be granted. Therefore, the trial court erred in not granting Defendant's motion to dismiss as to felonious larceny and felonious possession of stolen goods, and we should vacate Defendant's felonious larceny charge and remand for entry of judgment for misdemeanor larceny or misdemeanor possession of stolen goods and resentencing accordingly.

Were we to vacate the conviction for felonious larceny and remand for entry of judgment for misdemeanor larceny or misdemeanor possession of stolen goods and resentencing, the second issue raised by Defendant would be moot, as any error in failing to instruct the jury that the propane tank must have been shown to be worth more than

$1,000.00 for the purposes of felonious larceny would have no effect. Finally, as to the erroneous sentencing under both larceny and possession of stolen goods, I concur with the Majority.

KEITH WILLIAMS, CEO/DIRECTOR, SOUTHEASTERN PUBLIC SAFETY GROUP, INC., PLAINTIFF

v.

NORTH CAROLINA DEPARTMENT OF JUSTICE, CRIMINAL STANDARDS DIVISION, DEFENDANT

No. COA19-1031

Filed 18 August 2020

Tort Claims Act—negligent interference with contract—failure to state a claim

Plaintiff's claim for negligent interference with a contract was properly dismissed by the Industrial Commission for a failure to state a claim—not for lack of subject matter jurisdiction—because negligent interference with a contract is not a tort recognized in North Carolina. Because the dismissal of plaintiff's claim was upheld on appeal, plaintiff's argument that the Commission relied too heavily on plaintiff's Form T-1 affidavit became moot.

Appeal by Plaintiff from an Order filed 18 June 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 April 2020.

Ian Morris for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenzie M. Rakes, for defendant-appellee.

MURPHY, Judge.

The State Tort Claims Act authorizes the Industrial Commission to hear claims arising as a result of the negligence of any agent of the State within the scope of their employment. Where the Industrial Commission does not dismiss a claim for lack of subject matter jurisdiction, but instead for failure to state a claim upon which relief may be granted, we affirm when the claim is not a recognized form of negligence.

There is neither a statute nor caselaw in North Carolina which would support Plaintiff's claim for negligent interference with a contract. In 1914, our Supreme Court held a party to a contract who is injured by the negligence of a third party cannot recover damages from that third party. North Carolina caselaw does not support Plaintiff's request that we recognize the tort of negligent interference with a contract. Further, since we are an error-correcting court, it is not our role to expand the law. The claim for negligent interference with a contract was properly dismissed for failure to state a claim upon which relief may be granted. We affirm.

BACKGROUND

Southeastern Public Safety Group, Inc. ("Southeastern") is a North Carolina corporation and certified company police agency. On 31 March 2015, Southeastern became certified to provide law enforcement services to the North Carolina Department of Transportation. On 19 July 2016, Southeastern won a bid to provide law enforcement services for traffic control to Sugar Creek Construction ("SCC"). The contract required traffic control by a law enforcement agency in an active work zone.

On 7 April 2017, Southeastern's Chief Executive, Keith Williams ("Williams"), was contacted by Morgan Powell of the Federal Highway Administration. Powell was in contact with Randy Munn ("Munn"), an official representative of the North Carolina Department of Justice ("the NCDOJ"). Powell contacted Williams by forwarding a message from Munn, where Munn requested information on Williams's "certification as a company police agency." Williams complied. Munn later forwarded Williams an email from the Assistant Attorney General, informing Williams that his work for SCC was in violation of N.C.G.S. § 74E ("the Company Police Act") and Southeastern must stop work on the contract immediately.

On 18 December 2017, Williams, in his official capacity and on behalf of Southeastern, filed a North Carolina Industrial Commission ("NCIC") Form T-1[1] ("T-1 Affidavit")for a claim of damages under the Tort Claims Act. Williams made claims of work stoppage attributed to the NCDOJ in its failure to administrate the Company Police Act. The T-1 Affidavit further alleged the administrative stoppage prevented the business from providing police services as contracted and caused severe economic loss.

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1. The T-1 Affidavit is a form the NCIC requires a claimant to file in order to enter the case onto its hearing docket.

The NCDOJ filed a Motion to Dismiss on 21 February 2018, pursuant to Rule 12(b)(6) for failure to state a claim and Rule 12(b)(1), (2), and (6) for lack of subject matter jurisdiction over intentional tort and/or constitutional rights violations. Williams moved to amend the complaint on 6 March 2018 to include additional causes of action based on "negligent infliction of economic loss" due to breaches of duty to investigate and duty to inform.

On 30 May 2018, the Deputy Commissioner entered an order ("the 30 May 2018 Order") dismissing Williams's claims with prejudice under Rule 12(b)(1) due to lack of subject matter jurisdiction of the NCIC to handle claims of alleged intentional tort or constitutional rights violations and breach of contract actions. A notice of appeal and application for review to the Full Commission was submitted by Williams on 14 June 2018. Williams argued "[t]he claim was and still is that [the NCDOJ] negligently inflicted economic harm to Southeastern by failing to thoroughly administer, supervise, investigate, inform and protect Southeastern." Further, Williams argued "[w]hile some of the alleged actions of . . . Munn were intentional actions, they could just as easily be attributed to misfeasance, inaction, poor supervision, or outright incompetence."

The Full Commission's order ("the Order") affirmed the 30 May 2018 Order. The Full Commission held "[Williams's] Affidavit and *Motion to Amend Complaint* include allegations of constitutional violations, breach of contract claims, and intentional torts, including tortious interference with a contract. Said claims are outside of the [NCIC]'s jurisdiction and, as such, are subject to dismissal." The Order further concluded that "[t]o the extent [Williams] has remaining purported negligence claims, including negligent tortious interference with a contract, they are not recognized claims under which relief can be granted under North Carolina law and are subject to dismissal under Rule 12(b)(6)." Williams timely appealed on 17 July 2019.

ANALYSIS

A. Standard of Review

> The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act 'shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.'

Simmons ex rel Simmons v. Columbus Cnty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (quoting N.C.G.S. § 143-293 (2003)).

"Under the Tort Claims Act, when considering an appeal from the [Full] Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the [Full] Commission's findings of fact, and (2) whether the [Full] Commission's findings of fact justify its conclusions of law and decision." *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001).

"[T]he North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls." *Pate v. N.C. Dep't of Transp.*, 176 N.C. App. 530, 533, 626 S.E.2d 661, 664 (2006); N.C.G.S. § 143-300 (2019).

1. Dismissal for Lack of Subject Matter Jurisdiction

The NCIC is "a court for the purpose of hearing and passing upon tort claims against . . . institutions and agencies of the State." N.C.G.S. § 143-291 (2019).

> The [NCIC] shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id. "It is well-settled that the Tort Claims Act does not permit recovery for intentional injuries. Only claims for negligence are covered." *Fennell*, 145 N.C. App. at 592, 551 S.E.2d at 492 (internal citations omitted); N.C.G.S. § 143-291 (2019).

"Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter." N.C.G.S. § 1A-1, Rule 12(b)(1) (2019). "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986).

"It is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would

otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel." *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961). "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).

"When the record shows a lack of jurisdiction in the lower court, the appropriate action . . . is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.*

2. Dismissal for Failure to State a Claim

"Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) Failure to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (2019).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Henderson v. Charlotte-Mecklenburg Bd. of Educ., 253 N.C. App. 416, 419, 801 S.E.2d 145, 148 (2017).

Dismissal is proper when one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Subject Matter Jurisdiction

The Order dismissed Williams's negligence claims, "including negligent tortious interference with [a] contract," under Rule 12(b)(6). The

non-negligence claims were dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

Williams argues the Full Commission erred in finding that his complaint was based on some intentional tort and not the negligent supervision, administration, and investigation of Southeastern by Munn and the NCDOJ. Williams argues the Full Commission has jurisdiction over claims that arise from the negligence of any agent of the State while acting within the scope of his employment. Williams argues the NCDOJ ordered it to cease work on its contract with SCC, and as a result it "suffered personal, economic injury." Further, Williams argues Munn was not intentionally injuring Williams, but rather this injury was the result of Munn's negligence. Williams asks us to conclude the Full Commission does have subject matter jurisdiction.

"The State Tort Claims Act authorizes the [NCIC] to entertain claims arising as a result of a negligent act of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency, or authority[.]" *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983); N.C.G.S. § 143-291 (2019). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity . . . must be strictly construed." *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627.

> Suits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent authorized by the Tort Claims Act, . . . and that Act authorizes recovery only for negligent torts. Intentional torts . . . are not compensable under the Tort Claims Act.

Wojsko v. State, 47 N.C. App. 605, 610, 267 S.E.2d 708, 711 (1980); *see also* N.C.G.S. § 143-291 (2019).

The Order dismissed the claim of "negligent tortious interference with a contract" under Rule 12(b)(6). The Full Commission acknowledged the motion to dismiss under Rules 12(b)(1) and 12(b)(6), but chose to dismiss the negligence claim under Rule 12(b)(6). The Full Commission did not dismiss the negligence claim for lack of subject matter jurisdiction, but instead for failure to state a claim upon which relief may be granted. Therefore, this claim was properly dismissed. While the Full Commission dismissed the non-negligence claims under Rule 12(b)(1), it did not order that it lacked jurisdiction to decide a negligence claim.

The Full Commission did not err in dismissing Williams's claim of negligent interference with a contract because the claim was dismissed

for failure to state a claim upon which relief may be granted, not for lack of subject matter jurisdiction.

C. Failure to State a Claim

Williams next argues the Full Commission erred in finding no claim was alleged because Williams established the NCDOJ had a duty to administer, supervise, investigate, and inform company police agencies and failed to do so. Williams argues the claim was and still is that the NCDOJ negligently stopped it from working in contract with SCC, thus the NCDOJ breached their duty under the Company Police Act. Further, Williams argues the NCDOJ was not seeking to intentionally injure the contract, but the NCDOJ was the actual and proximate cause of Williams's injury and inability to complete the contract.

"A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Forsyth Mem'l Hosp., Inc. v. Armstrong World Indus. Inc.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994) (quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)). Dismissal is proper under Rule 12(b)(6) when "the complaint on its face reveals that no law supports the plaintiff's claim." *Wood*, 355 N.C. at 166, 558 S.E.2d at 494.

This appeal is bound by the jurisdictional requirements of the Tort Claims Act, and therefore any claim must be based in negligence. "Under the Tort Claims Act, jurisdiction is vested in the [NCIC] to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie*, 307 N.C. at 536, 299 S.E.2d at 626.

There is neither a statute nor any caselaw supporting Williams's claim for negligent interference with a contract. North Carolina recognizes a claim for tortious interference with a contract. *See Beck v. City of Durham*, 154 N.C. App. 221, 231-232, 573 S.E.2d 183, 191 (2002). However, our Supreme Court has declined to recognize negligent interference with a contract. *See generally Thompson v. Seaboard Air Line Ry.*, 165 N.C. 377, 81 S.E. 315 (1914).

In *Thompson v. Seaboard Air Line Ry.*, a lumber company contracted with the plaintiff to cut and saw timber. *Thompson*, 165 N.C. at 378, 81 S.E. at 316. The plaintiff brought an action against a railway company after a fire ignited by sparks from a train engine destroyed a

portion of a timber lot where the plaintiff was working. *Id.* Evidence showed that the fire destroyed groceries, provisions, and shacks owned by the plaintiff. *Id.* The Supreme Court noted that "no recovery can be had for an indirect, unintended injury to one arising from a tort to another." *Id.* at 379, 81 S.E. at 316.

> Where, however, by the willful tort of a third person, one of two contracting parties is disabled from performing his contract, the wrong having been committed with *intent* to injure the other, it has been held that the latter may recover from the tort feasor in damages. But *unless the wrong is done with a willful intent to injure the complaining party, the latter cannot recover.*

Id. (emphasis added) (internal alterations omitted). While *Thompson* is not an express rejection of a negligent interference with a contract cause of action, it is an implicit rejection. Presented with the opportunity to recognize such a cause of action, our Supreme Court demurred and instead cited approvingly authority holding the injury too attenuated from the wrongdoing to merit recognition of a claim based on inability to perform a contract due to a third party's negligence. *Id.* at 380, 81 S.E. at 316 (citing *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903)).

In *Thompson*, our Supreme Court cited *Byrd v. English* to support the application of the principle that "unless the wrong is done with a willful intent to injure the complaining party, the latter cannot recover." *Thompson*, 165 N.C. at 379-380, 81 S.E. at 316. *Byrd* is a case from the Supreme Court of Georgia that is analogous to the present situation where Williams is claiming negligent interference with a contract, and given our Supreme Court's reliance on the same, we consider it here.

> According to this petition, the damage done by them was to the property of the Georgia Electric Light Company, who were under contract to the plaintiff to furnish him with electric power, and the resulting damage done to the plaintiff was that it was rendered impossible for that company to comply with its contract. If the plaintiff can recover of these defendants upon this cause of action, then a customer of his, who was injured by the delay occasioned by the stopping of his work, could also recover from them, and one who had been damaged through his delay could in turn hold them liable, and so on without limit to the number of persons who might recover on account of the injury done to the property of the company owning the conduits. To state such a proposition is to demonstrate its absurdity.

Byrd v. English, 117 Ga. 191, 193-94, 43 S.E. 419, 420 (1903). *Byrd* held a party to a contract, who is injured by reason of the failure of the other party to comply with its terms, cannot recover damages of a third person, a wrongdoer, whose negligence rendered the performance of the contract impossible. *See id.*

Here, Williams's claim is analogous to the situation in *Byrd*. Williams argues the NDDOJ negligently stopped Southeastern from working in contract with SCC, breaching its duty under the Company Police Act. Further, Williams argues the NCDOJ was the actual and proximate cause of Southeastern's injury and inability to complete the contract with SCC. Therefore, Williams is arguing the NCDOJ, a third party, was negligent and rendered the performance of the contract impossible. However, the courts in *Byrd* and *Thompson* held a party to a contract who is injured by the negligence of a third party cannot recover damages from that third party. As a result, North Carolina caselaw does not support Williams's request that we recognize the tort of negligent interference with a contract.

Even if negligent interference with a contract was an issue of first impression as Williams states, and it has not been barred from recognition by our Supreme Court, it would not be our role to expand the law in a way to create such a cause of action. "This Court is an error-correcting court, not a law-making court." *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). We are "not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature, who have the power to rectify any inequities . . . ." *Id.* at 126, 723 S.E.2d at 358. It would be the role of the General Assembly or our Supreme Court to expand the law to create a cause of action for negligent interference with a contract.

"[T]he Tort Claims Act . . . waive[s] the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant." *Guthrie*, 307 N.C. at 535, 299 S.E.2d at 625. Since the Tort Claims Act is in derogation of sovereign immunity it must be strictly construed, and its terms must be strictly adhered to. *Etheridge v. Graham*, 14 N.C. App. 551, 554, 188 S.E.2d 551, 553 (1972); *Watson v. N.C. Dep't of Corr.*, 47 N.C. App. 718, 722, 268 S.E.2d 546, 549 (1980). As a result, even if it were in our power to expand the law, we would not expand the Tort Claims Act to include an unrecognized claim when sovereign immunity has not been waived with the knowledge of the creation of a new tort.

Williams failed to state a claim for which relief can be granted because negligent interference with a contract is not a tort recognized in North Carolina. The Full Commission did not err in dismissing this claim under Rule 12(b)(6).

D. Full Commission's Consideration of Prior Filings

Williams argues the Full Commission relied too heavily on the T-1 Affidavit and not the proposed *Amended Complaint*. Specifically, Williams argues the Full Commission relied on the "emotional and colloquial language" of the T-1 Affidavit, and not the allegations of negligent behavior from the proposed *Amended Complaint*.

"[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, 241 N.C. App. 1, 8, 771 S.E.2d 920, 925 (2015). Having addressed the dismissal of the negligent interference with a contract claim as proper, Williams's argument that the Full Commission erred in its judgment basing the dismissal on the T-1 Affidavit rather than the proposed *Amended Complaint* is now moot. Dismissal of this third issue is proper.

CONCLUSION

Williams's claim of negligent interference with a contract was properly dismissed for failure to state a claim upon which relief may be granted, not for lack of subject matter jurisdiction. Further, negligent interference with a contract is not a tort recognized in North Carolina, and thus Williams failed to state a claim for which relief can be granted. The Full Commission did not err dismissing this claim.

Williams's claim that the Full Commission relied on the T-1 Affidavit rather than the proposed *Amended Complaint* is deemed moot because the negligent interference with a contract claim was properly dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge BROOK concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 AUGUST 2020)

HARRINGTON v. HARRINGTON No. 19-961	Beaufort (17CVD609)	Dismissed and remanded.
IN RE A.K. No. 19-630	Johnston (18JA140-142)	Vacated and Remanded
IN RE A.M. No. 19-965	Johnston (18JA193)	DISMISSED IN PART; VACATED IN PART; AND REMANDED
STATE v. FRANKLIN No. 19-873	Rutherford (16CRS53926)	No Error
STATE v. HELMS No. 19-955	Cabarrus (17CRS53000-01)	No Plain Error in Part; No Error in Part; Reversed in Part
STATE v. LAMM-SMITH No. 19-1041	Wilson (17CRS50354) (17CRS50358)	Affirmed
STATE v. McNEILL No. 19-1081	Robeson (16CRS50969)	No Error
STATE v. ROBERSON No. 19-905	Craven (16CRS50713-14) (17CRS103)	NO ERROR IN PART; DISMISSED IN PART.
STATE v. SWEET No. 19-857	Forsyth (17CRS57244-45)	No Error
STATE v. TREADWAY No. 20-22	Haywood (18CRS328)	No Prejudicial Error
STATE v. WHITAKER No. 18-1220	Forsyth (15CRS61754)	Affirmed in part; no error in part.

D C CUSTOM FREIGHT, LLC, PLAINTIFF
v.
TAMMY A. ROSS & ASSOCIATES, INC., DEFENDANT

No. COA19-1059

Filed 1 September 2020

1. Insurance—Action against agent—negligence claim based on failure to procure insurance coverage—agent's duty limited to coverage requested

Where plaintiff-trucking company engaged defendant-insurance agent to procure coverage for vehicles rented by plaintiff from a third party, plaintiff rented vehicles on both long-term and short-term leases but the policy obtained by defendant only covered vehicles on long-term leases, and plaintiff's claim was denied when a vehicle on short-term lease was damaged in a collision, summary judgment was properly granted to defendant on plaintiff's claim for negligence for failure to use reasonable skill, care, and diligence in procuring insurance for plaintiff. There was no evidence that plaintiff requested coverage for short-term leases, and since defendant's duty was limited to securing the coverage requested by the policyholder, any failure to recommend additional insurance did not constitute negligence.

2. Insurance—Action against agent—breach of contract—no duty beyond requested coverage—no additional duty in contract created by Certificate of Insurance

Where plaintiff-trucking company engaged defendant-insurance agent to procure coverage for vehicles rented by plaintiff from a third party, plaintiff rented vehicles on both long-term and short-term leases but the policy obtained by defendant only covered vehicles on long-term leases, and plaintiff's claim was denied when a vehicle on short-term lease was damaged in a collision, summary judgment was properly granted to defendant on plaintiff's claim for breach of contract for failure to procure insurance covering short-term rentals. There was no evidence that plaintiff requested coverage for short-term rentals and defendant only had a duty to procure the coverage requested by plaintiff. A Certificate of Insurance provided by defendant to the third-party lessor which implied coverage for all vehicles did not create an additional duty in contract.

3. Insurance—Action against agent—unfair and deceptive trade practices—misrepresentation of terms of policy to third party—necessity of reliance

Where plaintiff-trucking company engaged defendant-insurance agent to procure coverage for vehicles rented by plaintiff from a third party, plaintiff rented vehicles on both long-term and short-term leases but the policy obtained by defendant only covered vehicles on long-term leases, and plaintiff's claim was denied when a vehicle on short-term lease was damaged in a collision, summary judgment was properly granted to defendant on plaintiff's claim for unfair and deceptive trade practices despite the fact that defendant provided Certificates of Insurance to the third-party lessor which implied coverage for all vehicles. Because the Certificates of Insurance containing the misrepresentations were sent to a third party and were never seen by plaintiff prior to the collision which gave rise to this case, there was no evidence plaintiff relied on the misrepresentations in its decision-making process.

Appeal by Plaintiff from Order and Judgment entered 26 September 2019 by Judge Kevin Bridges in Union County Superior Court. Heard in the Court of Appeals 28 April 2020.

The Duggan Law Firm, PC, by Christopher Duggan, and The Fitzgerald Dwyer Law Firm, PC, by Peter Dwyer, for Plaintiff-Appellant.

Parker Poe Adams & Bernstein LLP, by Jason R. Benton and Jessica C. Dixon, for Defendant-Appellee.

INMAN, Judge.

The primary question in this case is whether a claim for unfair and deceptive trade practices against an insurance agent, based on the agent's misrepresentation to a third party of the terms of a policy, can be maintained absent evidence that the plaintiff relied on the misrepresentation. We hold that North Carolina Supreme Court precedent precludes such a claim absent evidence that the plaintiff's actual and reasonable reliance on a misrepresentation caused the claimed damages.

Plaintiff D C Custom Freight, LLC, filed suit against its insurance agent, Defendant Tammy A. Ross & Associates, Inc., after Defendant sent documents to a third party implying that Plaintiff's coverage was broader than what was contained in the policy. Plaintiff was left without

coverage when a truck it rented from the third party was involved in an accident. Plaintiff appeals from: (1) the trial court's grant of summary judgment for Defendant on Plaintiff's claims for negligence, breach of contract, and unfair and deceptive trade practices ("UDTP"); and (2) the trial court's denial of Plaintiff's motion to amend its complaint asserting those claims.

We affirm the trial court's decision. This case is controlled by our Supreme Court's decision in *Bumpers v. Community Bank of Northern Virginia*, 367 N.C. 81, 747 S.E.2d 220 (2013), which holds that UDTP claims based on misrepresentation require a showing of both actual and reasonable reliance to prove that the misrepresentation caused damages. We hold that this requirement extends to claims made within the insurance industry context, in which certain practices are defined as unfair or deceptive under N.C. Gen. Stat. §58-63-15. We also hold that Plaintiff has failed to produce evidence sufficient to support a claim for negligence or breach of contract. The trial court's grant of summary judgment was therefore proper as to each of Plaintiff's claims. For the same reasons, we affirm the trial court's denial of Plaintiff's motion to amend those claims as futile.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff is a freight shipping and trucking company operating in North and South Carolina. Defendant is an insurance agent and broker. In 2016 Plaintiff engaged Defendant to procure commercial automobile insurance coverage, providing Defendant with a list of Plaintiff's equipment and a copy of its former insurance policy to use as a "go-by." Through Defendant, Plaintiff purchased a policy from Wesco Insurance Company ("Wesco") covering the period from 11 March 2017 to 11 March 2018 (the "2017-2018 policy"). Plaintiff used rented vehicles in its business, including trucks rented from Rush Enterprises, Inc. ("Rush"), some via long-term leases and some via short-term rentals. The long-term leased trucks were individually listed in the 2017-2018 policy and covered for physical damage. Trucks rented on a short-term basis were not individually enumerated and were not covered by the policy.

On 6 December 2017, Rush's insurance company requested that Defendant send a Certificate of Insurance ("COI") that showed Plaintiff's liability insurance limits and physical damage deductibles for leased or rented vehicles. Defendant prepared and sent a COI to the insurer and to Plaintiff. This certificate (the "December COI") indicated only that the policy provided liability coverage. The certificate did not mention collision coverage. The insurer requested an amended certificate that listed

coverage limits and deductibles for comprehensive and collision coverage. Defendant sent a second COI (the "revised December COI") to the insurer, revised to add the entry "Specified Perils/Collision Deductibles: $2500." The revised December COI was not sent to Plaintiff.

The next year, Plaintiff renewed the insurance policy it had purchased through Defendant, covering the term of 11 March 2018 through 11 March 2019. Defendant sent a third COI to Rush's insurer (the "March COI"), which was identical to the revised December COI except that it listed a $3000 deductible for "Specified Perils/Collision." The March COI, like the revised December COI, was sent only to Rush's insurer and not to Plaintiff.

In June 2018, Plaintiff rented a truck from Rush on a short-term basis. The short-term rental agreement with Rush required Plaintiffs to provide collision insurance for the truck. In July the rented truck was damaged in a collision. Plaintiff submitted a claim to Wesco. The claim was denied because short-term rentals were not covered by Plaintiff's policy.

Plaintiff filed suit against Defendant, asserting claims for fraudulent misrepresentation, negligence, breach of contract, fraudulent concealment, and unfair and deceptive trade practices. Defendant moved for summary judgment as to all of Plaintiff's claims. Plaintiff then moved to amend its complaint and for summary judgment on its breach of contract and UDTP claims. Plaintiff's proposed amended complaint removed its claim for fraudulent concealment, replaced its claim for fraudulent misrepresentation with a claim for negligent misrepresentation, and added factual allegations regarding the certificates of insurance. Plaintiff later supplemented its motion to amend with a revised amended complaint, which modified its negligent misrepresentation claim into one based in simple negligence. Plaintiff also withdrew its motion for summary judgment on breach of contract.

Following a hearing, the trial court denied Plaintiff's motion to amend the complaint, denied Plaintiff's motion for summary judgment on its UDTP claim, and granted Defendant's motion for summary judgment on all of Plaintiff's claims. Plaintiff appeals.

II. ANALYSIS

Although Plaintiff asserted additional claims in its complaint, its notice of appeal only contests the trial court's grant of summary judgment and denial of its motion to amend as to its claims for negligence, breach of contract, and unfair and deceptive trade practices. Plaintiff

also contests the trial court's denial of its motion for summary judgment as to unfair and deceptive trade practices. We address each cause of action in turn.

A. *Standard of Review*

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2019). The court must examine the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences. *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997). We review trial court rulings on motions for summary judgment *de novo*. *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012). Under *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the trial court. *Id.*

We review a trial court's denial of a motion to amend for abuse of discretion. *Delta Envtl. Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694 (1999). Denying a motion to amend without any apparent justification is an abuse of discretion, but when the trial court states no reason for the denial we may examine any apparent reasons for the ruling. *Id.* Proper reasons for denial include futility of the amendment. *Id.* "When an amendment would be futile in light of the propriety of summary judgment on a plaintiff's claim, it is not an abuse of discretion for the trial court to deny the amendment." *N. Carolina Council of Churches v. State*, 120 N.C. App. 84, 93, 461 S.E.2d 354, 360 (1995).

B. *Negligence*

[1] Plaintiff contends in its negligence claim that Defendant, because it failed to procure insurance coverage for short-term rental trucks, violated its duty to "use reasonable skill, care and diligence" in procuring insurance for Plaintiff. *Holmes v. Sheppard*, 255 N.C. App. 739, 744, 805 S.E.2d 371, 375 (2017). We disagree.

An insurance agent's duty in procuring insurance is limited to securing the coverage that the policyholder has requested. *Baggett v. Summerlin Ins. and Realty, Inc.*, 143 N.C. App. 43, 50-51, 545 S.E.2d 462, 467 (Tyson, J., dissenting), *rev'd for reasons stated in the dissent*, 354 N.C. 347, 554 S.E.2d 336 (2001). Failure to recommend additional insurance to cover a risk faced by the policyholder does not constitute

negligence. *See Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 562, 393 S.E.2d 306, 308 (1990) (no reasonable expectation that defendant insurance agent recommend or procure coverage for home after builder's policy lapsed at completion of construction); *Phillips by Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (insurance agent had no duty to inform client that increasing liability coverage limits would make him eligible for uninsured motorist coverage).

In this case, Plaintiff has not presented evidence raising a genuine issue of material fact regarding whether Plaintiff requested that Defendant obtain coverage for the short-term rental trucks. When seeking insurance coverage, Plaintiff provided Defendant a copy of its previous insurance policy, which did not cover short-term rentals. Plaintiff argues that its representative told Defendant that Plaintiff engaged in short-term rentals, and that this constituted a request for coverage. Considering the testimony in the light most favorable to Plaintiff, it does not show a request for coverage of short-term truck rentals, and it does not show that Defendant promised to obtain such coverage. Defendant had no duty to procure coverage beyond what Plaintiff actually requested.

Plaintiff compares this case to *Holmes v. Sheppard*, 255 N.C. App. 739, 805 S.E.2d 371 (2017). In *Holmes*, after the plaintiff's insurance claim was denied because the policy did not provide coverage for vacant property, the plaintiff sued his insurance agent for failing to obtain that coverage. 255 N.C. App at 742, 805 S.E.2d at 373. The plaintiff testified that he requested the coverage while his property was vacant and told the insurance agent that he "did not want to have another issue because of vacancy," as a previous claim he had filed was denied due to a vacancy exclusion. *Id.* at 744, 805 S.E.2d at 375. We held that this testimony was sufficient to raise a genuine issue of material fact as to whether the plaintiff had requested the coverage and we reversed the trial court's grant of summary judgment for the defendant. *Id.* at 745, 748-49, 805 S.E.2d at 375, 377-78.

This case is distinguishable from *Holmes*. There is no evidence that Plaintiff communicated to Defendant a request to insure short-term rentals. The previous insurance policy Plaintiff provided to Defendant as an example of the coverage needed did not include coverage for short-term rentals. Plaintiff presented no evidence that it requested greater or different coverage from that provided in the previous policy. And, unlike in *Holmes*, Plaintiff did not make a statement expressly indicating a desire to rectify a gap in coverage. On these facts, and considering the

evidence in the light most favorable to Plaintiff, we hold that Plaintiff has failed to demonstrate a genuine issue of material fact as to whether it requested the insurance coverage at issue, and in turn as to whether Defendant owed a duty of care to obtain such coverage. We conclude that the trial court properly granted summary judgment on Plaintiff's negligence claim.

Plaintiff's initial complaint also asserted a claim for fraudulent misrepresentation based on Defendant's issuance of the COI to Rush Enterprises misrepresenting Plaintiff's coverage. The trial court granted Defendant's motion for summary judgment on that claim. Plaintiff's proposed amended complaint added a claim for negligence based on Defendant's representation to Rush. Because Plaintiff has not argued on appeal that either the fraudulent misrepresentation claim or a negligence claim based on that misrepresentation should have survived summary judgment, those issues are abandoned and we do not consider them. N.C. R. App. P. 28(b)(6).

C. *Breach of Contract*

[2] Plaintiff argues that, by failing to procure insurance covering short-term rentals, Defendant breached its contract to act as Plaintiff's insurance agent and broker. We disagree because, as explained above, the evidence does not establish that Plaintiff requested that Defendant procure this coverage.

When an insurance agent has breached its duty to procure insurance requested by the insured, the insured may seek remedy in tort or in contract. *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C. 599, 604, 109 S.E.2d 632, 634 (1921). To establish a claim for breach of contract, the party asserting the claim has the burden of showing the existence of a valid contract and a breach of the terms of that contract. *Samost v. Duke Univ.*, 226 N.C. App. 514, 518, 742 S.E.2d 257, 260 (2013).

As explained above, Plaintiff has not introduced evidence showing that it requested coverage for short-term rentals. Nor has it shown that the contract between Plaintiff and Defendant extended Defendant's duties beyond the standard requirement that an insurance agent procure the coverage actually requested by the insured.

Plaintiff argues that the issuance of the revised December and March COIs, which implied collision and comprehensive coverage for all vehicles, created a duty that Defendant procure that coverage. However, a COI is distinct from a contract in both law and industry practice:

> A certificate of insurance is not a policy of insurance and does not amend, extend, or alter the coverage afforded

> by the policy to which the certificate of insurance makes reference. A certificate of insurance shall not confer to a certificate of insurance holder new or additional rights beyond what the referenced policy of insurance expressly provides.

N.C. Gen. Stat. § 58-3-150(e) (2019). The COIs at issue in this case provided that they "do[] not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder." The second and third COIs, which included references to collision or comprehensive coverage, were never sent to Plaintiff before the collision giving rise to this case. Considering the evidence in the light most favorable to Plaintiff, we cannot hold that these COIs created an additional duty in contract.

Plaintiff argues that denying it relief serves as a "shocking notice" to the insurance community that insurers can issue certificates listing anything they like without repercussion. We disagree. Our legislature has prohibited the issuance of COIs that "contain[] any false or misleading information concerning the policy of insurance to which the certificate of insurance makes reference." N.C. Gen. Stat. § 58-3-150(f)(2) (2019). We simply hold that a COI, sent to a third party and never communicated to the insured, without any additional consideration, does not create additional contractual duties owed to the insured.

D. *Unfair and Deceptive Trade Practices*

[3] Plaintiff last argues that the trial court erred in granting summary judgment on its claim for unfair and deceptive trade practices. This claim rests on the intersection of two statutes: N.C. Gen. Stat. § 75-1.1, which creates a private cause of action for UDTP, and N.C. Gen. Stat. § 58-63-15(1), which our courts have held recognizes certain acts within the insurance context as *per se* unfair or deceptive practices. Section 75-1.1 UDTP claims based on a misrepresentation by the defendant generally require a showing that the plaintiff relied on the misrepresentation, leading to its injury. We now consider whether stating a claim in the insurance context, within the scope of Section 58-63-15(1), relieves Plaintiff of the requirement to show reliance. As discussed below, we hold that Plaintiff must show reliance and, because Plaintiff has failed to do so, the trial court properly granted summary judgment on this claim.

Section 75-1.1 of our General Statutes prohibits unfair and deceptive acts between parties engaged in a business transaction. N.C. Gen. Stat. § 75-1.1; *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). To prevail on a UDTP claim under

Section 75-1.1, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice (2) in or affecting commerce which (3) proximately caused injury to the plaintiff. *Id.*

Determining whether an act is an unfair or deceptive practice that violates Section 75-1.1 is a question of law. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Ordinarily, the trial court will determine, based upon the jury's findings, whether the acts engaged in by the defendant were unfair or deceptive practices in or affecting commerce. *Id.* A practice is deceptive if it has the tendency to deceive, and unfair when it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* (quotations and citations omitted). In this case that analysis is unnecessary because misrepresenting the terms of an insurance policy is a *per se* deceptive act satisfying the first element of a UDTP claim.

Our legislature has enumerated a number of "unfair and deceptive acts or practices in the business of insurance." N.C. Gen. Stat. § 58-63-15 (2019).[1] Misrepresenting the terms of an insurance policy is one of the proscribed behaviors:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentations and False Advertising of Policy Contracts.–Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation

1. Plaintiff's original complaint does not refer to Section 58-63-15, but the amended complaint characterizes the claim as under the section and pleads facts specific to it.

> to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

N.C. Gen. Stat. § 58-63-15 (2019).

Section 58-63-15 is a regulatory statute, enforced by the Commissioner of Insurance, and does not create a private cause of action. However, our Supreme Court has held that a violation of Section 58-63-15(1) is, as a matter of law, an unfair or deceptive act or practice. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986). In *Pearce*, the plaintiff purchased a life insurance policy including an additional payment if he died in an accident. *Id.* at 463, 343 S.E.2d at 176. He later sent a letter to his insurance company informing it that he had joined the Air Force and asking if he was "fully covered." *Id.* The insurance company confirmed that the accidental death rider would be payable "should his death occur while in the Armed Forces but not as the result of an act of war." *Id.* at 464, 343 S.E.2d at 176. The plaintiff died in a training flight, and the insurance company refused to pay benefits under the accidental death rider, citing an exception in the policy. *Id.* at 465, 343 S.E.2d at 177. Our Supreme Court held that the insurance company violated the misrepresentation provision of N.C. Gen. Stat. § 58-54.4 (now codified at N.C. Gen. Stat. § 58-63-15(1)), and that such a violation is a *per se* unfair or deceptive trade practice under Section 75-1.1. *Id.* at 470, 343 S.E.2d at 179.[2]

In this case, Plaintiff's claim is likewise based on a misrepresentation by Defendant regarding what was covered under its policy: the policy did not provide comprehensive or collision coverage to short-term rentals, but the revised December COI and the March COI imply that this coverage exists. Defendant argues that this misrepresentation cannot constitute a deceptive trade practice because it did not gain any advantage in the marketplace from this misrepresentation. However, while examining whether a defendant benefitted from an act may be a factor in determining whether that act is an unfair or deceptive practice, that determination does not need to be made in this case. Misrepresenting the terms of an insurance policy is, as a matter of law, a deceptive act. We need not weigh factors to determine whether this first element of

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2. Section 58-63-15 enumerates thirteen different categories of unfair and deceptive acts or practices in the business of insurance. Not all of these categories have been incorporated as *per se* unfair or deceptive acts satisfying the first element of a UDTP claim. *See, e.g., N.C. Steel, Inc. v. Nat'l Council on Compensation Ins.*, 347 N.C. 627, 632-33, 496 S.E.2d 369, 372 (1998).

a UDTP claim is satisfied, and therefore whether Defendant gained an advantage by its misrepresentation is not relevant to our analysis.[3]

Defendant argues that, because Plaintiff's UDTP claim is based on misrepresentation, Plaintiff must also show that it relied upon the misrepresentation in order to show causation—the third element of a UDTP claim under Section 75-1.1. Defendant contends that Plaintiff cannot show reliance because the revised December and March COIs were never seen by Plaintiff prior to the accident giving rise to this case. We agree.

We previously addressed this question in *Cullen v. Valley Forge Life Insurance Company*, and held that reliance is not a requirement to show causation in a UDTP claim stemming from Section 58-63-15(1). 161 N.C. App. 570, 589 S.E.2d 423 (2003). In *Cullen*, the plaintiff applied for a life insurance policy from the defendant and submitted to a medical examination and released his medical records. 161 N.C. App. at 572-73, 589 S.E.2d at 426-27. Later, the plaintiff applied for additional coverage and underwent a second medical examination, which revealed a blood blister. *Id.* The insurance company denied the additional coverage and sent the plaintiff a letter stating that "no coverage or contract was ever in effect" and "no coverage ever existed." *Id.* at 573, 589 S.E.2d at 427. This statement was a misrepresentation, as the company's internal memos showed that the plaintiff was covered, violating Section 58-63-15(1) and constituting an unfair or deceptive practice as a matter of law. *Id.* at 579, 589 S.E.2d at 430-431. The defendant argued that the plaintiff could not show an injury in the absence of evidence that he relied on the misrepresentation, but we held that a showing of reliance was not required to prove causation. *Id.* at 580, 589 S.E.2d at 431.

However, this holding is called into question by our Supreme Court's decision in *Bumpers v. Community Bank of Northern Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013). While *Bumpers* concerns a UDTP claim occurring outside of the context of the insurance industry and Section 58-63-15(1), it holds that "a claim under section 75-1.1 stemming from an alleged misrepresentation does indeed require a plaintiff to

3. Defendant cites *Erler v. Aon Risks Services, Inc. of the Carolinas*, in which we held that a misrepresentation by an insurance agent as to the coverage the purchaser would receive did not amount to an unfair or deceptive trade practice because "no unfair advantage was to be gained from defendants' actions." 141 N.C. App. 312, 321, 540 S.E.2d 65, 71 (2000). However, this decision is directly at odds with our Supreme Court's decision in *Pearce*. We are compelled to follow *Pearce*. *See, e.g.*, *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (acknowledging that where a conflict exists between Supreme Court precedent and a decision of this Court, we are bound to follow the former).

demonstrate reliance on this misrepresentation in order to show the necessary proximate cause." *Id.* at 88-89, 747 S.E.2d at 226-27. In *Bumpers*, the plaintiffs paid loan discount fees to a lender but were not provided discounted loans. *Id.* at 84, 747 S.E.2d at 223. The Supreme Court held that the plaintiffs' claim was based on a misrepresentation, and they could not show proximate cause without presenting sufficient evidence that they actually relied upon the misrepresentation. *Id.* at 89, 747 S.E.2d at 227. Stated directly, "actual reliance requires that *the plaintiff* have affirmatively incorporated the alleged misrepresentation into [their] decision-making process." *Id.* at 90, 747 S.E.2d at 227 (emphasis added).

We are not convinced by Plaintiff's argument—that *Cullen* controls over *Bumpers* because *Bumpers* does not involve the insurance industry. In *Cullen*, we based our holding that no showing of reliance was necessary on two factors. First, neither statute at issue included language requiring reliance. 161 N.C. App. at 580, 589 S.E.2d at 431. Second, we observed that "actual deception is not an element necessary under N.C. Gen. Stat. § 75-1.1 to support an unfair or deceptive practices claim." *Id.* (citing *Johnson v. Insurance Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980), *overruled in part on other grounds*, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988); *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000)). Neither of these reasons is specific to insurance-based claims made under Section 58-63-15(1), and they apply equally to *any* claim made pursuant to Section 75-1.1. In short, *Cullen* itself declined to draw the distinction Plaintiff now asks us to adopt.

Nor does *Pearce*, which recognized misrepresentations in the insurance industry as *per se* deceptive trade practices supporting a UDTP claim, imply that such a claim can be sustained without showing reliance. The Supreme Court compared the causation analysis for such claims to the "detrimental reliance requirement under a fraud claim" and concluded that the insured in that case had presented evidence showing that he relied on assurances from the insurance company that he was covered. *Pearce*, 316 N.C. at 471-72, 343 S.E.2d at 180-81. Plaintiff has not submitted, nor can we identify, any authority or analysis concluding that the element of proximate cause in the insurance context should be treated differently than causation outside of it. For all of these reasons, we hold that, in order to succeed on a UDTP claim arising under Section 58-63-15(1), a plaintiff must show reliance on the misrepresentation.

We also note that the precedents cited in *Cullen* held that evidence of actual deception was not required to establish the first element of a UDTP claim—the presence of an unfair or deceptive trade practice. *See*,

e.g., *Poor*, 138 N.C. App. at 28-29, 530 S.E.2d at 845 ("A practice is deceptive if it 'possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception.' " (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). *Cullen* applied the holding in these cases to the third element—proximate cause—without acknowledging this distinction or explaining why the same analysis should apply to two different elements of a tort.

Prior to *Cullen*, we consistently held that UDTP claims based on an alleged misrepresentation require the plaintiff to show actual reliance on the misrepresentation in order to establish that element. *Tucker v. Boulevard at Piper Glen LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002); *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995). Rather than being distinguishable from *Bumpers'* general rule that a showing of reliance on the part of the plaintiff is required, *Cullen* is in direct conflict with that rule. *See Bumpers* at 100, S.E.2d at 234, n. 10 (Beasley, J., dissenting) (citing *Cullen* as authority providing that evidence of reliance is not necessary to support a UDTP claim). Accordingly, we interpret the Supreme Court's decision in *Bumpers* as overruling *Cullen* in this respect and hold that Plaintiff in this case must show reliance to succeed on its UDTP claim.

In this case, Defendant did not send Plaintiff the documents containing the alleged misrepresentations. When Rush's insurer first requested a COI on 6 December 2017, Defendant sent a certificate to both the insurer and to Plaintiff. This initial COI did not suggest that short-term rentals had comprehensive and collision coverage. In fact, the initial COI included no representation that Plaintiff had any insurance coverage other than for liability. One week later, on 14 December 2017, Defendant sent the Revised December COI, which listed a "specified perils/collision deductible," only to the insurer, and not to Plaintiff. Likewise, the March COI, which related to the policy in force when the accident occurred, was sent only to Rush and not to Plaintiff.

The evidence, considered in the light most favorable to Plaintiff, is insufficient to create a disputed issue of fact regarding whether Plaintiff relied on Defendant's alleged misrepresentations. The only document Plaintiff received from Defendant provided no representation regarding the insurance coverage in dispute. Plaintiff argues that its rental of trucks from Rush shows reliance on the alleged misrepresentations, because Rush agreed to the short-term rentals on the condition that Plaintiff have collision coverage for those vehicles. This attenuated connection is insufficient to establish a factual dispute regarding Plaintiff's reliance.

Section 75-1.1 requires a showing of (1) actual reliance—that "the plaintiff . . . affirmatively incorporated the alleged misrepresentation into his or her decision-making process" and (2) that the reliance was reasonable. *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. In this case, the evidence does not indicate such affirmative incorporation. At best, Plaintiff passively continued to engage in the deal it had made with Rush when the lack of collision coverage did not create a barrier. While Plaintiff argues that it relied on Defendant "to send Rush whatever they were requesting," and Plaintiff's representative testified that the fact that Rush "let the truck go" indicated it had received the COI, this is not enough to show that *Plaintiff* relied upon the information in the COI. At most, Plaintiff knew that Rush requested information regarding the collision deductibles, and then later rented the trucks to Plaintiff. *See*, *e.g.*, *Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 701, 671 S.E.2d 7, 12 (2009) ("Under a theory of negligent misrepresentation, liability cannot be imposed when the plaintiff does not *directly* rely on information prepared by the defendant, but instead relies on altered information provided by a third party.").

Given that Plaintiff's representatives could have, at any time, examined the insurance policy and discovered that collision coverage was not provided for short-term rentals, any reliance on such attenuated information was unreasonable. "Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. An insured's access to its policy does not always render reliance on an agent's misrepresentation of the terms of that policy unreasonable. *See*, *e.g.*, *Pearce*, 316 N.C. 461, 343 S.E.2d 174. But in cases of negligent misrepresentation we have held that, when terms are unambiguously expressed in the policy, reliance on misrepresentations as to those terms is unjustified. *Cobb v. Pennsylvania Life Ins. Co.*, 215 N.C. App. 268, 276, 715 S.E.2d 541, 549 (2011).

While UDTP and negligent misrepresentation claims are not identical, the facts of this case lead us to conclude that it was unreasonable for Plaintiff to rely on Rush's rental of trucks to conclude that those trucks were covered by the insurance policy procured by Defendant. Plaintiff is a sophisticated business, engaged in the business of trucking, and Plaintiff's representatives testified that no representative at any point read the policy it purchased through Defendant. Plaintiff's previous policy, provided to Defendant as a go-by, did not cover short-term rentals. A third party (Rush) requested confirmation of a policy term, and any misrepresentation of the term was communicated only to the

third party. These facts are distinguishable from cases like *Pearce*, in which the insured requested clarification of a policy and received a misrepresentation as to that term in response. In this case, Plaintiff's reliance on Rush's actions to determine the terms of its insurance contract was unreasonable.

In its reply brief, Plaintiff contends that, even if it did not directly rely on Defendant's misrepresentation, the reliance of a third party can show causation for a UDTP claim. In *Ellis v. Smith-Broadhurst, Inc.*, decided by this court before our Supreme Court's decision in *Bumpers*, an insurance agent sued a competitor for submitting a policy comparison to a potential client that misrepresented the plaintiff's policy. 48 N.C. App. 180, 268 S.E.2d 271 (1980). We held that, because there was some evidence that the client "continued to rely on the comparison made by defendants" in making its decision, there was a genuine issue of material fact as to proximate cause. 48 N.C. App. at 184, 268 S.E.2d at 274. *Ellis* is either directly in conflict with *Bumpers*, and therefore not binding, or distinguishable from this case.

The majority opinion in *Bumpers* is unequivocal in its language: "actual reliance requires that *the plaintiff* have affirmatively incorporated the alleged misrepresentation into his or her decision-making process." 367 N.C. at 90, 747 S.E.2d at 227 (emphasis added). "A plaintiff must prove that *he or she* detrimentally relied on the defendant's misrepresentation." *Id.* (citing *Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F.Supp. 303, 308 (M.D.N.C. 1988) (emphasis added)). It is clear from this case that only the direct reliance of the plaintiff is sufficient to support a UDTP claim based on misrepresentation. The holding in *Bumpers* precludes a UDTP claim such as that in *Ellis*, in which a third party's reliance caused damage to the plaintiff. Accordingly, Plaintiff cannot base a theory of causation on the reliance of another party.

This case is also factually distinguishable from *Ellis*. In *Ellis*, the defendant made a misrepresentation to a potential client that caused them to purchase its product over the plaintiff's. 48 N.C. App. at 181, 268 S.E.2d at 272. The unfair and deceptive practice at issue in *Ellis* was a misrepresentation that directly interfered with the plaintiff's business opportunity and caused the plaintiff harm. In this case, taking the evidence in the light most favorable to Plaintiff, Rush relied on the COI in deciding to rent trucks to Plaintiff on a short-term basis. However, simply renting the trucks to Plaintiff did not cause any harm. The harm arose only when an accident occurred, incurring losses that Plaintiff assumed were covered under its policy.

Because the evidence, considered in the light most favorable to Plaintiff, is insufficient to show that (1) Defendant made a misrepresentation to Plaintiff concerning insurance coverage; (2) Plaintiff relied on the representation; or (3) Plaintiff's attenuated reliance on a third party's reliance would be reasonable, the trial court did not err in allowing Defendant's motion for summary judgment as to UDTP. For these same reasons, Plaintiff's amended complaint cannot raise a genuine issue of material fact and is therefore futile. The trial court did not err in denying Plaintiff's motion to amend.

III. CONCLUSION

For the above reasons, we hold that the trial court did not err in allowing Defendant's motion for summary judgment and denying Plaintiff's motion to amend and motion for summary judgment.

AFFIRMED.

Judges STROUD and COLLINS concur.

FLORIAN HALILI, PLAINTIFF
v.
DENADA RAMNISHTA, DEFENDANT

No. COA19-869

Filed 1 September 2020

1. Child Custody and Support—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—child's home state

The trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to make an initial custody determination as to the parties' minor daughter, where its unchallenged findings of fact established that the parties did not move from New York—where their daughter was born—to North Carolina until five months before the custody action commenced and, therefore, North Carolina was not the daughter's "home state" under UCCJEA (requiring six months for "home state" status). North Carolina did not become the daughter's home state when the family took a twelve-day vacation there six months before the action commenced.

2. Child Custody and Support—jurisdiction—relinquishment—inconvenient forum—Uniform Child Custody and Jurisdiction Enforcement Act

The trial court properly concluded that North Carolina was an inconvenient forum in which to determine custody for the parties' youngest child and, therefore, did not abuse its discretion by relinquishing its jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). When determining that New York (the parties' prior home) was a more appropriate forum, the trial court properly considered the relevant factors under the UCCJEA and, in doing so, did not err by considering circumstances as they existed after plaintiff filed the complaint. Further, the UCCJEA—unlike its statutory predecessor, the Uniform Child Custody Jurisdiction Act—did not require a specific finding that it was in the child's best interest for the court to relinquish jurisdiction.

3. Child Custody and Support—jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—misapprehension of the law

The trial court did not act under a misapprehension of the law in concluding it lacked subject matter jurisdiction to adjudicate the parties' child custody case. Although the court initially concluded it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to determine custody of the parties' youngest child, it relinquished its jurisdiction after determining that North Carolina was an inconvenient forum for this litigation. The court also correctly determined that it lacked jurisdiction as to the eldest child where North Carolina was not the child's "home state" for UCCJEA purposes.

Appeal by Plaintiff from Orders entered 9 August 2018 and 28 November 2018 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 29 April 2020.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Jonathan McGirt for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Florian Halili (Plaintiff) appeals from (1) an Order granting a Motion to Dismiss (Dismissal Order) filed by Denada Ramnishta (Defendant) on the basis the trial court did not have subject-matter jurisdiction over this child-custody action under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)[1] and (2) an Order denying Plaintiff's Motion for a New Trial brought under Rule 59 of the North Carolina Rules of Civil Procedure (Rule 59 Order). At the heart of this case are the trial court's Conclusions in the Dismissal Order that (1) North Carolina was not the "home state" of the parties' oldest child, Opal,[2] and (2) although North Carolina was the "home state" of the parties' youngest child, Riley, North Carolina was an inconvenient forum for this litigation. The Record before us tends to show the following:

On 19 January 2018, Plaintiff, at the time acting pro se, filed a Complaint in Mecklenburg County District Court, seeking temporary and permanent custody of the minor children.[3] On 2 March 2018, Defendant filed her Motion to Dismiss in the current action, requesting the trial court dismiss Plaintiff's Complaint for lack of subject-matter jurisdiction. Defendant's Motion to Dismiss asserted the trial court lacked subject-matter jurisdiction under the UCCJEA because the state of New York was Opal's home state and North Carolina was an inconvenient forum in which to determine the issue of child custody for Riley.

The trial court held a hearing on Defendant's Motion to Dismiss on 28 June 2018, at which both parties presented evidence and arguments to the trial court. On 9 August 2018, the trial court entered its Dismissal Order.

In the Dismissal Order, the trial court made Findings of Fact that Plaintiff does not challenge on appeal. These Findings of Fact are thus binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (holding unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal (citations omitted)). Therefore, these Findings form the operative facts of this case, including:

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1. As codified in North Carolina at N.C. Gen. Stat. § 50A-101 *et seq.* (2019).

2. In briefing, the parties refer to the children by their initials. We apply pseudonyms for the minor children for ease of reading.

3. Included in Plaintiff's prayer for relief in this custody action was a concomitant request for the trial court to set child support.

1. [Plaintiff] currently resides in Mecklenburg County, North Carolina, and [Defendant] currently resides in New York County, New York.

2. The parties were married to each other in August of 2007 in New York, and permanently physically separated on January 11, 2018.

3. There are two (2) children of the parties' marriage, namely, [Opal] . . . and [Riley] . . . .

4. [Opal] was born in New York State and [Riley] was born in Charlotte, North Carolina.

5. From July 11, 2011, and until August 17, 2017, the parties and [Opal] resided in New York County, New York. On August 17, 2017, the parties and [Opal] left New York and began residing in Charlotte, North Carolina on August 18, 2017. On January 11, 2018, [Defendant] and the minor children left Charlotte, North Carolina, and returned to their home in New York, New York.

6. It is undisputed the parties had the intent to permanently relocate from New York to North Carolina and that move would be for a period of time longer than one (1) year. [Defendant] intended at one point in time that the move to North Carolina would be approximately two (2) to three (3) years. [Plaintiff] intended at one point in time that the move to North Carolina would be approximately five (5) years.

7. As evidence of intent to move from New York to North Carolina, the parties listed their New York coop apartment for sale in June 2017. However, any sale would not occur earlier than three (3) months later due to the building application and approval process for the coop.

8. As evidence of intent to move from New York to North Carolina, in April 2017, the parties purchased a home in Charlotte, North Carolina, in addition to the existing condominium they own in Charlotte. The parties executed loan documents for this new home indicating that they would occupy the home within sixty (60) days following the purchase. However, the parties did not occupy the home within this time period.

9. As evidence of intent to move from New York to North Carolina, [Defendant] searched for, and accepted, a job offer on April 1, 2017 in Charlotte, but the record is clear that the parties did not move to Charlotte at this time.

10. As evidence of intent to move from New York to North Carolina, in January 2017, [Defendant] applied for a school in Charlotte for [Opal] to attend beginning August 2017.

11. The parties moved to North Carolina from New York, with the intent to move, on August 17, 2017. This date is supported by many facts, including:

a. The parties' actions to make the New York apartment unhabitable by returning the cable television box on August 17, 2017, and forwarding the New York mail to Charlotte on September 1, 2017.

b. Text communications from [Defendant] to an individual on August 21, 2017, indicating she moved to Charlotte, North Carolina, the preceding weekend.

c. The parties and [Opal] ([Riley] having not yet been born) packing up their New York registered car with items necessary to live in North Carolina and driving to Charlotte and arriving on August 18, 2017. These items included [Plaintiff's] wine collection and the parties' safe that contained numerous important documents.

d. Numerous pictures of [Opal] in the New York apartment on August 17, 2017, saying goodbye to the New York home.

e. The Charlotte home was professionally cleaned immediately prior to the parties and [Opal] arriving in Charlotte on August 18, 2017. Additionally, a washer and dryer had been installed and available for use in the Charlotte home prior to the family['s] arrival.

12. The parties and [Opal] ([Riley] having not yet been born), visited Charlotte, North Carolina for a vacation from June 28, 2017 until July 9, 2017, when they flew

via airplane roundtrip from New York. During this vacation, the parties stayed in a hotel for the first three (3) nights of their trip and then stayed for the remainder at their unfurnished home in Charlotte. The hotel had Internet access for [Defendant] to work and a pool for [Opal] to swim, which was part of the reason for choosing this hotel. The decision to vacate the hotel was made by [Plaintiff] and not [Defendant], who was approximately six (6) month's pregnant at the time. [Defendant's] testimony was more credible as to why the parties and the minor children spent the remainder of this visit at their unfurnished home. The Charlotte home was not habitable at this time. This home was dirty from construction, did not have necessary living items, including, but not limited to, utensils, furniture, washer and dryer, cable or Internet service.

13. During the visit to Charlotte, North Carolina from June 28, 2017 until July 9, 2017, [Defendant] met with potential doctors to assist in the delivery of [Riley] in September 2017. On June 29, 2017, [Defendant] sent a text message to a friend stating that, ". . . We are in clt till 7/8. I am working out of here so I can meet with some doctors and visit the two hospitals."

14. [Opal] resided in North Carolina from August 18, 2017 until January 11, 2018. [Opal] did not reside in North Carolina for six (6) months preceding the filing of [Plaintiff's] Complaint.

15. Between January 8th, 2018 and January 19th, 2018, the parties were in substantial marital conflict such that [Defendant] chose to move back to their New York apartment with the minor children on January 11th, 2018. The subject and actions of the parties during this marital conflict is before the New York County Family Court for permanent adjudication[.]

. . . .

21. There is also a pending New York Supreme Court action, filed by [Defendant] . . . for the following relief: absolute divorce, child custody, child support, maintenance, an equitable distribution of marital property . . . and related relief.

In its Dismissal Order, the trial court concluded it lacked subject-matter jurisdiction under the UCCJEA to make an initial custody decision regarding Opal because North Carolina was not Opal's home state. The trial court concluded North Carolina was Riley's home state, but North Carolina was an inconvenient forum and New York was a more convenient forum, thereby relinquishing its jurisdiction over Riley. Having made these Conclusions, the trial court finally concluded it "lacks subject matter jurisdiction to adjudicate the issue of child custody regarding the minor children."

On 20 August 2018, Plaintiff filed a Motion for a New Trial requesting the trial court grant Plaintiff a new trial. The trial court held a hearing on Plaintiff's Rule 59 Motion on 22 October 2018. On 28 November 2018, the trial court entered its Rule 59 Order denying Plaintiff's Motion for a New Trial. Plaintiff filed Notice of Appeal from both the Dismissal Order and Rule 59 Order on 2 January 2019.

Appellate Jurisdiction

Before addressing subject-matter jurisdiction under the UCCJEA, we must resolve an issue of appellate jurisdiction. Defendant has filed a Motion to Dismiss Appeal and Motion for Appellate Sanctions contending Plaintiff's Notice of Appeal was untimely filed five days late—thereby depriving this Court of jurisdiction over the appeal under N.C. R. App. P. 3(c)(1). Plaintiff counters Defendant's delayed and/or defective service of the trial court's Rule 59 Order tolled the time for filing Notice of Appeal and, as such, his appeal was timely noticed.[4]

We acknowledge the parties appear to have spared no effort in their vigorous litigation (and re-litigation) of this issue both in the trial court and in this Court (both in motions and in briefs). We, however, decline to wade into the factual and credibility determinations necessary to conclusively vindicate either party on this particular procedural dispute. Rather, Plaintiff has also filed a Petition for Writ of Certiorari with our Court, seeking review of the trial court's Orders in the event we conclude Plaintiff's Notice of Appeal was untimely. Presuming *arguendo* Plaintiff's Notice of Appeal was untimely having been filed more than thirty days after entry of the trial court's Rule 59 Order, in our discretion, we grant Plaintiff's Petition for Writ of Certiorari. N.C. R. App. P.

4. On 6 January 2020, Plaintiff filed with this Court a Motion to Tax Costs and Have Other Penalties Imposed Against Appellee (Motion to Tax Costs). Both parties' Motions seek to impose either sanctions or tax costs against the other party. In our discretion, we deny both Plaintiff's Motion to Tax Costs and Defendant's Motion for Appellate Sanctions. *See* N.C. R. App. P. 25(b); 34(b).

21(a)(1); *see also Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner."). Because we grant Plaintiff's Petition for Writ of Certiorari, we dismiss as moot Defendant's Motion to Dismiss Appeal.

Issues

The dispositive issues in this case are whether (I) the trial court erred by concluding North Carolina was not Opal's home state under the UCCJEA; (II) the trial court erred by declining to exercise jurisdiction over Riley after concluding North Carolina was an inconvenient forum; and (III) the trial court acted under a misapprehension of the law in concluding it lacked subject-matter jurisdiction to adjudicate the issue of child custody regarding the minor children.

Analysis

I. Home-State Determination

[1] Plaintiff first contends the trial court erred by concluding it lacked subject-matter jurisdiction over Opal pursuant to the UCCJEA on the basis North Carolina was not Opal's home state.

A. Standard of Review

As noted above, Plaintiff does not challenge the trial court's Findings of Fact, rather narrowing his focus on the question of whether those Findings support the trial court's Conclusion it had no jurisdiction under the UCCJEA as it related to Opal. "Whether the trial court has jurisdiction under the UCCJEA is a question of law[.]" *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015) (citation omitted). Accordingly, we review the trial court's conclusions de novo. *See Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 281, 767 S.E.2d 378, 383 (2014) (citations omitted).

B. Discussion

A North Carolina court has jurisdiction to make an initial child-custody determination under the UCCJEA if North Carolina was

> the home state of the child on the date of the commencement of the proceeding, *or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State*[.]

N.C. Gen. Stat. § 50A-201(a)(1) (2019) (emphasis added). A child's "home state" is

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7) (2019). Section 50A-102(5) defines "commencement" for UCCJEA purposes as "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5).

Here, the trial court found:

> 5. From July 11, 2011, and until August 17, 2017, the parties and [Opal] resided in New York County, New York. On August 17, 2017, the parties and [Opal] left New York and began residing in Charlotte, North Carolina on August 18, 2017. On January 11, 2018, [Defendant] and the minor children left Charlotte, North Carolina, and returned to their home in New York, New York.
>
> . . . .
>
> 12. The parties and [Opal] ([Riley] having not yet been born), visited Charlotte, North Carolina for a vacation from June 28, 2017 until July 9, 2017, when they flew via airplane roundtrip from New York. During this vacation, the parties stayed in a hotel for the first three (3) nights of their trip and then stayed for the remainder at their unfurnished home in Charlotte. The hotel had Internet access for [Defendant] to work and a pool for [Opal] to swim, which was part of the reason for choosing this hotel. The decision to vacate the hotel was made by [Plaintiff] and not [Defendant], who was approximately six (6) month's pregnant at the time. [Defendant's] testimony was more credible as to why the parties and the minor children spent the remainder of this visit at their unfurnished home. The Charlotte home was not habitable at this time. This home was dirty from construction,

> did not have necessary living items, including, but not limited to, utensils, furniture, washer and dryer, cable or Internet service.
>
> . . . .
>
> 14. [Opal] resided in North Carolina from August 18, 2017 until January 11, 2018. [Opal] did not reside in North Carolina for six (6) months preceding the filing of [Plaintiff's] Complaint.

Plaintiff argues the trial court erred as a matter of law by grounding its Conclusion North Carolina was not Opal's home state on a Finding Opal did not "reside" in North Carolina for six months preceding the filing of Plaintiff's Complaint. Specifically, Plaintiff asserts the trial court incorrectly conflated "residency" with the statutorily required inquiry as to where Opal "lived" with her parents for the preceding six months. *Id.* § 50A-102(7). Rather, Plaintiff contends the relevant inquiry for UCCJEA purposes is simply whether the child was "physically present" with a parent in the state for the six months preceding the action.[5]

We need not decide in this case, however, whether Plaintiff's definitional argument is correct or not. This is so because the trial court was using its Findings as to residency not to define jurisdiction under the UCCJEA but to resolve the critical *factual* dispute between the parties central to the issue—when did the parties actually begin living in North Carolina. Plaintiff's contention is that the parties began living in North Carolina on 28 June 2017 and that the parties' return to New York from 9 July 2017 until 18 August 2017 was merely a "temporary absence" from North Carolina that does not count against the relevant six-month period. *See* N.C. Gen. Stat. § 50A-102(7). Conversely, Defendant contends the parties actually continued to live in New York until 18 August 2017 and that the parties' visit to North Carolina from 28 June 2017 until 9 July 2017 was merely a vacation—and thus a

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5. While North Carolina has apparently not decided this question, Plaintiff aptly cites caselaw from a number of other jurisdictions in support of his position. *See*, *e.g.*, *In re M.S.*, 205 Vt. 429, 436, 176 A.3d 1124, 1130 (2017) ("We join several other states in holding that it is the child's physical presence—not a parent or child's residence, domicile or subjective intent—that is relevant to determining a child's home state." (footnote and citations omitted)); *Slay v. Calhoun*, 332 Ga. Ct. App. 335, 340-41, 772 S.E.2d 425, 429-30 (2015) (concluding the language "lived" in definition of home state refers to the state where the child is physically present, not state of legal residence (citations omitted)); *In re Tieri*, 283 S.W.3d 889, 893 (Tex. Ct. App. 2008) ("In determining where a child lived for the purposes of establishing home state jurisdiction, the trial court must consider the child's physical presence in a state and decline to determine where a child lived based on the child's or the parents' intent." (citation omitted)).

temporary absence from New York. As such, Defendant argues the date the child began "living with" the parties in North Carolina was not until 18 August 2017 and therefore North Carolina had not attained home-state status when Opal returned to New York in January 2018 just prior to the commencement of this action.

As is evident from the trial court's unchallenged Findings, the trial court agreed with Defendant's view of the facts. The trial court was looking to "residence"—in addition to a number of other facts contained in its Findings—as part of the totality of the circumstances to determine whether the parties' visit to North Carolina beginning 28 June 2018 was a temporary absence from New York or whether the parties' return to New York from 9 July 2018 to 18 August 2018 was a temporary absence from North Carolina. *See Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004) ("adopting a totality of the circumstances approach to determine whether the absence [from a state] was merely a temporary absence" (citation omitted)). The trial court's determination the 28 June 2018 visit to North Carolina was a "vacation" and therefore the parties had not moved to North Carolina during this period is exactly the type of factual dispute best left to the trial court and one in which we cannot second guess as an appellate court. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("But an important aspect of the trial court's role as a finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because *the trial court is uniquely situated to make this credibility determination* that appellate courts may not reweigh the underlying evidence presented at trial." (emphasis added)).[6] Because the trial court's binding Findings establish Opal did not live in North Carolina for six consecutive months prior to, or within six months prior to, the filing of Plaintiff's Complaint, the trial court properly concluded North Carolina did not have home-state jurisdiction over Opal under the UCCJEA.

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6. Consider the following example—the Smiths have lived in North Carolina with their four-year-old child since their child's birth. The Smiths then decide to take a one-week vacation to Hawaii. During this vacation, the Smiths decide they would like to move permanently to Hawaii. Upon returning to North Carolina, they begin preparing to move, and three months later, the Smiths in fact move to Hawaii. Under Plaintiff's view, the Smiths' one-week vacation, and the subsequent three-month period they spent in North Carolina preparing to move to Hawaii, would be considered a time period that the Smiths had "lived" in Hawaii for purposes of a home-state determination, regardless of the Smiths' intent. Such a result is contrary to how our courts have typically analyzed where a family resides under the UCCJEA. *See Chick*, 164 N.C. App. at 449, 596 S.E.2d at 308 ("adopting a totality of the circumstances approach to determine whether the absence [from a state] was merely a temporary absence" (citation omitted)).

II. Inconvenient-Forum Determination

[2] Plaintiff next argues the trial court erred by declining to exercise jurisdiction over Riley after determining North Carolina was an inconvenient forum and that New York was a more appropriate forum. First, Plaintiff contends the trial court erred by considering a variety of factors occurring after the filing of Plaintiff's Complaint. Second, Plaintiff asserts the trial court erred by failing to find it was in the children's best interests for North Carolina to decline jurisdiction.

A. 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) (citation omitted). 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)." *Id.* 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).

B. Discussion

Pursuant to N.C. Gen. Stat. § 50A-207(a), a North Carolina court that has jurisdiction under the UCCJEA to make a child-custody determination may "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 trial court must "consider whether it is appropriate for a court of another state to exercise jurisdiction." *Id.* § 50A-207(b). In making this determination, the trial 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 relevant 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. § 50A-207(b)(1)-(8).

In its Dismissal Order, the trial court made the following Findings of Fact regarding Section 50A-207(b)'s factors:

> a. With respect to [Section] 50A-207(b)(1), while no conclusive evidence was offered, the evidence presented supports that there may have been domestic violence by [Plaintiff] against [Defendant] and/or the minor child [Opal]. In March 2018, [Opal] began Trauma Focused Cognitive Behavioral Therapy in New York at Spence-Chapin Services to Families & Children, which continued in April and was interrupted for approximately six (6) weeks. Pursuant to a Stipulation entered May 18, 2018, and signed by the parties, their New York attorneys, and Judge Douglas E. Hoffman of the New York Supreme Court, [Opal] was re-enrolled and is currently receiving Trauma Focused Cognitive Behavioral Therapy. Additionally, there are numerous domestic violence proceedings pending in New York.
>
> b. With respect to [Section] 50A-207(b)(2), as of June 28, 2018, the minor children have been residing in New York for five (5) months, and [Riley] resided in North Carolina for slightly less than four (4) months, and [Opal] resided in North Carolina for five (5) months, before moving to New York on January 11, 2018. As it relates to [Riley], and as of June 28, 2018, he has spent more time in New York than he has in North Carolina during his lifetime.

> c. With respect to [Section] 50A-207(b)(3) and (4), the distance between New York and North Carolina is not a slight distance, but [Plaintiff] can better bear the cost of travel between these two (2) states as his income is substantially greater than [Defendant's].
>
> d. With respect to [Section] 50A-207(b)(5), the Court considered this factor and it does not apply to this case.
>
> e. With respect to [Section] 50A-207(b)(6), there is greater evidence in New York than there is in North Carolina as it relates to [Opal]. There is at least one (1) full year of her being in school in New York as opposed to roughly four (4) months in North Carolina from late August to December 2017, so there are likely more teachers, school providers, and more people who have been involved in [Opal's] life that provide evidence to the court in New York rather than in North Carolina. Additionally, from a medical standpoint, there is a longer history in New York as opposed to, at best, six (6) months in North Carolina. In terms of family and friends, [Plaintiff's] parents reside in North Carolina, and [Defendant's] parents do not reside in the United States. However, there are numerous friends, coworkers, and more people to provide testimony and evidence in New York as opposed to North Carolina.
>
> f. With respect to [Section] 50A-207(b)(7), New York and North Carolina have equal ability to expeditiously decide the issue of child custody.
>
> g. With respect to [Section] 50A-207(b)(8), New York and North Carolina have equal familiarity with the facts and issues in the pending litigation.

Based on these Findings, the trial court determined North Carolina was an inconvenient forum and New York was a more convenient forum; therefore, the trial court relinquished jurisdiction as it related to Riley.

Plaintiff, again, does not challenge the trial court's Findings of Fact regarding its inconvenient-forum determination; accordingly, these Findings are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (citations omitted). Instead, Plaintiff first contends the trial court erred by considering "post-filing activities and factors" and the trial court should have instead limited its inconvenient-forum inquiry to

whether North Carolina was an inconvenient forum at the time of *filing* Plaintiff's Complaint.

A review of Section 50A-207, however, belies Plaintiff's argument. First, Section 50A-207(a) provides a trial court "may decline to exercise its jurisdiction *at any time* if it determines that it is an inconvenient forum under the circumstances[.]" N.C. Gen. Stat. § 50A-207(a) (emphasis added). Where this Statute allows the trial court to decline exercising jurisdiction "at any time[,]" it necessarily follows the trial court is not limited to considering whether North Carolina is an inconvenient forum *only* at the time of a plaintiff filing its complaint, but rather the trial court may consider whether it is an inconvenient forum "under the circumstances" as they exist *after* the filing of a complaint. *Id.* Further, in making this determination, the trial court "shall consider all relevant factors" listed in Section 50A-207(b). *Id.* § 50A-207(b). This Statute's factors, however, are not confined only to the circumstances as they existed at the filing of a plaintiff's complaint but necessarily contemplate post-filing circumstances as well, such as "[t]he relative financial circumstances of the parties[.]" *Id.* § 50A-207(b)(4). Accordingly, the trial court did not err by considering post-filing activities in its inconvenient-forum determination.

Plaintiff next argues the trial court erred in its inconvenient-forum determination because the trial court failed to find it was in the children's best interests for North Carolina to decline jurisdiction. In support of his argument, Plaintiff cites our Court's decision in *Kelly v. Kelly*, which held—"*Without a showing that the best interest of the child would be served if another state assumed jurisdiction*, North Carolina courts should not defer jurisdiction pursuant to [N.C. Gen. Stat. §] 50A-7." 77 N.C. App. 632, 635, 335 S.E.2d 780, 783 (1985) (emphasis added). We disagree.

In *Kelly*, our Court considered whether a trial court erred in its inconvenient-forum determination under the UCCJEA's statutory predecessor—the Uniform Child Custody Jurisdiction Act (UCCJA). *See id.* at 634-35, 335 S.E.2d at 782 (citation omitted); *see also* 1979 N.C. Sess. Law 110 (N.C. 1979) (enacting the UCCJA); 1999 N.C. Sess. Law 223 (N.C. 1999) (codified at N.C. Gen. Stat. § 50A-101 *et seq.*) (repealing the UCCJA and enacting the UCCJEA). Both the UCCJA and UCCJEA contained analogous inconvenient-forum provisions that required trial courts to consider certain factors in determining whether North Carolina is an inconvenient forum. *See* 1979 N.C. Sess. Law 110, § 1 (then-codified at N.C. Gen. Stat. § 50A-7); N.C. Gen. Stat. § 50A-207.

Relevant to this appeal, the UCCJA provided: "In determining if it is an inconvenient forum, the court shall consider if it is in the *interest* of the child that another state assume jurisdiction." 1979 N.C. Sess. Law 110, § 1 (emphasis added) (then-codified at N.C. Gen. Stat. § 50A-7(c)). Under the UCCJEA, however, a trial court must "consider whether it is *appropriate* for a court of another state to exercise jurisdiction" before determining whether it is an inconvenient forum. N.C. Gen. Stat. § 50A-207(b) (emphasis added). Further, the UCCJEA did not retain any of the UCCJA's language requiring a trial court to consider the interests of the child in its inconvenient-forum analysis. *See id.* Therefore, *Kelly*'s holding that a trial court should not defer jurisdiction under the UCCJA without a showing that it would be in the best interest of the child has no application under the current UCCJEA. Accordingly, the trial court did not err by not including a finding that relinquishing jurisdiction over Riley was in the child's best interest.

Furthermore, the trial court's detailed Findings of Fact, which Plaintiff does not challenge on appeal, illustrate it considered the relevant factors under Section 50A-207 based on the evidence the parties chose to submit to the trial court, and these Findings of Fact support the trial court's ultimate Conclusion relinquishing jurisdiction over Riley because North Carolina was an inconvenient forum. *See In re M.M.*, 230 N.C. App. at 228-29, 750 S.E.2d at 52-53 (citations omitted). Therefore, the trial court did not abuse its discretion. *See id.* (citations omitted).

III. Lack of Jurisdiction

[3] Plaintiff lastly argues the trial court erred in its Conclusion of Law 6, which provides: "This Court lacks subject matter jurisdiction to adjudicate the issue of child custody regarding the minor children." Plaintiff contends this Conclusion is "flatly wrong" because the trial court had already determined North Carolina was Riley's home state and thus that North Carolina had subject-matter jurisdiction to adjudicate the issue of child custody. *See* N.C. Gen. Stat. § 50A-201(a)(1). Accordingly, Plaintiff asserts the trial court acted under a "misapprehension of law" and therefore "the trial court's decisions finding New York a more convenient forum and declining to grant [Plaintiff] a new trial constitute abuses of the trial court's discretion[.]"

As Defendant correctly points out, however, Plaintiff's argument "puts the cart before the horse." In its Dismissal Order, the trial court made the following Conclusions of Law:

> 1. The Court has jurisdiction to adjudicate [Defendant's] Motion to Dismiss.

2. Pursuant to [N.C. Gen. Stat. §] 50A-102, North Carolina is not [Opal's] home state for the purpose of exercising jurisdiction to make an initial custody determination pursuant to [N.C. Gen. Stat. §] 50A-102.

3. Pursuant to [N.C. Gen. Stat. §] 50A-102(7), North Carolina is [Riley's] home state.

4. Pursuant to [N.C. Gen. Stat. §] 50A-201(a)(1), North Carolina has jurisdiction to make an initial child custody determination regarding [Riley].

5. However, pursuant to [N.C. Gen. Stat. §] 50A-207, North Carolina is an inconvenient forum under the circumstances regarding [Riley] and New York is a more convenient forum to exercise jurisdiction and make a child custody determination regarding [Riley].

6. This Court lacks subject matter jurisdiction to adjudicate the issue of child custody regarding the minor children.

7. [Defendant's] Motion to Dismiss should be granted as a matter of law.

As the trial court's Conclusions make clear, the trial court first determined it did not have subject-matter jurisdiction over Opal because North Carolina was not her home state. *See id*. Regarding Riley, the trial court then concluded it did have jurisdiction over Riley but *declined* to exercise its jurisdiction after concluding North Carolina was an inconvenient forum. Indeed, in its Decretal Section, the trial court expressly stated, "North Carolina *relinquishes* jurisdiction over [Riley]." (emphasis added). Thus, Conclusion of Law 6 simply recognizes the trial court no longer had jurisdiction because it had already determined North Carolina did not have jurisdiction over Opal and relinquished its jurisdiction over Riley. Accordingly, the trial court did not act under a misapprehension of the law and did not err in dismissing Plaintiff's Complaint for lack of subject-matter jurisdiction.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Dismissal Order and Rule 59 Order.

AFFIRMED.

Judges DILLON and BERGER concur.

HOLLAND v. FRENCH

[273 N.C. App. 252 (2020)]

DONNIE GEORGE HOLLAND, EXECUTOR OF THE ESTATE OF SHIRLEY DAVIS PENDERGRASS, PLAINTIFF
v.
RICHARD ALLAN FRENCH AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. COA19-498

Filed 1 September 2020

Evidence—subsequent remedial measures—impeachment—relevance—probative value—limiting instruction

In a wrongful death action arising from a car crash, which included a claim against the Department of Transportation (DOT) for negligent installation of a stop sign at the crash site, a traffic engineer's written recommendation in a post-accident report that the stop sign be relocated was admissible under the impeachment exception to Evidence Rule 407 (excluding evidence of subsequent remedial measures). The report was relevant evidence contradicting the engineer's testimony that the sign was sufficiently visible in its current placement, and the report's probative value was not substantially outweighed by the danger of unfair prejudice. Further, the trial court did not err by failing to issue a limiting instruction as to the report where DOT failed to request that instruction pursuant to Rule 105.

Judge DILLON concurring in result with separate opinion.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant North Carolina Department of Transportation from order entered 18 October 2018 and from judgment entered 11 December 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 8 January 2020.

W. Earl Taylor, Jr. for plaintiff-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Alesia M. Balshakova, Joseph Finarelli, and Alexander G. Walton, for the State.

MURPHY, Judge.

A professional recommendation concerning a stop sign's placement made in a post-accident report was a subsequent remedial measure typically excluded from evidence under Rule 407. That professional recommendation was appropriately used as impeachment evidence when it was properly admitted under the impeachment exception of Rule 407 and when it was relevant for impeachment under Rule 401. The professional recommendation was relevant evidence for impeachment purposes when it contradicted the witness's perception, memory, or narration, or the veracity of the witness's testimony, on direct examination.

The trial court did not abuse its discretion in concluding the probative value of the professional recommendation was not substantially outweighed by the danger of unfair prejudice when the professional recommendation was highly probative, was prepared by the witness, and was used to contradict the witness on cross-examination.

When the party that called the witness to testify fails to request a limiting instruction in accordance with Rule 105 concerning the witness's recommendation, another party may make arguments concerning that evidence upon its proper admission.

BACKGROUND

On 4 April 2016, Ms. Shirley Pendergrass ("Decedent") and Richard French ("French") were involved in a motor vehicle crash at the intersection of Castalia Road and Red Road in Nash County. Decedent was driving on Castalia Road in an easterly direction, while French was driving on Red Road in a northerly direction. A stop sign required drivers approaching the intersection in a northerly direction on Red Road to stop and yield to drivers on Castalia Road. Decedent and French arrived at the intersection at the same time, and despite the stop sign, French failed to stop and yield the right of way. The two vehicles collided, and Decedent sustained fatal injuries.

French was charged with the following: misdemeanor death by motor vehicle; failing to stop for a stop sign; and failing to yield the right of way. On 5 August 2016, French pleaded guilty to misdemeanor reckless driving to endanger.

On 31 May 2016, Decedent's Executor, Donnie George Holland ("Plaintiff"), sued French and his wife, who owned the vehicle French was driving, for wrongful death. French's wife was later granted a dismissal from the case. Plaintiff alleged French's failure to stop at the duly erected stop sign at the intersection of State Road 1425 ("Castalia Road") and State Road 1417 ("SR 1417" or "Red Road") in Nash County caused

the crash. Plaintiff amended the Complaint to add the North Carolina Department of Transportation ("NCDOT") as a Third-Party Defendant for negligent installation and maintenance of traffic control devices on Red Road.

NCDOT filed a motion in limine seeking to exclude any reference to or any evidence of subsequent remedial measures pursuant to North Carolina Rule of Evidence 407, including "recommendations for subsequent remedial measures." The trial court ruled that Plaintiff was "prohibited from mentioning [subsequent remedial measures] during jury selection or [the] case in chief," but reserved the issue for decision if the "matter [became] a direct issue" upon NCDOT's presentation of evidence.

At trial, NCDOT called Christopher Lewis ("Lewis"), an Assistant Division Traffic Engineer, about the placement of the stop sign. Lewis had visited the intersection where the crash occurred in December 2014, and again to make a 2016 post-accident report.[1] In portions of direct examination, Lewis testified as follows:

> [NCDOT]: And did you go to the intersection [in 2014] to look at the signage there?
>
> [Lewis]: I did.
>
> [NCDOT]: And what signage did you observe at the time?
>
> [Lewis]: . . . What I found was a typical intersection that you would find in a rural part of a county. . . . So, I didn't see an issue safety-wise when I went to the location. . . . [T]here wasn't a sight distance issue to the primary stop sign on the right-hand side.
>
> . . .
>
> [NCDOT]: . . . [In 2014, d]id you determine if there was any visibility issue with the right-hand stop sign?
>
> [Lewis]: I did not see any.
>
> [NCDOT]: And, therefore, you -- you did not make a decision to put any additional signage?
>
> [Lewis]: No, it -- it wasn't necessary. . . . That - - that's my job is to make sure that when I leave something,

1. This post-accident report was Exhibit 37 at trial.

I leave it -- leave it in a safe manner. And I even for a minute questioned whether there was [a] visibility issue . . . . I would have instructed the sign erector while you're here go ahead and add a stop ahead sign.

[NCDOT]: So, you would not have instructed him?

[Lewis]: I mean, if -- if there were --

[NCDOT]: Oh.

[Lewis]: -- a visibility issue, I would have instructed him to do so, but *in this case there wasn't.*

. . .

[Lewis]: So, getting back to the stop sign, we want to put the stop sign in a location where you can see it from a distance off. We want to give you as much time as you can to perceive what it is and to be able to safely come to a stop. And when I looked at this intersection in 2014, maintenance-wise with a supplemental stop sign, that's great that it's there. I saw no reason to -- to take it out and having that it's been there and I have no history of it, my primary concern is that stop sign on the right-hand side. And -- and I left there feeling that it was safe based on the engineering judgment.

. . .

[NCDOT]: You've – you've heard the testimony by Mr. Marceau and the other experts with respect to their opinions about application of [the Manual on Uniform Traffic Control Devices]. Do you have any reasons to disagree with their opinions?

[Lewis]: . . . And when I went to t[h]is location in 2014 prior to the accident, I left there with the impression that this is safe. I can see this stop sign. . . . So, do I disagree with what's been – what's been said? I can't think of anything I disagree with. . . .

[NCDOT]: But I mean, they opined the intersection ahead sign should have been placed and the supplemental sign should have been protected. I mean, do you agree with that?

[Lewis]: Could you say that again?

[NCDOT]: Yes. They opined that the stop ahead sign should have been placed.

[Lewis]: Again, I don't know the history behind it, so it's difficult for me to say what the reasons were for it being there to begin with.

[NCDOT]: No, I mean, the stop ahead sign. They say that it should have been placed by NCDOT, the experts –

[Lewis]: The stop – the stop ahead sign?

[NCDOT]: Correct.

[Lewis]: I'm sorry. I thought you were referring to supplemental.

[NCDOT]: Yeah.

[Lewis]: *The stop ahead sign, no, it -- it doesn't – it's not necessary for it to be placed because the visibility is to that primary stop sign.* I have -- you know, but the time I saw the intersection, I had no reason to – to add it.

. . .

[NCDOT]: They also opined about NCDOT -- they opined about the placement of the right-hand stop sign. That it – the way it was placed it was closer to the woods, not as close to Red – Red Road and *that created the visibility conspicuity issue.* Do you agree with that?

[Lewis]: *No.*

(Emphasis added).

When direct examination of Lewis concluded, Plaintiff requested, out of the presence of the jury, to be allowed to question Lewis with respect to Exhibit 37, which comported with the trial court's ruling

regarding subsequent remedial measures evidence. Lewis prepared Exhibit 37 after the accident, and the report stated that the stop sign was "too far out" and needed to be "move[d] in closer" to the road "for better sight distance." Plaintiff sought to use that report to impeach Lewis's testimony on direct examination. After hearing arguments on the issue, the trial court allowed Plaintiff to proceed with cross-examination of Lewis, and to use Exhibit 37 in doing so, while noting and overruling NCDOT's standing objection.

On cross-examination, Lewis further testified as follows:

> [Plaintiff]: How many times did you tell this jury that there was nothing wrong with that stop sign to the right?
>
> [Lewis]: More than once.
>
> [Plaintiff]: How many times did you estimate you told the jury there was nothing wrong with that stop sign to the right?
>
> [Lewis]: I don't recall how many times.
>
> [Plaintiff]: I had seven or eight. Is that about right?
>
> [Lewis]: I - - I don't recall. I would say that's fair.
>
> [Plaintiff]: How many times did you tell this jury there's not [a] visibility issue with that stop sign on the right?
>
> [Lewis]: Several times.
>
> [Plaintiff]: How many times did you tell that jury that you didn't see any reason that he didn't [see] that sign?
>
> [Lewis]: I don't know what the circumstances were in this crash. I could not find a reason, you know, why he wouldn't have seen the sign.
>
> [Plaintiff]: How many times did you tell the jury there was no sight distance issue in this case?
>
> [Lewis]: Several times.

Plaintiff then questioned Lewis regarding Exhibit 37. Lewis acknowledged Exhibit 37 referred to the stop sign at issue, he made the handwritten notations on Exhibit 37, and those notations were made

after he went to the scene of the accident. According to Lewis, he wrote the following on Exhibit 37: "northbound stop sign too far out [on Red Road]"[2] (the commonly used name for the road); an underlined "Yes!" next to that first opinion; and "move in closer to State Road 1417 for better sight distance." In addition, Lewis testified he believed the stop sign was "too far out to the right." Lewis also acknowledged he knew about the handwritten notations on Exhibit 37 when he testified during his direct examination testimony.

The jury found both French and NCDOT negligent and awarded Plaintiff $800,000.00 in damages. NCDOT timely appeals.

ANALYSIS

On appeal, NCDOT argues the trial court erred in admitting Exhibit 37 into evidence, and that Plaintiff's use of the exhibit in enlarged, poster form was misleading and prejudicial. Exhibit 37 is Lewis's 2016 post-accident report, which contains hand-written notations stating the stop sign was "too far out [on Red Road]" and should be "move[d] in closer to [Red Road] for better sight distance[.]" To support its argument of erroneous admission of the report, NCDOT argues (1) Exhibit 37 was inadmissible evidence of subsequent remedial measures pursuant to Rule 407 of the Rules of Evidence, and (2) the probative value of Exhibit 37, which the trial court admitted for impeachment, was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403 of the Rules of Evidence. We analyze both arguments and also perform a Rule 401 analysis of whether Exhibit 37 constituted proper, relevant impeachment evidence.

A. Rule 407

1. Standard of Review

First, we examine whether Exhibit 37 was a subsequent remedial measure susceptible to exclusion under Rule 407. Our precedent does not clearly provide the standard of review for Rule 407; however, an analysis of our past cases shows that de novo review has consistently been used. As a result, we review the trial court's Rule 407 determination de novo.

In general, appellate courts review a trial court's evidentiary rulings according to an abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 139 L. Ed. 2d 508 (1997) ("We have held that abuse of

2. The phrase "on Red Road" does not appear on Exhibit 37, but Lewis confirmed that his notation "northbound stop sign too far out" referred to "on Red Road."

discretion is the proper standard of review of a district court's evidentiary rulings."); *see also Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997) (holding that "admission of [evidence] . . . [is] addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown"). Additionally, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

However, in multiple cases, when ruling on issues involving Rule 407, we have considered the matter anew and substituted our own judgment regarding a trial court's evidentiary ruling involving Rule 407. In those cases, we applied de novo review, without explicitly saying so.

For example, the following review of the record took place in *Smith v. N.C. Dept. of Nat. Res. & Cmty. Dev.*:

> Finally, plaintiff contends the Commissioner erred in failing to admit evidence of subsequent remedial measures shown in exhibits number 9 through 18 and discussed in exhibit number 29. As plaintiff correctly points out, it is unclear from the transcript of the proceedings whether or not exhibit 29 was admitted into evidence. For the purposes of this argument, we will assume that it was not. Plaintiff argues the exhibits were admissible under Rules 407 and 803(8) of the North Carolina Rules of Evidence. According to Rule 407, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, but such evidence may be offered for other purposes such as 'proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.' N.C.G.S. § 8C-1, Rule 407 (1992). Rule 803(8) provides that public records and reports are an exception to the hearsay rule. § 8C-1, Rule 803(8) (1992).
>
> Exhibits 9 through 18 are photographs of signs, railings and stairways constructed around the area of Beauty Falls after Richard Smith's death. Plaintiff argues they were admissible under Rule 407 because the State contested the feasibility of precautionary measures. *We disagree.* . . . [T]he park superintendent[] testified that the park could not be made "safe," but admitted that it could be made "safer" and mentioned several examples of possible precautionary measures. We find that the evidence was

> properly excluded under Rule 407, because the State did not challenge the feasibility of precautionary measures, nor did it contest ownership or control of the area.
>
> Alternatively, plaintiff argues the evidence serves to impeach the State's contentions that the area could not be made safe, claiming that the new railings and sign now render that area completely safe. We find this position to be unsupported by the evidence. The fact that no accidents have occurred since the safety measures were put in place does not prove that accidents will not happen at Beauty Falls in the future. We believe the Commissioner correctly concluded that exhibits 9 through 18 were inadmissible.

Smith v. N.C. Dept. of Nat. Res. & Cmty. Dev., 112 N.C. App. 739, 746, 436 S.E.2d 878, 883 (1993) (emphasis added).

We also performed a de novo review in *Benton v. Hillcrest Foods, Inc.*:

> Plaintiffs concede that the instructions to security guards were created after the shootings in issue. However, plaintiffs argue that the instructions, which state that the security guards should lock the door in the event of a disturbance in the parking lot, show the feasibility of precautionary measures and would have impeached defendants' testimony that there was no reason to lock the front door of the restaurant which was open twenty-four hours a day.
>
> A witness for defendant stated, 'There's no reason to lock the door.' However, testimony that there is no reason to lock the door does not address the feasibility of locking the door. Instead, the statement refers to the perceived lack of necessity to do so. Therefore, whether or not it would have been possible to lock the door was not controverted, and evidence that such a measure would have been feasible is not admissible under Rule 407.

Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 53, 524 S.E.2d 53, 61 (1999). Immediately after that treatment of Rule 407, we stated "[w]hether to exclude evidence *under Rule 403* is within the sound discretion of the trial court." *Id.* (emphasis added).

Further, in *Lane v. R.N. Rouse & Co.*, after explicitly stating that the standard of review concerning admission of evidence of similar circumstances is abuse of discretion, we did not mention that standard of review when examining a trial court's Rule 407 ruling:

> Finally, Rouse assigns error to the trial court's admission of measures taken by Rouse, immediately following decedent's death, to cover the floor openings with plywood.
>
> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment. N.C. R. Evid. 407.
>
> Here, Rouse argued repeatedly that it had no control of the construction site on the day of the accident. Rouse's witnesses also questioned the feasibility of covering the floor openings. However, we agree with the trial court that evidence of Rouse's actions in placing covers over the openings immediately after decedent's fall was admissible as evidence of Rouse's control of the work site on the day of the accident and of the feasibility of taking that precautionary measure.

Lane v. R.N. Rouse & Co., 135 N.C. App. 494, 498-99, 521 S.E.2d 137, 140 (1999) (alterations omitted).

In reviewing our precedent, we have performed de novo review of trial courts' Rule 407 rulings without expressly identifying the standard of review. We now perform a de novo review of the Record to determine whether Plaintiff offered the evidence as a subsequent remedial measure, and whether the evidence was admissible.

2. Subsequent Remedial Measures

"According to Rule 407, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct, but such evidence may be offered for other purposes such as 'proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.' " *Smith*, 112 N.C. App. at 746, 436 S.E.2d at 883 (quoting N.C.G.S. § 8C-1, Rule 407 (1992)). This general exclusion of subsequent remedial measures stems from the rationale that "[p]recautions against the future cannot be considered as an admission of actionable negligence in the past." *McMillan v. Atlanta & C. Air Line Ry. Co.*, 172 N.C. 853, 855, 90 S.E. 683, 685 (1916). A post-accident report

containing recommendations for improvements is excluded under Rule 407. *Smith*, 112 N.C. App. at 746-47, 436 S.E.2d at 883. Post-incident written notes containing instructions are also excluded under Rule 407. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

After reviewing the Record and Lewis's testimony, we agree with the trial court's ruling that Lewis's notes in Exhibit 37 concerning the sign's placement ("stop sign too far out") and whether he believed the sign needed to be relocated ("move in closer to SR 1417 for better sight distance") qualified as subsequent remedial measures excludable under Rule 407, unless an appropriate exception applied. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61 (holding that written instructions to security guards after a shooting were excluded under Rule 407). Lewis's notes in Exhibit 37 were made after the traffic collision at issue. In this post-accident report, Lewis made a professional recommendation to move the stop sign, which "would have made the event less likely to occur" if it had been made before the accident and in conjunction with actual movement of the sign. N.C.G.S § 8C-1, Rule 407 (2019). Generally, these notes and post-accident reports should be excluded under Rule 407. *Smith*, 112 N.C. App. at 746-47, 436 S.E.2d at 883.

However, Rule 407 instructs further that evidence of subsequent remedial measures may not serve as a bar to evidence introduced to impeach:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule *does not require the exclusion of evidence of subsequent measures when offered* for another purpose, such *as . . . impeachment.*

N.C.G.S § 8C-1, Rule 407 (2019) (emphasis added). If Plaintiff properly offered the notes in Lewis's post-accident report for impeachment purposes, Rule 407 does not prohibit the admission of Lewis's notes in his post-accident report and no longer applies. We examine whether Plaintiff properly offered Lewis's notes for impeachment purposes.

B. Rule 401

1. Relevance

Next, we examine whether Lewis's testimony was offered for a proper, relevant purpose, to wit: impeachment. "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*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *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).

Here, the trial court determined Exhibit 37 was relevant for impeachment purposes, and the deferential standard of Rule 401 informs our approach in reviewing the relevancy of evidence for impeachment under Rule 407. *State v. Stewart*, 231 N.C. App. 134, 139, 750 S.E.2d 875, 878 (2013). Lewis's notes concerning the sign's placement, and whether he believed the sign was in the safest place for visibility on Red Road, had a logical tendency to prove the veracity of his testimony concerning whether the sign at issue in this case should have been placed in a different location. Lewis's notes also had a logical tendency to make his testimony more or less believable to the jury.

2. Impeachment Purposes

A longstanding principle within our jurisprudence provides that "[t]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959) (quoting *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930)); *see also State v. Shuler*, 841 S.E.2d 607, 610 (N.C. Ct. App. 2020). "Impeachment evidence has been defined as evidence used to undermine a witness's credibility, with *any* circumstance tending to show a defect in the witness's *perception*, *memory*, *narration or veracity* relevant to this purpose." *State v. Gettys*, 243 N.C. App. 590, 595, 777 S.E.2d 351, 356 (2015) (emphasis added) (quoting *State v. Allen*, 222 N.C. App. 707, 721, 731 S.E.2d 510, 520 (2012)).

The opposing party can impeach by offering evidence of that witness's prior inconsistent statements. *State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988). Plaintiff concedes the inability to call Lewis as an adverse witness for the sole purpose of introducing

Exhibit 37. Had NCDOT not called Lewis as a witness, Exhibit 37 would not have been admissible. However, NCDOT chose to call Lewis as a witness, and we examine the Record for testimonial inconsistencies permitting Plaintiff to use Exhibit 37 for the purpose of undermining Lewis's credibility.

On direct examination, Lewis testified that when he went to the intersection "[he] didn't see an issue safety-wise . . . there wasn't a sight distance issue to the primary stop sign on the right-hand side." More specifically, he testified he did not see any visibility issues regarding the stop sign, the placement of the stop sign was safe, and he could see the stop sign. Lewis explicitly disagreed with the opinions of Marceau, Barrett, and Sutton, all retained experts who testified in the same capacity that the placement of the stop sign created a "visibility conspicuity issue."

Prior to Plaintiff's introduction of Exhibit 37 on cross-examination, Lewis confirmed he had already told the jury "several times" that "there was nothing wrong with that stop sign to the right," there was "no[] visibility issue with th[e] stop sign on the right," and that he "could not find a reason . . . why [French] wouldn't have seen the sign." This testimony directly conflicts with Lewis's notation on Exhibit 37, which states the stop sign was "too far out [on Red Road]" and should be "move[d] in closer to [Red Road] for better sight distance." The notations on Exhibit 37 directly conflict with Lewis's testimony on direct and cross-examinations and tend to discredit his testimonial account of his 2016 inspection. Exhibit 37 and the corresponding testimony on cross-examination were admissible impeachment evidence notwithstanding the general prohibition of evidence of subsequent remedial measures. The trial court did not err in admitting Exhibit 37 for impeachment.

NCDOT asks us to rely on *Benton*, where we placed limits on a plaintiff's ability to cross-examine defense witnesses with evidence of subsequent remedial measures. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61. There, a patron was shot and killed during an altercation at a restaurant, and an eyewitness for the defense testified, "[t]here's no reason to lock the door." *Id.* The plaintiff attempted to contradict this testimony by introducing evidence of written instructions, created after the incident, directing security guards to lock the door in case of disturbances in the parking lot. *Id.* at 52-53, 523 S.E.2d at 60-61. We affirmed the trial court's decision to exclude evidence of the written instructions to contradict the witness; the witness's testimony did not address the feasibility of locking the door, an uncontroverted issue, and instead referred only to his perceived lack of necessity of doing so during the incident. *Id.*

Benton is distinguishable from the present case, and NCDOT's reliance on *Benton* is misplaced. Our conclusion regarding Rule 407 in *Benton* turned on whether the parties controverted the feasibility of taking precautionary measures, which is another exception under Rule 407. *Id.* at 53, 524 S.E.2d at 61. In *Benton*, we only discussed impeachment in passing and in relation to proving feasibility. *Id.* The written instructions, which were adopted after the shooting, were not relevant to "show a defect in the witness's perception, memory, narration or veracity" of an eyewitness account of the shooting. *Gettys*, 243 N.C. App. 590 at 595, 777 S.E.2d at 356. Unlike the evidence of subsequent remedial measures at issue in *Benton*, Exhibit 37 is relevant to show a defect in Lewis's perception, memory, and narration, as well as the veracity of his testimony, concerning the safety inspection he conducted following the accident. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

NCDOT also contends "[t]he impeachment exception applies when a party initiates the purported testimonial inconsistency and thereby tries to gain an unfair advantage by exploiting the exclusionary provision of Rule 407." To support this assertion, NCDOT cites cases in which evidence of subsequent remedial measures was admissible to impeach a witness who inaccurately described the condition at the time of the accident or asserted the condition was repaired before the accident. *See Tise v. Town of Thomasville*, 151 N.C. 281, 65 S.E 1007 (1909); *Mintz v. Atlantic Coast Line R. Co.*, 236 N.C. 109, 72 S.E.2d 38 (1952). NCDOT also cautions if we allow Plaintiff to impeach Lewis's testimony with a report that reflects a change in his "engineering judgment" based on new "available pertinent information," then the exception will swallow the rule.

While NCDOT cites cases demonstrating how trial courts apply the impeachment exception to combat patently false testimony, it fails to cite any authority limiting application of the impeachment exception to these exclusive purposes. Adoption of such a narrow interpretation of the impeachment exception would actually impermissibly broaden the Rule 407 prohibition of evidence of subsequent remedial measures, which does not allow defendants in negligence cases to "avail themselves of the [prohibition on remedial measures evidence] for the purposes of preventing a fair and full disclosure of pertinent facts not tending to establish negligence." *Pearson v. Harris Clay Co.*, 162 N.C. 224, 226, 78 S.E. 73, 74 (1913). When the Record discloses that a defense witness, on direct examination, testifies about conditions prior to an accident or injury, which Lewis testified to in this case, it is proper on cross-examination to contradict that witness's assertion with evidence

directly controverting the witness's testimony. *Jefferson v. City of Raleigh*, 194 N.C. 479, 482, 140 S.E. 76, 77 (1927); *see generally Tise*, 151 N.C. 281, 65 S.E. 1007.

Plaintiff's use of Exhibit 37 on cross-examination was proper, relevant impeachment—NCDOT called Lewis as a witness, and Exhibit 37 contradicted Lewis's testimony and undermined his credibility. Rule 407 does not exclude Exhibit 37 for such a use, despite the general prohibition of evidence of subsequent remedial measures. The impeachment exception to Rule 407 applies, and Plaintiff's impeachment of Lewis with his own report constituted relevant evidence. Next, we examine whether Rule 403 would prohibit the use of Exhibit 37, despite it being proper, relevant impeachment evidence excepted from Rule 407's general prohibition.

C. Rule 403

NCDOT argues the trial court should have excluded Exhibit 37 because its probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury. We disagree. The trial court did not abuse its discretion in allowing the evidence under Rule 403.

"Rule 403's balancing test mandates the exclusion of prejudicial or otherwise inapplicable evidence when 'its probative value is substantially outweighed' by its prejudicial or inapplicable nature." *State v. Alonzo*, 261 N.C. App. 51, 59, 819 S.E.2d 584, 590 (2018) *modified on other grounds*, 373 N.C. 437, 838 S.E.2d 354 (2020). "Relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury[.]' " *State v. Smith*, 263 N.C. App. 550, 566, 823 S.E.2d 678, 689 (2019) (quoting N.C.G.S. § 8C-1, Rule 403 (2019)). We note that "the balance under Rule 403 favors admissibility of probative evidence." *State v. Peterson*, 179 N.C. App. 437, 460, 634 S.E.2d 594, 612 (2006).

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015) (quoting *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008)).

Exhibit 37 was highly probative to whether Lewis's testimony was credible concerning the stop sign's placement. Lewis prepared the report in Exhibit 37, but his testimony at trial contradicted what he wrote in it. We also note the proper purpose of the direct impeachment; Lewis was not collaterally attacked with a report he did not compose.

NCDOT argues that *Benton v. Hillcrest Foods, Inc.* should guide our analysis regarding Rule 403 balancing in the present case. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61. In *Benton*, we reviewed a trial court's Rule 403 exclusion of evidence in the form of written instructions to restaurant security guards, given after a confrontation between patrons, to "lock the door in the event of a disturbance in the parking lot." *Id.* We held "that the proffered evidence [wa]s of slight probative value and present[ed] a danger that the jury would be unfairly prejudiced against [the] defendant for not having taken the remedial measure earlier." *Id.* Unlike the low probative value of post-confrontation written instructions to security guards in *Benton*, Lewis's 2016 inspection notes were highly probative, as they were evidence of his opinion concerning the safety and need for improvement of the stop sign's placement, and contradicted the opinion he later provided before the jury. The risk of unfair prejudice to NCDOT was low. Here, the trial court did not abuse its discretion.

D. Limiting Instruction

NCDOT also argues the trial court committed reversible error because it failed to issue a limiting instruction, after Plaintiff's closing argument, restricting Exhibit 37 to its proper scope. During closing argument, Plaintiff argued that all the evidence, including Exhibit 37 and Lewis's related testimony, proved NCDOT's negligence was the proximate cause of an accident that "killed a nice lady." According to NCDOT, Plaintiff also argued Lewis's testimony and opinions regarding the safety of the stop sign placement were "dishonest," "untruthful," and "could not be trusted."

NCDOT was entitled, *upon request*, to an instruction limiting the jury's consideration of Exhibit 37 to its proper scope. Rule 105 of the North Carolina Rules of Evidence provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

N.C.G.S. § 8C-1, Rule 105 (2019). "The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held error in the absence of a request by the defendant for such limiting instructions." *State v. Love*, 152 N.C. App. 608, 617, 568 S.E.2d 320, 326 (2002). Additionally, "[counsel have] wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case

supported by the evidence, and to argue the law as well as the facts." *Jenkins v. Harvey C. Hines Co.*, 264 N.C. 83, 91, 141 S.E.2d 1, 6 (1965).

Although Plaintiff's reference to Exhibit 37 and Lewis's related testimony conceivably had the potential to have the jury consider the evidence for an improper purpose, NCDOT failed to request a limiting instruction. In light of impeachment evidence discrediting Lewis's testimony, Plaintiff had wide latitude to argue Lewis's testimony and opinions regarding the safety of the stop sign placement were "dishonest," "untruthful," and "could not be trusted."

The trial court did not commit reversible error by not issuing a limiting instruction, because NCDOT failed to request an instruction limiting the jury's consideration of Exhibit 37 to its proper scope.

CONCLUSION

Exhibit 37 was a subsequent remedial measure under Rule 407, but fell into the exception in Rule 407 as impeachment evidence and was properly admitted under Rules 407 and 401. Exhibit 37 was relevant evidence contradicting Lewis's perception, memory, or narration, or the veracity of his testimony on direct examination, and the trial court did not abuse its discretion in concluding the probative value was not substantially outweighed by the danger of unfair prejudice. NCDOT failed to request a limiting instruction in accordance with Rule 105 concerning Exhibit 37, and Plaintiff was allowed to make arguments concerning Exhibit 37, upon its proper admission.

NO ERROR.

Judge DILLON concurs in result with separate opinion.

Judge TYSON concurs in part and dissents in part, with separate opinion.

DILLON, Judge, concurring in result.

This matter involves a fatal car accident occurring at an intersection in 2016, where the driver at fault ran a stop sign. After the accident, the North Carolina Department of Transportation ("NCDOT") sent Mr. Lewis (one of its engineers) to the intersection to make a post-accident report. In his report, Mr. Lewis recommended that the NCDOT take remedial action to make the stop sign more obvious to approaching drivers.

At trial, Plaintiff called experts who testified that the NCDOT had been negligent in the placement of the stop sign prior to the accident.

During the NCDOT's case in defense, the NCDOT chose to call Mr. Lewis to refute Plaintiff's experts. The NCDOT's counsel elicited from Mr. Lewis his opinion that the NCDOT had not been negligent in locating the stop sign prior to the accident. Specifically, Mr. Lewis testified that he had visited the intersection in 2014, two years prior to the accident, and that, based on his 2014 visit, it was his opinion that the stop sign was in a safe location. During Plaintiff's cross-examination of Mr. Lewis, Plaintiff questioned him about his visit to the intersection in 2016, shortly after the accident. Over the NCDOT's objection, Plaintiff introduced Mr. Lewis' post-accident report into evidence to impeach his testimony.

The jury returned a verdict in favor of Plaintiff, finding the NCDOT negligent.

On appeal, the NCDOT argues that Mr. Lewis' post-accident report should not have been admitted, based on Rule 407 of our Rules of Evidence, which generally excludes evidence that the defendant took remedial measures *after* an accident to make its property safer. *See* N.C. Gen. Stat § 8C-1, Rule 407 (2016). Indeed, Rule 407 recognizes that actions by a property owner after an accident to make its property safer is *not* an admission that the owner had been negligent in keeping its property safe at the time of the accident. *Id.*

I concur with the result in this case that the trial court did not commit reversible error in admitting the report into evidence based on the reasoning below.

Mr. Lewis' report at issue contains this written notation:

> STOP SIGN TOO FAR OUT. MOVE IN CLOSER TO [THE INTERSECTION] FOR BETTER SIGHT DISTANCE.

This notation was circled. Outside this circled notation was written "YES!"

The above notation contains two different statements by Mr. Lewis, which I address separately.

The first statement – "STOP SIGN TOO FAR OUT" – could reasonably be interpreted as Mr. Lewis' opinion that the stop sign was not in a safe location at the time of the accident . . . that the sign was situated "too far" from the intersection. As such, I conclude that the statement was properly admitted for impeachment purposes, irrespective of

whether it falls within Rule 407.[1] The statement could be interpreted as a direct contradiction of the opinion Mr. Lewis offered during his in-court testimony that the stop sign was not negligently placed.

It was the NCDOT who decided to call Mr. Lewis as a witness. Accordingly, Plaintiff had the right to impeach Mr. Lewis regarding any testimony he gave on direct examination with out-of-court statements he had made to the contrary, including any such statements contained in his post-accident report. Had the NCDOT not called Mr. Lewis, this first statement probably would not have come in to evidence. Accordingly, the trial court correctly allowed this statement in to evidence.

The second statement in the report is Mr. Lewis' recommendation that the stop sign be "move[d] closer to [the intersection] for better sight distance[.]" I agree with my colleagues that this second statement, standing alone, clearly falls within Rule 407. However, unlike the first statement, this second statement does not contradict anything Mr. Lewis testified to during his direct testimony. He never testified that he had *not* recommended the stop sign be moved after his 2016 visit. Accordingly, I conclude the statement was inadmissible.

However, any error in allowing the second statement into evidence was not prejudicial to the NCDOT. Admittedly, Mr. Lewis' recommendation that the stop sign should be moved to make it safer, though not an admission that the stop sign was not safe to begin with, does *suggest* to the jury that Mr. Lewis believed that the NCDOT had been negligent in its original placement of the stop sign. But, here, the jury already heard evidence suggesting that Mr. Lewis thought the stop sign was not in a safe location and that he thought it had been placed "too far" from the intersection. It is almost certain that, based on this first statement alone, the jury already assumed that Mr. Lewis thought remedial action was required. It is unlikely that the second statement – where he actually recommends remedial action – was crucial in swaying the jury to find the NCDOT negligent.

The NCDOT extensively cites to *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 524 S.E.2d 53 (1999) to support its position that the trial court committed reversible error. *Benton* is an instructive case on the

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1. It could be argued that this first statement, standing alone, falls outside of Rule 407 in that it does not suggest remedial action. But it could be argued that the statement falls within Rule 407, since it is part of a report commissioned by the NCDOT which recommends that remedial action be taken. However, even if the statement falls within Rule 407, it is still admissible, as Rule 407 allows evidence of remedial action to be admitted if properly offered for impeachment purposes.

nuances of the impeachment exception of the Rule 407 exclusion, but that case does not contradict my position here. In *Benton*, a restaurant patron's estate sued *the restaurant* for failing to maintain a safe environment after the decedent was fatally shot. *Id.* at 46, 524 S.E.2d at 57. After losing at trial, the estate appealed, arguing that the trial court incorrectly disallowed evidence that the restaurant had issued written instructions to its security guards, post-shooting, that the restaurant doors should be locked whenever trouble was detected outside. *Id.* at 53, 524 S.E.2d at 61. Our Court affirmed, concluding that the written instructions were Rule 407 evidence and that the instructions did not contradict evidence offered by the restaurant that "there was no reason to lock the front door." *Id.* at 53, 524 S.E.2d at 61. In rejecting the estate's argument, Judge (future Justice) Timmons-Goodson, writing for our Court, noted that the restaurant's post-shooting instructions to lock the door when danger was detected outside would have only served as impeachment testimony had the restaurant's witness testified that *it was not feasible* to lock the door:

> However, testimony that there is no reason to lock the door does not address the feasibility of locking the door. Instead, the statement refers to the perceived lack of necessity to do so. Therefore, whether or not it would have been possible to lock the door was not controverted, and evidence that such a measure would have been feasible is not admissible under Rule 407.

Id. at 53, 524 S.E.2d at 61. If, however, the written instructions had contained a statement that the restaurant owners thought they had acted imprudently in not having a policy to lock the doors, perhaps *that* statement would have been admissible to impeach the suggestion by the restaurant's witness that the restaurant saw no need to lock the doors.

I conclude that the NCDOT received a fair trial, free from reversible error.

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

I. Background

Shirley Davis Pendergrass died from injuries sustained during a car accident on 4 April 2016. Donnie George Holland qualified as executor for her estate ("Plaintiff"). He filed a wrongful death action against Richard Allan French ("French") for his alleged failure to stop at a stop sign at the intersection of Castalia and Red Roads in Nash County.

French asserted a third-party claim against the North Carolina Department of Transportation ("NCDOT"). Plaintiff was allowed to amend its complaint to bring direct causes of action against NCDOT for negligently installing traffic control devices on Red Road. NCDOT asserted sovereign immunity in its answer to Plaintiff's amended complaint.

Prior to trial, NCDOT also timely filed a motion *in limine* to prevent Plaintiff and French from introducing evidence of its subsequent remedial measures. Plaintiff asserted it was unaware of what witnesses NCDOT would call and who might be subject to cross-examination. The court preliminarily ruled counsel must refrain from commenting on the remedial evidence in front of the jury until the parties addressed the evidence.

At trial, relevant to NCDOT, Plaintiff introduced testimony of two engineers, Daren Marceau and Dr. Rollin Barrett. French presented one engineer, Mike Sutton. NCDOT presented testimony of Christopher Lewis, traffic engineer; Johnnie Paul Hennings, accident reconstruction analyst; and Andy Brown, division traffic engineer. After a hearing outside of the jury's presence, the trial court ruled over NCDOT's objection Plaintiff would be allowed to cross-examine Lewis regarding an aerial drawing and notes thereon he had prepared after the accident. His notes stated the stop sign was too far out from and that it needed to be moved closer to the road for better sight distance. Plaintiff argued this evidence impeached Lewis' prior testimony.

The jury returned a verdict and found French and NCDOT were negligent and awarded $800,000 in damages. NCDOT appealed.

II. Issue

NCDOT argues the trial court erred by allowing Plaintiff to impeach Lewis with Plaintiff's Exhibit 37 in violation of Rule 407. N.C. Gen. Stat. § 8C-1, Rule 407 (2019). NCDOT also argues the trial court abused its discretion and prejudicially erred by allowing this evidence to be admitted in violation of Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

III. Standards of Review

A trial court's evidentiary rulings are generally reviewed by appellate courts under an abuse of discretion standard. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 139 L. Ed. 2d 508, 516 (1997) (citations omitted) ("We have held that abuse of discretion is the proper standard of review of a [trial] court's evidentiary rulings."); *see also Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997) (holding that "admission of [evidence] . . . [is] addressed to the sound discretion of the trial court

and may be disturbed on appeal only where an abuse of such discretion is clearly shown"). Additionally, regarding prejudice, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

"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); N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Even though we review relevancy rulings *de novo*, we give the trial court rulings regarding whether evidence is relevant "great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570 (2019), *appeal dismissed*, *review denied*, 373 N.C. 175, 833 S.E.2d 806 (2019).

As the plurality opinion correctly notes: "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015) (quoting *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008)).

IV. Jurisdiction

NCDOT asserted sovereign immunity to a direct action against the state in its answer to Plaintiff's amended complaint. As sovereign immunity precludes suits directly against the State and is jurisdictional unless expressly waived, this issue is threshold before reaching the merits of NCDOT's claims. In *Batts v. Batts*, 160 N.C. App. 554, 586 S.E.2d 550 (2003), *disc. rev. denied*, 358 N.C. 153, 592 S.E.2d 553 (2004), this Court addressed this issue under a similar factual scenario.

The plaintiff, Stacy Batts, was a passenger in a car operated by Shawan Batts. *Id.* at 555, 586 S.E.2d at 551-52. The complaint alleged a stop sign controlling Mr. Batts direction of travel was obstructed by tree limbs. *Id.* The complaint was filed against Mr. Batts and the Town of Elm City. *Id.* Mr. Batts filed a crossclaim against the Town of Elm City and a third-party complaint against NCDOT. *Id.* The plaintiff then obtained permission of the trial court to amend her complaint to add NCDOT as a defendant and to dismiss her claim against the Town of Elm City. *Id.* at 556, 586 S.E.2d at 552. The trial court denied NCDOT's motion to dismiss the plaintiff's complaint based on sovereign immunity. *Id.*

On appeal, NCDOT also contended proper jurisdiction of the plaintiff's claim was before the Industrial Commission pursuant to the Tort Claims Act. *Id.* at 557, 586 S.E.2d at 552-53. This Court affirmed the trial court's denial of NCDOT's motion to dismiss. *Id.* at 559, 586 S.E.2d at 554.

North Carolina Rule of Civil Procedure 14(c) provides that the State may be joined as a third-party defendant notwithstanding the provisions of the Tort Claims Act. N.C. Gen. Stat. § 1A-1, Rule14(c) (2019). Rule 14(a) provides that a plaintiff may allege a claim against a third-party defendant arising of the transaction or occurrence that is the subject matter of the plaintiff's claim. N.C. Gen. Stat. § 1A-1, Rule14(a) (2019). N.C. Gen. Stat. § 143-291 (2019) indicates sovereign immunity does not prevent the State from being joined as a third-party defendant in wrongful death action. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 187 (1982) ("We recognize that actions for indemnification, as well as actions for contribution, are generally brought by means of a third-party complaint. Rule 14(c) does not limit the nature or character of third-party actions permissible against the State. We therefore hold that the State may be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts.").

This Court concluded the plaintiff's amended complaint against NCDOT was proper.

> Under the clear language of Rule 14(a), once a third-party defendant is added to a lawsuit, a plaintiff may assert claims directly against the third-party defendant, subject only to the limitation that the claim arose out of the same transaction or occurrence as the plaintiff's original claim against the original defendant.
>
> The Tort Claims Act waives sovereign immunity. By the addition of Rule 14(c), the General Assembly created an exception to the general rule that claims against the State under the Tort Claims Act must be pursued before the Industrial Commission as to third-party claims. . . . By adding subsection (c) to Rule 14, the General Assembly waived the State's immunity to claims brought by a plaintiff under Rule 14(a), subject to the express limitations contained therein.

Batts, 160 N.C. App.at 557, 586 S.E.2d at 552-553. Jurisdiction was proper in the superior court.

V. Analysis

A. Rule 407

We all agree the trial court correctly ruled Lewis' notes and recommendations in Exhibit 37 concerning the sign's placement ("stop sign too far out") and whether he believed the sign needed to be relocated ("move in closer to SR 1417 for better sight distance") qualified under Rule 407 as subsequent remedial recommendations and measures and were properly excluded unless an appropriate exception applies. N.C. Gen. Stat. § 8C-1, Rule 407; *see Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 53, 524 S.E.2d 53, 61 (holding that written instructions to security guards after a shooting were excluded under Rule 407). The trial court properly ruled that Plaintiff was "prohibited from mentioning [subsequent remedial measures] during jury selection or [the] case in chief," but reserved the issue for decision if the "matter [became] a direct issue" upon NCDOT's presentation of evidence.

When measures are taken after an event, which if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. N.C. Gen. Stat. § 8C-1, Rule 407. "Precautions against the future cannot be considered as an admission of actionable negligence in the past." *McMillan v. Atlanta & C. Air Line Ry. Co.*, 172 N.C. 853, 855, 90 S.E. 683, 685 (1916). A post-accident report containing recommendations for improvements or remediation is excluded under Rule 407. *Smith v. N.C. Dept. of Nat. Resources*, 112 N.C. App. 739, 746-47, 436 S.E.2d 878, 883 (1993). Post-incident written notes containing instructions are also excluded under Rule 407. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

"This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment." N.C. Gen. Stat. § 8C-1, Rule 407; *see Lane v. R.N. Rouse & Co.*, 135 N.C. App. 494, 498-99, 521 S.E.2d 137, 140 (1999).

It is undisputed Lewis' notes in Exhibit 37 were made during a required site visit and review after the fatal traffic accident at issue had occurred. Lewis made a professional observation and recommendation in this 2016 post-accident report to move the stop sign, which "would have made the event less likely to occur" if it had been made before the accident and in conjunction with actual movement of the sign. N.C. Gen. Stat. § 8C-1, Rule 407. NCDOT properly asserted and the trial court

correctly ruled preliminarily Lewis' post-accident report should be excluded from evidence under Rule 407. *Id.*; *Smith*, 112 N.C. App. at 746-47, 436 S.E.2d at 883.

This correct ruling, together with NCDOT's continuing objections, shifted to Plaintiff the burden to show a basis to allow admission. Whether Plaintiff met this burden becomes the pivotal question before us. Lewis' direct testimony that the sign was visible was not impeached. His post-accident statement could not be admitted on this basis. N.C. Gen. Stat. § 8C-1, Rule 407.

Under Rule 407 and the trial court's ruling, Plaintiff also concedes his inability to have called Lewis as an adverse witness for the sole purpose of introducing Exhibit 37, even though he was the author of the notes and comments on the exhibit. Had NCDOT not called Lewis as a witness, Exhibit 37 would not have been admissible under the trial court's ruling. *Id.*

As noted above, evidence of subsequent remedial measures, including post-incident written notes containing instructions, is not admissible to prove prior negligence or culpable conduct, but such evidence may be admitted by Plaintiff showing other purposes such as "proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment." *Id.*; *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61.

When a party is attempting under Rule 407 to introduce evidence of a subsequent remedial measure for impeachment, the party must make an offer of proof containing:

> [1.] What the witness will testify to if the judge permits the proponent to pursue the line of inquiry.
>
> [2.] The evidence is logically relevant to some issue other than the general question of negligence or fault.
>
> [3.] The issue the evidence relates to is disputed in the case.

Robert P. Mosteller et al., *North Carolina Evidentiary Foundations*, Ch. 8, § 8-7(B) (3d ed. 2014).

Here, Plaintiff failed to lay a foundation and did not introduce any evidence this information is logically relevant to some issue other than the general question of NCDOT's negligence or fault. If Plaintiff meets its burden, Exhibit 37 may be subject to be admitted under the exceptions listed in Rule 407. Additionally, each line of notation on Exhibit 37

asserted as admissible needs to be subjected to the above analysis prior to admission. *Id.*

NCDOT argues this Court's decision in *Benton* is dispositive to exclude Exhibit 37. In *Benton*, we limited a plaintiff's ability to cross-examine defense witnesses with evidence of subsequent remedial measures. *Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61. A patron was shot and killed during an altercation at a restaurant. *Id.* An eyewitness for the defense had testified, "[t]here's no reason to lock the door." *Id.* Plaintiff attempted to undermine and impeach this testimony by introducing into evidence written instructions, created after the incident, which directed the restaurant's security guards to lock the door in case of disturbances occurring in the parking lot. *Id.* at 52-53, 523 S.E.2d at 60-61.

This Court affirmed the trial court's decision to exclude evidence of the written instructions to contradict the witness' testimony. We held the witness' testimony did not address the feasibility of locking the door, an uncontroverted issue, and instead referred only to the witness' belief of the lack of necessity of doing so during the incident. *Id.*

More than two years had elapsed since Lewis' first visit to the rural site in 2014, the basis of his direct testimony, and again in late 2016 for the required post-accident visit. Plaintiff laid no foundation or showing that the conditions Lewis had observed in 2014 had not changed or were similar to those he observed after the accident in 2016. *Mintz v. Atlantic Coast Line R. Co.*, 236 N.C. 109, 72 S.E.2d 38 (1952); *Tise v. Town of Thomasville*, 151 N.C. 281, 65 S.E 1007 (1909).

Plaintiff failed to carry its burden by not offering how "[t]he evidence is logically relevant to some issue other than the general question of negligence or fault" in the face of NCDOT's motion *in limine* and continuing objection to admission and the trial court's prior ruling. Mosteller, *North Carolina Evidentiary Foundations*, § 8-7 (B). I vote to reverse the trial court's decision to allow cross-examination of Lewis based upon his 2016 post-accident review, recommendations, and the remedial actions taken. N.C. Gen. Stat. § 8C-1, Rule 407. I respectfully dissent.

B. Rule 403

Even if Lewis' post-accident notes and recommendations were admissible under the impeachment exception to Rule 407, NCDOT argues the trial court should have excluded Exhibit 37 under Rule 403. NCDOT asserts the danger of unfair prejudice and misleading the jury

substantially outweighed its probative value. This Court has held: "Rule 403's balancing test mandates the exclusion of prejudicial or otherwise inapplicable evidence when 'its probative value is substantially outweighed' by its prejudicial or inapplicable nature." *State v. Alonzo*, 261 N.C. App. 51, 59, 819 S.E.2d 584, 590 (2018), *modified on other grounds*, 373 N.C. 437, 838 S.E.2d 354 (2020).

NCDOT urges this Court to overturn the trial court's decision to allow Plaintiff to impeach Lewis' testimony regarding conditions he observed in 2014 with a post- accident 2016 report that reflects a change in his "engineering judgment" based on new post-accident "available pertinent information." It argues that to affirm the trial court's application of the rule would allow the exceptions to swallow the overriding policy for the rule of exclusion to encourage remedial repairs.

NCDOT acknowledges the trial court's admission of evidence of remedial measures under the Rule 407 exceptions pursuant to Rule 403 is reviewed on appeal for abuse of discretion. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61 (holding whether to exclude evidence is within the sound discretion of the trial court and will not be disturbed "absent a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision").

NCDOT also argues the probative value was substantially outweighed by prejudice because by Plaintiff using a "blown-up poster" of Lewis' 2016 post-accident note, Plaintiff and French were allowed to "falsely" and aggressively cross-examine Lewis and to argue this properly excluded evidence in closing argument.

Plaintiff counters these arguments and cites a federal circuit court case as persuasive authority. In *Dollar v. Long Mfg., N.C., Inc.*, the plaintiff sought to introduce a warning letter from a witness to contradict his trial testimony about the safety of a backhoe when attached to a certain tractor. *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977). The federal court analyzed the Federal Rule of Evidence 403, holding:

> Rule 403 authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, we do not think this situation called for its application. In the face of Saunders' testimony as to his present opinion of the safety of the backhoe when attached to a rollbar-equipped tractor, we do not think unfair prejudice to the defendant would have resulted from his having been confronted by his own letter warning of exposure to death by such use. Of course,

> "unfair prejudice" as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't (sic) material. The prejudice must be "unfair."

Id.

I agree with NCDOT that presuming this line of questioning was permissible under the exceptions to Rule 407, "its probative value is substantially outweighed by its prejudicial or inapplicable nature" under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403. I also respectfully dissent from the plurality opinion's holding to the contrary.

VI. Conclusion

The trial court correct ruled that Rule 407's general prohibition of admission of evidence of subsequent remedial measures precludes admission of Exhibit 37. NCDOT lodged a continuing objection to this questioning. Plaintiff failed to lay a required foundation to carry his burden to show Lewis' post-accident 2016 notes, recommendation, and report did not remain within the exclusion of Rule 407.

We all agree Exhibit 37 was prepared post-accident, recommended and documented subsequent remedial measures implemented under Rule 407. Plaintiff failed to carry its burden to show Lewis' post-accident 2016 report fell into an exception in Rule 407 as impeachment evidence to be properly admitted. In the alternative, the probative value of Lewis' statements was substantially outweighed by the danger of unfair prejudice under Rule 403. NCDOT is entitled to a new trial. I concur in part and respectfully dissent in part.

IN RE J.M.

[273 N.C. App. 280 (2020)]

IN THE MATTER OF J.M., D.M., AND K.M.

No. COA19-724

Filed 1 September 2020

1. Child Abuse, Dependency, and Neglect—permanency planning review hearing—waiver of counsel—knowing and voluntary—written findings

In a permanency planning matter, the trial court properly treated a respondent-mother's answers during a colloquy as a waiver of respondent's right to counsel, but the matter was remanded for entry of written findings regarding whether the waiver was knowing and voluntary pursuant to N.C.G.S. § 7B-602(a1).

2. Child Visitation—grandmother as guardian—discretion regarding visitation—improper delegation of authority

A guardianship order was vacated and remanded where the trial court improperly delegated its judicial authority by granting a child's grandmother, who was made guardian of the child, discretion to modify the parameters of respondent-mother's visitation depending on respondent-mother's conduct.

Appeal by Respondent-Mother from orders entered 23 January 2019 by Judge Elizabeth Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 26 May 2020.

Senior Associate County Attorney Kristina A. Graham for Mecklenburg County Department of Social Services, Petitioner-Appellee.

William L. Gardo II for Guardian ad Litem.

Peter Wood for Respondent-Appellant.

McGEE, Chief Judge.

Respondent-Mother ("Respondent") appeals from a permanency planning order and guardianship order granting guardianship of her children J.M., D.M., and K.M. to their maternal grandmother (the "grandmother") and awarding her visitation. On appeal, Respondent argues the trial court erred in (1) treating her request for a new attorney as a waiver of counsel and (2) granting the grandmother discretion over

Respondent's visitation with her children. We remand the permanency planning order to the trial court for written findings of fact sufficient to demonstrate that Respondent's waiver of counsel was knowing and voluntary. We also vacate and remand the part of the permanency planning order and the guardianship order granting the grandmother discretion over Respondent's visitation with the children.

I. Factual and Procedural History

Respondent has four children: J.M, D.M., K.M., and T.L.[1] Father ("Father") is the biological father of J.M., D.M., and K.M. (the "children"), but not T.L. The Mecklenburg County Department of Social Services, Youth and Family Services ("DSS") received a child protective services ("CPS") report concerning all four children on 6 February 2017. Following an investigation, DSS filed a petition on 19 May 2017 alleging that J.M., D.M., K.M., and T.L. were neglected and dependent juveniles.

The petition alleged that at the time of the CPS investigation, both Respondent and Father were homeless and, as a result, Respondent had placed the children in the care of the grandmother. Respondent picked the children up from the grandmother's home on 16 March 2017 and dropped them off the next day at DSS explaining, in front of the children, "that she didn't want them." After the children were returned to the grandmother's home, Respondent contacted DSS and explained that she wanted to relinquish her rights to the children. Respondent appeared at the grandmother's home on 18 May 2017—holding a box cutter—and demanded to see the children. Charlotte Mecklenburg Police Officers arrived at the grandmother's house and drove K.M. and D.M. to school, but Respondent refused to let J.M. out of her arms until DSS arrived at the house. Respondent expressed that she would rather the children be placed in foster care, even if they had to be split up, than remain in the grandmother's care.

After appointing Donna Jackson ("Ms. Jackson") as provisional counsel for Respondent, the trial court conducted an adjudication hearing on 22 August 2017. At the end of the hearing, after the trial court announced its finding in open court that the children were neglected and dependent juveniles, the following occurred:

> MS. JACKSON: Your Honor, I have not turned in an affidavit of indigency, but at this time, [Respondent] is wanting me to withdraw. So I don't know if you want to address that issue with her.

1. T.L. has turned 18 years old and is not part of this appeal.

> THE COURT: Well, [Respondent], because your children have been adjudicated neglected and dependent, you do have the right to the assistance of a lawyer during these hearings. And if you are unable to afford to pay a lawyer, you have the right to a court-appointed lawyer. I think we went over this some time ago. So do you want the help of a lawyer during these proceedings?
>
> [RESPONDENT]: No, I don't.
>
> THE COURT: You want to represent yourself?
>
> [RESPONDENT]: Yes.
>
> THE COURT: You sure about that?
>
> [RESPONDENT]: Uh-huh (yes).
>
> MR. SMITH: Your Honor, the Department (inaudible) Ms. Jackson remain (inaudible).
>
> THE COURT: Are you asking that Ms. Jackson withdrew [sic] and be removed from representing you?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Okay. Well, just to ensure that your due process rights are protected, I mean I don't have any reason not to accept your waiver of your right to counsel, and I'll find that you waived your right to counsel. But at least for the next hearing, I'm going to ask Ms. Jackson to remain as standby counsel, for which role, Ms. Jackson, you can still submit an application. Okay? So that if there are legal issues that come up at the next hearing and you need a lawyer, you want some help just getting an explanation or understanding that, I just want her to be here to answer those questions in case they come up. Okay?
>
> [RESPONDENT]: Uh-huh (yes).
>
> THE COURT: Just to make sure that you have whatever help you may need at the next hearing. Okay? Okay. Then we're adjourned.

In the adjudication order entered 5 September 2017, the trial court made the following pertinent findings of fact: Respondent's mental health diagnoses have included bipolar disorder, schizophrenia, narcissistic personality disorder, and schizo-affective disorder. Between 2002

and August 2016, DSS received 21 CPS reports regarding Respondent's care of the children, including allegations that Respondent's mental illness impacted her ability to care for the children, domestic violence with Father, drug use in the home, and Respondent encouraging T.L. to kill herself. Regarding Respondent's counsel, the trial court found: Respondent "waived her right to counsel at the end of the adjudication hearing and informed the Court that she will represent herself. [DSS] objected. [Respondent] may exercise her right to waive counsel; however the Court will appoint Ms. Jackson in a standby capacity." The trial court continued the children's custody with DSS and continued supervised visitation between Respondent and the children.

Ms. Jackson appeared as standby counsel for Respondent at the disposition hearing on 11 September 2017. In the disposition order entered 26 September 2017, the trial court established a primary plan of reunification with Respondent or Father with a secondary plan of adoption and continued supervised visitation between Respondent and the children. Ms. Jackson appeared as standby counsel at a review hearing on 13 November 2017.

The trial court held a permanency planning hearing on 27 June 2018. At the start of the hearing, the trial court told Respondent that Ms. Jackson was in a different hearing and asked Respondent what she wanted to do. Respondent expressed her desire to proceed with the hearing without Ms. Jackson. Following the hearing, the trial court entered an order expanding Respondent's visitation to two hours of unsupervised visitation per week.

Ms. Jackson filed a motion to withdraw as attorney of record for Respondent on 22 October 2018 because she "ha[d] become seriously ill and c[ould] not continue to represent" Respondent. The trial court granted Ms. Jackson's motion and appointed Rhonda Hitchens[2] ("Ms. Hitchens") as Respondent's standby counsel. A permanency planning hearing and visitation hearing was scheduled on 4 December 2018. At the start of the hearing, Ms. Hitchens requested that the court continue the permanency planning hearing to a later date, but proceed with the visitation hearing. The following exchange ensued:

> THE COURT: So are you aware that [Respondent] is representing herself?

---

2. In the order appointing new counsel and the 20 December 2018 "visitation order and subsequent permanency planning hearing continuance order," Respondent's counsel is listed as "Rhonda Wilson." However, in the transcript and DSS reports, Respondent's counsel is listed as "Rhonda Hitchens."

MS. HITCHENS: Yes.

THE COURT: And that you are standby counsel?

MS. HITCHENS: Well, we had that conversation. I apologize, I should have started with that. So we had that conversation. She said that Ms. Jackson was her standby counsel.

THE COURT: Hmm-hmm.

MS. HITCHENS: She went through my bar information, and she was able to verify that I was really a lawyer. She came up here to verify that I was appointed to represent her. She verified all that information. And once we talked, she decided that she wanted me to represent her. She didn't want me as her standby counsel. But I guess the Court would have to have her here to say that.

The trial court spoke directly to Respondent:

THE COURT: All right. So, [Respondent], you recall several months ago we talked about the fact that you have the right to the help of a lawyer. Do you remember that?

[RESPONDENT]: Yes.

THE COURT: And that if you can not afford to hire a lawyer, you have the right to a court-appointed lawyer. Do you remember that?

[RESPONDENT]: Yes, ma'am.

THE COURT: Now, at that time, kind of at the beginning of this case, you said that you did not want a lawyer, that you wanted to represent yourself. Do you remember that?

[RESPONDENT]: I do.

THE COURT: And I ordered Ms. Jackson to remain as standby counsel.

[RESPONDENT]: Correct.

THE COURT: So are you -- have you changed your position as to whether you want the help of a lawyer?

[RESPONDENT]: Yes.

THE COURT: Okay. What is your position today? What do you want today?

> [RESPONDENT]: Oh, I want her to -- Ms. Hitchens, I'm sorry, to represent me.
>
> THE COURT: So you do want the help of a lawyer today?
>
> [RESPONDENT]: Yes.
>
> THE COURT: And you're asking for a court appointed lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Can you afford to hire a lawyer?
>
> [RESPONDENT]: No.

The trial court found Respondent was indigent and appointed Ms. Hitchens as Respondent's counsel. The trial court then continued the permanency planning hearing until 8 January 2019 and proceeded to the hearing on visitation.

During the visitation hearing, a DSS social worker testified that Respondent's overnight visitation had been eliminated in mid-November 2018 after DSS "became concerned about [Respondent's] mental status because of the incidents that were occurring[;]" notably, Respondent sprayed pepper spray in her niece's face on 9 November 2018, remained parked outside the grandmother's home for 12 hours on 10 November 2018, and communicated threats to the grandmother at her home on 18 November 2018. The social worker explained that based on Respondent's behavior, DSS changed Respondent's visitation with the children from unsupervised to supervised.

Following the hearing, the trial court entered a "visitation order and subsequent permanency planning hearing continuance order" on 20 December 2018. In regard to Respondent's motion to continue the permanency planning hearing, the trial court found:

> 1. [Respondent] requested that the Court appoint Ms. Wilson as her attorney. Ms. Wilson was previously appointed as standby counsel as [Respondent] [chose] to represent herself at prior hearings.
>
> . . . .
>
> 3. The Court explained that the next hearing would not be continued if [Respondent] changed her mind about counsel and counsel's role at the next hearing. The permanency planning review hearing is continued in the interest of justice.

Regarding visitation, the trial court found that "visitation needs to be adjusted" for Respondent. Explaining that "[t]he [c]ourt is concerned about the respondent mother's recent behaviors of sitting outside her mother's home for most of a day and pepper spraying her [niece] during an argument[,]" the trial court found that "[t]here has been a deterioration" in Respondent's mental health that necessitated she "schedule an appointment with her therapist and medication management doctor." The trial court found Respondent's visitation with the children "needs to remain supervised until she demonstrates mental health stability."

The trial court conducted the permanency planning hearing on 8 January 2019. At the start of the hearing, the court addressed Respondent:

> THE COURT: All right. So, [Respondent], umm, Ms. Hitchens did inform me in the presence of the other attorneys that you are asking that she be released as your attorney. Is that correct?
>
> [RESPONDENT]: Yes.
>
> THE COURT: So you understand that in these proceedings, you have the right to the help of a lawyer. Do you understand that?
>
> [RESPONDENT]: I can't hear you.
>
> THE COURT: Do you understand that in these kinds of cases, cases involving abuse and neglect, that you have the right to the help of a lawyer?
>
> [RESPONDENT]: Yes. THE COURT: And you understand that when you cannot afford to hire a lawyer, you have the right to a court-appointed lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Okay. Now Ms. Hitchens had been appointed to represent you; is that correct?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Do you want the help [of] a lawyer today?
>
> [RESPONDENT]: Not Ms. Hitchens. Or just a lawyer, period?
>
> THE COURT: Do you want the help of a lawyer?

> [RESPONDENT]: I don't know.
>
> THE COURT: Well, do you want Ms. Hitchens to continue to represent you or not?
>
> [RESPONDENT]: No.
>
> THE COURT: Okay. So are you asking that she be released as your court-appointed lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Now, you understand that if I release her, you may not be able to have the help of a lawyer at all. She is the second lawyer that's been involved in your case, and this would be the second time that you've asked the Court to dismiss a lawyer. Do you understand that?
>
> [RESPONDENT]: Hmm-hmm.
>
> THE COURT: So is it your desire to proceed with the hearing today without the help of a lawyer?
>
> [RESPONDENT]: Yes.
>
> THE COURT: Okay. I'm going to ask Ms. Hitchens just to remain as standby counsel in case something comes up and you have a question and need her help. Okay? But at this point, we're going to proceed with you representing yourself, which you have done in other hearings. Okay?
>
> [RESPONDENT]: Hmm-hmm

The hearing proceeded with Respondent representing herself and Ms. Hitchens serving as standby counsel. DSS and the guardian ad litem expressed their shared recommendation that the grandmother be named guardian and Father and Respondent have visitation; DSS presented the court with a proposed visitation agreement. Respondent questioned witnesses and expressed her disagreement with the grandmother being named guardian because Respondent had "been doing everything on [her] case plan that [she] need[ed] to."

The trial court announced its determination that "it is in the best interest of these children that they not remain in the custody of the Department, and that they be placed in the guardianship of the maternal grandmother." Further, the trial court explained that the visitation plan proposed by DSS "is in the best interests of the children," but explained it would be making a "few modifications," including that "the

grandmother shall have authority to modify conditions or duration of a visit of either parent if there[']s evidence that the demeanor or conduct of the parent could inflict emotional distress or cause harm to any one of the children." Finally, the trial court announced that Respondent or Father had the right to file a motion in the future if either parent wanted "different or more visitation or . . . fe[lt] like things have improved[.]" Respondent stated, "[t]hat's fine, I'm going to appeal."

On 23 January 2019, the trial court entered the "subsequent permanency planning hearing #1 order" (the "permanency planning order") and the guardianship order, granting the grandmother guardianship of the children. The permanency planning order and the guardianship order both noted that Respondent's attorney had been "released on [Respondent's] motion" and adopted DSS's proposed visitation agreement, with the following modifications:

> The parents shall not visit the juveniles together. [The grandmother] shall have authority to modify the conditions or duration of visits for either parent if there is evidence that the demeanor or conduct of either parent would cause emotional distress or harm to the children.

The comprehensive visitation agreement, adopted by the trial court, provided Respondent with four hours of unsupervised visitation and two hours of unsupervised "phone calls/facetime/skype" per week with the children.

Respondent appeals from the permanency planning order and the guardianship order.

II. Analysis

A. Waiver of Counsel

[1] Respondent contends that the trial court erred at the 8 January 2019 hearing by treating her request for a new attorney as a waiver of counsel. As a result, Respondent asserts the trial court failed to conduct the appropriate statutory inquiry. We hold that the trial court correctly treated Respondent's request at the 8 January 2019 hearing as a waiver of counsel. However, we remand to the trial court to make written findings of fact sufficient to demonstrate that Respondent's waiver was knowing and voluntary.

N.C. Gen. Stat. § 7B-602 states that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of

indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2019). Furthermore, "[a] parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1).

Respondent cites *In re S.L.L.*, 167 N.C. App. 362, 605 S.E.2d 498 (2004), in arguing that the trial court erred by equating her request for new counsel as a waiver of court-appointed counsel. In that case, following the release of his court-appointed counsel, the respondent-father stated, "I want counsel" on two occasions. *Id.* at 363, 605 S.E.2d at 499. The trial court explained to the respondent that, based on his decision to proceed without the help of two different court-appointed attorneys, he was "just going to have to represent [himself]" as the trial court was unable to "continue the case ad infinitum until [the respondent] f[ound] an attorney [he was] pleased with[.]" *Id.* On appeal, this Court noted that the respondent did not "expressly and voluntarily waive his right to counsel" but, instead, "repeatedly requested new counsel." *Id.* at 364, 605 S.E.2d at 499. As a result, this Court held that "the trial court erred by equating [the] respondent's request for new counsel with a waiver of court-appointed counsel, and requiring [the] respondent to proceed to trial pro se." *Id.* at 365, 605 S.E.2d at 500.

The present case is distinguishable from *S.L.L.* because Respondent *did not* ask for a new court-appointed attorney at the 8 January 2019 hearing. Although Respondent initially stated, "I don't know" when asked by the trial court if she wanted the help of an attorney, she ultimately clarified, after a series of follow-up questions, that it was her desire to proceed with the hearing without the help of an attorney. Thus, we reject Respondent's assertion that the trial court incorrectly treated her request for new counsel as a request to waive her right to counsel.

Having established that Respondent did not request new counsel, we next determine whether Respondent's waiver of counsel was adequate under N.C. Gen. Stat. § 7B-602(a1); *i.e.* whether the waiver occurred "after the court examine[d] the parent and ma[de] findings of fact sufficient to show that the waiver [was] knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1). This Court held that where a "trial court undertook a fairly lengthy dialogue with [a] respondent mother to determine her awareness of her right to counsel and the consequences of waiving that right[,]" "the trial court's inquiry was adequate to determine whether [the] respondent mother knowingly and voluntarily waived her right to counsel." *In re A.Y.*, 225 N.C. App. 29, 39, 737 S.E.2d 160, 166 (2013).

In the present case, the trial court informed Respondent of her right to counsel and her right to have appointed counsel, and then explained that if she chose to release to Ms. Hitchens—the second attorney appointed to represent her—the hearing would "proceed with [Respondent] representing [herself], which [she] ha[d] done in other hearings." Respondent confirmed that she understood her right to have appointed counsel and also understood that she "may not be able to have the help of a lawyer at all." The trial court inquired whether it was Respondent's request that Ms. Hitchens be released as her court-appointed lawyer; Respondent replied, "yes." The trial court again asked Respondent if she wanted to proceed in that hearing *without the help of a lawyer* and Respondent replied, "yes." Thus, it appears that "the trial court's inquiry was adequate to determine whether [Respondent] knowingly and voluntarily waived her right to counsel." *In re A.Y.*, 225 N.C. App. at 39, 737 S.E.2d at 166.

However, the trial court failed to make "findings of fact sufficient to show that the waiver [was] knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1). The permanency planning order does note that Respondent's attorney was "released on [Respondent's] motion[;]" however, the order is devoid of any findings regarding Respondent's waiver of counsel and decision to proceed *pro se*. As a result, we remand to the trial court for the entry of written findings of fact on whether Respondent's waiver of counsel was knowing and voluntary. Should the trial court determine that Respondent's waiver of counsel was not knowing or voluntary, Respondent shall be entitled to relief from the permanency planning order and a new permanency planning hearing shall be held. *Cf. In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010) (remanding to the trial court for findings of fact on an ineffective assistance of counsel claim).

B. Visitation

[2] Respondent also contends that the trial court impermissibly delegated a judicial function by granting the grandmother discretion over Respondent's visitation with the children. We must agree.

"This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citation omitted). Visitation in juvenile matters is controlled by N.C. Gen. Stat. § 7B-905.1, which provides, in pertinent part, as follows:

> (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 visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.
>
> (b) If the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised. Unless the court orders otherwise, the director shall have discretion to determine who will supervise visits when supervision is required, to determine the location of visits, and to change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances. . . . If the director makes a good faith determination that the visitation plan is not consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. . . .
>
> (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) (2019).

This Court has also explained that a trial court may not delegate its judicial function of awarding visitation to a juvenile's custodian:

> [the] judicial function [of awarding visitation] may [not] be . . . delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where[,] and under what circumstances a parent may visit his or her child . . . would be delegating a judicial function to the custodian.

In re J.D.R., 239 N.C. App. 63, 75, 768 S.E.2d 172, 180 (2015) (quoting *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)).

Respondent argues that the trial court's provision allowing the grandmother "to modify the conditions or duration of visits for either parent if there is evidence that the demeanor or conduct of either parent would cause emotional distress or harm to the children" is an improper grant of judicial authority. DSS asserts that the provision does not grant the grandmother discretion over Respondent's visitation because the grandmother is not authorized to terminate or suspend visitation; rather, she is only allowed "to change the conditions and length of the visit upon the same good faith granted to DSS that the visit is not in the juveniles' best interest."

Under N.C. Gen. Stat. § 7B-905.1(b)—the subsection applicable to juveniles in DSS custody—DSS is authorized to "temporarily suspend all or part of the visitation plan" if "the director makes a good faith determination that the visitation plan is not consistent with the juvenile's health and safety." However, N.C. Gen. Stat. § 7B-905.1(c)—the subsection applicable to juveniles in the custody or guardianship of a relative—contains no similar statutory provision allowing for the temporary suspension of visitation based on a "good faith determination." Further, this Court has recognized a distinction, in the context of visitation, between a court's award of discretion to DSS and a court's award of discretion to a guardian. *See In re K.W.*, 272 N.C. App. 487, 496, 846 S.E.2d 584, 591, 2020 WL 4091362, at *6 (July 21, 2020) (explaining that the cases relied upon by the respondent-mother "involve a grant of authority by the court to a guardian, not DSS, and are therefore distinguishable from this case").

In *In re C.S.L.B.*, 254 N.C. App. 395, 829 S.E.2d 492 (2017), this Court addressed the trial court's award of discretion over the respondent-mother's visitation to the guardian of the juveniles. There, the visitation order provided:

> Visits shall occur unsupervised for four hours a week upon leaving the Daybreak program provided [the r]espondent-mother tests negative and there is *no concern* she is using. She should not leave the children alone with anyone else during visitation, unless it is with a family member. Visits can become longer and more frequent with every six months of clean time outside the program. Visits should return to supervised or be suspended if [the r]espondent-mother tests positive for illegal substances,

> if there is *concern* she is using, or if there is *concern* for discord between [the r]espondent-mother and the children's father during visits.

Id. at 399–400, 829 S.E.2d at 495 (emphasis in original) (brackets omitted). Explaining that the visitation order "leaves [the r]espondent-mother's visitation to the discretion of the guardians based on their 'concerns[,]' " this Court vacated the order because it "improperly delegate[d] the court's judicial function to the guardians by allowing them to unilaterally modify [the r]espondent-mother's visitation." *Id.* at 400, 829 S.E.2d at 495 (citations omitted).

In the present case, as in *C.S.L.B.*, the trial court delegated the judicial function of determining Respondent's visitation plan to the children's guardian. *Id.* Although DSS is correct that the provision did not explicitly authorize the grandmother to terminate or suspend Respondent's visitation, the trial court did delegate to the grandmother the power "to unilaterally modify" Respondent's visitation. *Id.* at 400, 829 S.E.2d at 495 (citations omitted). As a result, we must vacate and remand this provision of the permanency planning order and guardianship order.

III. Conclusion

For the reasons discussed above, we remand the permanency planning order to the trial court to make sufficient written findings of fact to demonstrate Respondent's waiver of court-appointed counsel was knowing and voluntary. Further we vacate and remand the provision in the permanency planning order and the guardianship order granting the grandmother discretion over Respondent's visitation with the children.

REMANDED IN PART; VACATED AND REMANDED IN PART.

Judges DIETZ and COLLINS concur.

IN RE V.M.

[273 N.C. App. 294 (2020)]

IN THE MATTER OF V.M.

No. COA19-1028

Filed 1 September 2020

Child Abuse, Dependency, and Neglect—adjudication—neglect—accidental child intoxication—sufficiency of findings—cursory analysis

After a four-month-old baby was hospitalized for acute alcohol intoxication as a result of drinking baby formula that the mother prepared using one of the water bottles that her relatives had used to store alcohol at a family gathering, an order adjudicating the infant as neglected was reversed and remanded for further findings. The trial court did not find that the mother knew or reasonably could have discovered that the water bottle contained alcohol, or that her baby suffered "some physical, mental, or emotional impairment" or a substantial risk thereof; instead, the court based its adjudication on a conclusory analysis.

Judge ARROWOOD dissenting.

Appeal by respondent-mother from orders entered 22 May 2019 and 6 August 2019 by Judges Tiffany M. Whitfield and Cheri Siler-Mack, respectively, 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 petitioner.

Benjamin J. Kull for respondent-mother.

Alston & Bird LLP, by Ryan P. Ethridge, for the Guardian ad Litem.

YOUNG, Judge.

Respondent-mother appeals from the trial court's order adjudicating V.M. ("Vinny")[1] neglected under N.C. Gen. Stat. § 7B-101(15) and ordering respondent-mother and respondent-father (collectively, "respondent-parents") to submit to random drug screens. After careful review, we reverse and remand.

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

I. Background

This action arises out of a Cumberland County Department of Social Services ("DSS") report concerning Vinny, who was admitted to the hospital with a blood alcohol level of 179 and diagnosed with acute alcohol intoxication. Respondent-parents are the biological parents of Vinny, who was four months old at the time of the incident at issue. The events leading up to the incident are as follows.

Respondent-mother is a stay-at-home mom and the primary caretaker of Vinny. In January 2019, respondent-mother took Vinny with her to Atlanta, Georgia for an aunt's funeral. Respondent-father was unable to accompany them on the trip due to a work conflict. Following the funeral service on Friday, 25 January 2019, respondent-mother and other family members gathered at a cousin's house, which had a full bar. While there, some members of the family began drinking. Respondent-mother and her brother, Domico, did not participate in the drinking, but were present in the home while the drinking took place. At some point, some of the family members who were drinking, including respondent-mother's sister Selenia, transferred the liquor into water bottles. Respondent-mother, Vinny, and Domico later spent the night at an Airbnb with Selenia.

The next morning, the group returned to their cousin's home to pick up their grandmother, who was going to ride back to North Carolina with Domico, respondent-mother, and Vinny. Before leaving, Domico grabbed some water bottles that he believed were unopened from the kitchen counter of their cousin's home. During the car ride back to North Carolina, respondent-mother fed Vinny formula that she prepared using one of the water bottles. Domico testified that throughout this process he did not detect the smell of alcohol in the car. Vinny subsequently became fussy. Despite respondent-mother's attempts to console him, Vinny remained fussy even after they arrived home. Throughout all relevant times, Vinny was primarily in the care of respondent-mother.

Respondent-mother took Vinny to the hospital the next morning, where doctors determined he had alcohol in his system and diagnosed him with acute alcohol intoxication. After speaking with his sister about the situation, Domico smelled the water bottle respondent-mother had used to prepare Vinny's formula and detected an odor of alcohol. Domico then realized he must have mistakenly grabbed one of the water bottles containing liquor from their cousin's house, which respondent-mother later used to prepare Vinny's formula. The matter was referred to DSS, and Vinny was temporarily placed in the care of his

paternal grandparents on 29 January 2019. Respondent-parents cooperated with DSS and worked to satisfy the agency's requirements.

On 18 February 2019, DSS filed a juvenile petition alleging that Vinny was neglected, dependent, and abused. DSS also made an ex parte request for non-secure custody of Vinny. The trial court denied this request, with the requirement that Vinny remain placed in the care of his paternal grandparents. On 22 May 2019, the trial court adjudicated Vinny to be a neglected juvenile but dismissed the allegations of abuse and dependency. The trial court also ordered that Vinny be returned to the care of respondent-parents and required respondent-parents to submit to two random drug screens. On 12 June 2019, the trial court held a full dispositional hearing. The trial court found that there were no safety concerns with respondent-parents, and on 6 August 2019, ordered that Vinny remain in the home of respondent-parents. The trial court further ordered that respondent-parents submit to additional random drug screens, following their admission that if tested that day they would test positive for marijuana. Respondent-mother timely filed notice of appeal on 5 September 2019.

II. Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect . . . 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) (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.* "We review a trial court's conclusions of law *de novo*." *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015).

III. Analysis

In her first assignment of error, respondent-mother contends that the trial court erred in adjudicating Vinny a neglected juvenile. We agree.

Pursuant to N.C. Gen. Stat. § 7B-101(15) (2019), a neglected juvenile is:

> Any juvenile less than 18 years of age . . . 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 . . . .

"In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful." *In re Thompson*, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). However, not every act of negligence on part of the parent results in a neglected juvenile. *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). "In order to adjudicate a juvenile neglected, our courts have additionally '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." ' " *Id.* (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-902 (1993)). Generally, North Carolina courts have found neglect where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id.*

A. Finding of Fact 16

In the trial court's order, it states, "the Court, after reviewing the evidence, record, testimony and arguments presented, makes the following findings by clear, cogent and convincing evidence" and lists facts numbered one through twenty. Of those twenty findings of fact numbers 16 and 18 are at issue. The trial court's finding of fact 16 states, in pertinent part, as follows:

> a. Respondent Mother stated that the child was primarily in her care on 1/25/19 and 1/26/19; however, the child was in the presence of other adults during that time frame. That by admission via testimony of the parties, there was alcohol being placed in water bottles. That the mother, along with the child, and at least two additional adults traveled from the State of Georgia to the State of North Carolina while preparing a bottle for the minor child with a water bottle removed from the previous overnight stay.
>
> b. That the maternal uncle stated that upon returning to the vehicle after the child was admitted to the hospital, he retrieved a water bottle from the backseat, and placing it to his nose, he could smell the odor of alcohol.

c. That Respondent Parents have made no attempts to remove the child from the paternal grandparents' care and physical custody.

Respondent-mother concedes the majority of the substance of this finding. Respondent-mother concedes that Vinny was primarily in her care; that alcohol was placed into the bottles on Friday, 25 January 2019; that respondent-mother, her brother, and their grandmother traveled from Georgia to North Carolina; and that Domico, after Vinny was admitted to the hospital, discovered the smell of alcohol in one of the bottles. Respondent-mother does take issue with particular details of these findings – that it was not "the parties" but respondent-mother's brother and sister who testified; that the evidence only supported a determination that alcohol was placed in bottles on Friday, 25 January 2019, and not any other day; that the evidence did not support a determination that respondent-mother returned to North Carolina with anyone other than Vinny, Domico, and her grandmother – but she does not challenge the fundamental determinations raised therein.

We likewise hold that there was evidence to support the thrust of each of these findings in turn. They are, ultimately, a factual recitation of the events of that day. The issue is not with finding of fact 16, but with the conclusion of law derived therefrom.

B. Finding of Fact 18

Respondent-mother contends that finding of fact 18 is actually a conclusion of law. We agree.

As a general rule, "[t]he labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018). Thus, "[i]f the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." *Id.*

The trial court's finding of fact 18 states, in pertinent part, that:

> Based on the foregoing findings of fact, the Court finds that the juvenile [Vinny] was a neglected juvenile, within the meaning of N.C. Gen. Stat. § 7B-101(15), in that at the time of the filing of the Petition, the juvenile did not receive proper care, supervision, or discipline from the juvenile's parent, custodian, or caretaker and the juvenile lived in an environment injurious to the juvenile's welfare because Respondent Mother allowed the child to be in

> an environment in which alcohol was being poured into water bottles and the juvenile later tested positive for a high level of alcohol and was subsequently diagnosed with acute alcohol intoxication. That the acute alcohol intoxication occurred as a result of Respondent Mother using a water bottle containing alcohol to make a bottle of formula for the child. . . .

"The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). The first sentence of finding of fact 18 applies the facts of the case to the statutory definition of "neglected juvenile" and, through that reasoning, reaches a conclusion that Vinny is neglected. Consequently, this is more of a conclusion of law rather than a finding of fact. Indeed, this Court has held that determinations that a juvenile is neglected are "more properly designated conclusions of law and we treat them as such for the purposes of . . . appeal." *Id.*

As finding of fact 18, inasmuch as it determines Vinny's status as a neglected juvenile, is more properly considered a conclusion of law, we review it *de novo*, to determine whether it is supported by the findings of fact. *J.R.*, 243 N.C. App. at 312, 778 S.E.2d at 443. It is here that the trial court's analysis falters.

The trial court did not find that respondent-mother knew, or even reasonably could have discovered, the danger of alcohol in the bottles. The trial court did not find that respondent-mother's behavior fell "below the normative standards imposed upon parents by our society." Perhaps most glaringly, the trial court did not find that Vinny suffered "some physical, mental, or emotional impairment," or that there was a substantial risk of the same.

Instead, the trial court summarily found that Vinny "did not receive proper care, supervision, or discipline from [his] parent . . . and [that he] lived in an environment injurious to [his] welfare" based solely on the fact that (1) Vinny was in an environment where alcohol was being poured into water bottles, and (2) Vinny was subsequently diagnosed with acute alcohol intoxication. In short, the trial court made a leap of logic which it did not adequately explain, and which this Court does not follow.

To be clear, we do not hold that the trial court could not have concluded that Vinny was neglected. Had the court engaged in more detailed analysis, offered additional factual findings, explained what steps respondent-mother could or should have taken, determined that the danger was in some way foreseeable, or even just offered more than a token conclusion, we might be able to uphold such a determination. But the analysis in this case was cursory and conclusory, at best. The findings, such as they are, support a determination that a tragic and unfortunate accident occurred here – an accident which might have been preventable with the benefit of hindsight, but which respondent-mother had no way of knowing would occur, nor any means to prevent it, absent some form of precognition. The trial court's analysis is simply too cursory to be permitted to stand.

Upon our *de novo* review, we hold that the findings of fact in the trial court's order do not support its conclusion of law that Vinny is a neglected juvenile. Accordingly, we remand this order to the trial court. On remand, the trial court shall either make additional appropriate findings of fact, not inconsistent with this opinion, to support its conclusion, or properly comport its conclusion to fit the findings it has already made.

Because we reverse and remand the trial court's order, we need not address the remainder of respondent-mother's arguments.

REVERSED AND REMANDED.

Judge DILLON concurs.

Judge ARROWOOD dissents in separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the majority's holding reversing the trial court's adjudication of neglect. While the majority asserts the trial court's findings of fact do not support its conclusion of law that Vinny is a neglected juvenile, I would hold the trial court did make sufficient findings to support its conclusion.

As the majority correctly notes, "[i]n general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful." *In re Thompson*, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). "In order to adjudicate a juvenile neglected, our courts have additionally '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." ' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-902 (1993)). Generally, North Carolina courts have found neglect where "the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id.*

Here, in its finding of fact 18, the trial court found, in pertinent part, that:

> Based on the foregoing findings of fact, the Court finds that the juvenile [Vinny] was a neglected juvenile, within the meaning of N.C. Gen. Stat. § 7B-101(15), in that at the time of the filing of the Petition, the juvenile did not receive proper care, supervision, or discipline from the juvenile's parent, custodian, or caretaker and the juvenile lived in an environment injurious to the juvenile's welfare because Respondent Mother allowed the child to be in an environment in which alcohol was being poured into water bottles and the juvenile later tested positive for a high level of alcohol and was subsequently diagnosed with acute alcohol intoxication. That the acute alcohol intoxication occurred as a result of Respondent Mother using a water bottle containing alcohol to make a bottle of formula for the child. During the time that the juvenile obtained alcohol in his system, he was in the exclusive care of Respondent Mother. . . .

The majority asserts that finding of fact 18 is more properly considered a conclusion of law, and is thus subject to *de novo* review. "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) (quotation marks and citation omitted). Though the majority contends finding of fact 18 is not supported by the trial court's other findings, I disagree.

The trial court made several findings leading up to its finding of fact 18, including the following:

> 15. That the Petitioner, the Guardian ad Litem, Respondent Mother, and Respondent Father 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. That those admissions are as follows:

a. *The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 01/27/2019 concerning the safety of the juvenile[].*

b. *On 01/27/19, Respondent Mother took the child to Cape Fear Valley Medical Center stating that the child had been fussing a lot.*

c. *On 1/27/19, the child tested positive for alcohol; his ethanol level was 242 mg/dl. The child was tested a second time and his blood alcohol level was 179. The child was diagnosed with acute alcohol intoxication.*

d. *Respondent Mother stated that the child was primarily in her care on 1/25/19 and 1/26/19.*

. . . .

16. That the Court made the additional finding of facts by clear, cogent, and convincing evidence as it relates to the verified Petition filed on February 18, 2019 and sworn testimony provided before the Court on today's date:

d. *Respondent Mother stated that the child was primarily in her care on 1/25/19 and 1/26/19; however, the child was in the presence of other adults during that time frame. That by admission via testimony of the parties, there was alcohol being placed in water bottles. That the mother, along with the child, and at least two additional adults traveled from the State of Georgia to the State of North Carolina while preparing a bottle for the minor child with a water bottle removed from the previous overnight stay.*

e. *That the maternal uncle stated that upon returning to the vehicle after the child was admitted to the hospital, he retrieved a water bottle from the backseat, and placing it to his nose, he could smell the odor of alcohol.*

f. *That Respondent Parents have made no attempts to remove the child from the paternal grandparents' care and physical custody.*

(emphasis in original). In finding of fact 18, the trial court summarized its findings in findings of fact 15 and 16 and applied the law to those facts in order to reach its determination that Vinny was a neglected juvenile. The majority acknowledges the trial court's finding of fact 16 is supported by the evidence. However, it then proceeds to hold that finding of fact 18, which is based on finding of fact 16 and several of the trial court's other findings, is not supported by sufficient findings.

The majority appears to take issue with the fact that, in its view, the trial court did not make certain findings, including that: (1) respondent-mother knew, or even reasonably could have discovered, the danger of alcohol in the bottles; (2) respondent-mother's behavior fell "below the normative standards imposed upon parents by our society[;]" and (3) Vinny suffered "some physical, mental, or emotional impairment," or that there was a substantial risk of same. The majority further insists that, "[h]ad the court engaged in more detailed analysis, offered additional factual findings, explained what steps respondent-mother could or should have taken, determined that the danger was in some way foreseeable, or even just offered more than a token conclusion, [it] might be able to uphold such a determination." However, this Court has made clear that, in determining whether a juvenile is neglected, a parent's fault or culpability is not a determinative fact. *In re A.L.T.*, 241 N.C. App. 443, 451, 774 S.E.2d 316, 321 (2015). In addition, contrary to the majority's assertions, the trial court's findings make clear that respondent-mother's oversight led to four-month old Vinny needing to be hospitalized and treated for acute alcohol intoxication. The evidence in the record also supports this.

Respondent-mother's brother and sister both testified that family members, including respondent-mother's sister, were drinking liquor and pouring it into water bottles on Friday during a family gathering at their cousin's house. Respondent-mother, who was taking care of Vinny, was also present at the gathering while these activities were taking place. The next day, on the drive home from the environment in which alcohol had been poured into water bottles, respondent-mother fed Vinny formula she prepared using a water bottle taken from such environment. Due to respondent-mother's conduct, four-month old Vinny suffered some physical impairment or injury, namely, acute alcohol intoxication. Notably, when respondent-mother's brother smelled the water bottle in question, he was able to detect the odor of alcohol. Had

respondent-mother been more attentive, she likely would have noticed that the water bottle had already been tampered with and its contents smelled like alcohol. Ultimately, this mistake "constituted either severe or dangerous conduct" which "caus[ed] injury . . . to the juvenile[,]" supporting a finding of neglect. *In re Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258.

In finding of fact 18, the trial court's logical reasoning is clear as it applies the law to the facts gleaned from its previous findings to determine that Vinny was a neglected juvenile. I would thus hold that finding of fact 18 is supported by the evidence and the trial court's evidentiary findings, and would affirm the trial court's adjudication of neglect.

I would further hold that the trial court did not abuse its discretion in its dispositional order. Respondent-mother asserts the trial court abused its discretion when it ordered respondent-parents to submit to random drug screens and a substance abuse assessment. Pursuant to N.C. Gen. Stat. § 7B-904(d1)(3) (2019), "[a]t the dispositional hearing or a subsequent hearing, the court may order the parent . . . [to] [t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication." The trial court may also within its discretion order the parent to "undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication." N.C. Gen. Stat. § 7B-904(c). "For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015) (citation omitted). This includes "order[ing] services which could aid 'in both understanding and resolving the possible underlying causes' of the actions that contributed to the trial court's removal [or adjudication]." *Matter of S.G.*, 268 N.C. App. 360, 368, 835 S.E.2d 479, 486 (2019) (quoting *In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 632-33 (2013)).

Though respondent-mother argues the trial court abused its discretion because there was no evidence of a history of substance abuse or a drug-related parenting problem, I disagree. The day after Vinny was diagnosed with acute alcohol intoxication, respondent-parents tested positive for marijuana. Based on these facts, the trial court in its adjudication order exercised its discretion to order respondent-parents to submit to two random drug screens. Respondent-parents tested negative for those two tests, but refused to submit to a third. At the full dispositional hearing, respondent-parents admitted that if tested that day, they would

test positive for marijuana. DSS then requested custody of the juvenile based on respondent-parent's admissions to testing positive for illegal substances. The trial court denied the motion; however, evidently sensing a problem with respondent-parents' inability to remain drug-free throughout the adjudication and disposition process, it pleaded with respondent-parents to "[j]ust don't smoke anymore for the next little bit," so that their case could be closed. Because respondent-parents admitted they would test positive for marijuana, and in light of the adjudication of neglect involving use of another intoxicant, I would hold the trial court's order requiring respondent-parents to submit to additional drug screens and another substance abuse assessment was not "so arbitrary that it could not have been the result of a reasoned decision." *In re T.N.G.*, 244 N.C. App. at 408, 781 S.E.2d at 100 (citations omitted). I therefore respectfully dissent.

BRENTLEY ALLEN JACKSON, PLAINTIFF
v.
KELLIE LYNN JACKSON (NOW CLELLAND), DEFENDANT

No. COA19-259

Filed 1 September 2020

Civil Procedure—Rule 60(b) relief—prior order contrary to law—improper remedy

The trial court erred by entering a Civil Procedure Rule 60(b) order to relieve a parent from the child support provisions of the court's prior custody order where the Rule 60(b) order found that the prior order was rendered contrary to law (because the prior order did not contain the required findings of fact). Erroneous orders may be addressed only by timely appeal.

Judge BERGER concurring in result only.

Appeal by Defendant from orders entered 31 August 2018 and 10 October 2018 by Judge William B. Sutton, Jr. in Sampson County District Court. Heard in the Court of Appeals 4 September 2019.

Benjamin Lee Wright for plaintiff-appellee.

Gregory T. Griffin for defendant-appellant.

MURPHY, Judge.

Rule 60 is an improper method to remedy erroneous orders, which are properly addressed only by timely appeal. As a result, the trial court erred when it entered a Rule 60(b) order to relieve Plaintiff from the provisions of its prior custody order that, as theorized by the Rule 60(b) findings of fact, erroneously contained child support obligations. We vacate and remand.

BACKGROUND

On 29 January 2016, Plaintiff-Appellee Brentley Allen Jackson ("Plaintiff") filed his *Complaint for Divorce from Bed and Board, Child Custody, and Child Support*. Defendant-Appellant Kellie Lynn Jackson (now Clelland; "Defendant") timely answered and counterclaimed, and a hearing was held on the issue of custody on 3-4 August 2017. As a result of the hearing, a custody order ("the Custody Order") was entered by the trial court on 5 September 2017. The Custody Order decreed, in relevant part:

> Plaintiff shall reimburse Defendant for travel to and from preschool and school and shall receive a credit for any trips he has to make to Fayetteville for custody exchanges and return at the same rate of reimbursement. The reimbursement rate shall be the rate given to State Employees for travel and the mileage will be from 118 Hay Street to the preschool or school or lesser mileage if Defendant moves her residence closer to the schools.

Plaintiff pursued no appeal from the Custody Order. Nor did Plaintiff pay Defendant for her travel in accordance with the Custody Order.

Eight months later, in June 2018, Defendant filed a *Motion to Show Cause* requesting that Plaintiff be held in civil contempt for violating the payment provision of the Custody Order. Plaintiff responded with a *Motion for Relief from Order and/or Modification of Order*, which asked the trial court to void the provision of the Custody Order requiring him to pay travel expenses. In relevant part, Plaintiff's motion argued:

> 5. That at the hearing on [3-4 August 2017] neither the Plaintiff nor the Defendant offered evidence as to their respective incomes nor the cost of sending the minor child to Grace Preschool.
>
> . . .

> WHEREFORE, the Plaintiff prays the Court as follows:
>
> 1. That the Plaintiff be relieved of the child support provisions of the [Custody Order] pursuant to Rule 60(b)(1) in that the provisions concerning reimbursement and payment of daycare amount to a child support order and were entered by mistake in that the Court did not have facts in evidence to support a child support award because neither party offered evidence on the issue.
>
> . . .
>
> 3. That in the alternative, the Plaintiff be relieved of the provisions of the [Custody Order] pursuant to Rule 60(b)(6) in that there are no findings of fact regarding the incomes of the parties in said order, the cost of pre-school and health insurance and the provisions concerning reimbursement and payment of daycare are not supported by evidence and Plaintiff has a meritorious defense to the entry of such provisions and his rights have been injuriously affected by the [Custody] Order.

The following week, Defendant moved to dismiss Plaintiff's motion.

On 13 August 2018, the trial court heard Plaintiff's motion and entered an order ("the Rule 60(b) Order") stating in relevant part:

> **FINDINGS OF FACT**
>
> 1. This action was tried before the Court on [3 and 4 August 2017] and [the Custody] Order was entered on [5 September 2017].
>
> 2. That the Court required the Plaintiff to pay the cost of preschool and school and reimburse the Defendant for travel to and from preschool and school, receive a credit for any trips he made to Fayetteville, North Carolina for custody exchanges and gave reimbursement to Defendant at the rate given to state employees for travel and the mileage for 118 Hay Street, Fayetteville, North Carolina to the school the child attended.
>
> 3. That the Court did made no [sic] findings as to the income of the Plaintiff or the Defendant in [the Custody] Order, nor did it make findings as to the cost of preschool and school, or health insurance for the minor child and no evidence was presented on those issues by either parties [sic].

4. That the [Custody] Order requiring the Plaintiff to reimburse the Defendant for travel cost is not supported by findings of fact.

5. That the Court therefore, is setting aside [the Custody Order] and substituting therefore the order set forth herein in lieu thereof.

CONCLUSIONS OF LAW

1. That the [Custody] Order of [5 September 2017] should be set aside and an appropriate Order substituted therefore based upon the Court's findings, pursuant to:

a. Rule 60(b)(5) in that it is no longer equitable that the [Custody] Order should have prospective application; and

b. Rule 60(b)(6) in that the [Custody O]rder is irregular because it did not make findings as to the parties incomes [sic], cost of insurance and daycare and ordered the Plaintiff to make reimbursements to Defendant without determining the parties['] ability to pay.

2. That the rights of the Movant have been injuriously affected and the movant [sic] has shown a meritorious defense.

3. That the Defendant's Motion for Contempt against the Defendant [sic] has been rendered moot and therefore her motion for contempt should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the [Custody] Order entered in this cause on [5 September 2017] is set aside and the Court is substituting therefore the following Order: . . .

The Rule 60(b) Order is almost identical to the Custody Order, but omits the section about travel reimbursement, and was entered without an additional evidentiary hearing.

In response to the Rule 60(b) Order, Defendant moved for a new trial, arguing the trial court lacked authority to issue a new custody order without making new findings or conducting a new evidentiary hearing. On 10 October 2018, the trial court denied Defendant's *Motion for New Trial*, and Defendant filed timely notice of appeal.

ANALYSIS

Rule 60(b) states in relevant part:

> (b) . . . 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 the following reasons:
>
> (5) . . . it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time . . . . A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

N.C.G.S. § 1A-1, Rule 60(b)(5)-(6) (2019).

"[A] motion under [N.C.]G.S. [§] 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review." *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981) (citing *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979); *In re Snipes*, 45 N.C. App. 79, 81, 262 S.E.2d 292, 294 (1980); 2 McIntosh, N.C. Practice and Procedure § 1720 (Supp. 1970)).[1]

"An erroneous judgment is one rendered contrary to law. . . . [It] must remain and have effect until by appeal to a court of [appeals] it shall be reversed or modified." *Young v. State Farm Mut. Auto. Ins. Co.*,

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1. *Town of Sylva* was specifically concerned with Rule 60(b)(6), which would render its more general holding on Rule 60(b) dicta. However, we have adopted the broader rule applying to all of Rule 60(b) in later cases. *See, e.g.*, *McKyer v. McKyer*, 182 N.C. App. 456, 642 S.E.2d 527, (2007); *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415, (1997); *Jenkins v. Middleton*, 114 N.C. App. 799, 443 S.E.2d 110. (1994); *Lang v. Lang*, 108 N.C. App. 440, 424 S.E.2d 190, (1993); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211, (1990); *J. D. Dawson Co. v. Robertson Mktg., Inc.*, 93 N.C. App. 62, 376 S.E.2d 254, (1989); *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557, (1986); *Coleman v. Coleman*, 74 N.C. App. 494, 328 S.E.2d 871, (1985). Therefore, we apply *Town of Sylva's* holding to both Rule 60(b)(5) and 60(b)(6) in this case.

267 N.C. 339, 343, 148 S.E.2d 226, 229 (1966) (citing *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460) (emphasis omitted). "An erroneous order is one 'rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles.' . . . An erroneous order may be remedied by appeal; it may not be attacked collaterally." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777, (1987) (quoting *Wynne v. Conrad*, 220 N.C. 355, 360, 17 S.E.2d 514, 518 (1941)).

Here, Plaintiff's motion argued the trial court should relieve him of the child support provisions because "there are no findings of fact regarding the income of the parties in [the Custody Order], the cost of pre-school and health insurance and the provisions concerning reimbursement and payment of daycare are not supported by evidence" as "neither the Plaintiff nor the Defendant offered evidence as to their respective incomes nor the cost of sending the minor child to Grace Preschool." The trial court's Rule 60(b) Order cited Rule 60(b)(5) and Rule 60(b)(6) to relieve Plaintiff from the child support provisions based on Finding of Fact 3, which states the trial court "made no findings as to the income of the Plaintiff or the Defendant in [the Custody Order], nor did it make findings as to the cost of preschool and school, or health insurance for the minor child and no evidence was presented on those issues by either parties [sic]," and Finding of Fact 4, which states "the [Custody] Order requiring the Plaintiff to reimburse the Defendant for travel cost . . . [was] not supported by findings of fact."

Plaintiff's 60(b) motion and the Rule 60(b) Order describe a legal error in the Custody Order, rather than an irregularity. In Plaintiff's 60(b) motion, he argues there were no findings of fact, nor any facts in evidence, to support the child support provisions of the Custody Order, and as a result he should be relieved of the provisions related to child support. Similarly, the Rule 60(b) Order concludes the child support provisions in the Custody Order are unsupported by findings of fact in that order. The motion and order reflect that both Plaintiff and the trial court believed the Custody Order was "rendered contrary to law." *Young*, 267 N.C. at 343, 148 S.E.2d at 229. Thus, it was an erroneous order that could only be remedied by appeal, not by Rule 60(b). *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

Although not explicit in Plaintiff's Rule 60(b) motion or the Rule 60(b) Order, we interpret the comments about the child support provisions being unsupported by the evidence to be referring to N.C.G.S. § 50-13.4(c), which requires:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (2019); *see also Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) ("Under [N.C.]G.S. [§] 50-13.4(c), . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate . . . that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents."). Based upon the findings of fact provided in the Rule 60(b) Order, the trial court relieved Plaintiff of the child support provisions ordered nearly a year earlier due to the failure of the earlier order to address "the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties." N.C.G.S. § 50-13.4(c) (2019). Absent the required findings, the earlier order was "rendered contrary to [N.C.G.S. § 50-13.4(c)]." *Young*, 267 N.C. at 343, 148 S.E.2d at 229. Such an erroneous order could only have been addressed by appeal, not by Rule 60(b). *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

Additionally, we interpret the aspects of Plaintiff's motion and the Rule 60(b) Order addressing findings of fact as referring to the requirement that:

> [w]here, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. . . . The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow

> the appellate courts to perform their proper function in the judicial system.

Coble, 300 N.C. at 712, 268 S.E.2d at 188-189 (internal citations and quotation omitted). Again, the findings of fact in the Rule 60(b) Order show that the action being complained of was the entry of child support provisions that were "rendered contrary to law" as the Custody Order failed to include the required findings of fact to support its child support determination. Therefore, the trial court erred in using Rule 60(b) here to relieve Plaintiff of the child support obligations as the findings of fact in the Rule 60(b) Order described the Custody Order as an erroneous order. We vacate the Rule 60(b) Order as an impermissible remedy for an alleged erroneous order that could only be addressed by appeal. *Town of Sylva*, 51 N.C. App. at 548, 277 S.E.2d at 117.

CONCLUSION

The trial court impermissibly used Rule 60(b) to rectify what it described as an erroneous order that only could have been addressed by appeal and not by Rule 60(b). We vacate the Rule 60(b) Order. Defendant's remaining arguments on appeal are rendered moot and we do not address them. We remand this matter to the trial court for further proceedings, including a hearing on Defendant's *Motion for Contempt*.

VACATED IN PART; REMANDED IN PART.

Judge INMAN concurs.

Judge BERGER concurs in result only.

K2 ASIA VENTURES, PLAINTIFF
v.
KRISPY KREME DOUGHNUT CORPORATION, AND KRISPY KREME DOUGHNUTS, INC., DEFENDANTS

No. COA19-314

Filed 1 September 2020

Parties—real party in interest—breach of contract—business entity as plaintiff—different name in contract and complaint

In a breach of contract case between two business entities, the trial court properly dismissed plaintiff's lawsuit for failure to prosecute its claims in the name of a real party in interest, pursuant to Civil Procedure Rule 17(a), where plaintiff's registered corporate name differed from the names listed on the contract and in its complaint, but where plaintiff did not move to substitute itself as a party until nine years after filing suit and three years after defendant raised a clear objection on Rule 17 grounds. Further, plaintiff's argument that a corporate misnomer was insufficient to warrant dismissal was rejected where it presented no evidence that the plaintiff-entity named in the complaint even existed.

Appeal by plaintiff from order entered 13 November 2018 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 7 January 2020.

Broocks Law Firm, PLLC, by Ben C. Broocks, pro hac vice, and Blanco, Tackabery & Matamoros, P.A., by Chad A. Archer, and Peter J. Juran, for plaintiff-appellants.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Jason M. Wenker, and Chris W. Haaf, for defendant-appellees.

BRYANT, Judge.

Where K^2 Asia Ventures failed to establish that it was a real party in interest, we affirm the trial court's 13 November 2018 order dismissing the action pursuant to Rules 17(a) and 41(b).

On 7 April 2009, in Forsyth County Superior Court, K^2 Asia Ventures ("K^2 Asia"), Ben C. Broocks, and James G.J. Crow filed a complaint (amended 7 February 2011) against Robert Trota; Veronica Trota; Joselito Saludo; Carolyn T. Salud; Roland V. Garcia; Cristina T. Garcia;

Jim Fuentebella; Mavis Fuentebella; Sharon Fuentebella; Max's Baclaran Inc.; Chickens R. Us, Inc.; Max's Makati Inc.; Max's Ermita, Inc.; Max's of Manila, Inc.; The Real American Doughnut Company Inc.; Trofi Ventures, Inc.; Ruby Investment Company Holdings, Inc.; Krispy Kreme Doughnut Corporation; and Krispy Kreme Doughnut, Inc. Broocks and Crow were the principals of K^2 Asia. K^2 Asia's company, whose principal place of business was in Austin, Texas, was founded to facilitate and promote the opening of Krispy Kreme Doughnuts franchises in Asia. Other than Krispy Kreme Doughnut Corporation and Krispy Kreme Doughnuts, Inc., ("Krispy Kreme"), a company whose principal place of business was in Winston-Salem, North Carolina, the other putative defendants were companies, company owners, or investment companies with business interests in the Philippines.

Per the amended complaint, K^2 Asia was founded with the objective of bringing Krispy Kreme's franchises to countries in Asia. Believing that Krispy Kreme would require a partnership with a fast-food business operator in each of the target countries, plaintiff contacted representatives of a restaurant group—Max's Group— in regard to potential operations in the Philippines. Max's Group was receptive to the prospect of partnering with Krispy Kreme. K^2 Asia enticed representatives of Krispy Kreme to travel to the Philippines and meet with representatives of Max's Group. K^2 Asia provided analysis concerning projected product pricing, product volumes, ingredient costs, sources for potential alternative ingredients, and potential franchise locations. K^2 Asia asserted that during negotiations, it was agreed that should a Krispy Kreme franchise be granted to Max's Group, K^2 Asia would receive a management fee of one percent (1%) of the gross revenue and a ten percent (10%) equity interest in the operations (with 5% received after the third year and 5% received after the fifth year). Moreover, K^2 Asia would be granted the right to acquire additional equity in exchange for contributing twenty-five percent (25%) of the budgeted capital requirements. In cooperation with Max's Group, K^2 Asia would be allowed to raise capital from outside investors. Eventually, Krispy Kreme granted K^2 Asia exclusive rights to negotiate agreements for franchise rights in the Philippines (the "K^2 Asia/Krispy Kreme Exclusivity Agreement"). Plans were developed to create a business entity known as "The Real American Doughnut Company, Inc." between Krispy Kreme, Max's Group, and K^2 Asia. Max's Group provided a "Memorandum of Understanding" ("MOU") which documented the agreement between K^2 Asia and Max's Group with regard to K^2 Asia's interest in the yet to be formed "The Real American Doughnut Company, Inc." The MOU recited the agreed-upon management fee (1%) but differed as to the previously agreed upon equity interest, which had

been ten percent (10%). The MOU stated that K² Asia's equity interest would be five percent (5%). It was also communicated that K² Asia need not immediately raise capital funds (which were to be in exchange for additional equity). Thereafter, Max's Group communicated that K² Asia would not be granted a management fee and would not receive any equity interest. K² Asia alleged that the decision to forego paying K² Asia the management fee and allowing K² Asia an equity interest was based on the recommendation of Krispy Kreme.

Krispy Kreme and Max's Group ultimately executed a development agreement and a franchise agreement for Krispy Kreme franchises in the Philippines. The franchise agreement listed the ownership interests in Krispy Kreme Philippines franchises. K² Asia did not receive an ownership interest. The Real American Doughnut Company, Inc., was formed, but K² Asia was not included as an interested party. K² Asia alleged that Krispy Kreme required that Max's Group periodically pay Krispy Kreme development fees, franchise fees, royalties, and other fees for each store; submit weekly sales reports for each store; submit annual development plans, sales forecasts, line item margin reviews, and marketing plans; and purchase certain mixes, products, equipment, and fixtures from Krispy Kreme. Representatives of Max's Group traveled to North Carolina for training with Krispy Kreme in July 2006 and for a franchise convention in 2007. K² Asia contended that Max's Group provided large monetary payments to Krispy Kreme and frequently communicated with representatives of Krispy Kreme regarding its ongoing business operations.

Per the complaint, K² Asia, Broock, and Crow sought to recover monetary damages from Krispy Kreme based on theories of breach of contract; intentional interference with a contractual relationship and/or prospective economic advantage; promissory estoppel; violation of principles of partnership, joint venture, and fiduciary duty; fraud, constructive fraud, and fraudulent inducement; unfair and deceptive trade practices; aiding and abetting breach of fiduciary duty; civil conspiracy; quantum meruit/unjust enrichment; and punitive damages.

Though the motions were not included in the record, court orders in the record state that Krispy Kreme moved to dismiss K² Asia's complaint. The trial court granted the motions in part. The court dismissed all claims asserted by individuals Broocks and Crow, as well as K² Asia's claims for fraud and unfair and deceptive trade practices against Krispy Kreme.

Krispy Kreme filed its answer to K² Asia's complaint on 11 April 2011.

Following a joint motion by Krispy Kreme and K^2 Asia, on 23 September 2011, then Chief Justice Sarah Parker designated this matter as exceptional and assigned it to the Honorable Anderson Cromer, Superior Court Judge.

On 7 May 2015, Krispy Kreme filed a motion for summary judgment. In its brief filed in support of its motion for summary judgment, Krispy Kreme references an order of the trial court entered on 26 July 2013. Per Krispy Kreme (and acknowledged by K^2 Asia) the trial court dismissed all non-resident defendants. Per Krispy Kreme, by the 26 July 2013 order, the court "reduced the case to a few remaining claims against Krispy Kreme by a purported company called 'K^2 Asia Ventures.' "

In its motion for summary judgment, Krispy Kreme contended that K^2 Asia lacked standing to bring a claim.

> 2. [K^2 Asia] is not an entity that signed the purported contracts at issue, and the entities that signed those contracts are not parties to the suit.
>
> 3. Further, there is no evidence that [K^2 Asia] exist[ed]. Indeed, there is no evidence that the entities that signed the purported contracts exist[ed].

More specifically, Krispy Kreme argued that the MOU—which documented the agreement between K^2 Asia and Max's Group with regard to K^2 Asia's interest in the then yet to be formed The Real American Doughnut Company, Inc.—was executed by "K^2 Asia Ventures, Ltd., a limited partnership, by K^2 Asia Management, LLC, general partner, by . . . Broocks, Member and Manager." Krispy Kreme points out that in the 26 July 2013 order, the trial court found "neither K^2 Asia Ventures, Ltd. nor K^2 Asia Management LLC [wa]s a named plaintiff in this civil action." As to K^2 Asia's claim against Krispy Kreme for breach of contract, Krispy Kreme argued that "the contract . . . which is referred to in the Amended Complaint as the 'Exclusivity Agreement'—also was executed by 'K^2 Asia Ventures, Ltd.' " Moreover, Krispy Kreme contended that the only evidence of the existence of K^2 Asia related to an entity named K^2 Asia Ventures G.P., a Cayman Island company, which was not a party to the civil suit. Krispy Kreme argued that it was entitled to summary judgment on all claims because K^2 Asia had failed to produce any evidence that it existed or had standing to bring the asserted claims.

On 28 May 2015, in response to Krispy Kreme's motion for summary judgment, K^2 Asia argued that it was a real party in interest.

- K^2 Asia Ventures is K^2 Asia Ventures G.P. [a Cayman Island company] and any failure to include the suffix "G.P." in the caption was a misnomer;
- K^2 Asia Ventures G.P. ratified the pre-incorporation [MOU], making it the proper party to sue on the claims that arise from such contract;
- K^2 Asia Ventures G.P. is K^2 Asia Ventures, Ltd.
- Krispy Kreme is judicially estopped from contending K^2 Asia is not the real party in interest because it has admitted that K^2 Asia exists and is the proper party to this litigation.

In all events, under North Carolina Rules of Civil Procedure and applicable case law, no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest.

K^2 Asia further contended that the Certificate of Incorporation for K^2 Asia Ventures G.P., as well as a Memorandum & Articles of Association of K^2 Asia Ventures G.P., had been provided to Krispy Kreme. K^2 Asia acknowledged that at the time the MOU was executed, K^2 Asia Ventures Ltd. did not exist. Broock, president of K^2 Asia Ventures, "believed that he would, in the near future, create a company called K^2 Asia Ventures Ltd." Based on this belief, Broock drafted the K^2 Asia/Krispy Kreme Exclusivity Agreement using K^2 Asia Ventures Ltd. as the name of the party to the agreement. However, when the Cayman Island entity was created, it was incorporated as K^2 Asia Ventures G.P., rather than K^2 Asia Ventures Ltd. K^2 Asia further acknowledged that "no such entity with the name of K^2 Asia Ventures Ltd. was ever registered in the Cayman Islands." Yet, K^2 Asia argued that Krispy Kreme should be judicially estopped from arguing that K^2 Asia did not have standing. Alternatively, K^2 Asia argued that should the trial court rule K^2 Asia was not a real party in interest, "a trial court should either correct [K^2 Asia]'s error itself or refuse to hear the motion for summary judgment until the real party in interest is substituted for the plaintiff."

Over three years later, on 13 November 2018, the trial court entered its order on Krispy Kreme's motion for summary judgment. The court stated that it would not "substitute a party on its own motion or upon the invitation extended by [K^2 Asia] in its brief before the trial court." The court noted that the case had been pending since 2009 and that K^2 Asia had not filed a motion to substitute the Cayman Island company

named K^2 Asia Ventures G.P. as the real party in interest since 2009 or in the three years since Krispy Kreme raised a clear objection in 2015. The court found this delay not reasonable.

Considering Krispy Kreme's motion for summary judgment made pursuant to Rule 56 as a motion to dismiss pursuant to Rule 41(b),

> [t]he [c]ourt interprets Krispy Kreme's motion for summary judgment, described as a Rule 56 motion, as a motion for dismissal of the action brought by [K^2 Asia] for failure to prosecute or to comply with the rules of civil procedure, namely failure to comply with Rule 17(a) and prosecute its claims in the name of the real party in interest. As such, the [c]ourt treats [Krispy Kreme's] motion as one made under Rule 41(b). The [c]ourt finds and concludes that, based on the papers submitted and the protracted history of this case, K^2 Asia Ventures (nothing else appearing), is not the real party in interest. However, the case will be dismissed without prejudice. It is the [c]ourt's view that this result captures the spirit and letter of Rules 17(a) and 41(b) of the North Carolina Rules of Civil Procedure.

K^2 Asia appeals.

On appeal, K^2 Asia argues that the trial court erred by denying K^2 Asia's right to amend its complaint and failing to address the issue of misnomer.

Motion to Amend complaint

K^2 Asia argues that the trial court erred by denying its motion to amend the complaint to reflect the real party in interest. K^2 Asia contends that once Krispy Kreme moved for summary judgment on the basis that K^2 Asia was not the real party in interest, K^2 Asia moved the court to amend the complaint to reflect the real party in interest, but three years later, the trial court denied K^2 Asia's motion. We disagree.

> "[O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion." *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). . . . Proper reasons for denying a motion to amend include undue delay, unfair prejudice, bad faith, futility of amendment, and repeated failure of the moving party to

> cure defects by other amendments. *Delta*, 132 N.C.App. at 166, 510 S.E.2d at 694.

Revolutionary Concepts, Inc. v. Clements Walker PLLC, 227 N.C. App. 102, 110, 744 S.E.2d 130, 136 (2013); *see also Key Risk Ins. Co. v. Peck*, 252 N.C. App. 127, 133–34, 797 S.E.2d 354, 358 (2017) ("Where a case is not brought by the real party in interest, it is within the discretion of the trial court to allow a motion to substitute under Rule 17(a)" (citation omitted)).

In *Revolutionary Concepts, Inc.*, 227 N.C. App. 102, 744 S.E.2d 130, this Court considered whether the trial court erred in failing to permit the plaintiff (a post-merger surviving corporation) to substitute itself as the real party in interest pursuant to Rule 17 for the previous merging corporation—which had been a real party in interest. Prior to the merger, the merging corporation filed a complaint and voluntarily dismissed its claims pursuant to Rule 41(a). After the voluntary dismissal but prior to the merger, the would-be surviving corporation timely re-filed the claims the merging corporation had voluntarily dismissed. But at that time, the would-be surviving corporation lacked standing to do so. For more than three years following the merger, the merger surviving corporation failed to take any action to assert its standing to bring the claims it had filed pre-merger on the basis that it was the survivor of the merging corporation—the real party in interest. "[W]ithout some action by [the surviving corporation] post-merger to assert those claims as the surviving entity of the merger, its claims brought in [pre-merger] do not automatically incorporate any claims [the merging corporation] could have brought but failed to do so simply by virtue of the merger." *Id.* at 110, 744 S.E.2d at 136. Thus, the trial court denied the merger surviving corporation's motion to substitute itself as the real party in interest pursuant to Rule 17. *Id.* at 112, 744 S.E.2d at 137.

On appeal, this Court held that it

> [could] discern no abuse of discretion in denying the Rule 17 motion because [the] plaintiffs could have substituted [the] post-merger [company] at any point after the August 2008 merger. However, they did not attempt to do so for over three years, until the hearing in January 2012. Although our Courts generally permit liberal amendment of pleadings, here, we believe that the trial court's decision to not allow [the] post-merger [plaintiff] to be substituted as the real party in interest at the summary judgment hearing does not constitute an abuse of discretion. [The

> p]laintiffs have failed to offer any compelling reason why they failed to do so in a reasonable time after the merger. . . . Therefore, we conclude that the trial court did not abuse its discretion in denying [the plaintiffs'] motion to substitute itself as the real party in interest pursuant to Rule 17.

Id.; *see also Street v. Smart Corp.*, 157 N.C. App. 303, 309, 578 S.E.2d 695, 700 (2003) (affirming a trial court's dismissal of an action where the record reflected no attempt or request by the plaintiff to substitute the real party in interest where the plaintiff "was aware of the real party in interest defense for approximately seven months before the hearing based on defendant's answer and for approximately three weeks based on the motion to dismiss"); *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 269, 344 S.E.2d 64, 68 (1986) (upholding the trial court's dismissal of the action where the plaintiffs failed to prosecute their claims and the record reflected "a long history of foot-dragging by [the] plaintiffs").

Here, the record reflects that on 7 May 2015, Krispy Kreme filed its motion for summary judgment and a brief in support of said motion. Krispy Kreme contended that K^2 Asia lacked standing to bring the lawsuit because it was not a real party in interest in any of the claims asserted in the amended complaint. Moreover, K^2 Asia was not the entity which signed the K^2 Asia/Krispy Kreme Exclusivity Agreement or the MOU. In its brief, Krispy Kreme referenced the trial court's 26 July 2013 order in which the trial court made findings of fact that the MOU—which K^2 Asia had described as the agreement between K^2 Asia and Max's Group—was executed by "K^2 Asia Ventures, Ltd., a limited partnership, by K^2 Asia Management, LLC, general partner, by . . . Broocks, Member and Manager" and that "neither K2 Asia Ventures, Ltd. nor K2 Asia Management LLC [wa]s a named plaintiff in this civil action." As to K^2 Asia's claim(s) against Krispy Kreme based on the K^2 Asia/Krispy Kreme Exclusivity Agreement—which K^2 Asia described as the agreement in which Krispy Kreme granted K^2 Asia exclusive rights to negotiate agreements for franchise rights in the Philippines—Krispy Kreme argued that "the contract . . . which [wa]s referred to . . . as the 'Exclusivity Agreement'—also was executed by 'K^2 Asia Ventures, Ltd.' " Moreover, Krispy Kreme contended that the only evidence of the existence of K^2 Asia related to an entity named K^2 Asia Ventures G.P., a Cayman Island company, which was not a party to the civil suit. Krispy Kreme argued that it was entitled to summary judgment on all claims because K^2 Asia had failed to produce any evidence that K^2 Asia Ventures existed.

On 28 May 2015, K^2 Asia filed its brief in opposition to Krispy Kreme's motion for summary judgment. In pertinent part, K^2 Asia argued that if

the trial court determined that K² Asia was not a real party in interest, Krispy Kreme was still not entitled to summary judgment. K² Asia quoted General Statutes, section 1A-1, Rule 17(a), as follows: "***[n]o action shall be dismissed*** **on the ground that it is not prosecuted in the name of the real party in interest** ***until a reasonable time has been allowed after objection*** for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and ***such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest***." After stating that "the court should order a continuance" to allow the real party in interest a reasonable time to be brought in and plead, K² Asia asserted that

> [o]n a motion for summary judgment for lack of the real party in interest, a trial court should either correct [K² Asia]'s error itself or refuse to hear the motion for summary judgment until the real party in interest is substituted for the plaintiff.
>
> . . . .
>
> Therefore, even if the [c]ourt believes that K² Asia Ventures is not the real party in interest in this action, pursuant to Rule 17, it must permit [the real party in interest] to be substituted in.
>
> . . . .
>
> . . . [I]n the event that the [c]ourt finds that K² Asia Ventures is not the real party in interest, [K² Asia] respectfully reserves its right to substitute K² Asia Ventures G.P. as the real party in interest.

Over three years later, on 13 November 2018, the trial court entered its order in response to Krispy Kreme's motion for summary judgment. The court noted that Krispy Kreme's motion for summary judgment, filed 7 May 2015, raised the issue of what entity was the real party in interest; however, "[i]nterestingly, neither the named [K² Asia] nor Defendant [Krispy Kreme] have calendared the matter for hearing." The court summarized K² Asia's arguments in opposition to Krispy Kreme's motion as follows:

> o K² Asia Ventures is K² Asia Ventures G.P. [a Cayman Island company incorporated on 30 July 2004] and any failure to include the suffix "G.P." in the caption was a misnomer;

- o K^2 Asia Ventures G.P. ratified the pre-incorporation [MOU], making it the proper party to sue on the claims that arise from such contract;
- o K^2 Asia Ventures G.P. is K^2 Asia Ventures, Ltd.
- o Krispy Kreme is judicially estopped from contending K^2 Asia is not the real party in interest because it has admitted that K^2 Asia exists and is the property party to this litigation[.]

The court stated that upon its review of the arguments presented, "the primary basis for [K^2 Asia]'s argument that K^2 Asia Ventures is K^2 Asia Ventures G.P. and that K^2 Asia Ventures G.P. is K^2 Asia Ventures Ltd.; is 'it's because we say it is.' "

The court cited Rule 17 of our Rules of Civil Procedure.

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

N.C. Gen. Stat. § 1A-1, Rule 17(a) (2019).

In its order, the court stated that

> [it declines] to substitute a party on its own motion or upon the invitation extended by [K^2 Asia] in its brief. This case has been pending since 2009. [K^2 Asia] has not filed a motion to substitute the Cayman Island company named K^2 Asia Ventures G.P. as the real party in interest. However, [K^2 Asia] did . . . "reserve its right to substitute K^2 Asia Ventures G.P. as the real party in interest" in the event the [c]ourt found that K^2 Asia Ventures is not the real party in interest.
>
> It is not reasonable, in the [c]ourt's view or opinion, for [K^2 Asia] to wait more than nine years after [K^2 Asia]'s case was filed, and more than three years after a clear objection was voiced by [Krispy Kreme] that the case was not being prosecuted in the name of the real party in interest, to exercise its right to substitute the name of the real party in interest.

The court then stated that it interpreted Krispy Kreme's motion for summary judgment as a motion to dismiss the action for K² Asia's failure to prosecute or to comply with the Rules of Civil Procedure, namely Rule 17(a), and the failure to prosecute its claims in the name of the real party in interest. "The [c]ourt finds and concludes that, based on the paper submitted and the protracted history of this case, K² Asia Ventures (nothing else appearing), is not the real party in interest." The court elected to treat Krispy Kreme's motion for summary judgment as a Rule 41(b) motion for involuntary dismissal.

We hold that the trial court did not abuse its discretion by declining to *ex mero motu* substitute the real party in interest for K² Asia or by denying K² Asia's reservation of the right to substitute K² Asia Ventures G.P. as the real party in interest, where K² Asia failed to do so pursuant to Rule 17 over a three year period. Accordingly, on this argument, K² Asia is overruled.

Misnomer of a party

K² Asia argues that the trial court erred by failing to address the issue of misnomer of a party. We disagree.

K² Asia contends that there was never a question that it was incorporated in the Cayman Islands and asserts the following: "while in the [Exclusivity Agreement] [Broock] used 'K2 Asia Ventures **Ltd.**' instead of 'K2 Asia Ventures, **G.P.**,' " there is no indication Krispy Kreme was misled about the entity with which it was contracting. "[Though] the trial court concluded that the only way it could tell that K2 Asia Ventures, **Ltd.** is the same as K2 Asia Ventures **G.P.**, was because [Broock] said so. That is of course true, as no one can know my thoughts as to the use of the 'K2 Asia Ventures, Ltd.' as [Broock] did except [Broock]."

In essence, K² Asia argues that K² Asia Ventures, Ltd.—named in the Exclusivity Agreement with Krispy Kreme and the MOU with Max's Group—is not a registered corporation[1] but is the same entity as K² Asia Ventures G.P., which is a company registered in the Cayman Islands. K² Asia Ventures G.P. is the same entity as K² Asia—the named plaintiff in the current civil suit—and all three entities represent the real party in interest.

In support of its argument that corporate misnomers are insufficient to warrant dismissal of an action, K² Asia cites *Troy & N. Carolina*

1. In its brief to this Court, plaintiff asserts that Krispy Kreme reserved the name K² Asia Ventures Ltd. in the Cayman Islands before filing its motion for summary judgment.

Gold Mining Co. v. Snow Lumber Co., 170 N.C. 273, 277, 87 S.E. 40, 42 (1915) (reasoning that in the context of the transference of property by deed, "[a] misnomer does not vitiate [the deed], provided the identity of the corporation with that intended to be named by the parties is apparent"); and *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 524 S.E.2d 591 (2000) (discussing *Troy & N. Carolina Gold Mining Co.*, 170 N.C. 273, 87 S.E. 40). In reviewing "the disparity in the corporate name, our Supreme Court stated that '[a]s to the plaintiff being described by the wrong name in the deed, this is at most but a misnomer or latent ambiguity, which can be explained by parol evidence so as to fit the description to the person or corporation intended. . . . A corporate name is essential, but the inadvertent or mistaken use of the name is ordinarily not material if the parties really intended the corporation by its proper name.' " *Tomika Invs.*, 136 N.C. App. at 496, 524 S.E.2d at 594 (alterations in original) (citation omitted); *see also id.* at 497, 524 S.E.2d at 594 ("[T]here is only a latent ambiguity in the deed, and no evidence that [the] defendant was prejudiced by the misstatement of Tomika's corporate name. [The d]efendant knew it was dealing with a corporation named 'Tomika Investment' or 'Tomika Investments,' of which [the] defendant Latimer was President. Concurrently with the execution of the deed, Tomika executed a lease with option to buy to the defendant, and impressed its corporate seal bearing its correct corporate name on the lease. We hold that the error in designating the grantee in the deed from [the] defendant Macedonia was not sufficient to void the deed as a matter of law, and hold that the trial court correctly granted summary judgment on this issue.").

K^2 Asia's argument regarding misnomer of party names is well taken. There is no dispute that Krispy Kreme contracted with Broock's business entity or for that matter, that Max's Group contracted with Broock's business entity. However, Broock's business entity with which Krispy Kreme and Max's Group contracted is not the business entity Broock registered. Moreover, the business entity Broock registered is not the entity in the current civil suit named in the complaint as plaintiff, K^2 Asia. Nothing else appearing, for this Court to hold K^2 Asia to be a real party in interest, we would necessarily endorse the existence of a business entity for which there is no evidence of existence other than "because we say it is." We do not so hold. Therefore, K^2 Asia's argument, on this point, is overruled and the trial court's 13 November 2018 order is

AFFIRMED.

Judges ZACHARY and COLLINS concur.

SAULS v. BARBOUR

[273 N.C. App. 325 (2020)]

JOHN D. SAULS, ET AL., PLAINTIFFS
v.
ROBERT O. BARBOUR, ET AL., DEFENDANTS

No. COA19-1042

Filed 1 September 2020

1. Civil Procedure—motion for judgment on the pleadings—conversion to motion for summary judgment—affidavits—consideration by trial court

In an action concerning a dispute over an easement, defendants' submission of two affidavits opposing plaintiffs' motion for judgment on the pleadings did not convert the motion into one for summary judgment where nothing in the record indicated that the trial court considered the affidavits (which were materials outside the pleadings). Because the trial court considered only the pleadings, attachments, and arguments of counsel—and excluded the affidavits from consideration—the motion was not converted to one for summary judgment.

2. Easements—appurtenant—ingress and egress—identified in deeds and plats—motion for judgment on the pleadings

The trial court did not err by granting plaintiffs' motion for judgment on the pleadings in an action concerning a dispute over an easement where the recorded deeds and plats that were attached to the complaint sufficiently identified an appurtenant easement of ingress and egress ("30' INGRESS / EGRESS EASEM'T") across defendants' property.

Appeal by Defendants from order entered 11 July 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 August 2020.

Ragsdale Liggett PLLC, by Amie C. Sivon and Matthew L. Hubbard, for Plaintiffs-Appellees.

Edmundson & Burnette, LLP, by James T. Duckworth, III, and Daniel R. Flebotte & Associates, PLLC, by Daniel R. Flebotte, for Defendants-Appellants.

COLLINS, Judge.

Defendants appeal from an order granting Plaintiffs' motion for judgment on the pleadings in their action to quiet title and for declaratory judgment that Plaintiffs have an appurtenant easement over Defendants' property. Defendants argue that the trial court erred because Defendants' submission of two affidavits opposing the motion converted the motion into one for summary judgment, there were material issues of fact that precluded the trial court from effectively granting summary judgment, and Plaintiffs are not entitled to an appurtenant easement as a matter of law. We affirm the order.

I. Procedural History

Plaintiffs brought an action in Wake County Superior Court on 24 August 2018 to quiet title and for declaratory judgment that Plaintiffs have an appurtenant easement of ingress and egress across Defendants' property. Plaintiffs attached to the complaint the recorded deeds and maps for both Plaintiffs' and Defendants' properties. Plaintiffs filed an amended complaint on 16 April 2019. Defendants filed an answer on 8 May 2019. The next day, Plaintiffs filed a motion for judgment on the pleadings. On 20 June 2019, Defendants filed two affidavits in opposition to the motion.[1] After conducting a hearing on 9 July 2019, the trial court entered an order on 11 July 2019, granting Plaintiffs' motion for judgment on the pleadings, and declaring that "Plaintiffs have a perpetual appurtenant easement across the land designated "30' INGRESS / EGRESS EASEM'T" on the plat maps referenced by both Plaintiffs' and Defendants' deeds." Defendants timely filed notice of appeal.

II. Factual Background

Prior to 1980, Walter and Coma Willard owned a tract of land located between Penny Road and Lake Wheeler Road in Wake County. In 1980, the Willards conveyed the northwestern, 3-acre portion of their property at 5005 Penny Road ("Penny Rd. Property") to David Hursey and his wife by a general warranty deed recorded in the Wake County Registry.[2] The Willards retained ownership of the remaining tract ("Willard Tract") that adjoined the Penny Rd. Property on the east and south sides and extended east to Lake Wheeler Road. A survey map of the Penny Rd. Property was recorded in 1981 ("Penny Rd. Property Map"), and is depicted below. The Penny Rd. Property Map shows both the Penny Rd.

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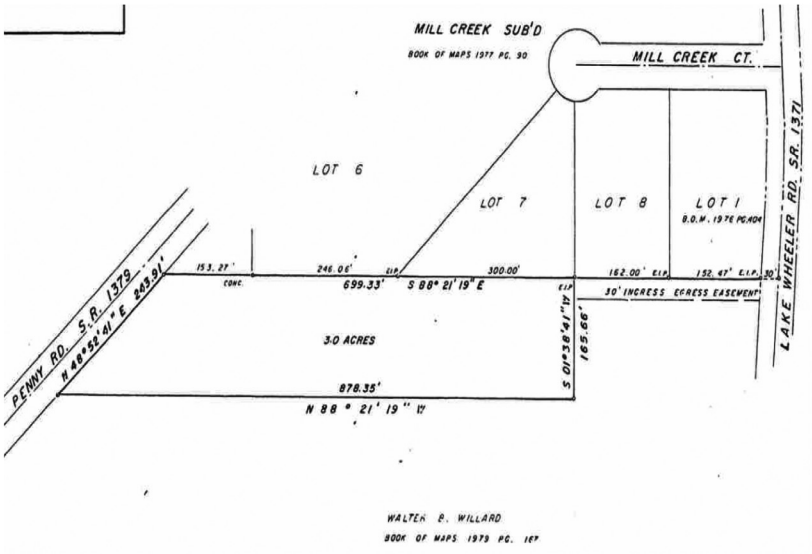
1. Defendants did not otherwise file a response in opposition to the motion.

2. All recordings referred to herein were filed in the Wake County Registry.

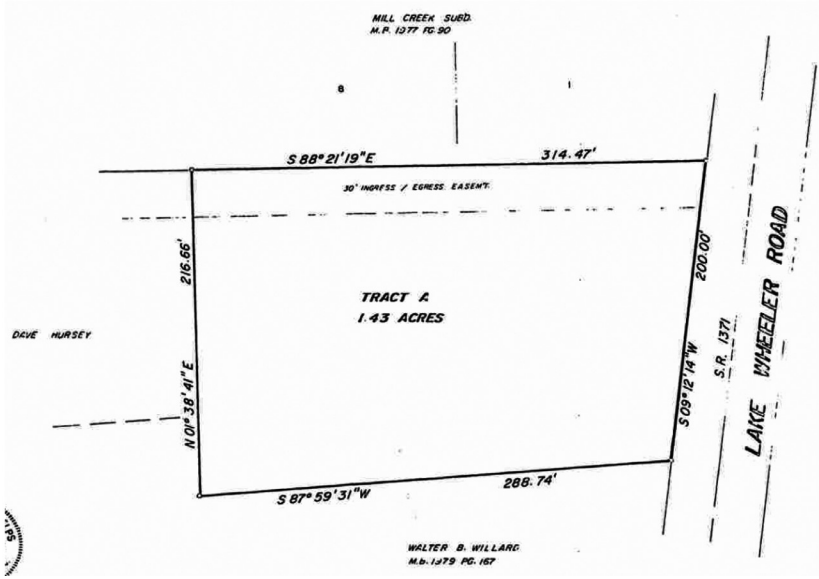
Property and the adjoining Willard Tract. The Willard Tract includes an area labeled "30' INGRESS EGRESS EASEMENT" running across the entire northern border of the Willard Tract, from the Penny Rd. Property on the west side to Lake Wheeler Road on the east side.

Penny Rd. Property Map



In 1983, the Willards subdivided the northeastern portion of the Willard Tract at 4900 Lake Wheeler Road and recorded a map of the newly created 1.43-acre parcel, labeling it "Tract A" ("Subdivision Map"). The Subdivision Map, depicted below, includes an area on the northern border of Tract A labeled "30' INGRESS / EGRESS EASEM'T," running across the entire 314.47-foot northern boundary of Tract A, from the Penny Rd. Property on the west side to Lake Wheeler Road on the east side. The dotted line representing the southern boundary of the area labeled "30' INGRESS / EGRESS EASEM'T" extends partly into the adjoining Penny Rd. Property. At the time the Subdivision Map was recorded, the Penny Rd. Property was owned by the Hurseys and is accordingly labeled "Dave Hursey."

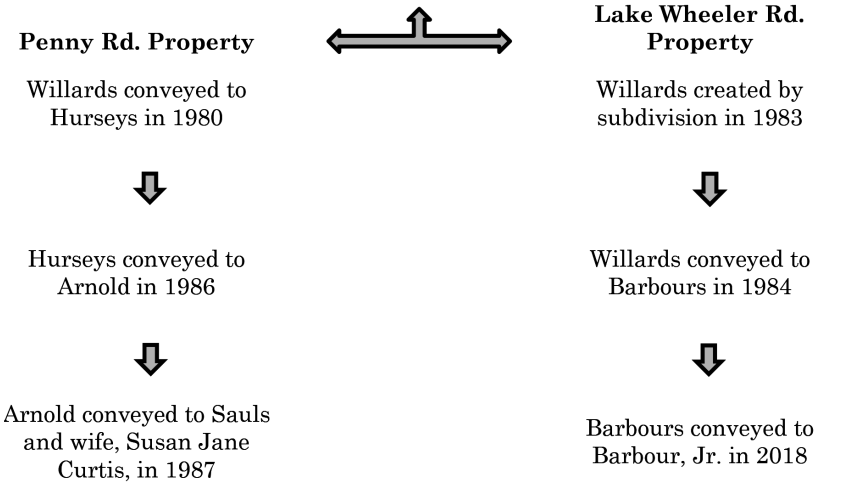
Subdivision Map



In 1984, the Willards conveyed Tract A at 4900 Lake Wheeler Road ("Lake Wheeler Rd. Property") to Robert Barbour and his wife, Barbara Barbour, by a recorded general warranty deed ("Barbour Deed"). The Barbour Deed expressly refers to the Subdivision Map recorded by the Willards in 1983, which shows the "30' INGRESS / EGRESS EASEM'T." The Barbour Deed also states that title to the property is subject to "all easements of record in the Wake County Registry which affect the title of the said lot."

The Barbers conveyed the Lake Wheeler Rd. Property in 2018 to their son, Robert Barbour, Jr., by a non-warranty deed ("Barbour Jr. Deed"). The Barbour Jr. Deed was recorded and expressly refers to the Subdivision Map recorded by the Willards in 1983, which shows the "30' INGRESS / EGRESS EASEM'T." Robert Barbour, Jr., is the record owner of the Lake Wheeler Road Property and resides there with his father, Robert Barbour (collectively "Defendants").

The Penny Rd. Property was conveyed by the Hurseys in 1986 to Richard Arnold by general warranty deed. Arnold conveyed it in 1987 to John Sauls and his wife, Susan Jane Curtis, by general warranty deed ("Sauls Deed"). The Sauls Deed expressly refers to the Penny Rd. Property Map recorded in 1981, which shows the "30' INGRESS EGRESS EASEMENT." Plaintiffs are members of the Sauls family, who are currently the record owners of the Penny Rd. Property.



Plaintiffs allege that their family members used the property designated on the maps as an ingress/egress easement across Defendants' property to access their home from Lake Wheeler Road. In April 2018, Defendants parked a vehicle on that property, thereby blocking Plaintiffs' access to the Penny Rd. Property from Lake Wheeler Road. Barbour, Jr., later told Sauls that Plaintiffs do not have a legal easement over Defendants' property and that they could not continue to use the easement across Defendants' property to access their own.

III. Discussion

Defendants argue that the trial court erred by granting Plaintiffs' motion for judgment on the pleadings, because: (1) Defendants' submission of two affidavits opposing the motion converted it into one for summary judgment; (2) the trial court erred by effectively granting summary judgment; and (3) even if not converted into summary judgment, judgment on the pleadings was improper because material issues of fact exist, and Plaintiffs are not entitled to a perpetual appurtenant easement as a matter of law.

A. Submission of Affidavits

[1] Defendants first argue that their submission of two affidavits in opposition to Plaintiffs' motion for judgment on the pleadings converted the motion into one for summary judgment.

Rule 12(c) of the North Carolina Rules of Civil Procedure provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to *and not excluded* by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019) (emphasis added).

This provision sets forth a procedure analogous to the conversion of a motion to dismiss under Rule 12(b)(6) to a motion for summary judgment. *See* 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1371 (3d ed. 2020) (citing Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.")). With respect to both motions to dismiss and motions for judgment on the pleadings, the trial court is vested with discretion to choose whether to consider materials outside the pleadings submitted in support of or in opposition to those motions. *See id.* at §§ 1366, 1371. *See also McBurney v. Cuccinelli*, 616 F.3d 393, 410 (4th Cir. 2010) ("[A] judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings. . . . [N]ot considering such matters is the functional equivalent of excluding them—there is no more formal step required." (internal quotation marks and citation omitted)).

Documents attached to and incorporated within a complaint become part of the complaint. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). "They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion without converting it into a motion for summary judgment." *Id.* (citation omitted). "[I]n the event that the matters outside the pleadings considered by the trial court consist only of briefs and arguments of counsel, the trial court need not convert the motion into one for summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 573, 768 S.E.2d 47, 54 (2014) (internal quotation marks, ellipses, brackets, and citation omitted).

In determining whether a trial court considered matters outside the pleadings when entering judgment on the pleadings, reviewing courts have looked to cues in the trial court's order. *See Davis v. Durham*

Mental Health/Dev. Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004) (motion for judgment on the pleadings not converted into motion for summary judgment, even though plaintiff presented at least three documents to the trial court, where the order stated, "[b]ased upon the pleadings and the arguments of counsel, the Court finds that Defendant is entitled to entry of a judgment in its favor based on the pleadings"); *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (Rule 12 motion was not converted into Rule 56 motion where affidavits were introduced to support the motion, because "the trial court specifically stated in its order that for the purposes of the Rule 12 motion, it considered only the amended complaint, memoranda submitted on behalf of the parties[,] and arguments of counsel").

In this case, prior to the hearing on the motion for judgment on the pleadings, Defendants filed two affidavits in opposition to the motion.[3] In its order granting the motion, the trial court specifically stated:

> After reviewing Plaintiffs' motion, evaluating the pleadings and all attachments, and considering the arguments of counsel, this Court concludes that no genuine issues of material fact remain, that this case may be decided as a matter of law, and that it is therefore appropriate to enter judgment on the pleadings.

As in *Davis* and *Privette*, the trial court's order indicates that the trial court evaluated the pleadings and all attachments, and considered the arguments of counsel. Notably, it does not state that the trial court considered Defendants' affidavits, which would appropriately have been considered on a motion for summary judgment. Additionally, nothing in the record indicates that the trial court considered matters beyond the pleadings, arguments, and briefs. Accordingly, although the affidavits were *presented* to the trial court, they were *excluded* by the trial court from consideration in its ruling. The motion was therefore not converted into one for summary judgment.

B. Summary Judgment

By Defendants' next two arguments, Defendants contend that the trial court erred in effectively awarding Plaintiffs summary judgment.

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3. Plaintiffs state in their appellate brief that they asked the trial court at the motion hearing to exclude the affidavits. Because the record on appeal does not contain a transcript of the hearing, we cannot determine whether the trial court ruled on this request in open court.

These arguments are necessarily dependent upon Defendants' position that their submission of affidavits converted Plaintiffs' motion for judgment on the pleadings into one for summary judgment. However, as explained above, Plaintiffs' motion for judgment on the pleadings was not converted into one for summary judgment where the trial court excluded Defendants' affidavits, and the trial court granted judgment on the pleadings in favor of Plaintiff. Defendants' argument is thus overruled.

C. Judgment on the Pleadings

[2] Finally, Defendants argue that, even if the motion for judgment on the pleadings was not converted into one for summary judgment, the trial court erred by entering judgment on the pleadings. Defendants specifically allege that a material issue of fact exists as to whether the description of the purported appurtenant easement is sufficient to identify such an easement.

This Court reviews a trial court's order granting a motion for judgment on the pleadings de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Under a de novo review, we "may freely substitute our judgment for that of the trial court." *Carteret County v. Kendall*, 231 N.C. App. 534, 536, 752 S.E.2d 764, 765 (2014) (internal quotation marks, brackets, and citation omitted).

"A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). The movant must show that no material issue of facts exists and that the movant is entitled to judgment as a matter of law. *Id.*

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (citations omitted).

"An easement is a right to make some use of land owned by another." *Tanglewood Prop. Owners' Ass'n, Inc. v. Isenhour*, 254 N.C. App. 823, 830, 803 S.E.2d 453, 458 (2017) (ellipsis and citation omitted).

"An appurtenant easement is an easement created for the purpose of benefiting particular land . . . [and] attaches to, passes with[,] and is an incident of ownership of the particular land." *Id.* at 830, 803 S.E.2d at 459 (citation omitted).

"An easement can be created in several ways, including grant, estoppel, way of necessity, implication, dedication, prescription, reservation, and condemnation." *Id.* (citation omitted). "Although easements must generally be created in writing, courts will find the existence of an easement by implication under certain circumstances." *Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 97, 318 S.E.2d 861, 862-63 (1984) (citation omitted). "Appurtenant easements implied by plat are recognized in North Carolina." *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459 (citing *Hinson v. Smith*, 89 N.C. App. 127, 131, 365 S.E.2d 166, 168 (1988) (holding property owners possess "a private easement over and across all of the property designated as 'Beach' on the recorded plat")). An appurtenant easement may be created "by implied dedication, with either a formal or informal transfer," *Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 826 (2006) (citation omitted), and may be created "when the purchaser whose transaction relies on the plat is conveyed the land," *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989). *See also Hinson*, 89 N.C. App. at 130, 365 S.E.2d at 167 ("Conduct which implies the intent to dedicate may operate as an express dedication, as where a plat is made and land is sold in reference to the plat.").

"The easement areas must be sufficiently identified on the plat in order to establish an easement, although an express grant is not required." *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459 (citing *Conrad v. West-End Hotel & Land Co.*, 126 N.C. 776, 779-80, 36 S.E. 282, 283 (1900) (holding purchasers' deed reference to plat containing area identified "Grace Court" sufficient to establish purchasers' right to "open space of land"); *Harry v. Crescent Res., Inc.*, 136 N.C. App. 71, 75, 80, 523 S.E.2d 118, 121, 123-24 (1999) (determining remnant parcels depicted on plat and "described by metes and bounds" but not further identified insufficient to establish an easement); *Hinson*, 89 N.C. App. at 130-31, 365 S.E.2d at 167-68 (finding area designated "Beach" on recorded plat referenced by property owners' deeds sufficient to establish a private easement)).

In this case, Plaintiffs attached the following documents of public record to their amended complaint, incorporating them by reference: the Sauls Deed, which explicitly refers to the Penny Rd. Property Map; the Penny Rd. Property Map; the Barbour Deed and the Barbour Jr. Deed, which both explicitly refer to the Subdivision Map; and the Subdivision

Map. These documents thus became part of the complaint and were properly considered in connection with Plaintiffs' motion for judgment on the pleadings. *See Weaver*, 187 N.C. App. at 204, 652 S.E.2d at 707. Defendants admitted the existence of these documents in their answer and admitted that "[b]oth plats referenced in Plaintiffs' and Defendants' deeds show the Easement as '30' INGRESS / EGRESS EASEM'T.' "

The Sauls Deed expressly refers to the Penny Rd. Property Map, which shows the 30-foot ingress/egress easement on and across Defendants' property. The Barbour Deed and Barbour Jr. Deed expressly refer to the Subdivision Map, which shows the 30-foot ingress/egress easement on and across Defendants' property. *See Price*, 95 N.C. App. at 715, 383 S.E.2d at 688 (An appurtenant easement may be created "when the purchaser whose transaction relies on the plat is conveyed the land"). The inclusion of the specifically labeled 30-foot ingress/egress easement on the recorded Subdivision Map demonstrates the Willards' intent that the ingress/egress easement be used by the owners of the Penny Rd. Property to traverse the Lake Wheeler Rd. Property to access their property from Lake Wheeler Road. *See Hinson*, 89 N.C. App. at 130, 365 S.E.2d at 167; *Nelms*, 179 N.C. App. at 209, 632 S.E.2d at 826 (appurtenant easement may be created by implied dedication, either by formal or informal transfer).

As in *Price* and *Hinson*, the easement in this case is sufficiently identifiable to establish an ingress/egress easement across Defendants' Lake Wheeler Rd. Property for the benefit of Plaintiffs' Penny Rd. Property. Both recorded maps show that the easement across Defendants' property: (a) is labeled as an ingress/egress easement; (b) is coterminous with the northern boundary of Defendants' property, which is described in metes and bounds in the Barbour Jr. Deed, on the Subdivision Map, and on the Penny Rd. Property Map, and is labeled 314.47 feet long; (c) intersects with Lake Wheeler Road on its east side; (d) intersects with the Penny Rd. Property on the west side; and (e) is 30 feet wide, as can be inferred from the "30' ingress/egress easement" label.

Defendants argue that the description of the easement on the map is ambiguous. Defendants assert that "notwithstanding the ingress/egress terms," "there is a question whether the description of the purported ingress/egress easement is, as a matter of law, sufficient to identify itself or whether it locates the utility easement." Defendants point to the affidavits submitted to, and excluded by, the trial court to support their argument that the area labeled on the maps "30' INGRESS / EGRESS EASEM'T" is not an ingress/egress easement but is actually a 30-foot utility easement. Defendants' argument is meritless.

First, the plain language of the label "INGRESS / EGRESS EASEM'T" defeats Defendants' argument that the easement shown on the parties' respective maps is not an ingress/egress easement but is instead a "utility easement." *See Swaim v. Simpson*, 120 N.C. App. 863, 864-65, 463 S.E.2d 785, 787 (1995) ("Because the deed identified the easement as one for ingress and egress, the trial court erred in expanding its use" "to provide for the location, installation, and maintenance of facilities for domestic utilities[.]"). "When the language [of a conveyance] . . . is clear and unambiguous, effect must be given to its terms . . . ." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). The term "ingress/egress easement" is neither ambiguous nor silent as to the scope of the easement. As Defendants note, the terms "ingress/egress" must be ignored in order for Defendants' argument to be tenable.

Defendants also argue that the "30' ingress/egress easement" language is insufficient to identify an appurtenant easement because the southern boundary line of the easement is incapable of being located. Defendants assert that it is not possible to determine if the easement is 30 feet wide since the easement's label on the Subdivision Map does not contain the word "wide." However, according to the Subdivision Map, the length of the easement is 314.47 feet. Hence, the 30-foot descriptor refers to the width of the easement.

Defendants further argue that the southern boundary line of the easement is incapable of being located because it is represented by a dotted line, which indicates that this boundary was not surveyed. As explained above, the easement represented on the maps is 314.47 feet long and 30 feet wide. The northern boundary of the easement is coterminous with the northern boundary of the Lake Wheeler Rd. Property. The southern boundary of the easement is located 30 feet from and below the northern boundary of the property at all points along the easement.

The recorded deeds and plats create a sufficiently identifiable appurtenant ingress/egress easement across the Lake Wheeler Rd. Property, which provides access to the Penny Rd. Property from Lake Wheeler Road. *See Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459; *Hinson*, 89 N.C. App. at 130, 365 S.E.2d at 167. All material allegations of fact were admitted in the pleadings. Plaintiffs were entitled to an easement as a matter of law. The trial court did not err by entering judgment on the pleadings in favor of Plaintiff. *See Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

III. CONCLUSION

The motion for judgment on the pleadings was not converted into one for summary judgment. Judgment on the pleadings was proper because all material allegations of fact were admitted in the pleadings. As a matter of law, Plaintiffs' dominant estate is served by a perpetual appurtenant easement across the portion of Defendants' property designated "30' INGRESS / EGRESS EASEM'T" on the plat maps referenced by both Plaintiffs' and Defendants' deeds. We affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
OMARI LEWIS CRUMP, SR., DEFENDANT

No. COA19-747

Filed 1 September 2020

1. Criminal Law—motion for mistrial—inadmissible evidence—curative instruction—jury polled

In a prosecution for forcible sexual offense, the trial court did not abuse its discretion by denying defendant's motion for mistrial where, after the victim testified that someone had pressured her not to testify, the trial court sustained defendant's objection to the testimony, gave a strong curative instruction to the jury (even stating that the person who pressured the victim was not defendant), and polled the jurors as to their understanding of the curative instruction.

2. Constitutional Law—effective assistance of counsel—admission of element of charge—no violation

Where defense counsel admitted an element of the charge against defendant (that he engaged in a sexual act with the victim—an element of second-degree forcible sexual offense) during closing argument without defendant's consent, defendant's Sixth Amendment right to effective assistance of counsel was not violated. Neither admission of an element of a charge nor misspeaking constitute a per se violation of the Sixth Amendment, and counsel's performance was not objectively deficient.

3. Constitutional Law—effective assistance of counsel—admission of element of charge—no structural error

The Court of Appeals declined to interpret *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), to extend *State v. Harbison*'s prohibition against admitting a client's guilt without consent to a prohibition against admitting an element of the charge without consent. Because defense counsel admitted only an element of the charge without defendant's consent, there was no structural error.

Appeal by Defendant from judgments entered 31 January 2019 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 2020.

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

Franklin E. Wells, Jr. for defendant-appellant.

MURPHY, Judge.

The trial court did not abuse its discretion when, in response to questions deemed inadmissible regarding witness intimidation, it denied Defendant's motion for a mistrial, sustained Defendant's objection to the questions, gave a curative instruction to the jury, and polled the jury as to their understanding of the curative instruction.

Further, the United States Supreme Court's recent decision in *McCoy v. Louisiana* does not change our ineffective assistance of counsel analysis. *McCoy v. Louisiana*, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). When a defense counsel makes statements in closing that are either an admission of an element of the charged crime or misstatements that defense counsel rectifies, a defendant's Sixth Amendment rights are not automatically violated.

BACKGROUND

Omari Lewis Crump ("Defendant") appeals his convictions of possession of a firearm by a felon and second-degree forcible sexual offense under N.C.G.S. § 14-27.27. The incident leading to his arrest involved an encounter with an individual initially thought to be his daughter, Kate.[1] At trial, the State presented evidence that Defendant discharged

1. This pseudonym is used throughout this opinion to protect the identity of the juvenile and for ease of reading.

a shotgun from his apartment's balcony and forcibly attempted to have sexual intercourse with Kate. Defendant asserts two issues on appeal.

First, Defendant argues the trial court abused its discretion when, after the State asked Kate if anyone had pressured her not to testify, it denied his motion for a mistrial and instead gave a curative instruction to the jury. Defendant argues the trial court's instruction was insufficient to cure the prejudice caused by these questions. Before trial, Defendant moved to exclude testimony *from a detective* pertaining to Kate's grandmother allegedly pressuring Kate not to testify. The State acknowledged the issue would be moot unless it called the detective as a witness and agreed to refrain from questions and comments regarding the detective's potential testimony on that matter.[2]

When the State asked Kate if anyone had pressured her not to testify, Defendant objected, and the trial court overruled the objection. When the State asked how the person pressured Kate not to testify, Kate stated someone had pressured her not to testify; Defendant objected again and asked to be heard, and the trial court excused the jury. Although the State claimed the questions pertained to Defendant's fiancée pressuring Kate, the trial court sustained Defendant's objection. The trial court sustained the objection due to hearsay, but also as unfairly prejudicial to Defendant under Rule 403 of the North Carolina Rules of Evidence in the event the testimony was not hearsay.

Defendant then moved for a mistrial, which the trial court denied; instead, the trial court decided to issue a "strong cautionary instruction." The subsequent cautionary instruction to the jury explained that the trial court was "striking [the testimony] from the record, and . . . from your consideration," and the court had "learned that whoever this person was, . . . was not this Defendant."

The trial court also polled the jury concerning their ability to disregard the prior line of questioning and accept the cautionary instruction; each juror affirmed their ability to disregard the State's questioning in the matter and to accept the cautionary instruction.

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2. On appeal, Defendant seeks to connect the State's partial agreement regarding the detective's testimony to the State's questions to Kate during trial. The connection between the subject matter of Defendant's applicable motion in limine and the State's questioning of Kate is tenuous, as the State's agreement during motions in limine was to refrain from certain questions to the detective, not to Kate. We focus our analysis on the State's questions to Kate during trial, Defendant's objections to those questions, and the trial court's response to those questions and objections. We do not agree with Defendant that the State violated its agreement concerning the applicable motion in limine.

Second, Defendant argues Defense Counsel's direct or tacit admission, without Defendant's consent, that Defendant and Kate had sexual contact violated his Sixth Amendment rights and was ineffective assistance of counsel or structural error.

Defendant references two types of statements Defense Counsel made in closing—the first regarding incest, and the second regarding consent. The State initially charged Defendant with incest, but later dropped the charge. In closing, Defense Counsel made statements regarding the State's unsuccessful case against Defendant relating to incest, stating "the [S]tate had a slam-dunk incest case" initially, but the State's expert "determined they weren't related." Defense Counsel stated he was not conceding any element of the crime, but made multiple statements regarding consent and sexual contact between Defendant and Kate. After these comments, the trial court ascertained Defense Counsel made these statements without Defendant's consent. The trial court allowed Defense Counsel to reopen his closing statement due to Defendant's concerns about the comments regarding sexual activity with Kate, and Defense Counsel's explanation to the trial court that the expressed view regarding the strength of the incest case "was the [former] view of the [S]tate," not Defense Counsel's view. Upon reopening closing argument, Defense Counsel stated "[w]hat was meant to be said was the [S]tate *thought* they had a slam-dunk incest case, and then they found it was determined it wasn't there." (Emphasis added). After Defense Counsel's comments in the re-opened closing argument, the trial court polled the jurors concerning the comments, ensuring the jury understood Defendant's position.

Defendant argues he is entitled to a new trial if we agree with either claim of error.

ANALYSIS

A. Mistrial

[1] We review a trial court's denial of a defendant's motion for mistrial for abuse of discretion. *State v. Hester*, 216 N.C. App. 286, 290, 715 S.E.2d 905, 908 (2011). "It is well settled that a motion for a mistrial and the determination of whether [a] defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (quoting *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996)). "The trial court's decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *King*, 343

N.C. at 44, 468 S.E.2d at 242. Often, "[a]ny potential prejudice [is] cured by the trial court's instruction to the jury not to consider the remark." *McNeill*, 349 N.C. at 648, 509 S.E.2d at 423. In *State v. Locke*,

> the trial court's prompt actions of sustaining the objections and issuing a curative instruction were sufficient to cure any prejudice. This Court has held consistently that such actions cure any prejudice due to a jury's exposure to incompetent evidence from a witness. . . . [The] defendant's argument appears to be that the mere questions posed by the prosecutor were prejudicial. The Court applies the same rule when faced with this situation.

State v. Locke, 333 N.C. 118, 124, 423 S.E.2d 467, 470 (1992) (internal citation omitted).

The questions at issue are:

[State:]	Has anyone tried to talk you out of coming to court?
[Defense Counsel:]	Objection.
THE COURT:	Overruled.
[Kate:]	Yes.
[State:]	How specifically did that person try to talk you out of coming to court?
[Kate:]	One, they offered me money not to come.
[Defense Counsel:]	Objection. May we be heard, Your Honor?

After determining this testimony was inadmissible, the trial court denied Defendant's motion for a mistrial and gave the following subsequent cautionary instruction to the jury:

> *The Court will sustain the objection to the last question and indeed to all the questions on that last topic*. And the Court is going to -- Members of the Jury, I'm *striking from the record*, and therefore will tell you to *strike from your consideration*, any testimony that some person whose name you have not heard, talked to this witness about not coming to court.

> That is no longer in the record, and it's no longer for your consideration. I'm instructing you not to consider that in any way, shape or form in your deliberations.
>
> Moreover, *I'm going to go a step further*, that's usually what I would do. I'm going to go a step further. I'm telling you that *I have learned that whoever this person was*, if they said what was alleged to be said, *was not this Defendant*. So that whoever that person that you heard was unnamed, that was not [Defendant], it was not [Defendant]; all right?
>
> I will further tell you that *the State and [Defendant] agree that there is no evidence whatsoever that [Defendant] solicited* anybody to talk with this witness about upcoming court, or *coached or enticed or paid* somebody to talk to this witness about not coming to court, *or even knew* of any statement or effort on the part of another person, whoever that might be, to talk to this witness about not coming to court.
>
> Whoever that person was, I'm telling you it was not [Defendant], and that's from the State; okay? And I'm also telling you the D.A.s and [Defendant] agree that there is *no evidence to implicate [Defendant] in any way shape or form that somebody warned this witness saying don't come to court*, if that was said. Having said that, don't consider it, *compartmentalize it*.

(Emphasis added).

After the cautionary instruction, the trial court polled the jurors in the following manner:

> So let me ask a question. . . . How many Members of the Jury believe that you can accept what I've told you, that whoever that was, it was not [Defendant], that there's no evidence at all that he knew anything about it or had anything to do with it?
>
> And further, can even ignore and block this away and never consider it as you debate on the verdicts in these cases? If you can do that, please raise your hand.
>
> (Affirmative response from the fourteen jurors.)

> THE COURT: The Court finds that all twelve jurors and two alternative juror[s] have replied in the affirmative. If you could not do that, if you believe that somehow or another this is going to affect your deliberation or you can't put it out of your mind, please raise your hand.
>
> (No response from the fourteen jurors.)
>
> THE COURT: Let the record reflect that no jurors have replied in the affirmative.

In light of our caselaw regarding the import and effect of jury instructions to cure potential prejudice, as well as removal of evidence from the consideration of the jury, the denial of the motion for a mistrial in this case was not an abuse of discretion. *See McNeill*, 349 N.C. at 648, 509 S.E.2d at 423; *see also Locke*, 333 N.C. at 124, 423 S.E.2d at 470. We also note the connection between the subject matter of Defendant's applicable motion in limine and the State's questioning of *Kate* is tenuous, as the State's agreement during motions in limine was to refrain from asking certain questions *to the detective*.

The trial court properly exercised its discretion by issuing a strong curative instruction to the jury and by polling the jury on disregarding the inadmissible testimony to cure any potential prejudice. *See McNeill*, 349 N.C. at 648, 509 S.E.2d at 423; *see also Locke*, 333 N.C. at 124, 423 S.E.2d at 470.

B. Defense Counsel's Closing Arguments

1. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

> When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden[, a] defendant must satisfy a two part test. 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error[was] so serious as

> to deprive the defendant of a fair trial, *a trial whose result is reliable*.'

State v. Braswell, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)) (internal citations omitted).

"[I]neffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-508 (1985). However, where "counsel [admits an element of the crime charged, but does] not admit guilt [and tells] the jury that they could find the defendant not guilty . . . [the admission] does not fall with the *Harbison* line of cases where violation of the defendant's Sixth Amendment rights are presumed." *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986); *see generally State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002).

If defense counsel admits the guilt of his or her client during trial over the disagreement of the defendant, defense counsel violates his or her client's Sixth Amendment rights and commits structural error. *McCoy*, 138 S. Ct. at 1509-11, 200 L. Ed. 2d at 831-33.

2. Ineffective Assistance of Counsel

[2] Although usually properly resolved at the trial court, we address Defendant's ineffective assistance of counsel argument, which centers on Defense Counsel's statements during closing argument regarding sexual contact between Defendant and Kate. *See State v. Clark*, 159 N.C. App. 520, 531, 583 S.E.2d 680, 687 (2003) ("Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. Such claims may, however, be raised on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue."). In closing, Defense Counsel made the following statements regarding the State's unsuccessful case against Defendant:

> The [S]tate went from a theory of incest, because everybody presumed they were related, until [the State's expert] took out her computer and looked at the alleles and determined they weren't related.
>
> . . .
>
> "[T]he [S]tate had a slam-dunk incest case. No longer. After [the State's expert] did her scientific testing on both

> buccal swabs from [Kate] and from [Defendant], the family relationship was over."

Despite Defense Counsel's statement he was not conceding any element of the crime, he also made statements regarding consent and sexual contact:

> I'm going to suggest to you the real operative fact in this case, as dirty and unpalatable as the facts are, is whether there was consent and whether it was by force.
>
> . . .
>
> [Kate] signed off on it happening . . . . You can attach her inference to it, but I'll tell you the inference it attaches to. It attaches to this situation was consensual at that point.
>
> . . .
>
> [T]he [S]tate had a slam-dunk incest case. No longer. After [the State's expert established Defendant and Kate were not related], the family relationship was over, [and] we're left with a second-degree sex offense where consent and force and these other things have to come into play.

If Defense Counsel admitted Defendant's guilt in closing argument without the consent of Defendant, counsel violated Defendant's Sixth Amendment rights, and Defendant would prevail on his ineffective assistance of counsel claim. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-508. However, the transcript does not reveal any such admission of guilt occurred, and caselaw does not support Defendant's argument that an admission of an element of the charge violates his Sixth Amendment rights. *See Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Gainey*, 355 N.C. at 93, 558 S.E.2d at 476.

Defense Counsel either admitted an element of a charge without Defendant's consent or misspoke. First, Defense Counsel may have *admitted an element*—specifically, the "engages in a sexual act with another person" element—of the second-degree forcible sexual offense charge without Defendant's consent, particularly in his discussion of consent as it related to Defendant and Kate. If the statements during closing argument were not such an admission, Defense Counsel *misspoke* concerning the incest charge the State dismissed and its supposed effect on the State's strategy at trial. Neither an admission of an element without Defendant's consent nor misspeaking constitute a per se violation of *Harbison* or *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

Defense Counsel's statements regarding consent and the dismissed incest charge relate to second-degree forcible sexual offense defined by statute as:

> (a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person[.]

N.C.G.S. § 14-27.27 (2019). If Defense Counsel's comments regarding consent and the dropped incest charge were an admission of consensual sexual contact between Defendant and Kate, Defense Counsel would have admitted commission of section (a) of the statute—"if the person engages in a sexual act with another person." N.C.G.S. § 14-27.27 (a) (2019). However, an admission of consensual sexual contact is not an admission of the "[b]y force and against the will of the other person" element. N.C.G.S. § 14-27.27 (a)(1) (2019). Nowhere in his closing argument did Defense Counsel admit his client's guilt under every element of N.C.G.S. § 14-27.27; specifically, Defense Counsel did not admit to *both* (a) and (a)(1). *See id.* Defense Counsel vociferously argued that Defendant did not perpetrate sexual contact "[b]y force and against the will of the other person." *Id.* Thus, Defense Counsel did not admit Defendant's guilt under the statute and did not commit a per se Sixth Amendment violation under *Harbison*.

However, Defense Counsel's statements could also have been a simple misstatement, which was properly remedied by re-opening his closing argument to clarify what he meant, as an incest charge was not before the trial court. Defense Counsel claimed he meant to argue the State had to change its approach when DNA evidence showed Defendant was not Kate's biological father; in other words, Defense Counsel argued the State thought it had an easy conviction regarding incest, but the DNA evidence changed the case to one of force and consent.

We disagree with Defendant's argument on appeal that Defense Counsel's comments concerning a dropped incest charge and whether sexual contact between Defendant and Kate was consensual were a violation of *Strickland* and constituted ineffective assistance of counsel. We review Defense Counsel's comments according to the highly deferential judicial scrutiny of counsel's performance required by *Strickland*. *Strickland*, 466 U.S. at 680-81, 80 L. Ed. 2d at 689. An admission of an element does not constitute an admission of guilt, and the comments were not a *Harbison* violation. *See Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Gainey*, 355 N.C. at 93, 558 S.E.2d at 476.

Furthermore, tactical errors and misstatements do not necessarily equate to a Sixth Amendment violation. *Fisher*, 318 N.C. at 533-34, 350 S.E.2d at 346-47. Since incest was not a charge before the trial court, and the jury had heard expert testimony that Defendant was not the biological father of Kate, Defense Counsel's statements regarding the State having "a slam-dunk incest case" were not objectively deficient representation resulting in prejudice that made a fair trial impossible. Rather, Defense Counsel's comments attacked the State's strategy and strength of position in its prosecution of Defendant, which was not objectively deficient representation under *Strickland*.

3. Structural Error

[3] Defendant also argues Defense Counsel committed structural error, asking us to interpret *McCoy v. Louisiana* to extend *Harbison*'s prohibition from admitting a client's *guilt* to a prohibition of admitting an *element* without a client's consent. *See McCoy*, 138 S. Ct. at 1509-11, 200 L. Ed. 2d at 831-34. In *McCoy*, the United States Supreme Court held that

> [b]ecause a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative [when counsel admitted McCoy murdered three family members over McCoy's objection].
>
> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review.

Id. at 1510-11, 200 L. Ed. 2d at 833 (internal citations omitted).

However, the approach Defendant proposes does not comport with the Supreme Court's holding and view of the facts in *McCoy*. *Id.* at 1512, 200 L. Ed. 2d 821. In *McCoy*, the defendant pleaded not guilty to murdering three family members. *Id.* at 1505-06, 200 L. Ed. 2d at 827. Over the defendant's repeated disagreement, the defense counsel admitted his client "committed three murders. . . . [The defense counsel admitted] he's guilty . . . [and] told the jury . . . that McCoy was the killer" and " 'took [the] burden off of [the prosecutor] . . . on that issue.' " *Id.* at

1505-07, 200 L. Ed. 2d at 827-29. The defense counsel also stated "there was 'no way reasonably possible' that [the jury] could hear the prosecution's evidence and reach 'any other conclusion than Robert McCoy was the cause of these individuals' death,' " and " '[his] client committed three murders.' " *Id.* at 1506-07, 200 L. Ed. 2d at 828.

The Supreme Court deemed the defense counsel's "admission of McCoy's *guilt* despite McCoy's insistent objections [to be] incompatible with the Sixth Amendment," which constituted structural error, as the admissions prevented the defendant from making "the fundamental choices about his own defense," namely whether to plead guilty or not guilty. *Id.* at 1511-12, 200 L. Ed. 2d at 834 (emphasis added). Even Justice Alito's Dissent, which posited that the defense counsel only admitted an element that would necessitate a different result, acknowledged "[w]hen the Court expressly states its holding, it refers to a concession of guilt," not the concession of an element. *Id.* at 1512 n.1, 200 L. Ed. 2d at 834 n.1. According to Justice Alito, McCoy's counsel only admitted the commission of an element, which would not constitute error. *Id.* at 1512, 200 L. Ed. 2d at 834-35.

In light of the Majority and the Dissent in *McCoy* differing on whether the defense counsel admitted guilt or an element of the offense but not on the result each type of admission merited, *McCoy* did not change our *Harbison* landscape. Defendant's argument that the admission of an element without a client's consent constitutes structural error because "Mr. McCoy's lawyer made it clear he was only admitting one element" does not comport with the holding in *McCoy*, where the Majority repeatedly stated McCoy's lawyer admitted his client's *guilt*, not an element. *Id.* at 1510-12, 200 L. Ed. 2d at 833-34.

Here, Defense Counsel's comments during closing arguments were at most an admission of an element of the offense without Defendant's consent. There was no structural error.

CONCLUSION

The trial court did not abuse its discretion when it denied Defendant's motion for a mistrial, and instead gave a curative instruction to the jury and polled the jurors on their understanding.

Defense Counsel's performance was not objectively deficient under *Strickland*. *McCoy* does not change our ineffective assistance of counsel analysis. Defense Counsel's statements, which were either an admission of an element of second-degree forcible sexual offense or misstatements Defense Counsel rectified, did not violate Defendant's Sixth

Amendment rights, no structural error occurred, and Defense Counsel provided effective assistance of counsel under *Strickland*.

AFFIRMED.

Judges COLLINS and YOUNG concur.

STATE OF NORTH CAROLINA
v.
JARRION E. HOOD

No. COA19-736

Filed 1 September 2020

1. Jury—selection—motion to strike jury panel—lack of randomness—prejudice analysis

In a murder trial, defendant failed to show he was prejudiced by the trial court's denial of his motion to strike the first twelve prospective jurors for lack of randomness (eleven of whom had surnames that started with the letter "B"). Even if the selection of names was not random as required by statute (N.C.G.S. § 15A-1214(a)), defendant neither struck nor exercised a peremptory challenge against any of these prospective jurors, six of whom were ultimately empaneled on the jury, and made no showing that the selection process affected the outcome of his trial.

2. Jury—selection—Batson claim—summary denial—lack of findings

In a murder trial, the trial court erred by summarily denying defendant's *Batson* claim, asserting that the State dismissed a juror on the basis of race and that the State's purported race-neutral reason was pretextual, without making findings showing that it considered all of the evidence presented by defendant. The matter was remanded for a *Batson* hearing and entry of an order with requisite findings and conclusions.

Appeal by defendant from judgments entered 29 May 2018 by Judge R. Allen Baddour, Jr., in Durham County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Marilyn G. Ozer for defendant-appellant.

ZACHARY, Judge.

Defendant Jarrion E. Hood appeals from judgments entered upon a jury's verdicts convicting him of first-degree felony murder, two counts of attempted robbery with a dangerous weapon, and possession of a firearm by a felon. On appeal, Defendant argues that the trial court (1) erred by denying his written motion to strike the initial jury panel, and (2) clearly erred by overruling his *Batson* challenge. After careful review, we conclude that Defendant's first argument lacks merit. With regard to Defendant's *Batson* challenge, we remand for the trial court to conduct a proper *Batson* hearing consistent with our Supreme Court's recent holding in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020).

Background

In October 2014, Adam Behnawa responded to Defendant's post on Craigslist.com listing a cell phone for sale. The men arranged to meet in a residential neighborhood in Durham County, North Carolina so that Behnawa could examine the cell phone and possibly purchase it from Defendant. In the early evening of 28 October 2014, Behnawa and his son, Jawad Razai, drove to the agreed-upon location. Upon approaching the driver's side window on foot, Defendant pointed a gun at Behnawa and Razai, demanded money, and proceeded to pistol-whip Behnawa. Behnawa gave Defendant $100 and attempted to drive away, but Defendant prevented him from leaving by reaching in and turning off the truck, and he demanded Behnawa's cell phone and more money.

Despite Razai's offer of money, Defendant continued pistol-whipping Behnawa about the head. Razai exited the truck, and was eventually able to grab Defendant from behind. The men struggled for Defendant's gun; two shots were fired, one of which mortally wounded Razai.

After a foot chase, Behnawa tackled Defendant. A bystander restrained Defendant while Behnawa returned to check on his son. Behnawa prayed in Farsi as he waited for the EMTs to arrive. Razai died at the hospital while Behnawa was at the police station giving his statement. Meanwhile, Defendant was arrested and charged with possession of a firearm by a felon, two counts of attempted robbery with a dangerous weapon, and murder.

The case against Defendant came on for trial on 14 May 2018 in Durham County Superior Court, the Honorable R. Allen Baddour, Jr., presiding.[1] Before commencing jury voir dire, defense counsel told the trial court that she was concerned that the jury venire had not been randomly selected. Counsel orally moved to strike the first 12 prospective jurors called from the jury panel; the trial court denied Defendant's motion and proceeded with voir dire. On the second day of voir dire, Defendant filed a written motion to strike the jury panel for lack of randomness, which the trial court denied in open court. On the third day of jury voir dire, Defendant raised a *Batson* challenge to the State's exercise of a peremptory strike against an African-American prospective juror. The trial court summarily denied Defendant's *Batson* challenge. The jury was empaneled the following day.

On 29 May 2018, the jury returned verdicts finding Defendant guilty of all charges. The trial court arrested judgment on both convictions for attempted robbery with a dangerous weapon. For his first-degree felony murder conviction, the trial court sentenced Defendant to life imprisonment without the possibility of parole. The trial court imposed an additional concurrent sentence of 15-27 months for Defendant's conviction for possession of a firearm by a felon. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, Defendant argues that (1) the trial court erred by denying his written motion to strike the jury panel because it was not randomly selected, and (2) the trial court clearly erred by overruling his *Batson* challenge. We address each argument in turn.

I. Jury Selection Procedures

[1] There is a statutory two-step process for selecting the jury panel. First, the jury commission for each county constructs a master jury list of prospective jurors from lists of registered voters and licensed drivers, as well as other reliable sources of names. N.C. Gen. Stat. §§ 9-1 & 9-2(a)-(b) (2019). The clerk of superior court is then tasked with preparing a randomized list of names of individuals to be summoned for jury duty from the master jury list. *Id.* § 9-5. The clerk is required to prepare the randomized list by "a method of selection that results in each name on a list having an equal opportunity to be selected." *Id.* § 9-2(h).

1. A trial for these offenses initially commenced on 15 August 2017, but due to defense counsel's health problems, the trial court ordered a mistrial on 23 August 2017.

In criminal cases, "[j]urors are selected [from the jury panel] . . . pursuant to section 15A-1214(a), which provides in pertinent part: 'The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called.' " *State v. Williams*, 363 N.C. 689, 709-10, 686 S.E.2d 493, 506 (2009) (quoting N.C. Gen. Stat. § 15A-1214(a) (2007)), *cert. denied*, 562 U.S. 864, 178 L. Ed. 2d 90 (2010). "The intended result of jury selection is to empanel an impartial and unbiased jury." *State v. Garcia*, 358 N.C. 382, 407, 597 S.E.2d 724, 743 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

In the instant case, Defendant contends that the trial court "violated the statutory mandate of random jury selection when it denied Defendant's written motion to strike" the first 12 prospective jurors called from the jury panel "for lack of randomness." Whether a trial court violated a statutory mandate is a question of law, subject to de novo review on appeal. *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017).

Prior to the commencement of jury selection, the clerk provided the prosecutors and defense counsel with the list of the first 12 jurors to be called from the master jury list. Each juror had previously been assigned a unique number: the numbers assigned to the first 12 prospective jurors were 25, 96, 61, 153, 6, 3, 133, 102, 165, 114, 122, and 121. Of these, 11 had surnames beginning with the letter "B," while the twelfth had a surname beginning with the letter "C." Ten of the initial prospective jurors self-identified as white or Caucasian, one as black or African-American, and one as mixed race.

Before beginning jury voir dire, defense counsel moved to strike from the jury panel the first 12 prospective jurors listed by the clerk, arguing that the fact that 11 of the first 12 prospective jurors had surnames that started with the letter "B" indicated that they had not been selected randomly. The clerk responded that this was "just coincidental." The trial court denied Defendant's motion in open court, reasoning that although "the possibility exists of an alphabetical list or a stack of juror cards being presented to the clerk, [i]t is just as likely that the list was presented to the clerk in random order or in numerical order," and concluding that the juror numbers were nonsequential and appeared to be random. Six of the first 12 prospective jurors were ultimately empaneled as jurors.

Assuming, *arguendo*, that the clerk violated the mandatory statutory procedure for calling jurors from the panel in the case at bar, "a new

trial does not necessarily follow a violation of [a] statutory mandate." *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192 (2006). A defendant challenging such a violation must also establish "that [he was] prejudiced by this violation." *Id.* at 623, 630 S.E.2d at 241.

Defendant contends that he was prejudiced by the racial composition of the jury that resulted from the improper selection of the initial 12 prospective jurors from the jury panel. According to Defendant, the first 12 prospective jurors did not reflect the racial composition of Durham County: ten of the initial prospective jurors self-identified as white or Caucasian, one as black or African-American, and one as mixed race. The racial composition of the entire jury panel from which the initial 12 prospective jurors were drawn is not indicated.

In cases involving the violation of a statutory mandate for jury selection, "this Court has looked . . . to whether all peremptory challenges were exercised by the defendant in determining prejudice. If peremptory challenges are unused and the defendant makes no challenge for cause, then he cannot say he was forced to accept an undesirable juror." *Id.* at 623-24, 630 S.E.2d at 241 (citations omitted). Here, Defendant did not strike any of the initial 12 prospective jurors for cause, nor did he exercise a peremptory challenge against any of the initial 12 prospective jurors.

To be sure, it seems implausible that this particular selection of names for the initial 12 jurors called to the jury box would appear at random. Nevertheless, Defendant fails to raise "anything more than . . . a blanket assertion that [the] statutory violation of mandated jury selection procedures prejudiced [him]." *Id.* at 624, 630 S.E.2d at 241. We do not determine whether the first 12 prospective members called from the jury panel, or the jury panel as a whole, was randomly selected; however, even if there were a violation of section 15A-1214(a), Defendant has not established that the clerk's selection of the initial 12 prospective jurors "affected the conduct or outcome of his trial." *Garcia*, 358 N.C. at 408, 597 S.E.2d at 743. Accordingly, Defendant's first argument must fail.

II. Batson Challenge

[2] Defendant next contends that the State exercised a peremptory challenge against an African-American prospective juror for a racially discriminatory purpose, violating "the juror's constitutional right to serve on a jury and Defendant's constitutional rights to equal protection, due process and a jury of his peers."

A. Standard of Review

Upon review of a *Batson* inquiry, "[t]he findings of a trial court are not to be overturned unless the appellate court is convinced that its determination was clearly erroneous." *State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75 (citation and internal quotation marks omitted), *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). Under this standard, an appellate court will not reverse the trial court's ruling "unless on the entire evidence we are left with the definite and firm conviction that a mistake has been committed." *State v. Taylor*, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008) (citations and internal quotation marks omitted), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009). "[I]ssues of law are reviewed de novo." *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497.

B. Analysis

In North Carolina, a party may challenge an unlimited number of prospective jurors for cause. *See* N.C. Gen. Stat. § 15A-1212. Parties also may exercise a limited number of peremptory challenges to strike potential jurors, usually without any explanation. *See State v. Smith*, 291 N.C. 505, 526, 231 S.E.2d 663, 676 (1977) ("The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control."). Each defendant may exercise as many as six peremptory challenges during jury voir dire in a noncapital case, while the State is allowed six peremptory challenges per defendant. N.C. Gen. Stat. § 15A-1217(b). The parties are also "entitled to one peremptory challenge for each alternate juror in addition to any unused challenges." *Id.* § 15A-1217(c).

Peremptory challenges generally allow a party to remove a prospective juror for any reason. However, article I, section 26 of the North Carolina Constitution prohibits the use of peremptory challenges to exclude potential jurors "from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. In addition, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States "prohibits discrimination in jury selection on the basis of race, *see Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), or gender, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 L. Ed. 2d 89 (1994)." *State v. Maness*, 363 N.C. 261, 271, 677 S.E.2d 796, 803 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010). "Even a single act of invidious discrimination may form the basis for an equal protection violation." *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

In order to determine whether the State has engaged in impermissible racial discrimination in the selection of jurors, as proscribed by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the trial court must conduct a three-part analysis:

> First, the defendant must establish a *prima facie* case that the State has exercised a peremptory challenge on the basis of race. Second, once the *prima facie* case has been established by the defendant, the burden shifts to the State to rebut the inference of discrimination by offering a race-neutral explanation for attempting to strike the juror in question. The explanation must be clear and reasonably specific, but need not rise to the level justifying exercise of a challenge for cause. The prosecutor is not required to provide a race-neutral reason that is persuasive or even plausible. The issue at this stage is the facial validity of the prosecutor's explanation; and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. Our courts also permit the defendant to introduce evidence at this point that the State's explanations are merely a pretext. Third, and finally, the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination.

State v. Braxton, 352 N.C. 158, 179-80, 531 S.E.2d 428, 440-41 (2000) (citations and internal quotation marks omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

Our Supreme Court recently addressed the assessment required of a trial court in evaluating a *Batson* challenge. *Hobbs*, 374 N.C. at 349-60, 841 S.E.2d at 497-503. The defendant in *Hobbs* was an African-American male who was indicted for numerous felonies, including murder. *Id.* at 346, 841 S.E.2d at 495. Prior to trial, the defendant filed a motion containing statistical information regarding prior capital cases tried in the county in which he was being tried.[2] *Id.* During voir dire, the defendant raised *Batson* challenges to the State's peremptory challenges of African-American prospective jurors. *Id.* The trial court denied the defendant's *Batson* challenges, ruling that the State's peremptory challenges were not made on the basis of race. The defendant was convicted

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2. Unlike the instant case, the defendant in *Hobbs* was capitally tried. *Hobbs*, 374 N.C. at 348, 841 S.E.2d at 496. However, this distinction has no bearing on our *Batson* analysis.

of first-degree murder by malice, premeditation, and deliberation, and also under the felony-murder rule, along with five other felonies. *Id.* at 346-47, 841 S.E.2d at 495.

On appeal, our Supreme Court held, in pertinent part, that the trial court erred by failing to properly "consider[ ] all of the evidence necessary to determine whether [the defendant] proved purposeful discrimination with respect to the State's peremptory challenges" of the potential jurors in question. *Id.* at 356, 841 S.E.2d at 501. Citing the United States Supreme Court's recent decision in *Flowers v. Mississippi*, ___ U.S. ___, ___, 204 L. Ed. 2d 638, 657 (2019), the *Hobbs* Court stated that a defendant attempting to prove purposeful discrimination is entitled to "rely on all relevant circumstances to support a claim of racial discrimination in jury selection[,]" and to offer evidence that might include:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id.

"[W]hen a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge." *Id.* Thus, in *Hobbs*, the trial court erred by, *inter alia*, failing to "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence," and failing to conduct a comparative juror analysis, in an order supported by findings of fact and conclusions of law, and the case was remanded for a new *Batson* hearing. *Id.* at 358, 841 S.E.2d at 502.

In the instant case, Defendant raised a *Batson* challenge to the State's use of a peremptory challenge to strike an African-American prospective juror, Jermichael Smith. Defense counsel first presented the trial court with evidence of the prosecutor's "strike rate," which she contended showed that the State had exercised a disproportionate number of challenges against African-American prospective jurors, together with historical evidence of racial disparities in jury selection in North Carolina and in Durham County specifically. Defense counsel also noted that Defendant was African-American, while the victims were Afghan-Americans, and were "described as light-skinned by the witnesses[.]"

Additionally, defense counsel argued that despite Smith being "an ideal juror for the State in many ways," there were other indicia of racial discrimination, including the prosecutor's disparate questioning of Smith as compared to the other prospective jurors. For example, defense counsel noted that the prosecutor asked Smith "about being from a middle-class neighborhood, which did not come up with any of the other jurors." Defense counsel also claimed, *inter alia*, that the State improperly exercised a peremptory challenge against Smith because "he said that his cultural beliefs were that he's a black male," which Smith "expressed as distrust of the system"; therefore, "to the extent that the cultural beliefs [we]re the reason for the strike, [Smith] himself . . . directly linked that to his race as a black male."

The prosecutor responded that Smith was peremptorily challenged for race-neutral reasons, offering in rebuttal that Smith expressed an intense distrust of the legal system, and that he seemed to be strongly affected by the murders of several friends, whose deaths he felt were "of little concern to the government." In addition, the prosecutor noted his personal impression from Smith's responses during voir dire that although Smith had previously been a crime victim, he had also been a participant in a crime.

Defense counsel asserted in surrebuttal that the State's "laundry list" of reasons for the peremptory challenge was "inherently some evidence of pretextualness." Counsel also argued that Smith's distrust of the system was the result of being a black male, and therefore was not a race-neutral reason for the State's exercise of its strike. Moreover, defense counsel asserted that Smith "was differentially questioned" as compared to other prospective jurors, who received far fewer questions from the prosecutor.

The State then responded to Defendant's surrebuttal. Defendant moved to strike the rebuttal to the surrebuttal, but the trial court did not

rule on that motion. The trial court then summarily denied Defendant's *Batson* challenge, without making any findings of fact or conclusions of law.

The trial court's summary denial of Defendant's *Batson* challenge precludes appellate review. The trial court was tasked with considering the evidence and determining whether the challenged strike of prospective juror Smith "was motivated in substantial part by discriminatory intent" on the part of the State. *Id.* at 353, 841 S.E.2d at 499 (citation and internal quotation marks omitted). Without specific findings of fact, this Court cannot establish on review that the trial court "appropriately considered all of the evidence necessary to determine whether [Defendant] proved purposeful discrimination with respect to the State's peremptory challenge[ ]" of Smith. *Id.* at 356, 841 S.E.2d at 501.

Moreover, the trial court's ruling was deficient in that it "did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges[.]" *Id.* at 358, 841 S.E.2d at 502; *see also id.* ("[T]here is nothing new about requiring a court to consider all of the evidence before it when determining whether to sustain or overrule a *Batson* challenge.").

Pursuant to *Hobbs*, the trial court therefore erred in failing to make the requisite findings of fact and conclusions of law addressing the evidence presented by counsel. *See id.* at 360, 841 S.E.2d at 503-04 (remanding to the trial court with instructions "to conduct a *Batson* hearing . . . [and] to make findings of fact and conclusions of law"); *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) ("[I]t becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext."), *cert. denied*, 619 U.S. 1061, 136 L. Ed. 2d 618 (1997).

As made evident by our Supreme Court, the trial court's error requires remand for a new *Batson* hearing. *Hobbs*, 374 N.C. at 360, 841 S.E.2d at 504. "On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging juror [Smith] was pretextual. This determination must be made in light of all the circumstances" surrounding the State's use of its peremptory challenge. *Id.* at 360, 841 S.E.2d at 503. The trial court's order should demonstrate that the trial court considered all evidence presented by the parties, and evince the trial court's analysis in reaching its ultimate determination.

Conclusion

Defendant was not prejudiced by the trial court's denial of Defendant's motion to strike the initial jury panel due to an alleged, but unsubstantiated, violation of a statutory mandate.

Under the standard in *Hobbs*, the trial court erred in failing to make findings of fact and conclusions of law reflecting its analysis of the evidence in ruling upon Defendant's *Batson* challenge. We therefore remand this case to the trial court with instructions to conduct a *Batson* hearing consistent herewith and to enter an order containing the requisite findings of fact and conclusions of law.

NO ERROR IN PART; REMANDED FOR REHEARING.

Judges TYSON and BROOK concur.

STATE OF NORTH CAROLINA
v.
DMARLO LEVONNE FAULK JOHNSON, DEFENDANT

No. COA19-191-2

Filed 1 September 2020

1. Homicide—felony murder—assault on a law enforcement officer—general intent crime—diminished capacity—defense not available

Any error in the trial court's denial of defendant's motion for a continuance requesting more time to prepare for the State's rebuttal of his diminished capacity defense was not prejudicial where the jury found defendant guilty of felony murder with the underlying felony of assault on a law enforcement officer—a general intent crime, for which the defense of diminished capacity is not available.

2. Criminal Law—continuance motion—denied—right to present a defense

In a prosecution for armed robbery (a specific intent crime), the trial court did not err by denying defendant's continuance motion requesting more time to review certain evidence (recordings of jailhouse phone calls) that the State intended to use to rebut his diminished capacity defense—or by admitting that evidence at trial. Even though the State notified defendant of its intent to use the evidence

only the day before trial, defendant was not deprived of his constitutional right to present his defense because defense counsel knew of the recordings' existence for many months before trial and defendant failed to show any prejudice resulting from the alleged errors.

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 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.

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1. Defendant was represented by appellate counsel when the records and briefs were filed. After the record and all briefs, including Defendant's reply brief, had been filed, on 19 August 2019, Defendant filed a pro se Motion for the Replacement of Appellate Counsel. On 28 August 2019, this Court dismissed the motion without prejudice based upon N.C. Gen. Stat. § 7A-498.8(b)(1). This case was heard without oral argument, so Defendant's appellate counsel had already completed everything needed for this case to be decided prior to the filing of Defendant's pro se motion. Defendant's counsel then filed a Motion to Withdraw as Appellate counsel and Defendant filed a Motion for Appointment of Counsel. We originally filed an opinion in this matter on 16 June 2020 and denied Defendant's Motion for Appointment of Counsel. Upon motion of the appellate counsel on behalf of Defendant to withdraw the opinion, we have withdrawn the original opinion and filed this new opinion solely to address Defendant's Motion for Appointment of Counsel. This footnote is the only substantive change to the opinion. We grant Defendant's Motion for Appointment of Counsel for any further proceedings in our appellate court system.

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 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 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).

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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.

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 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

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.

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 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.

---

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.

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

3. The State identified 45 potential witnesses at the start of the trial, and 21 witnesses testified for the State.

> 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 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

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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.

> 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 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.

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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.

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 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.

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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.

I also note I am baffled by one of 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:

> The North Carolina Supreme Court has summarized the analysis applied by federal courts in reviewing

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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 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).

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 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 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.

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10. At sentencing, the trial court also recommended that Defendant "receive the benefit of mental healthcare treatment within the Department of Adult Corrections."

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.
BILLY RUSSELL LAND

No. COA19-1060

Filed 1 September 2020

1. Contempt—summary direct criminal contempt proceeding—indigent defendant—statutory right to counsel

In a case of first impression, the Court of Appeals held that an indigent person's statutory right to counsel pursuant to N.C.G.S. § 7A-451(a)(1) did not apply in a summary direct criminal contempt proceeding.

2. Sentencing—errors in sentencing orders—clerical error—substantive change from sentence orally rendered in defendant's presence—remand

Two criminal contempt orders were remanded due to errors in sentencing. The first order was remanded for correction of a clerical error because the trial court orally announced a sentence of twenty-four hours in jail, but the court's written order sentenced defendant to thirty days. The second order was vacated and remanded for resentencing because defendant's right to be present during sentencing was violated. The court failed to specify in its oral pronouncement whether the sentence should run concurrently or consecutively, and there was no record of defendant being present when the order imposing a consecutive sentence was entered, which constituted a substantial change in the sentence.

Appeal by Defendant from Orders entered 29 July 2019 by Judge Angela Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 9 June 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

Dylan J.C. Buffum for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Billy Russell Land (Defendant) appeals from two Orders entered on 29 July 2019, finding him in criminal contempt. The Record reflects the following:

Following a trial in Forsyth County District Court, Defendant was found guilty of: (I) operating a motor vehicle on a street or highway while displaying an expired registration plate on the vehicle knowing the same to be expired; (II) operating a motor vehicle on a street or highway without having a current electronic inspection authorization for the vehicle, such vehicle requiring inspection in North Carolina; and (III) operating a motor vehicle on a street or highway with no liability insurance. Defendant appealed these convictions to Superior Court.

Defendant appeared for a calendar call in Forsyth County Superior Court on 29 July 2019. Defendant, found indigent by the trial court, waived his right to counsel for the appeal of his traffic violations and appeared pro se. After a contentious calendar call—during which the trial court determined Defendant was continuously interrupting the court and Defendant was warned to stop doing so or face direct criminal contempt proceedings—and as Defendant was leaving the courtroom, he again interrupted the trial court.

At this point, the trial court ordered Defendant be brought back before it, saying, "Sir, I've warned you and warned you. And I specifically just said do not interrupt my court again as I'm going on, and you made a comment as you went walking out the door very loudly." The trial court informed Defendant it was beginning a summary direct criminal contempt proceeding against him. The trial court provided Defendant the opportunity to respond to the allegations of criminal contempt, asking Defendant if there was anything he wished to say. Defendant argued, "I'm under the Constitution. This is an expired plate matter. Under the Constitution, it says it carries no jail time." The trial court explained Defendant was not being tried for the traffic citations at the moment but rather for direct criminal contempt. Defendant continued speaking over the trial court as it tried to ask if there was anything else he wished to say in his defense. After Defendant concluded, the trial court found Defendant in direct criminal contempt, sentencing him to twenty-four hours in the Forsyth County jail. Defendant gave notice of appeal in open court.

Defendant then asked, "How you gonna to [sic] place me under arrest, man? Y'all doing some illegal shit, man. I'm under the Constitution. The Haile -- the Haile is my law." The trial court warned Defendant if he

interrupted the trial court again, it would hold him in contempt for a second time. Ignoring the trial court, Defendant went on, "I'm a Hebrew Israelite from the Tribe of Judah. I'm not a US citizen. Y'all not got a right to do this." As the bailiff tried to escort Defendant from the courtroom, he continued, "Y'all doing some illegal shit in here." At this point, the trial court called Defendant before it once more to commence a second criminal contempt proceeding. As the trial court moved through the proceeding, Defendant continued interrupting and speaking over the trial court. He again expressed wanting to file a notice of appeal, saying, "My lawyer's Yahweh Yahweh Yahweh[.]" To the trial court, Defendant said:

> I don't know who you think you are, ma'am, but you supposed to follow the Constitution. Under Bryant [sic] versus United States, it says that the Court must be watchful for the constitutional rights of the people and the citizen. Now, you're not doing that ma'am -- you're up here being arrogant -- because I had a question to ask you about whether my court date was going to be today.

Defendant continued speaking as the trial court concluded the proceeding and again found Defendant in contempt of court. This time, Defendant was sentenced to thirty days in the Forsyth County jail. As the bailiff took him away, Defendant repeatedly gave notice of appeal in open court.

On 29 June 2019, the trial court entered two Orders finding Defendant in criminal contempt. In the first Order (19 CRS 1781 Order), the trial court sentenced Defendant to thirty days' imprisonment. In the second Order (19 CRS 1789 Order), the trial court also sentenced Defendant to thirty days' imprisonment, which was to run consecutively to Defendant's sentence in the 19 CRS 1781 Order.

Issues

On appeal, Defendant does not challenge the underlying bases of the Orders finding him in criminal contempt; rather, he focuses his arguments on whether he was deprived of the right to counsel in those proceedings and on errors in the entry of the Orders themselves. Thus, the dispositive issues are whether (I) the right to counsel granted under N.C. Gen. Stat. § 7A-451(a)(1) applies in a summary direct criminal contempt proceeding and (II) the trial court erred or committed clerical errors in entering its sentences in both the 19 CRS 1781 and 19 CRS 1789 Orders.

Analysis

I. Statutory Right to Counsel

[1] Defendant first argues the trial court deprived him of his statutory right to counsel. "[A]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017) (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." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

The trial court held Defendant in direct criminal contempt. Pursuant to Section 5A-13(a), direct criminal contempt occurs when the act:

> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13(a)(1)-(3) (2019). In addition, "[t]he presiding judicial official may punish summarily for direct criminal contempt according to the requirements of [N.C. Gen. Stat. § 5A-14.]" *Id.* § 5A-13(a). The requirements of N.C. Gen. Stat. § 5A-14 for imposing contempt in a summary proceeding are:

> (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.
>
> (b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

Id. § 5A-14(a)-(b) (2019).

Defendant contends he was entitled to counsel pursuant to N.C. Gen. Stat. § 7A-451(a)(1), which provides: "An indigent person is entitled to the services of counsel in . . . (1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." *Id.* § 7A-451(a)(1) (2019). The issue of whether Section 7A-451(a)(1)'s right to counsel applies in a summary direct criminal contempt proceeding is a question of first impression for our courts. In answering this question, we do, however, begin to find guidance for our analysis in our Supreme Court's decision in *Jolly v. Wright*. *See* 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993).

In *Jolly*, the sole question before the Court was "whether an indigent defendant has a statutory or constitutional right to be represented by appointed counsel in *civil* contempt proceedings[.]" *Id.* at 85, 265 S.E.2d at 138 (emphasis added). The defendant in *Jolly* contended Section 7A-451(a)(1), the subsection at issue in the present case, granted him a right to counsel in civil contempt proceedings because in such a proceeding, defendant argued, he was subject to imprisonment. *Id.* Accordingly, our Supreme Court, although not discussing direct criminal contempt, analyzed Section 7A-451(a)(1) in answering the question before it.

The Court first noted, "[t]he intent of the Legislature controls the interpretation of a statute." *Id.* at 86, 265 S.E.2d at 139 (citation omitted). The *Jolly* Court then described its holding in *State v. Morris*, which was decided in the wake of *Gideon v. Wainwright*,[1]—"the Sixth Amendment right to appointed counsel was applicable to all felony and misdemeanor cases where the authorized punishment exceeded six months in prison and a $500 fine." *Jolly*, 300 N.C. at 87, 265 S.E.2d at 139 (citing *State v. Morris*, 275 N.C. 50, 59, 165 S.E.2d 245, 251 (1969)). *Morris*'s holding was codified by our General Assembly in the original version of Section 7A-451(a)(1). *Id.*

In *Argersinger v. Hamlin*, however, the Supreme Court of the United States expanded on *Gideon*, holding the Sixth Amendment required: "absent a knowing and intelligent waiver, no person may be imprisoned for *any offense*, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972) (emphasis added) (footnote omitted). As recognized by the *Jolly* Court, our General Assembly amended Section

1. 372 U.S. 335, 9 L. Ed. 2d 799 (1963).

7A-451(a)(1) into its current form in a direct response to *Argersinger*. *Jolly*, 300 N.C. at 87, 265 S.E.2d at 139 (citation omitted).

The *Jolly* Court stated: "It is clear, then, that the purpose of [Section] 7A-451(a)(1), as presently written, is to state the scope of entitlement to court appointed counsel in Sixth Amendment cases in light of current constitutional doctrine." *Id.* at 87, 265 S.E.2d at 140 (footnote omitted). "Use of the phrase '[a]ny case' [in Section 7A-451(a)(1)] is responsive to the precise holding of *Argersinger*, which states that the Sixth Amendment precludes *imprisonment* of a person for 'any offense,' however classified, unless he was represented by counsel at his trial. The words '[a]ny case' in [Section] 7A-451(a)(1) must therefore be construed as any criminal case *to which Sixth Amendment protections apply*." *Id.* at 87-88, 265 S.E.2d at 140 (alterations in original) (emphasis added).

The Court in *Jolly* also pointed out beyond Subsection (a)(1), Section 7A-451 sets out a number of specific situations in civil cases in which an indigent party has a right to counsel and civil contempt is not one such situation. *Id.* at 90, 265 S.E.2d at 141. In concluding its statutory analysis, the *Jolly* Court determined, "[a] joint review of legislative history and case law developments in the area of the Sixth Amendment right to appointed counsel leaves no doubt that the purpose of [Section 7A-451(a)(1)] is to state the scope of an indigent's entitlement to court appointed counsel in criminal cases *subject to Sixth Amendment limitations*." *Id.* at 86-87, 265 S.E.2d at 139 (emphasis added).

The *Jolly* Court continued: "Given the civil nature of civil contempt, it follows that the Sixth Amendment right to counsel as set forth in *Argersinger* is inapplicable to civil contempt because that right is confined to criminal proceedings. Accordingly, if there is a right to counsel in a civil contempt action, its source must be found in the Due Process Clause of the Fourteenth Amendment[.]" *Id.* at 92, 265 S.E.2d at 142 (footnote and citations omitted). On the specific question before it, the Court in *Jolly* ultimately held, "due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness." *Id.* at 93, 265 S.E.2d at 143.

Applying *Jolly* to the case at hand starts with a fundamental premise: "criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards." *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) (citation omitted). However, our courts and the United States Supreme Court have

consistently held the Sixth Amendment's right to counsel does *not* apply in summary direct criminal contempt proceedings. In *In re Williams*, the defendant was summarily punished for direct criminal contempt and sentenced to ten days in jail. 269 N.C. 68, 76, 152 S.E.2d 317, 323 (1967). On appeal, the defendant argued he was erroneously denied representation by counsel; however, our Supreme Court held the trial court was under no obligation to appoint counsel for the defendant. *Id.* Specifically, the Court said:

> We find no merit in the contention that the sentence was originally imposed when the contemner was not represented by counsel, or in the contention that the court was under a duty to appoint counsel for him. Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel. . . . There is no basis for the contention that to carry out the sentence would deprive him of his liberty without due process of law on the ground that he was denied a hearing or denied representation by counsel of his choice.

Id. at 76, 152 S.E.2d at 323-24.

In *In re Oliver*, the Supreme Court of the United States ruled due process of law requires one charged with criminal contempt "have the right to be represented by counsel[.]" 333 U.S. 257, 275, 92 L. Ed. 682, 695 (1948). However, the Court acknowledged there was a narrowly limited exception allowing trial courts to forego constitutional due process requirements, defined as:

> [C]harges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public.

Id. (quotation marks omitted). *In re Oliver* therefore stands for the proposition defendants summarily punished for direct criminal contempt have no constitutional right to counsel. *See id.*; *see also Levine v. United States*, 362 U.S. 610, 616, 4 L. Ed. 2d 989, 995 (1960) (stating summary direct "[c]riminal contempt proceedings are not within 'all criminal prosecutions' to which [the Sixth] Amendment applies" (citations omitted)).

Accordingly, because *Jolly* recognized Section 7A-451(a)(1)'s "any case" language is construed as any criminal case to which Sixth Amendment protections apply and because our courts and the United States Supreme Court have consistently recognized no right to counsel under the Sixth Amendment exists in summary direct criminal contempt proceedings, application of *Jolly* here leads to the conclusion Section 7A-451(a)(1) does not apply to summary proceedings for direct criminal contempt.

Defendant astutely observes both (1) *In re Williams* pre-dated Section 7A-451(a)(1) by two years—thus, obviously not addressing a statutory right to counsel discussed in *Jolly*—and (2) *Jolly* was subsequently overruled by our Supreme Court in *McBride*. In *McBride*, our Supreme Court determined its prior analysis in *Jolly* was misplaced as it related to whether due process required appointment of counsel in *civil* contempt. Pointing to the United States Supreme Court's decision in *Lassiter v. Department of Social Services*, the *McBride* Court explained:

> [I]n determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent's personal liberty rather than on the "civil" or "criminal" label placed on the proceeding. Where due process is concerned, "it is the defendant's interest in personal freedom . . . which triggers the right to appointed counsel."

McBride, 334 N.C. at 126, 431 S.E.2d at 16 (alteration in original) (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 25, 68 L. Ed. 2d 640, 648 (1981)). The *McBride* Court, in overruling *Jolly*'s specific holding, concluded: "In light of the Supreme Court's opinion in *Lassiter*, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages." *Id*. at 131, 431 S.E.2d at 19.

Notwithstanding the analysis utilized by *McBride* and *Lassiter*, these principles have not been extended to summary direct criminal contempt proceedings in the Sixth Amendment context. Indeed, to the contrary, the United States Supreme Court has subsequently held: "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)." *Turner v. Rogers*, 564 U.S. 431, 448, 180 L. Ed. 2d 452, 466 (2011). In fact, in its discussion, the *Turner* Court

itself recognized the existing exception to the right to counsel in summary direct criminal contempt proceedings: "This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case. And we have held that this same rule applies to criminal contempt proceedings (*other than summary proceedings*)." *Id.* at 441, 180 L. Ed. 2d 461-62 (emphasis added) (emphasis and citations omitted).

Thus, in light of the existing precedent from both the United States and North Carolina Supreme Courts establishing there is no Sixth Amendment right to counsel in summary proceedings for direct criminal contempt and our Supreme Court's discussion in *Jolly* establishing the right to counsel under Section 7A-451(a)(1) extends only as far as the Sixth Amendment right to counsel, we conclude, in the case *sub judice*, Defendant had no statutory right to counsel under Section 7A-451(a)(1).

We find further support for our conclusion from the contemporaneous nature of summary proceedings for direct criminal contempt. As the United States Supreme Court recognized in *Cooke v. United States*:

> To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or *assistance of counsel before punishment*, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary.

267 U.S. 517, 534, 69 L. Ed. 767, 773 (1925) (emphasis added). Further, "[w]here the contempt is committed directly under the eye or within the view of the court, it may proceed upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form[.]" *Id.* at 535, 69 L. Ed. at 773 (citations and quotation marks omitted); *see also State v. Yancy*, 4 N.C. 133, 133 (1814) ("The punishment, in [summary direct criminal contempt] cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court.").

Here, the trial court found, based on its direct observation, Defendant was continuously interrupting the trial court, causing a disturbance to the trial court's ability to properly conduct business. The trial court immediately acted in summary fashion to maintain authority over its courtroom. *See Cooke*, 267 U.S. at 534, 69 L. Ed. at 773 ("To preserve order in the court room for the proper conduct of business, the court must

act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court."). Since the trial court saw the contemptuous conduct first-hand, there were no questions of fact to be decided or evidence to be presented, where assistance of counsel could be especially useful. *See id.* ("There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense."). As such, the trial court was free to conduct summary proceedings and dictate punishment immediately based upon its own knowledge of the events. *See id.* at 535, 69 L. Ed. at 773 (citations omitted). Therefore, the trial court did not err in summarily punishing Defendant for direct criminal contempt without affording Defendant counsel because Section 7A-451(a)(1)'s right to counsel does not apply in summary direct criminal contempt proceedings.

In reaching this conclusion—and without questioning the propriety of the use of summary proceedings for direct criminal contempt in this case—we do, however, echo the Supreme Court of Florida, which in reaching a similar conclusion observed:

> That said, the very absence of the usual constitutional protections for an individual charged with direct criminal contempt and the extraordinary power to summarily punish an individual found in direct criminal contempt to incarceration for a period of up to six months without an attorney highlights what has been emphasized in our jurisprudence. Namely, courts must exercise restraint in using this power, especially where incarceration is being considered or imposed. The purpose of permitting a court to act immediately in cases of direct criminal contempt is that the misconduct of an individual in front of the court could interfere with the court's inherent authority to carry out its essential responsibilities.

Plank v. State, 190 So. 3d 594, 604-05 (Fla. 2016).

II. Sentencing Errors

[2] Defendant next argues, and the State concedes, the trial court committed clerical errors in both the 19 CRS 1781 and 19 CRS 1789 Orders. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining a clerical error as "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination" (citations and quotation marks omitted)). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to

the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

Here, when announcing its ruling in 19 CRS 1781, the trial court sentenced Defendant to twenty-four hours in jail. However, the trial court's 19 CRS 1781 Order provided a thirty-day sentence of imprisonment. Thus, the trial court's sentence in the 19 CRS 1781 Order reflects a clerical error. *See State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11-12 (1971) (holding a clerical error exists when a judgment does not reflect what was announced in open court). Accordingly, we remand for correction of the clerical error found in the 19 CRS 1781 Order. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696 (citation omitted).

As for the 19 CRS 1789 Order, Defendant first argues the trial court committed a clerical error by imposing the thirty-day sentence to run consecutively with the sentence in 19 CRS 1781 where the trial court in orally announcing its ruling did not specify whether the sentence should run concurrently or consecutively. *See* N.C. Gen. Stat. § 15A-1340.15(a) (2019) ("Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment."). In the alternative, Defendant argues the trial court's imposition of a consecutive sentence in 19 CRS 1789 constituted a substantive change to his sentence made outside of his presence, thereby violating his right to be present during sentencing. *See State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (citations omitted). We agree with Defendant's second argument and believe *Crumbley* controls our analysis.

In *Crumbley*, the defendant was convicted of multiple offenses, and the trial court orally rendered sentences for each conviction. *Id.* at 61, 519 S.E.2d at 96. These sentences were rendered in the defendant's presence in open court. *Id.* The trial court later entered a written and signed judgment imposing the same sentences as previously rendered but further stating the sentences would run consecutively, which had not been indicated in the previously orally rendered sentences. *Id.* On appeal, this Court vacated the sentence and remanded the matter for entry of a new sentencing judgment because the defendant was not present at the time the written judgment was entered and "[t]his substantive change in the sentence could only be made in the [d]efendant's presence, where he and/or his attorney would have an opportunity to be heard." *Id.* at 66-67, 519 S.E.2d at 99; *see also State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) ("The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial." (citation omitted)).

Likewise, in the case *sub judice*, the 19 CRS 1789 Order reflected a substantive change from the sentence orally rendered by the trial court in Defendant's presence. This is so because where the trial court does not announce a sentence is to run consecutively with another sentence, a defendant's sentences are to run concurrently. *See* N.C. Gen. Stat. § 15A-1340.15(a). "Because there is no indication in this record that Defendant was present at the time the written [19 CRS 1789 Order] was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing [order]." *Crumbley*, 135 N.C. App. at 66, 519 S.E.2d at 99.

Conclusion

Accordingly, for the foregoing reasons, we hold Defendant was not entitled to counsel under N.C. Gen. Stat. § 7A-451(a)(1) where the trial court proceeded to summarily punish Defendant for direct criminal contempt. We, however, remand the 19 CRS 1781 Order for correction of the clerical error contained in that Order, and we vacate the 19 CRS 1789 Order and remand for the entry of a new sentencing order.

19 CRS 1781 IS REMANDED FOR CORRECTION OF CLERICAL ERROR.

19 CRS 1789 IS VACATED AND REMANDED.

Judges BRYANT and INMAN concur.

STATE v. ROULHAC

[273 N.C. App. 396 (2020)]

STATE OF NORTH CAROLINA
v.
PETER LEE ROULHAC, III, DEFENDANT
AND
BRYAN KELLEY, PALMETTO SURETY CORPORATION, BAIL AGENT/SURETY
AND
MARTIN COUNTY BOARD OF EDUCATION, JUDGMENT CREDITOR

No. COA19-1070

Filed 1 September 2020

Bail and Pretrial Release—forfeiture—motion for relief filed prior to final judgment—exclusive statutory grounds for relief

Where the surety moved for relief from entry of bond forfeiture prior to it becoming a final judgment, and the basis for the motion was a violation of the 30-day notice requirement of N.C.G.S. § 15A-544.4(e), the surety's motion was properly denied because the trial court lacked the authority to grant the motion. N.C.G.S. § 15A-544.5 provides the exclusive avenue for relief from forfeiture when the forfeiture has not yet become a final judgment and improper 30-day notice is not one of the seven grounds for setting aside a forfeiture pursuant to that statute.

Appeal by surety from order entered 5 August 2019 by Judge Walter H. Godwin, Jr., in Martin County Superior Court. Heard in the Court of Appeals 29 April 2020.

Brian Elston Law, by Brian D. Elston, for surety-appellant.

Daniel A. Manning for judgment creditor-appellee.

ZACHARY, Judge.

The Palmetto Surety Corporation appeals from an order denying its motions seeking, *inter alia*, "an order instructing the [c]lerk not to enter [final] judgment" of forfeiture. After careful review, we affirm the trial court's order.

Background

The undisputed facts of this case are as follows: On 14 December 2016, the Palmetto Surety Corporation ("Surety") executed a $100,000 appearance bond securing the pretrial release of Defendant Peter Lee Roulhac, III, on criminal charges pending in Martin County Superior

Court. After Defendant failed to appear in court on 5 November 2018, the trial court issued an order for his arrest. On 13 December 2018, the Honorable Wayland J. Sermons, Jr., ordered that the appearance bond be forfeited. On that same date, an assistant clerk of superior court issued a bond forfeiture notice and served Surety and Defendant with a copy of the notice of entry of forfeiture by first-class mail.

On 13 May 2019, Surety moved the trial court (1) to modify the bond forfeiture pursuant to Rule 60 of the North Carolina Rules of Civil Procedure; (2) to strike the bond forfeiture; (3) to stay the proceedings; or (4) in the alternative, to grant Surety relief from the bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.8 (2019). Surety argued that "the Clerk did not provide proper notice of the Bond Forfeiture until 38 days past the Defendant's failing to appear" for his court date, rather than within the requisite 30-day period; thus, pursuant to N.C. Gen. Stat. § 15A-544.4(e), the "notice was not timely" and the bond forfeiture could not "become a final judgment." In the alternative, Surety asserted that N.C. Gen. Stat. § 15A-544.8 "also authorizes relief when notice was not provided under" N.C. Gen. Stat. § 15A-544.4 and that the trial court "should grant relief by not enforcing the bond forfeiture." The Martin County Board of Education objected to the motion, and the trial court heard Surety's motion on 15 July 2019.

By order entered 5 August 2019, the Honorable Walter H. Godwin, Jr., denied Surety's motions and declared the bond forfeiture a final judgment as of 27 July 2019. Surety timely appealed.

Discussion

On appeal, Surety contends that the trial court erred (1) "in its application of N.C. Gen. Stat. § 15A-544.5 to situations governed by the [North Carolina] Rules of Civil Procedure"; and (2) by failing to modify the order "so it complied with . . . N.C. Gen. Stat. § 15A-544.4(e)[.]"

Standard of Review

"When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citing *State v. Lazaro*,190 N.C. App. 670, 671, 660 S.E.2d 618, 619 (2008)). Questions of law are reviewed de novo. *State v. Hinnant*, 255 N.C. App. 785, 787, 806 S.E.2d 346, 347-48 (2017).

Analysis

"Bail bond forfeiture in North Carolina is governed by N.C. Gen. Stat. §§ 15A-544.1 – 544.8[.]" *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48, 612 S.E.2d 148, 151 (2005). "If a defendant who was released . . . upon execution of a bail bond fails . . . 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).

The defendant and each surety whose name appears on the bail bond are to be served with notice of the entry of bond forfeiture by first-class mail. *Id.* § 15A-544.4(a)-(b).

> Notice under this section shall be mailed not later than the 30th day after the date on which the defendant fails to appear as required and a call and fail is ordered. If notice under this section is not given within the prescribed time, the forfeiture shall not become a final judgment and shall not be enforced or reported to the Department of Insurance.

Id. § 15A-544.4(e).

It is well settled that "[t]he *exclusive avenue for relief* from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat.] § 15A-544.5." *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004) (emphasis added). "For bonds that have not become final judgments, the trial court can only 'set aside' a forfeiture if one of seven enumerated reasons have been established," as provided in section 15A-544.5(b). *State v. Ortiz*, 266 N.C. App. 512, 517, 832 S.E.2d 474, 477 (2019).

> (b) **Reasons for Set Aside.** – Except as provided by subsection (f) of this section,[1] a forfeiture shall be set aside for any one of the following reasons, and none other:
>
> > (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled . . . .

1. Subsection (f) provides that no bond forfeiture "may be set aside for any reason in any case in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f). Accordingly, subsection (f) is inapplicable here.

> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave . . . .
>
> (3) The defendant has been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540 . . . .
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question . . . .
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment . . . .
>
> (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 . . . at the time of the failure to appear . . . .
>
> (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 . . . .

N.C. Gen. Stat. § 15A-544.5(b).

Here, Surety argues that the grounds for setting aside a forfeiture as provided in section 15A-544.5(b) are inapplicable, in that Surety did not move to *set aside* the bond forfeiture, but merely to *modify* it for lack of compliance with subsection (e)'s provisions.

This Court addressed a similar issue in *State v. Sanchez*, 175 N.C. App. 214, 623 S.E.2d 780 (2005). In *Sanchez*, a notice of bond forfeiture was issued after the defendant failed to appear for his court date on 21 July 2004. 175 N.C. App. at 215, 623 S.E.2d at 780. The clerk mailed the notice of bond forfeiture to the defendant and his sureties on 27 August 2004, outside of the 30-day period prescribed by N.C. Gen. Stat. § 15A-544.4(e). *Id.* The surety then "moved to set aside the entry of forfeiture pursuant to N.C. Gen. Stat. § 15A-544.4(e) on the grounds

that [the] surety was not provided with notice of the forfeiture within thirty days after entry of forfeiture." *Id.* On appeal, we concluded that because the "surety's motion to set aside the entry of forfeiture was not premised on any ground set forth in [N.C. Gen. Stat.] § 15A-544.5," the trial court "*lacked the authority* to grant [the] surety's motion." *Id.* at 218, 623 S.E.2d at 782.

In the instant case, Surety has adroitly attempted to recharacterize its efforts to obtain relief from the entry of bond forfeiture. Nonetheless, because Surety moved for relief from the entry of bond forfeiture prior to it becoming a final judgment, N.C. Gen. Stat. § 15A-544.5 provides the "exclusive avenue for relief." *Ortiz*, 266 N.C. App. at 518, 832 S.E.2d at 478 (citation omitted); *accord State v. Knight*, 255 N.C. App. 802, 807-08, 805 S.E.2d 751, 755 (2017); *State v. Cobb*, 254 N.C. App. 317, 318, 803 S.E.2d 176, 178 (2017); *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012); *Robertson*, 166 N.C. App. at 670-71, 603 S.E.2d at 401. Any relief sought for violation of N.C. Gen. Stat. § 15A-544.4(e)'s 30-day notice requirement is unavailable prior to the entry of a final judgment.

Moreover, our General Statutes provide relief from a final judgment where a surety did not receive the requisite notice. As this Court stated in *Sanchez*, N.C. Gen. Stat. § 15A-544.8 provides that the trial court may set aside a final judgment of forfeiture if "[t]he person seeking relief was not given notice as provided in" N.C. Gen. Stat. § 15A-544.4. N.C. Gen Stat. § 15A-544.8(b)(1); *Sanchez*, 175 N.C. App. at 218, 623 S.E.2d at 782. "That the General Assembly specifically made allowance for relief from final judgment of forfeiture for faulty notice, and omitted the same as a ground for relief from an entry of forfeiture, suggests the legislature made a conscious choice in this regard." *Sanchez*, 175 N.C. App. at 218, 623 S.E.2d at 782. Despite Surety's contention that this statement from *Sanchez* is merely dicta, the reasoning is nevertheless sound and persuasive.

Conclusion

In that the trial court's findings support its conclusion that Surety failed to establish any reasons for relief specified in N.C. Gen. Stat. § 15A-544.5(b), we affirm the trial court's order.[2]

AFFIRMED.

Judges DIETZ and MURPHY concur.

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2. In light of our conclusion that the trial court properly denied Surety's motion under N.C. Gen. Stat. § 15A-544.5, we need not address Surety's remaining arguments.

UNIFUND CCR PARTNERS, PLAINTIFF
v.
FRED HOKE, DEFENDANT

No. COA20-87

Filed 1 September 2020

1. Judgments—debt on purchased credit account—renewal of default judgment—motion to dismiss—Consumer Economic Protection Act—heightened pleading requirements

In an action to renew a default judgment against defendant for a debt on a purchased credit account, the trial court properly denied defendant's motion to dismiss for failure to state a claim upon which relief can be granted for an alleged failure to comply with the heightened pleading requirements of the Consumer Economic Protection Act of 2009. Because a claim had already been filed and a judgment rendered, this action involved the judgment—not the underlying debt claim—and plaintiff was not acting as a collection agency but as a party seeking to enforce a previous judgment. Therefore, the pleading requirements of the Act were inapplicable.

2. Creditors and Debtors—debt on purchased credit account—renewal of default judgment—summary judgment—no genuine issue of material fact

In an action to renew a default judgment against defendant for a debt owed on a purchased credit account where defendant did not challenge the existence or validity of the judgment or the underlying debt but, instead, argued that plaintiff failed to satisfy the pleading requirements of the Consumer Economic Protection Act of 2009—an argument rejected by the court—there was no genuine issue of material fact and the trial court's grant of summary judgment for plaintiff was affirmed.

Appeal by defendant from order entered 4 November 2019 by Judge Roy H. Wiggins and from order entered 15 August 2019 by Judge Kimberly Best in Mecklenburg County District Court. Heard in the Court of Appeals 12 August 2020.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for plaintiff-appellee.

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr. and Erin C. Huegel, for defendant-appellant.

BERGER, Judge.

On August 15, 2019, the trial court entered an order denying Fred Hoke's ("Defendant") motion to dismiss, and on November 4, 2019, the trial court granted Unifund CCR Partners' ("Plaintiff") motion for summary judgment. Defendant appeals, arguing that Plaintiff was subject to heightened pleading requirements as a "collection agency" and "debt buyer," and that Plaintiff did not adhere to those requirements. We disagree.

Factual and Procedural Background

Plaintiff filed suit on April 24, 2008, seeking to collect on a debt from Defendant on a purchased credit account. On October 6, 2008, the trial court entered default against Defendant, and a default judgment was entered for the principal sum of $14,174.37, accruing interest at a rate of 8.00% per annum, and attorneys' fees of $2,499.43.

On September 25, 2018, Plaintiff filed an action to renew the default judgment obtained against Defendant, alleging that no payments had been received since entry of the default judgment. On December 28, 2018, the trial court entered default against Defendant, and a default judgment in the renewed action. However, on April 15, 2019, the trial court granted Defendant's motion to set aside the entry of default.

Subsequently, on May 15, 2019, Defendant filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Defendant argued that Plaintiff was required to comply with the heightened pleading requirements under the Consumer Economic Protection Act of 2009 (the "Act"), specifically, N.C. Gen. Stat. § 58-70-145 as a collection agency and N.C. Gen. Stat. § 58-70-150 as a "debt buyer."

In ruling on the motion to dismiss, the trial court found that Plaintiff was a licensed collection agency and "debt buyer" as defined by North Carolina law. However, the trial court also found that "this case does not arise out of conduct for which a collection agency license is required, because the Plaintiff filed suit not on a purchased debt but on a judgment that was entered in its favor." Likewise, the trial court determined that this case was "not a debt buyer action" either. Because "the debt merged into the judgment and was extinguished by the judgment[,]" the trial court concluded that this was an action on a judgment rather than a purchased debt. As a result, the trial court concluded that provisions of N.C. Gen Stat. §§ 58-70-145 and 58-70-150 were not applicable, and the trial court denied Defendant's motion to dismiss.

On May 22, 2019, Plaintiff filed a motion for summary judgment. On November 4, 2019, the trial court granted Plaintiff's motion for summary judgment, noting that there was "no dispute on the validity of the underlying debt," and thus, "no genuine issue as to any material fact."

Defendant appeals, arguing the trial court erred when it (1) denied the motion to dismiss, and (2) granted Plaintiff's motion for summary judgment.

Analysis

[1] Defendant first argues that Plaintiff failed to satisfy the heightened pleading requirements of the Act as a collection agency and "debt buyer," and therefore, the district court erred in denying his motion to dismiss. We disagree.

This Court reviews a motion to dismiss *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

The Act imposes a heightened pleading standard for causes of action filed by collection agencies and "debt buyers." *See generally* N.C. Gen. Stat. §§ 58-70-145, 58-70-150 (2019). A "collection agency" is "a person directly or indirectly engaged in soliciting, from more than one person delinquent claims of any kind owed or due or asserted to be owed or due the solicited person and all persons directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims." N.C. Gen. Stat. § 58-70-15(a) (2019). Under N.C. Gen. Stat. § 58-70-145, permit holders' complaints must adhere to certain requirements:

> [i]n any cause of action that arises out of the *conduct of a business for which a plaintiff must secure a permit* pursuant to this Article, the complaint shall allege as part of the cause of action that the plaintiff is duly licensed under this Article and shall contain the name and number, if any, of the license and the governmental agency that issued it.

N.C. Gen. Stat. § 58-70-145 (emphasis added).

Additionally, a "debt buyer" is "a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes[.]" N.C. Gen. Stat. § 58-70-15(b)(4).

Pertaining to "debt buyers," § 58-70-150 states,

> in any cause of action initiated by a debt buyer, as that term is defined in G.S. 58-70-15, all of the following materials shall be attached to the complaint or claim:
>
> (1) A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.
>
> (2) A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.

N.C. Gen. Stat. § 58-70-150.

Once a judgment is entered, other evidence of indebtedness is "extinguished by the higher evidence of record." *Sanders v. Boykin*, 192 N.C. 262, 266, 134 S.E. 643, 645 (1926) (citation omitted). Essentially, "the judgment merge[s] the debt upon which it was rendered." *Id.* at 266, 134 S.E. at 645. When this merger occurs, the judgment "becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt." *Id.* at 267, 134 S.E. at 645 (citation and quotation marks omitted).

Additionally, any cause of action on a judgment is independent from the action that resulted in a judgment, and a new suit must be filed. *Teele v. Kerr*, 261 N.C. 148, 149, 134 S.E.2d 126, 127 (1964). An independent action must be "brought to recover judgment on a debt." *Raccoon Valley Inv. Co. v. Toler*, 32 N.C. App. 461, 463, 232 S.E.2d 717,

718 (1977) (citation omitted). Thus, the same procedure of "issu[ing] a summons, filing of complaint, servi[ng the complaint]" must be performed to recover on a judgment debt. *Reid v. Bristol*, 241 N.C. 699, 702, 86 S.E.2d 417, 419 (1955).

Here, the action on the judgment is a new, distinct action. Because the original debt has merged into the judgment, this is not an action on a purchased credit account, but rather, an action on a judgment. Thus, the present action does not implicate the heightened pleading requirements set forth above.

Moreover, as an action to enforce a judgment, the present action did not "arise[] out of the conduct of a business for which a plaintiff must secure a permit" as a collection agency. N.C. Gen. Stat. § 58-70-145. An action that "arises out of the conduct of a business for which a plaintiff must secure a permit" would be an initial action to collect on "delinquent claims of any kind owed" or "asserting, enforcing or prosecuting of those claims." *See* N.C. Gen. Stat. § 58-70-145; *see* N.C. Gen. Stat. § 58-70-15(a). Because a claim was already filed and a judgment was rendered, the action now before this Court involves that judgment and *not* the underlying debt claim. Thus, Plaintiff did not act in its capacity as a collection agency when filing suit in this action.

While the present action is certainly a "cause of action," the action was not filed in Plaintiff's capacity as a "debt buyer," but as a party seeking to enforce a previous judgment. Here, the Act's pleading requirement seeks to "evidenc[e] the original debt" and "establish[] that the plaintiff is the owner of the debt." N.C. Gen. Stat. § 58-70-150. In this case, a judgment was rendered on the debt, and that judgment is now the only evidence of the debt. As a result, the pleading requirements of N.C. Gen. Stat. §§ 58-70-145 and 58-70-150 are inapplicable, and Plaintiff properly stated a claim upon which relief could be granted. Therefore, the trial court did not err in denying Defendant's motion to dismiss.

II. Summary Judgment

[2] Defendant further asserts that the trial court erred when it granted Plaintiff's motion for summary judgment. We disagree.

This Court reviews an appeal of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 573, 669 S.E.2d at 576 (citation and quotation marks omitted). "A genuine issue of material fact has been defined as

one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action[.]" *Master v. Country Club of Landfall*, 263 N.C. App. 181, 185-86, 823 S.E.2d 115, 119 (2018) (citation and quotation marks omitted).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). Once "the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own." *Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982).

Here, Defendant does not assert that the judgment or underlying debt are invalid. Specifically, on appeal, Defendant does not challenge the existence or validity of the judgment, nor the validity of the underlying debt. Rather, Defendant argues that Plaintiff failed to satisfy the pleading requirements of the Act. Thus, there is no genuine issue of material fact.

Accordingly, we affirm the trial court's order granting Plaintiff's motion for summary judgment.

Conclusion

For the reasons explained above, the trial court properly denied Defendant's motion to dismiss and properly granted Plaintiff's motion for summary judgment. Therefore, we affirm the judgment.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 SEPTEMBER 2020)

FIRST BANK v. LATELL No. 19-868	Buncombe (16CVS3435)	Affirmed
GAMEWELL MECH, LLC v. LEND LEASE (US) CONSTR., INC. No. 19-568	Durham (16CVS3850)	Affirmed in Part; Vacated in Part; and Remanded
GILBERT v. BRANDCO, INC. No. 19-672	N.C. Industrial Commission (14-028212)	Affirmed
HOPKINS v. HOPKINS No. 19-839	Mecklenburg (10CVD16884)	Dismissed
IN RE R.H. No. 20-64	Buncombe (19SPC1689)	Affirmed
N.C. STATE BAR v. SPRINGS No. 19-1120	N.C. State Bar (18DHC25)	Affirmed
RAY v. RAY No. 19-959	Moore (13CVD1263)	AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.
ROBINSON v. ROBINSON No. 20-5	Durham (17CVD4696)	Vacated and Remanded.
STATE v. BARBOSA No. 19-1104	Durham (18CR058468)	Affirmed
STATE v. BASKINS No. 19-371	Guilford (17CRS78394)	Dismissed
STATE v. BROWN No. 19-971	Cumberland (15CRS64909)	Affirmed
STATE v. KIM No. 20-54	Guilford (17CRS30095) (17CRS81133)	No Error
STATE v. MATHES No. 19-621	Avery (17CRS50213)	No Error in Part; Vacated in Part; and Remanded.
STATE v. ROGERS No. 19-557	Pitt (16CRS57113)	Affirmed

BRIAN KENT BROWN AND BROWN BROTHERS FARMS, PLAINTIFFS
v.
BETWEEN DANDELIONS, INC., F/K/A REMODEL AUCTION, INC., DEFENDANT

No. COA19-1074

Filed 15 September 2020

1. Contracts—promissory note—offer to exchange notes for shares of stock—terms of acceptance—terms not met

In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, where plaintiffs' offer to purchase shares of stock in exchange for cancelling the promissory notes was not accepted according to the terms set forth in the agreement detailing the offer, no contract was formed. Further, defendant's actions purporting to accept the offer were ineffective because defendant delivered a different type of stock than that specified in the agreement.

2. Contracts—promissory note—discharge by intentional act—N.C.G.S. § 25-3-604(a)—offer of cancellation not accepted

In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, plaintiffs' offer to purchase shares of stock in exchange for cancelling the promissory notes did not constitute an "intentional voluntary act" pursuant to N.C.G.S. § 25-3-604(a), so as to discharge defendant's debt, because defendant did not accept plaintiffs' offer according to the terms of the written agreement containing the offer. An unaccepted offer to cancel a promissory note does not equate to a complete agreement of cancellation.

3. Contracts—promissory note—satisfaction of debt—N.C.G.S. § 25-3-602—method of payment not listed in note

In an action for breach of promissory note and breach of contract to collect amounts owed on two promissory notes, defendant's purported delivery of shares to plaintiffs (unbeknownst to plaintiffs and of a different type than what plaintiffs requested in their offer to purchase stock in exchange for cancelling the notes) did not constitute satisfaction of its debt pursuant to N.C.G.S. § 25-3-602 because the language of the promissory notes required payment of money, not shares of stock.

Appeal by Plaintiffs from order entered 19 September 2019 by Judge R. Greg Horne in Watauga County Superior Court. Heard in the Court of Appeals 10 August 2020.

Miller & Johnson, PLLC, by Nathan A. Miller, for the Plaintiff-Appellant.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for the Defendant-Appellee.

BROOK, Judge.

Brian Kent Brown ("Kent Brown") and Brown Brothers Farms (collectively, "Plaintiffs") appeal the trial court's order granting summary judgment in favor of Between Dandelions, Inc. ("Defendant") and denying Plaintiffs' motion for summary judgment. We hold that the trial court erred in denying Plaintiffs' motion for summary judgment and granting summary judgment in favor of Defendant. Based on the parties' stipulation that there is no genuine issue of material fact with respect to Plaintiffs' claims, we reverse the order of the trial court.

I. Background

In October of 2007, Plaintiffs accepted two promissory notes from a predecessor entity of Defendant, Remodel Auction, Inc. ("Remodel Auction"). The promissory note accepted by Plaintiff Kent Brown was for $10,000, and the promissory note accepted by Mr. Brown on behalf of Brown Brothers Farms was for $20,000.

In February of 2008, Plaintiffs executed portions of two Subscription Agreements. The Subscription Agreements contemplated that Remodel Auction would be a party to them; however, Remodel Auction never executed its portions of the Subscription Agreements. Under the terms of the Subscription Agreements, the obligations owing under the notes to Plaintiffs were offered in exchange for common stock in Remodel Auction. Mr. Brown offered to purchase 100,000 shares in exchange for discharge of his $10,000 note, and Brown Brothers Farms offered to purchase 200,000 shares in exchange for discharge of its $20,000 note. Plaintiffs thereafter were issued 12,000 shares of Series "B" Preferred Stock in Remodel Auction, receiving two certificates reflecting ownership of these shares.

Between October 2007 and July 2018 when Plaintiffs initiated the present action, Defendant underwent a number of corporate changes, including several name changes, none of which are relevant to this dispute.

On 22 July 2018, Plaintiffs initiated this action to collect the amounts owing under the notes, alleging causes of action for breach of promissory note and breach of contract. Defendant answered on 2 November 2018.

On 19 June 2019, Defendant moved to substitute the defendant named in Plaintiffs' complaint, Appalachian Mountain Brewery, Inc., with Defendant. Plaintiffs chose not to oppose this motion, joining a 1 July 2019 consent order substituting Appalachian Mountain Brewery, Inc. with Defendant.

On 19 June 2019 Defendant also moved for summary judgment, filing an affidavit in support of the motion by the former chief executive officer and majority shareholder of Defendant's predecessor entity, Remodel Auction, as well as a transcript of Mr. Brown's deposition. Plaintiffs filed a cross-motion for summary judgment on 6 September 2019, along with an affidavit in support by Mr. Brown.

The motions came on for hearing before the Honorable R. Greg Horne in Watauga County Superior Court on 16 September 2019. Judge Horne granted Defendant's motion and denied Plaintiffs' cross-motion by an order entered 19 September 2019. In its order, the trial court concluded that Plaintiffs' offer to purchase the shares in Remodel Auction constituted a cancellation of their notes under N.C. Gen. Stat. § 25-3-604(a) and a discharge of the obligations owed under the notes.

Plaintiffs timely appealed.

II. Standard of Review

Issues of contract interpretation present questions of law, which we review de novo. *D.W.H. Painting Co., Inc. v. D.W. Ward Const. Co., Inc.*, 174 N.C. App. 327, 330, 620 S.E.2d 887, 890 (2005). The issue of whether a valid contract exists also presents a question of law, which we review de novo. *See M Series Rebuild v. Town of Mount Pleasant*, 222 N.C. App. 59, 67-68, 730 S.E.2d 254, 260 (2012).

III. Analysis

[1] In their sole argument on appeal, Plaintiffs contend that their execution of the Subscription Agreements constituted an offer to exchange their promissory notes for stock in Remodel Auction—an offer Remodel Auction never accepted. Because the offer was not accepted by Remodel Auction and the shares in Remodel Auction received by Plaintiffs were not the shares Plaintiffs offered to purchase, Plaintiffs argue there was no contract to exchange the notes for the shares of stock and that the amounts owing under the notes are due and payable. We agree.

> In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, idem re et sensu, and their minds must meet as to all the terms.

Dodds v. St. Louis Union Tr. Co., 205 N.C. 153, 156, 170 S.E. 652, 653 (1933) (internal citations omitted). An acceptance is not effective unless it is "(a) absolute and unconditional; (b) identical with the terms of the offer; (c) in the mode, at the place, and within the time . . . required by the offer." *Morrison v. Parks*, 164 N.C. 197, 197, 80 S.E. 85, 85 (1913) (citation and internal marks omitted). The offeror is thus said to be "master of his offer." *MacEachern v. Rockwell Int'l Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979). As such, the offeror may "require acceptance in precise conformity with his offer[,]" and also may by the terms of the offer permit acceptance "by performing a specific act rather than by making a return promise." *Id.*, 254 S.E.2d at 265-66.

The Subscription Agreements executed by Plaintiffs both state as follows:

> This Subscription Agreement sets forth the terms under which the undersigned ("Investor") will invest in Remodel Auction, Inc., a Delaware corporation, ("Corporation"). This Subscription is one of a limited number of subscriptions for up to a maximum of 2,435,000 shares of common stock in the Corporation (the "Shares") in an aggregate amount of up to $243,500 offered on behalf of the Corporation to a limited number of Investors holding promissory notes issued by the Corporation (the "Notes"). Each Share is payable $0.10 by an agreement by the Investor by execution of this Subscription Agreement to cancel all amounts due under the Notes, including principal and all accrued and unpaid interest, upon execution of this Subscription Agreement. *Execution of this Subscription Agreement by the Investor shall constitute an offer by the Investor to subscribe for the Shares set forth in this Agreement on the terms and conditions specified herein. The Corporation reserves the right to reject such subscription offer, or, by executing a copy of this Subscription Agreement, to accept such offer. If the Investor's offer is accepted, the Corporation will execute*

> *this Subscription Agreement and return an executed copy of the Subscription Agreement to the Investor.*

(Emphasis added.)

The Subscription Agreement executed by Plaintiff Kent Brown goes on to state:

> Investor hereby subscribes for 100,000 (Number) of Shares for a total purchase price of $10,000 (Number of Shares x $0.10) and hereby submits a Note with the principal and accrued interest amount of $10,000 (Number of Shares x $0.10 per Share) to Remodel Auction, Inc. for full cancellation and satisfaction of said Note.

The Subscription Agreement executed by Mr. Brown individually additionally provides:

> THE NAME OF THE OWNER OF THE SHARE(S) SHOULD BE MADE OUT ON THE CERTIFICATE IN THE FOLLOWING MANNER (PLEASE PRINT):
>
> Kent Brown

The Subscription Agreement executed by Mr. Brown on behalf of Brown Brothers Farms likewise states:

> Investor hereby subscribes for 200,000 (Number of Shares for a total purchase price of $20,000 (Number of Shares x $0.10) and hereby submits a Note with the principal and accrued interest amount of $20,000 (Number of Shares x $0.10 per Share) to Remodel Auction, Inc. for full cancellation and satisfaction of said Note.

The Subscription Agreement executed by Brown Brothers Farms additionally provides:

> THE NAME OF THE OWNER OF THE SHARE(S) SHOULD BE MADE OUT ON THE CERTIFICATE IN THE FOLLOWING MANNER (PLEASE PRINT):
>
> Brown Bros. Farms

Nobody signed either of the Subscription Agreements on behalf of Remodel Auction, and Mr. Brown testified at deposition that he never received the 300,000 shares referenced in the Subscription Agreements, nor did he ever receive copies of the agreements executed by anyone on behalf of Remodel Auction.

The former Chief Executive Officer and majority shareholder of Remodel Auction, Clinton F. Walker, averred in the affidavit filed in support of Defendant's motion for summary judgment that the 300,000 shares referenced in the Subscription Agreements were "delivered" to Plaintiffs by recording their ownership of the shares in the books maintained by the company, which existed in an Excel spreadsheet. Mr. Walker averred further that following a re-organization of Remodel Auction, Plaintiffs were issued 12,000 shares of Series "B" Preferred Stock in addition to the 300,000 shares of common stock previously "delivered" to them by recording their ownership in the company's books. At deposition Kent Brown testified that while he never received the 300,000 shares of common stock he offered to purchase, he did receive two share certificates representing 12,000 series "B" preferred shares in Remodel Auction; however, these shares were not the shares he offered to purchase, and he was unable to reach Mr. Walker to resolve the discrepancy between the 300,000 shares of common stock he offered to purchase and the 12,000 series "B" preferred shares for which received certificates, despite repeated attempts to do so.

Under the terms of the Subscription Agreements, the execution of each by Mr. Brown "constitute[d] an offer . . . to subscribe for the Shares set forth in [the] Agreement[s] on the terms and conditions specified [therein]." Those terms included that the subject matter of the offer was

> a limited number of subscriptions for up to a maximum of 2,435,000 shares of *common stock* in the Corporation (the "Shares") in an aggregate amount of up to $243,500 offered on behalf of the Corporation to a limited number of Investors holding promissory notes issued by the Corporation (the "Notes").

(Emphasis added.) No part of the offers by Mr. Brown and Brown Brothers Farms were to purchase 12,000 series "B" preferred shares in Defendant's predecessor entity; instead, as previously noted, Mr. Brown offered to purchase 100,000 shares of common stock in exchange for cancellation of $10,000 in promissory notes owed to him individually and Brown Brothers Farms offered to purchase 200,000 shares of common stock in exchange for cancellation of $20,000 in promissory notes owed to it. The terms of the Subscription Agreements also contemplated that the shares of common stock Plaintiffs were offering to purchase in exchange for cancellation of their notes were certificated securities, requiring Plaintiffs to indicate the manner in which "the name of the owner of the share(s) should be made out on the certificate[.]" (Capitalization removed.)

Defendant offers Mr. Walker's sworn statement that the ownership interests in Remodel Auction the Plaintiffs offered to purchase through execution of the Subscription Agreements were uncertificated securities as Delaware law defines that term to support the idea that Mr. Walker's "delivery" of the 300,000 shares of common stock to Plaintiffs by recording their ownership in the company's books was an acceptance of Plaintiffs' offer by performance. Setting aside the absence of evidence that this acceptance was ever communicated to Plaintiffs prior to the filing of Mr. Walker's affidavit, and Mr. Brown's testimony that in essence he had no knowledge of this purported acceptance by performance, Mr. Walker's sworn statement that the subject matter of the Agreements were uncertificated securities is at best an admission that Remodel Auction was unable to accept Plaintiffs' offer or unable to perform the contract contemplated by the Subscription Agreements.[1] We hold that no valid contract existed to purchase the shares in Remodel Auction because there was no acceptance of Plaintiffs' offer to purchase the shares through execution of the Subscription Agreements by Remodel Auction; any attempted acceptance of Plaintiffs' offers by Remodel Auction by performance varied materially from the terms of Plaintiffs' offers and was therefore ineffective.

[2] Defendant argues that Plaintiffs' offer to cancel their notes in exchange for stock is sufficient to constitute a cancellation or discharge under N.C. Gen. Stat. § 25-3-604(a). Under N.C. Gen. Stat. § 25-3-604(a),

> [a] person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

N.C. Gen. Stat. § 25-3-604(a) (2019). The trial court concluded that Plaintiffs' offer to cancel their notes through execution of the

1. Were it true that the ownership interests in Defendant's predecessor at the time qualified as uncertificated securities under Delaware law, as Mr. Walker has averred, this would not have provided any justification or excuse for accepting Plaintiffs' offer in a manner other than that contemplated by its terms. *See, e.g.*, *Beauford Cty. Lumber Co. v. Cottingham*, 173 N.C. 323, 329, 92 S.E. 9, 12 (1917) ("The acceptance . . . should have been in the terms of the offer, and, if it was not so, the plaintiff had the right to treat the offer as rejected[.]").

Subscription Agreements constituted a cancellation of the notes, drawing an equivalence between Plaintiffs' execution of the Subscription Agreements and full execution of the Subscription Agreements on the one hand—execution by Remodel Auction having never occurred—and between an offer to cancel a promissory note and an agreement to cancel a promissory note, on the other.

We hold that Plaintiffs' offer to cancel the notes in exchange for stock did not qualify as the "intentional voluntary act" required by N.C. Gen. Stat. § 25-3-604(a). Had Plaintiffs' offer to cancel the notes been accepted by Remodel Auction either through Remodel Auction's execution of the Subscription Agreements or performance according to the terms of Plaintiffs' offer, we would reach a different conclusion. N.C. Gen. Stat. § 25-3-604(a) does not by its terms limit the voluntary act requirement to the acts it lists but the listed acts are all of a final and permanent character we believe differs fundamentally from an unaccepted offer. *See*, *e.g.*, N.C. Gen. Stat. § 25-3-604(a) (2019) (listing voluntary acts of "surrender," "destruction," "mutilation," "striking out," and "renouncing"). We hold that conflating an unaccepted offer to cancel the notes and a complete agreement to cancel the notes was error.

[3] Defendant argues in the alternative that the obligations under the notes have been satisfied by payment under N.C. Gen. Stat. § 25-3-602, which provides that "an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument." N.C. Gen. Stat. § 25-3-602 (2019). According to Defendant, the "delivery" of the 300,000 shares by recording Plaintiffs' ownership in the books of Remodel Auction constituted a payment under N.C. Gen. Stat. § 25-3-602. The language of the promissory notes, however, does not provide for payment in shares of stock. The notes specify that payment is to be made to Plaintiffs in the quarterly amounts of $300 and $600 respectively, plus three percent interest until the obligations are satisfied. We therefore hold that the delivery of the 300,000 shares by recording Plaintiffs' ownership of them in the company's books did not constitute payment of the notes under N.C. Gen. Stat. § 25-3-602.

Defendant argues in the alternative that the doctrine of laches should apply as a bar to Plaintiffs' recovery on the notes because of Plaintiffs' delay in filing suit.

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay

> necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). Despite Plaintiffs' delay in filing suit, we decline Defendant's invitation to apply the equitable doctrine of laches to Plaintiffs' claims. We do not believe Plaintiffs' delay was unreasonable. Furthermore, Defendant has not argued and we discern no particular prejudice this delay has caused Defendant.

IV. Conclusion

We reverse the order of the trial court because Plaintiffs' offer to cancel their notes and discharge Defendant's obligations under the notes was never accepted and the amounts outstanding under the notes are due and payable, with interest.

REVERSED.

Judges BRYANT and STROUD concur.

CROSLAND v. PATRICK

[273 N.C. App. 417 (2020)]

JUDITH E. CROSLAND, PETITIONER
v.
BAILEY PATRICK, JR., AS EXECUTOR OF THE ESTATE OF JOHN CROSLAND, JR., RESPONDENT

No. COA19-713

Filed 15 September 2020

1. Husband and Wife—prenuptial agreement—Dead Man's Statute—alleged failure to make financial disclosures

Where decedent's wife challenged the validity of their prenuptial agreement—arguing that decedent failed to provide her with financial disclosures and that decedent revoked the agreement—her testimony regarding oral communications with decedent was barred by the Dead Man's Statute (Evidence Rule 601(c)) because she would benefit financially from those alleged communications.

2. Husband and Wife—prenuptial agreement—enforceability—revocation

A thirty-seven-year-old prenuptial agreement challenged after decedent-husband's death was enforceable, and the wife's argument that the husband had revoked the agreement was meritless because one spouse may not unilaterally cancel a prenuptial agreement.

3. Husband and Wife—prenuptial agreement—enforceability—statute of limitations

A thirty-seven-year-old prenuptial agreement challenged after decedent-husband's death on the basis that it was signed under duress, was procured without financial disclosure, or was unconscionable was barred by the statute of limitations, which was three years for each of the claims. The claims accrued at the time of the alleged wrongs (when the agreement was entered), and the Uniform Premarital Act did not apply because the agreement was entered before the Act's effective date.

Appeal by Defendant from order entered 24 May 2019 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 January 2020.

Shumaker, Loop & Kendrick, LLP, by Lynn R. Chandler and Lucas D. Garber, for petitioner-appellant.

Alexander Ricks PLLC, by Roy H. Michaux, Jr., for respondent-appellee.

Essex Richards, P.A., by Jonathan E. Buchan, Jr., for intervenor.

MURPHY, Judge.

Where specific allegations, which could establish the presence of a genuine factual dispute are barred by the Dead Man's Statute, no genuine issues of material fact exist and summary judgment is proper. Additionally, where the statute of limitations for a contract and fraud claim is three years, the statute of limitations bars any claim of fraud, duress, or undue influence after three years. Here, the prenuptial agreement was signed and executed thirty-seven years prior to this *Petition for Elective Share*, and the statute of limitation bars any challenge. Moreover, the alleged unilateral revocation of the prenuptial agreement argued in the pleadings has no legal significance. The trial court properly granted Respondent's motion for summary judgement.

BACKGROUND

John Crosland, Jr. ("Husband") died testate on 2 August 2015. His *Last Will and Testament* was executed on 7 August 2013 and admitted to probate 13 August 2015. Judith E. Crosland ("Wife"), as the surviving spouse, filed a *Petition for Elective Share* on 15 October 2015. She requested the trial court determine if the value of property passing to her under Husband's estate plan was less than fifty percent of his estate as provided by N.C.G.S. § 30-3.1.

On 5 November 2015, Respondent, Bailey Patrick, Jr. ("Executor"), as Executor of Husband's estate, filed a notice of transfer to Superior Court to determine all issues relating to or arising out of the *Petition for Elective Share*, and seeking a declaratory judgment that the prenuptial agreement dated and signed on 3 February 1978 ("the Agreement") was in all respects valid and enforceable. Executor argued the Agreement, if valid, would bar any claim for an elective share sought by Wife. Executor also sought a stay pending a determination as to whether the Agreement barred Wife's right to pursue an elective share.

Wife claims Husband first presented the Agreement to her on 3 February 1978, the night before their wedding. In her deposition, Wife testified she did not feel she had a choice regarding whether to sign the Agreement because she believed the wedding would not go forward unless she signed it. Both Husband and Wife signed the Agreement on 3 February 1978; their signatures were acknowledged before a Notary Public that same day.

Wife filed a reply to Executor's counterclaim for declaratory judgment ("the Reply") on 8 December 2015, which asserted the Agreement was invalid and unenforceable based upon allegations it was signed under duress, it was procured without adequate disclosure of material financial information, and it had been "revoked" by Husband during his lifetime. The Reply included the following:

> [Executor's] Counterclaim is barred in whole or in part because the document entitled "[Prenuptial] Agreement" was revoked by [Husband] during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by waiver, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by estoppel, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.

Wife died 16 October 2018. On 11 January 2019, Branch Banking & Trust Company ("BB&T"), as Executor for Wife's estate, was substituted as Petitioner.

On 27 March 2019, Executor moved for summary judgment pursuant to Rules 7 and 56 of the North Carolina Rules of Civil Procedure and for dismissal of the *Petition for Elective Share* under N.C.G.S. § 30-3.1. On 23 April 2019, Wife filed a cross-motion for summary judgment declaring the Agreement void (or alternatively voidable) and unenforceable.

An order was entered 24 May 2019 granting Executor's *Motion for Summary Judgment* and denying Wife's cross-motion for summary judgment. Wife appealed.

ANALYSIS

A. Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the [R]ecord 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.

> If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

In re Will of Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal citations and quotation marks omitted).

Our standard of review for decisions regarding N.C.G.S. § 8C-1, Rule 601(c), commonly known as the Dead Man's Statute, is also *de novo*. *In re Will of Baitschora*, 207 N.C. App. 174, 181, 700 S.E.2d 50, 55-56 (2010).

> [T]he function of Rule 601(c) is to exclude proffered testimony when it is shown (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest.

Id. at 180, 700 S.E.2d at 55 (quoting *In re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (internal quotation marks omitted). There is

> nothing in the language of Rule 601(c) [to] suggest[ ] that the implementation of the Dead Man's Statute involves the making of a discretionary determination, although the fact that its application may, under some circumstances, involve what amounts to a relevance determination does suggest that a degree of deference should be given to the trial court's decision.

Id. at 180-81, 700 S.E.2d at 55. Accordingly,

> the standard of review for use in [reviewing a ruling under Rule 601(c)] is one that involves a *de novo* examination of the trial court's ruling, with considerable deference to be given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving application of Rule 601(c).

Id. at 181, 700 S.E.2d at 55-56.

B. Dead Man's Statute

[1] "The North Carolina 'Dead Man's Statute,' formerly N.C.G.S. § 8-51 and now codified in Rule 601(c) of the Rules of Evidence, N.C.G.S.

§ 8C-1, Rule 601(c), has traditionally prohibited testimony involving both 'transactions' and 'communications' by individuals who would potentially benefit from the alleged statements of a deceased individual." *In re Will of Lamparter*, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998). The Dead Man's Statute, as now codified, is "applicable only to oral communications between the party interested in the event and the deceased." *Id.*

> Although a person interested in the event of the action is disqualified, his interest must be a direct legal or pecuniary interest in the outcome of the litigation. The key word in this phrase is legal, the cases as a whole showing that the ultimate test [in determining an interested party] is whether the *legal rights* of the witness will be affected one way or the other by the judgment in the case.

Rape v. Lyerly, 287 N.C. 601, 622, 215 S.E.2d 737, 750 (1975) (internal quotation marks omitted). "The purpose of [the Dead Man's Statute] is to exclude evidence of statements made by deceased persons, since those persons are not available to respond." *Estate of Redden ex rel. Morley v. Redden*, 194 N.C. App. 806, 808, 670 S.E.2d 586, 588 (2009) (internal quotation marks omitted).

The crux of this case rests upon whether or not the Agreement is valid and enforceable, and accordingly, whether Executor's motion for summary judgment was properly granted. On appeal, Wife argues the Agreement was void *ab initio* and unenforceable as a matter of law because Husband, allegedly, failed to provide her with financial disclosure and because the Agreement was, allegedly, revoked and destroyed.

To support her claim that the Agreement was void *ab initio*, Wife argues Husband failed to disclose his financial status as is mandated in *Tiryakian*. *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 370 S.E.2d 852 (1988). There are circumstances where "absent any voluntary waiver, especially considering the confidential relationship between prospective spouses, the failure to fully disclose one's financial status is grounds for invalidating [a prenuptial] agreement." *Id.* at 133, 370 S.E.2d at 855. Here, however, the evidence presented by Wife regarding Husband's lack of financial status disclosure was inadmissible under the Dead Man's Statute.

Wife is a "person interested in the event"; she has a "direct legal or pecuniary interest" in the outcome of the litigation. *Rape*, 287 N.C. at 622, 215 S.E.2d at 750. To agree with Wife's argument that the Agreement is void *ab initio* and is thereby unenforceable would require the Agreement to be set aside. Wife's *Petition for Elective Share* would be

granted, and Wife would inherit 50% of the total net assets of Husband's estate. *See generally* N.C.G.S. § 30-3.1(a)(4) (2019).

The only evidence we have regarding the Agreement comes from Wife's testimony during her deposition:

> [Wife's Attorney]: Were you expecting to be handed a prenuptial agreement the night before your wedding?
>
> [Wife]: No.
>
> [Wife's Attorney]: Did [Husband] – without going into anything he said to you, did he provide you any financial information when he presented you with that prenuptial?
>
> [Wife]: No.
>
> [Wife's Attorney]: Had he ever presented you with financial information prior to that?
>
> [Wife]: No.

In order to understand any financial status disclosure Husband provided to Wife, as alluded to in her deposition testimony, Wife would have to testify to oral communications between her and Husband, who was already deceased at the time Wife filed suit. Such testimony is barred by the Dead Man's Statute. *See* N.C.G.S. § 8C-1, Rule 601(c) (2019).

Additionally, if such testimony was not inadmissible and barred by the Dead Man's Statute and was allowed, additional problems could arise. For example, we find instructive the cautions raised in *Kornegay v. Robinson*, 176 N.C. App. 19, 625 S.E.2d 805 (Tyson, J. dissenting), *rev'd for reasons stated in dissent*, *Kornegay v. Robinson*, 360 N.C. 640, 637 S.E.2d 516 (2006). In *Kornegay*, a husband and wife signed a prenuptial agreement;[1] when the husband passed away, the wife believed the decedent-husband had executed a will with substantial provisions in her favor, but no such provisions were found in the will. *Kornegay*, 176 N.C. App. at 21, 625 S.E.2d at 806. The prenuptial agreement signed by the decedent and the wife included a provision waiving all the wife's rights as a spouse, including the right to claim a spousal share of the decedent's estate. *Id*. The wife brought an action for a declaratory judgment against the decedent's estate to invalidate the prenuptial agreement; the

1. *See Prenuptial Agreement*, Black's Law Dictionary (11th ed. 2019) ("An agreement made before marriage [usually] to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse. –Also termed *antenuptial agreement; antenuptial contract; premarital agreement* . . . .").

trial court granted summary judgment dismissing the wife's action. *Id.* at 21, 625 S.E.2d at 807. On appeal to this Court, the Majority reversed the trial court's grant of summary judgment and held "material issues of fact exist[ed] as to whether [the wife] entered the [prenuptial] agreement voluntarily." *Id.* at 27, 625 S.E.2d at 810. Judge Tyson, concurring in part and dissenting in part, would have affirmed the trial court's grant of summary judgment in light of the husband being deceased at the initiation of the lawsuit and the lack of evidence that the wife entered the agreement involuntarily. *Id.* at 31-32, 625 S.E.2d at 812-13. Our Supreme Court, in a *per curiam* opinion, adopted Judge Tyson's Dissent. *See Kornegay v. Robinson*, 360 N.C. 640, 637 S.E.2d 516 (2006).

Although the Dead Man's Statute was not directly mentioned in *Kornegay*, there are factual similarities that implicate the same concerns the Dead Man's Statute exists to protect against: "to exclude evidence of statements made by deceased persons, since those persons are not available to respond." *Estate of Redden ex rel. Morley*, 194 N.C. App. at 808, 670 S.E.2d at 588. In *Kornegay*, the wife contested the validity of a prenuptial agreement over fifteen years after it was signed, and only after the husband had passed away, making it impossible for him to respond. *Kornegay*, 176 N.C. App. at 31-32, 625 S.E.2d at 812.

Here, similar to the wife in *Kornegay*, Wife contested the validity of the Agreement signed thirty-seven years prior to the initiation of this lawsuit in 2015 and only brought suit after Husband had passed away. In order to support her argument that the Agreement is void *ab initio* and unenforceable, Wife would be required to testify to oral communications she had with Husband. Such oral communications, however, are barred by the Dead Man's Statute because Wife is an interested party and Husband is no longer able to respond. N.C.G.S. § 8C-1, Rule 601(c) (2019).

Moreover, as noted above, Wife's principal argument is the Agreement is not valid and enforceable due to Husband's alleged failure to disclose his financial status prior to the execution of the Agreement. In support of this argument, Wife relies on *Tiryakian*. *Tiryakian*, however, was distinguished in Judge Tyson's Dissent in *Kornegay*, and *Tiryakian* is also distinguishable here.

As stated in *Kornegay*, and unlike the facts before us, "*Tiryakian* addressed a prenuptial agreement within the context of an equitable distribution[,] [b]oth parties to the agreement were alive at the time of trial and [were able to testify] to the circumstances surrounding the execution of the premarital agreement[, and] was not before this Court

on a ruling" for summary judgment. *Kornegay*, 176 N.C. App. at 31, 625 S.E.2d at 812 (Tyson, J., dissenting).

Like the spouses in *Kornegay*, Husband and Wife were both previously married and had children by those marriages. There is no evidence of inequality in education or business experience between Husband and Wife. Unlike the husband and wife in *Tiryakian*, and similar to the husband and wife in *Kornegay*, Husband passed away before Wife challenged the Agreement. Unlike the lack of an evidentiary bar in *Tiryakian*, here the only evidence Wife presented to demonstrate the alleged invalidity of the Agreement is barred by the Dead Man's Statute.

C. Enforceability

[2] Moreover, in terms of the validity of the Agreement, "[i]t is well-settled in this jurisdiction that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written." *In re Estate of Tucci*, 94 N.C. App. 428, 432-33, 380 S.E.2d 782, 784-85 (1989) (quoting *In re Estate of Loftin*, 285 N.C. 717, 720-21, 208 S.E.2d 670, 673-74 (1974)); *see* N.C.G.S. § 52-10(a) (2019). "[Prenuptial] agreements are not against public policy, and if freely and intelligently and justly made, are considered in many circumstances as conducive to marital tranquility and the avoidance of . . . disputes concerning property." *Turner v. Turner*, 242 N.C. 533, 538, 89 S.E.2d 245, 248 (1955).

If we were to rule the Agreement unenforceable, we would "disregard . . . the sanctity of a solemn written agreement, probated before a notary public, promptly recorded in the public land records of the county, and unchallenged for over [thirty-seven] years"; it would be a "wholesale disregard of the bargained for and settled expectations of parties of equal bargaining power in preference to wholly unsupported parol averments in direct contradiction to the terms of the written agreement." *Kornegay*, 176 N.C. App. at 32, 625 S.E.2d at 813 (Tyson, J., dissenting). As Judge Tyson notes in the *Kornegay* Dissent, "[n]o regard [would be] shown for [Husband and Wife's] clearly stated bargain, long after [Husband] is no longer able to explain or defend the circumstances surrounding the execution of the agreement." *Id.* Holding the Agreement unenforceable would "only cause great uncertainty into the finality and enforceability of an . . . agreement entered into lawfully." *Id.* Accordingly, here Executor's motion for summary judgment was properly granted.

Wife further argues that Executor's motion for summary judgment was not properly granted because the Agreement was "revoked" during Husband's lifetime:

> [Executor's] Counterclaim is barred in whole or in part because the document entitled "[Prenuptial] Agreement" was revoked by [Husband] during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by waiver, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.
>
> [Executor's] Counterclaim is barred in whole or in part by estoppel, as [Husband] evidenced his intent to revoke and did revoke the document entitled "[Prenuptial] Agreement" during his lifetime.

Wife is the only party who claims, in her pleadings, that the Agreement was revoked. Wife's son, from her first marriage, provided an affidavit to support Wife's pleading that the Agreement was revoked. Presuming, *arguendo*, that Wife's son's affidavit is admissible, it is irrelevant because Wife merely claimed the Agreement was revoked by Husband. One spouse "may not unilaterally cancel a valid marital contract[.]" *In re Estate of Tucci*, 94 N.C. App. at 433, 380 S.E.2d at 785. Wife's argument that the Agreement was revoked is of no legal significance.

D. Statute of Limitations

[3] Wife argues the Agreement is unenforceable on grounds it was signed under duress, was procured without financial disclosure, or is unconscionable. Absent admissible evidence the Agreement was void *ab initio*, the statute of limitations for each of these claims is three years. *See* N.C.G.S. § 1-52(1), (9) (2019). "The statutes of limitations contain no exception in favor of [one spouse] against [the other spouse]. . . . [The] statutes of limitation run as well between spouses as between strangers." *Fulp v. Fulp*, 264 N.C. 20, 26, 140 S.E.2d 708, 713 (1965) (internal quotation marks omitted). The Agreement was signed before a notary in 1978. The enforceability and validity of the Agreement was not brought into question until 2015, thirty-seven years after it was entered into and after any "alleged fraud" was discovered. *See Swartzberg v. Reserve Life Insurance Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 276-77 (1960) (holding that the statute of limitations in N.C.G.S. § 1-52(9) "appl[ies] to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence").

Wife argues "the statute of limitations [did not begin] to run, if at all, [until] [Husband] died and [Wife] discovered that [Executor] sought

to enforce the [Prenuptial] Agreement against her." However, we have held the "cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Dawbarn v. Dawbarn*, 175 N.C. App. 712, 717, 625 S.E.2d 186, 190 (2006) (quoting *Davis v. Wrenn*, 121 N.C. App. 156, 158-59, 464 S.E.2d 708, 710 (1995)); *see also Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 415-16, 558 S.E.2d 871, 876 (2002) (holding that the claim of undue influence accrued at the time the deed was executed and filed, which was four years and one month beyond the statute of limitations and was, therefore, time-barred). Thus, the claim in this case accrued at the time Husband and Wife signed and implemented the Agreement, which was thirty-seven years prior to the initiation of this lawsuit in 2015. Wife's argument that the Agreement is unenforceable and voidable is, accordingly, time-barred.

Both parties acknowledge the Agreement is not controlled by the Uniform Premarital Agreement Act ("UPAA"), N.C.G.S. §§ 52B-1-11. The UPAA "became effective on 1 July 1987 and is applicable to premarital agreements executed *on* or *after that date*." *Huntley v. Huntley*, 140 N.C. App. 749, 752, 538 S.E.2d 239, 241 (2000) (citing 1987 N.C. Sess. Laws ch. 473, § 3) (emphasis added). Here, the Agreement was signed in 1978 and therefore is not controlled by the UPAA. Accordingly, N.C.G.S. § 52B-9, which states "[a]ny statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement" is not applicable. N.C.G.S. § 52B-9 (2019). The statute of limitations is not tolled in this case. We hold the three-year statute of limitations applies and Executor's *Motion for Summary Judgment* was properly granted.

CONCLUSION

Executor's *Motion for Summary Judgment* was properly granted and Wife's cross-motion for summary judgment was properly denied. The order and judgment appealed from is affirmed.

AFFIRMED.

Judges DILLON and TYSON concur.

IN RE C.M., K.S., J.S., M.A.S., AND K.S.

No. COA19-966

Filed 15 September 2020

1. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—sufficiency of findings and conclusions

In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court's order ceasing reunification efforts with respondent-mother was supported by sufficient evidence and findings of fact that addressed the substance of the requirements contained in N.C.G.S. § 7B-906.2(b). Any contradictions in the evidence regarding respondent's progress on her case plan were for the court to resolve.

2. Child Abuse, Dependency, and Neglect—permanency planning—termination of mother's visitation—abuse of discretion analysis

In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court did not abuse its discretion by terminating respondent-mother's visitation, based on sufficient competent evidence regarding respondent's lack of progress on her case plan and inability to adequately parent her children, which supported a finding that visitation was not in the children's best interests.

Judge ARROWOOD dissenting.

Appeal by respondent from order entered 13 May 2019 by Judge Wayne Michael in Davie County District Court. Heard in the Court of Appeals 10 June 2020.

Holly M. Groce for petitioner-appellee Davie County Department of Social Services.

Garron T. Michael, Esq., for respondent-appellant mother.

Matthew D. Wunsche for appellee guardian ad litem.

YOUNG, Judge.

Where the trial court's findings were supported by competent evidence, they are conclusive on appeal, notwithstanding contradictory evidence in the record. Where a portion of a finding was not supported by evidence, but did not impact the ultimate determination of the court, it was not error. Where the trial court's findings addressed the substance of statutory requirements, they complied with statute and were not erroneous. Where the unchallenged findings showed that mother had not made adequate progress with her DSS plan and was unable to provide supervision during visits, the trial court did not abuse its discretion in terminating visitation. We affirm.

I. Factual and Procedural Background

On 28 September 2017, the Davie County Department of Social Services (DSS) filed petitions with respect to five juveniles (the juveniles), C.M., K.S., J.S., M.A.S., and K.S.,[1] alleging that they were abused, neglected, and dependent. Specifically, DSS attached an exhibit outlining various bruises or descriptions of assault with regard to each child. The exhibit further noted that the mother of the juveniles has other children who were removed from her care by the state of Pennsylvania, that her live-in boyfriend has other children but does not have custody of them, that C.M.'s father's location is unknown but he is believed to be homeless in South Carolina, that the father of the remaining four children is also homeless in South Carolina, and that since 2017 the family has had eight open child protective services cases in three states. On 28 September 2017, the trial court entered an order for nonsecure custody of the juveniles.

The matter proceeded for two years and through multiple permanency planning hearings. On 13 May 2019, the trial court entered the latest order on review and permanency planning in this case. As a preliminary matter, the trial court noted that visitation with the three oldest of the juveniles had ceased as well, and that visitation only continued with the two youngest children, M.A.S. and K.S. The court found that mother expressed a desire to reunify only with the two youngest children, as the needs of the three older children were more than she could provide; the court declined to entertain this suggestion. The court further found that mother made only limited progress since the prior court hearing, that a parenting assessment found that she could not be a primary caregiver without intensive assistance, that mother often appeared overwhelmed or stressed, and that she lacked family or other caregiving

1. Pseudonyms are used for ease of reading and to protect the privacy of the juveniles. Likewise, the mother of the juveniles will be referred to simply as "mother."

supports. The court ultimately concluded that while DSS had exercised reasonable efforts towards reunification, reunification was not in the best interests of the juveniles, and returning the juveniles home within a reasonable period of time was not possible. The court therefore ordered that the juveniles would remain in DSS custody, that the permanent plan would be a primary plan of adoption with a secondary plan of guardianship, and that DSS was relieved of all reunification efforts. The court further ordered that mother would have one last visit with K.S., M.A.S., and K.S., but that visits with the other two children would remain ceased.

Mother appeals.

II. Cessation of Reunification

[1] In her first argument, mother contends that the trial court erred in ceasing reunification efforts. We disagree.

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

B. Analysis

Mother correctly notes that the trial court ceased all reunification efforts with her and ordered adoption as the primary plan and guardianship for the secondary plan for the juveniles. She also correctly notes that, should a trial court order an end to attempts at reunification, it must make findings that reunification efforts would be clearly unsuccessful or inconsistent with a juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b) (2019). Mother contends, however, that neither the evidence nor the findings of fact support such a determination.

First, mother contends that the order contains multiple findings unsupported by the evidence. In support of this position, she notes the existence of contradictory evidence. For example, with regard to finding of fact 7, in which the trial court found that mother "made limited progress" in her case plan, mother argues that she "completed significant portions of her case plan, including making progress with parenting her youngest two children[.]" Likewise, she challenges finding of fact 12, in which the trial court found that mother "has not demonstrated appreciable progress in demonstrating her ability to parent the children[,]" and

which she claims is contradicted by other evidence; and finding of fact 26, in which the trial court found that it "is not possible for the children to be returned home within a reasonable period of time[,]" and which she claims does not apply to all of the juveniles.

However, there is a difference between arguing that there is *no evidence* to support a finding by the trial court, and arguing that there is evidence which *contradicts* that finding. In a nonjury proceeding such as this, the findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *Matter of Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983). These three findings – findings of fact 7, 12, and 26 – are supported by evidence in the record. Kim Brown (Brown), social worker assigned to the instant case, specifically testified that mother "attempted but has not been able to show that she can obtain and maintain information or parent these children in a safe environment." Because these findings are supported by evidence in the record, notwithstanding any evidence to the contrary, we hold that the trial court did not abuse its discretion in entering them.

Mother also takes issue with finding of fact 8, in which the trial court found that "DSS did not have a release to track her progress [in therapy] and is unable to determine if Respondent Mother began to make progress in this area." Mother correctly notes that Brown testified that DSS did, in fact, receive releases to examine mother's mental health records. This portion of finding of fact 8 is therefore in error. However, even setting this finding aside, there were still ample unchallenged findings to support the trial court's conclusion. These unchallenged findings are presumed supported by competent evidence, and binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Accordingly, even though a portion of finding of fact 8 is erroneous, it does not impact the trial court's ultimate determination.

Having challenged the evidentiary bases for the trial court's findings, mother next argues that the trial court failed to make the requisite findings pursuant to N.C. Gen. Stat. § 7B-906.2(b). That statute specifically requires that, in ceasing reunification, a trial court must make findings pursuant to N.C. Gen. Stat. § 7B-901(c) (2019), concerning findings to be made at an initial dispositional hearing; findings pursuant to N.C. Gen. Stat. § 7B-906.1(d)(3) (2019), concerning hearings to be made at every permanency planning hearing; or findings "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b).

The trial court did conclude, although such conclusion is more accurately an ultimate finding of fact, that returning to mother's home "is not in the best interest of the minor children at this time, and is contrary to the health, safety, and welfare of the children." This would appear to be a finding that reunification would be inconsistent with the juveniles' health and safety.

However, even assuming *arguendo* that the trial court did not use the precise language of the statute, this is not fatal. Our Supreme Court has held that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013). Rather, we need only consider "whether the trial court's findings of fact address the substance of the statutory requirements." *Id.* at 166, 752 S.E.2d 454.

Here, there are abundant findings to support this ultimate determination. In addition to the trial court's specific finding that return to mother's home "is contrary to the health, safety, and welfare of the children[,]" the trial court found that mother sporadically attended her therapy sessions, that visits with the children are chaotic and the children do not listen, that an expert opined that mother could not be primary caregiver without intensive assistance, that mother lacks support systems to aid her in caregiving, that mother has been unable to provide necessary supervision and direction during visits, that one of the juveniles has admitted in therapy the neglect she suffered while living with mother, and that multiple juveniles suffer developmental or academic delays. These findings or portions of findings are unchallenged by mother, and binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Taken together, these findings "address the substance of the statutory requirements" by showing the neglect the juveniles suffered while in mother's care, along with its ongoing impact, and mother's inability to remedy those conditions, including her inability to supervise during visits and her failure to consistently attend therapies. This evidence therefore shows that reunification would be inconsistent with the juveniles' health or safety, even if it is not explicitly stated as such. Because the trial court's findings "address the substance of the statutory requirements," we hold that the court's failure to use the precise language of statute was not fatal, and that the court did not err in making its ultimate finding.

III. Visitation

[2] In her second argument, mother contends that the trial court erred in terminating visitation. We disagree.

A. Standard of Review

"This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

Mother argues that the trial court, in terminating visitation, failed to consider whether continued visits with the juveniles would be in their best interest. Rather, she claims, the trial court "erroneously overlooked" progress mother had allegedly made in visitation with the two youngest children, and argues that the termination of visitation was therefore an abuse of discretion.

Once more, mother attempts to offer contradictory evidence to suggest that the trial court's findings are unsupported. As we have held above, however, there is competent evidence in the record to support those findings, notwithstanding evidence to the contrary, and they are therefore conclusive on appeal.

Moreover, notwithstanding mother's arguments, the trial court's actions were in compliance with statutory mandate and case law. For example, this Court has held that, where a parent showed a lack of progress with DSS in parenting a minor child, the termination of visitation "is supported by the findings and the evidence, and the ruling is the result of a reasoned decision." *C.M.*, 183 N.C. App. at 215, 644 S.E.2d at 595. In the instant case, as in *C.M.*, there were ample findings that mother had not completed adequate progress in her case plan, and was continuing to have difficulty parenting the juveniles. The court specifically found that mother's visits with the remaining two children are "chaotic and the children do not listen[,]" that mother "has difficulty putting rules into place during visits and maintaining order[,]" and that mother "has not been able to provide [a necessary] level of supervision during visits." These findings or portions of findings are unchallenged by mother, and binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Taken together, they support a finding that visitation is not in the juveniles' best interests. Accordingly, we hold that the trial court did not abuse its discretion in terminating visitation.

AFFIRMED.

Judge DILLON concurs.

Judge ARROWOOD dissents in separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. In pertinent part, N.C. Gen Stat. § 7B-906.2(b) (2019) provides that, "At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and the secondary plan. Reunification shall be a primary or secondary plan *unless . . . the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety*." N.C. Gen Stat. § 7B-906.2(b) (emphasis added). While it is true that a permanency planning order need not contain a verbatim recitation of this language, it must be apparent from the order itself that the court considered whether reunification would be futile or inconsistent with the juvenile's health safety and need for a permanent home. *In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013) (interpreting similar language of mandate in N.C. Gen. Stat. § 7B-507(b) (2019)).

In the present case, the trial court's permanency planning order does not contain a single reference to N.C. Gen. Stat. § 7B-906.2(b), the controlling statute. In addition, a review of the order's conclusions of law 2, 5, and 6 makes clear that the trial court based its ultimate decision to end all reunification efforts on its determination that it was not in the best interest of the children to be returned to the mother at the present time. I see no conclusion of law in the order from which I can deduce that the trial court conducted the appropriate analysis required by N.C. Gen. Stat. § 7B-906.2(b). Thus, I would vacate the order and remand to the trial court for further proceedings.

WANDA CAMPBELL McLEAN, AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE SMITH, PLAINTIFF

v.

KATIE SPAULDING, DEFENDANT

No. COA20-36

Filed 15 September 2020

1. Declaratory Judgments—investment account—joint tenancy with right of survivorship—motion to dismiss—failure to state a claim

Where the decedent and defendant had opened an investment account and had selected the option on the account authorization form to hold the account as "Joint Tenancy WROS", the estate administrator's complaint for a declaratory judgment to establish the account as a single person account owned by the estate was properly dismissed by the trial court for failure to state a claim upon which relief could be granted. Although the complaint alleged the account form failed to meet the requirements of N.C.G.S. § 41-2.1(a) in order to establish a right of survivorship, that statute applied to deposits made to banking institutions. Because the account was deposited with a broker-dealer, it was governed by N.C.G.S. § 41-2.2 and the account form was sufficient to create a joint tenancy with right of survivorship under that statute.

2. Declaratory Judgments—motion to dismiss—failure to state a claim—statute of limitations

Where the decedent and defendant opened a joint investment account on 13 March 2013, decedent died 13 September 2018, and the estate administrator filed the original complaint on 23 October 2018 seeking a declaratory judgment to establish the account as a single person account owned by the estate, the trial court properly granted defendant's motion to dismiss for failure to state a claim because the claim was barred by the applicable statute of limitations. Since the statute of limitations for a declaratory judgment is based on the underlying claim, and the underlying claim here was based on liability arising out of a contract, the action had to be commenced within three years from the time the action arose—when the account with the right of survivorship was executed.

Appeal by plaintiff from order entered 1 October 2019 by Judge Mary Ann Talley in Bladen County Superior Court. Heard in the Court of Appeals 26 August 2020.

Coy E. Brewer, Jr. for plaintiff-appellant.

Hutchens Law Firm LLP, by Natasha M. Barone, J. Scott Flowers, Damón Gray II, for defendant-appellee.

TYSON, Judge.

Wanda Campbell McLean, as Administrator of the Estate of Josephine Smith ("Plaintiff"), appeals from an order entered on 1 October 2019 granting Katie Spaulding's ("Defendant") motion to dismiss. The trial court's order is affirmed.

I. Background

On 18 March 2013, Josephine Smith ("Smith") and Defendant opened the investment account number 446-13688-1-3 (the "Account"), as joint owners, with Edward D. Jones & Co., Limited Partnership d/b/a Edward Jones ("Edward Jones"). Smith and Defendant executed an Edward Jones' form entitled Account Authorization and Agreement Form ("Account Form"), which contained the following language under the "Joint Accounts Only" section:

> Joint owners must select one form of ownership. If you have questions regarding which form of ownership is appropriate for you, please contact your attorney. Edward Jones will not, nor is any employee authorized to, advise you with this choice.

Underneath the above language, the following seven choices were available:

1) Joint Tenancy WROS (Not available in LA)
2) Tenants in Common
3) Tenants by the Entireties
4) Community Property (Community Property States only)
5) Community Property WROS (CA, NV & AZ only)
6) Survivorship Martial Property (WI only)
7) Marital Property (WI only)

Smith and Defendant selected the first choice that the account would be held as "Joint Tenancy WROS." Section II of the Account Agreement specified the investment account "is for broker-dealer services in a non-discretionary account."

Smith died on 13 September 2018. At the time of Smith's death, the investment account had a value of $267,486.24. Plaintiff initially filed a complaint against Defendant and Edward Jones on 23 October 2018, in Bladen County. This complaint sought a declaratory judgment declaring the account is a single person account owned by Smith's estate. Edward Jones filed a motion to dismiss on 29 November 2018. The trial court entered an order dismissing the complaint against Edward Jones. Plaintiff then voluntarily dismissed the complaint against Defendant on 28 May 2019.

Plaintiff initiated this action by filing a second complaint in Bladen County. The second complaint asserted claims only against Defendant, not Edward Jones. Plaintiff alleged "the statutory requirements of N.C. Gen. Stat. § 41-2.1(a) requiring Right of Survivorship must be expressly provided for in the agreement, was not completed with any of the Edward Jones documents." As with the original complaint, Plaintiff sought a declaratory judgment establishing the Account "is a single person account owned by the Plaintiff Estate of Josephine Smith."

On 18 July 2019, Defendant filed motions to dismiss pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7), answer, and affirmative defenses in response to the second complaint. Defendant's motions to dismiss were heard by the trial court on 14 August 2019.

On 1 October 2019, the trial court entered an order dismissing the second complaint because the "[c]omplaint fails to state a claim upon which relief can be granted and to present a justiciable controversy because Plaintiff's claims against Defendant are barred by the statute of limitations." Plaintiff appeals.

II. Jurisdiction

Plaintiff appeals the trial court's order as of right pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

Plaintiff argues the trial court erred when it granted Defendant's Rule 12(b)(6) motion. She asserts her second complaint filed on 29 May 2019 states a claim upon which relief may be granted and the statute of limitations has not yet expired.

IV. 12(b)(6) Motion to Dismiss

A. Standard of Review

"On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* 'whether, as a matter of law, the allegations of

the complaint . . . are sufficient to state a claim upon which relief may be granted.' " *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), "the well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of facts are not admitted." *Azure Dolphin, LLC. v. Barton*, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018) (citation omitted).

This Court has held: "A statute of limitations defense is properly asserted in a motion to dismiss under Rule 12(b)(6), and is proper grounds for the trial court to find a complaint is without merit." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 473 (2003) (quotation marks and citation omitted), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004).

B. Declaratory Judgment Act

"The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty concerning rights, status and other legal relations, and although the Act is to be liberally construed, its provisions are not without limitation." *Consumers Power v. Power Co.*, 285 N.C. 434, 446, 206 S.E.2d 178, 186 (1974). Courts possess jurisdiction to render declaratory judgments when the pleadings disclose the existence of an actual controversy between the parties having adverse interest in the matter in dispute. *Gaston Bd. Of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). When asserting a claim for declaratory judgment, the claimant "must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties . . . with regard to their respective rights and duties in the premises." *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949).

Plaintiff's request for declaratory judgment is supported by two allegations/claims for relief: (1) the Account Form failed to comply with applicable statutory law, N.C. Gen. Stat. § 41-2.1(a), in order to establish a right of survivorship; and, (2) the right of survivorship was acquired by fraud. Although the second complaint contained one sentence alleging that the documents creating the Account were forged, Plaintiff failed to specifically allege the elements of fraud, include any argument, or to even mention any forgery in Plaintiff's principal brief or reply brief. Plaintiff has waived her right to challenge the court's dismissal of her forgery claim. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

C. N.C. Gen. Stat. § 41-2.1

[1] Plaintiff argues the Account Form failed to create a joint account with right of survivorship under N.C. Gen. Stat. § 41-2.1(1). Although Plaintiff references several other statutes in her brief, these additional statutes, N.C. Gen Stat. §§ 53C-6-6(f), 54B-129, 54-109.58, 53C-6-7 and 54C-165 (2019), were not argued before the trial court and were not referenced in the second complaint.

Plaintiff alleges the statutory requirement of N.C. Gen. Stat. § 41-2.1(a) requiring the right of survivorship must be expressly provided for in the agreement was not complied with by any of the documents that created the Account. Our review of the requirements and definitions set forth in N.C. Gen. Stat. § 41-2.1 reveals this statute is not applicable to the Account at issue.

N.C. Gen. Stat. § 41-2.1(a) provides:

> A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors . . . when both or all parties have signed a written agreement . . . expressly providing for the right of survivorship.

N.C. Gen. Stat. § 41-2.1(a) (2019).

While N.C. Gen. Stat. § 41-2.1(e)(2) defines a "deposit account" as:

> Both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.

N.C. Gen. Stat. § 41-2.1(e)(2) (2019).

N.C. Gen. Stat. § 41-2.1(e)(1) defines "banking institution" as "commercial banks, industrial banks, building and loan associations, and credit unions." N.C. Gen. Stat. § 41-2.1(e)(1) (2019).

D. Broker-Dealer

Edwards Jones is a registered broker-dealer and investment advisor. Plaintiff's original complaint acknowledged "Edward Jones is dually registered with the SEC as a broker-dealer and an investment advisor." Edward Jones is not a "commercial bank, industrial bank, building and loan association, savings and loan association, or a credit union."

Since Edward Jones' activities or services are neither within the definition of "banking institution," nor does the Account at issue fall within the definition of "deposit account" under N.C. Gen. Stat. § 41-2.1, those statutory requirements are not applicable either to Edward Jones or to the Account. In the first action, the trial court dismissed Plaintiff's complaint because Edward Jones is not a banking institution as is defined by the statute, but instead is a broker-dealer.

Plaintiff cites *O'Brien v. Reece*, 45 N.C. App. 610, 613-15, 263 S.E.2d 817, 819-20 (1980), wherein this Court examined parties' signature card for their deposit account with Central Bank & Trust Company to determine whether the language used therein was sufficient to comply with N.C. Gen. Stat. § 41-2.1 to create a joint account with a right of survivorship

O'Brien is not analogous to this case. Those facts deal with "deposit accounts" and "banking institutions," whereas this appeal involves an investment account with a registered broker-dealer and investment advisor. *Id.* Plaintiff's claim fails to satisfy the requirements of N.C. Gen. Stat. § 41-2.1 and fails to state a claim for relief.

E. N.C. Gen. Stat. § 41-2.2

This account is governed by N.C. Gen Stat. § 41-2.2 (2019). The General Assembly enacted N.C. Gen. Stat. § 41-2.2, for joint ownership of securities. A "security account" is defined as:

> reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death.

N.C. Gen. Stat. § 41-40(10) (2019).

The Account Form signed by both parties established the account for "broker-dealer services in a non-discretionary account." The Account falls within the definition of a "security account" as set forth in N.C. Gen. Stat. § 41-40(10). Under N.C. Gen. Stat. § 41-2.2(a), parties can choose to own a security account "as joint tenants with rights of survivorship, and not as tenants in common." A broker-dealer holds a security account for its owners as joint tenants with right of survivorship only when:

> *by book entry or otherwise indicates* (i) that the securities are owned with the right of survivorship, or (ii) otherwise

> clearly indicates that upon the death of either party, the interest of the decedent shall pass to the surviving party.

N.C. Gen. Stat. § 41-2.2(b)(2) (emphasis supplied). Based upon the plain language of the statute, no further specific language is required for a joint investment account to be established or held with right of survivorship.

F. Construing the Contract

The Account and the Account Form are contracts between Smith, Defendant, and Edward Jones. " 'The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' " *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (quoting *Electric Co. v. Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948)). The court looks to "the plain meaning of the written terms" in order to "determine the intent of the parties." *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)). The meaning of a contract is " 'gathered from its four corners.' " *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 279 (2015) (quoting *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949) (Stacy, C.J., *dissenting*)).

When interpreting a contract, the court must "construe them as a whole." *Id.*, 777 S.E.2d at 279 (citation omitted). "Each clause and word is considered with reference to each other and is given effect by reasonable construction." *Id.* at 336, 777 S.E.2d at 279 (citing *Sec. Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965)).

When the account was established, the parties were required to "select one form of ownership" with a default position on the Account Form under the "Joint Accounts Only" section. This section provides the seven options stated above. The Form Agreement specifies the account will be "deemed to be held jointly as tenants in common, unless we specify in the opening or registration otherwise." Both Smith and Defendant selected the "Joint tenancy WROS" option.

The Account Form satisfies the requirements of N.C. Gen. Stat. § 41-2.2 by being a "book entry" or writing which "otherwise" indicates "the securities are [jointly] owned with the right of survivorship." N.C. Gen. Stat. § 41-2.2. Smith and Defendant could have selected the box labeled "Tenants in Common" or not chosen by default. Instead, both signors specifically selected the box labeled "Joint Tenancy WROS."

The abbreviation or acronym "WROS" is commonly used to mean "with the right of survivorship" in North Carolina. NC Estate

Administration Manual § IX.II.6.C (2014). While the Account Form could have spelled out WROS to be clearer, the contract is free of any ambiguities. A distinguishing feature of a joint tenancy as opposed to a tenancy in common is the right of survivorship. *See Davis v. Bass*, 188 N.C. 200, 203, 124 S.E. 566, 569 (1924) (citation omitted). It is clear from the four corners of the Account Form that the parties intended and specifically chose to create the Account as a joint tenancy with right of survivorship.

In her reply brief, Plaintiff recognizes the Account is actually governed by N.C. Gen. Stat. § 41-2.2(a), and not by N.C. Gen. Stat. § 41-2.1. Plaintiff pivots her argument to assert both *O'Brien* and N.C Gen. Stat. § 41-2.1 articulates a public policy requiring the creation of a survivorship account should be done clearly and unambiguously. She posits the provisions of N.C. Gen. Stat. § 41-2.2 and the language of the Account Form should require a similar level of clarity.

Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue *via* reply brief. *See Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (holding appellant abandoned its statute of limitations argument "by its failure to advance the issue in its principal brief").

In both Plaintiff's second complaint and principal brief, Plaintiff argues the account at issue and Account Form fail to comply with N.C. Gen. Stat. § 41-2.1 and the account should be deemed "a single person account owned by the Plaintiff Estate of Josephine Smith." Not until Plaintiff's reply brief, does she mention N.C. Gen. Stat. § 41-2.2 for the first-time during litigation.

Since Plaintiff never asserted her public policy argument under N.C. Gen. Stat. § 41-2.2 in either the second complaint or in her principal brief, she has abandoned the issue and cannot revive the issue *via* her reply brief. *See id.*

More importantly, this public policy argument is properly presented to the General Assembly, as opposed for the first time in a reply brief to an error correcting court. *Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer*, 261 N.C. App. 325, 344, 821 S.E.2d 196, 210 (2018) (holding this Court is not the proper entity to address public policy considerations). This argument is abandoned and dismissed.

G. Statute of Limitations

[2] Plaintiff argues if the Account Form was insufficient to create a joint account with right of survivorship, then the statute of limitations did not

begin to run until Smith's death when Edward Jones "for the first time designated the account as a joint account with Right of Survivorship." We disagree.

Plaintiff's second complaint is a request for declaratory judgment. The statute of limitations for declaratory relief is based upon the underlying claims. *Asheville Lakeview Props., LLC v. Lake View Park Comm'n, Inc.*, 254 N.C. App. 348, 353, 803 S.E.2d 6323, 636 (2017) (citation omitted).

Plaintiff's underlying claim for declaratory judgement arises out of an "obligation or liability arising out of a contract." The claim is governed by N.C. Gen. Stat. § 1-52(1) (2019). Under N.C. Gen. Stat. § 1-52(1) "a plaintiff must commence any action based on a contract within three years from the time the cause of action accrues, absent the existence of circumstances which would toll the running of the statute of limitations." *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 448, 312 S.E.2d 421, 424 (1984).

The language of the Account Form was sufficient for the parties to create a joint account with right of survivorship. *See* N.C. Gen. Stat. § 41-2.2(a). No allegations in the second complaint, her principal brief, or her reply brief asserts the statute of limitations was tolled, nor did Plaintiff plead any facts tolling the three-year statute of limitations.

The statute of limitations commenced on 13 March 2013, the date on which the Account with the right of survivorship designation was executed. The three-year statute of limitations expired on 13 March 2016. Since Plaintiff has not shown why the statute of limitations should be tolled, her claim for declaratory judgment elapsed and is barred.

V. Conclusion

Plaintiff's second complaint failed to state a claim upon which relief may be granted. The statute of limitations has expired on Plaintiff's underlying contract claim. The trial court's dismissal of Plaintiff's second complaint is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and BROOK concur.

METLIFE GROUP, INC. O/B/O EMPLOYEES, PETITIONER
v.
DANIEL LEE SCHOLTEN, RESPONDENT

No. COA20-128

Filed 15 September 2020

1. Appeal and Error—petition for certiorari—no written notice of appeal—civil contempt

Where respondent did not file written notice of appeal from the trial court's order holding him in civil contempt for failure to produce a video he filmed in his former workplace, the Court of Appeals in its discretion denied respondent's petition for certiorari to review his claim that the trial court's order violated his right against self-incrimination since the relevant criminal charge had been resolved prior to the hearing on the motion to compel and he had been granted several continuances over the six-month period preceding the hearing due to his concern for his Fifth Amendment rights.

2. Contempt—civil contempt—Workplace Violence Prevention Act—court's authority to enter order compelling production of discoverable material

In a case involving a petition for a no-contact order where respondent was held in civil contempt for failing to produce a video he filmed when he returned to the offices of the petitioner (his former employer) after he was fired, the trial court's order holding respondent in civil contempt was affirmed. Under the Workplace Violence Prevention Act, the court had authority pursuant to N.C.G.S. § 95-264(b)(6) to enter a no-contact order which compelled the production of the video if necessary and appropriate. Therefore, the court also had authority to hold respondent in contempt for willfully refusing to produce the video, even in the absence of a pending discovery request.

Appeal by Respondent from order entered 27 June 2019 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 26 August 2020.

Parker Poe Adams & Bernstein LLP, by Melanie Black Dubis and Nana Asante-Smith, for the Petitioner-Appellee.

Mary McCullers Reece for the Respondent-Appellant.

BROOK, Judge.

Daniel Lee Scholten ("Respondent") appeals from an order finding him in civil contempt. We affirm the order of the trial court.

I. Background

Respondent is a former employee of MetLife Group, Inc. ("Petitioner"). In May of 2017, Respondent sent an e-mail to some of his professional colleagues in which he compared himself to Adam Lanza, the perpetrator of the Sandy Hook Elementary massacre. Like Mr. Lanza, Respondent experiences autism. Petitioner terminated Respondent's employment shortly after he sent the e-mail comparing himself to Mr. Lanza.

Respondent is also the author of a blog. Substantial portions of the blog are devoted to Respondent's thoughts and feelings about his former workplace and his experience of the circumstances surrounding the termination of his employment, as well as the kinship he feels with Mr. Lanza. The content of the blog includes numerous references that reasonably could be interpreted to suggest Respondent may be a danger to his former colleagues and Petitioner's other employees.

Over a year after his employment by Petitioner was terminated, on 14 June 2018 Respondent entered his former workplace with a GoPro video camera strapped to his chest and confronted several of his former colleagues. During the episode Respondent threatened to publicly disclose the video he was recording as well as his colleagues' personal information. The following day he was arrested for breaking and entering. Shortly afterward, he characterized the event in his blog as his "MetLife Shooting Rampage" and suggested that he might repeat the event at some future date.

On 26 June 2018, Petitioner sought an order prohibiting Respondent from contacting its employees or returning to the workplace and requiring Respondent to turn over a copy of the video he recorded on 14 June 2018, amongst other things. The trial court entered a temporary *ex parte* order granting Petitioner the requested relief on 27 June 2018. The court entered another order on 3 July 2018, making the provisions of the temporary order permanent, for one year.

On 2 July 2018, Petitioner filed a motion for Respondent to show cause why he should not be held in contempt of the court's 27 June 2018 order based on Respondent's failure to turn over the video. Rather than produce the video, Respondent had provided counsel with a

password-protected link that he represented would allow access to the video but refused to provide counsel with the password. Later, he delivered a blank thumb drive to counsel's office that he claimed contained the video but did not. On 12 July 2018, the trial court ordered Respondent to show cause why he should not be held in contempt for his failure comply with the 27 June 2018 order.

Petitioner filed a second motion for Respondent to show cause why he should not be held in contempt on 26 July 2018, this time for failing to comply with the 3 July 2018 order, again for failing to produce the video. Since the filing of the first show cause motion several weeks earlier, Respondent had provided counsel with another thumb drive that he claimed contained the video but this thumb drive was encrypted and password-protected, and Respondent refused to provide the password. On 1 August 2018, the trial court again ordered Respondent to show cause why he should not be held in contempt, and set a second show cause hearing.

On 7 and 10 August 2018, the trial court entered orders continuing the show cause hearings because Respondent's criminal charge for breaking and entering was still pending and Respondent was invoking his Fifth Amendment right against self-incrimination in refusing to produce the video. Petitioner opposed the continuances. The first show cause hearing was continued again on 7 September 2018 despite Petitioner's continued opposition. On 13 September 2018, the trial court entered an order continuing the second show second cause hearing to 25 October 2018 based on an agreement of the parties.[1]

The matter came on for hearing on 25 October 2018 before the Honorable Christine M. Walczyk in Wake County District Court. In an order entered the same day, Judge Walczyk found Respondent in civil contempt of the 3 July 2018 order and ordered him to be taken into custody until he produced the video. Judge Walczyk included an alternative purge provision in her order, allowing Respondent to produce an unencrypted, non-password protected copy of the video *without* audio to purge his contempt. Petitioner took a voluntary dismissal with prejudice of the first show cause hearing on 25 October 2018 and the court entered a dismissal the same day.

Respondent spent almost two weeks in jail in late October and early November of 2018 for his contempt of the 3 July 2018 order before

1. On 13 November 2018, Respondent entered a deferred prosecution agreement with the Wake County District Attorney's office, agreeing to plead guilty to the breaking and entering charge.

authorizing his counsel on 7 November 2018 to provide Petitioner with a copy of the video without audio under the alternative purge provision of Judge Walczyk's order.

On 14 January 2019, Petitioner filed a motion to compel the production of the video with the audio included, as had been required by the June and July 2018 orders.[2] Petitioner re-filed the motion on 12 February 2019. The matter came on for hearing before the Honorable Ned W. Mangum in Wake County District Court on 14 February 2019. In an order entered the same day, Judge Mangum granted the motion to compel.

On 19 March 2019, Petitioner once again moved the court for an order to show cause why Respondent should not be held in contempt of the 14 February 2019 order for failing to produce the video with audio. On 28 March 2019, the trial court once again ordered Respondent to show cause why he should not be held in contempt. On 17 June 2019, Respondent moved to set aside and dismiss the 14 February 2019 order.

Both matters came on for hearing before the Honorable Margaret P. Eagles in Wake County District Court on 27 June 2019. Judge Eagles denied Respondent's motion to set aside and dismiss in open court and found Respondent in contempt in a written order entered the same day. Under Judge Eagles's 27 June 2019 order, Respondent could only purge his contempt by providing a copy of the video with audio or providing the password that would enable Petitioner to access the password-protected thumb drive he had produced. Respondent was taken into custody at the conclusion of the 27 June 2019 hearing.

Respondent entered written notice of appeal from the 27 June 2019 order on 2 July 2019. The trial court stayed enforcement of the order on 17 July 2019, pending the outcome of the appeal.

On 3 March 2020, Respondent filed a "conditional petition for certiorari," requesting review of the 14 February 2019 order. Petitioner responded in opposition to Respondent's conditional petition on 26 March 2020.

II. Petition for Certiorari

[1] Respondent petitions our Court for certiorari to review the issue of whether his Fifth Amendment right against self-incrimination was violated by the 14 February 2019 order. Respondent's petition is conditional insofar as we do not consider him to have properly noticed his appeal. We first determine Respondent did not provide notice of appeal and then, in our discretion, deny his petition.

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2. As noted above, the provisions of the July 2018 order were in effect through 3 July 2019.

Respondent suggests that he noticed his appeal during the 14 February 2019 hearing on the motion to compel. The following colloquy transpired during that hearing:

> MR. SCHOLTEN: One question, if I may?
>
> THE COURT: Go ahead.
>
> MR. SCHOLTEN: So let's say you decide to grant the motion, I assume I will have an opportunity to appeal?
>
> THE COURT: I'm not sure that would be interlocutory, meaning you can't appeal it immediately to the Court of Appeals, but I haven't thought through it enough to even be able to answer that question.
>
> MR. SCHOLTEN: Okay, all right.

This question did not constitute notice of appeal from the 14 February 2019 order.

Unlike in a criminal case, in which entry of notice of appeal in open court is allowed under Rule 4(a)(1) of the North Carolina Rules of Appellate Procedure, in a civil case, notice of appeal must be in writing. *See* N.C. R. App. P 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by *filing* notice of appeal with the clerk of superior court[.]") (emphasis added). Respondent concedes that he did not enter timely written notice of appeal from the 14 February 2019 order.

"Certiorari is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927). In our discretion, we deny Respondent's petition for certiorari. We note that Respondent's criminal charge for breaking and entering was resolved several months prior to the February 2019 hearing on the motion to compel and that Respondent had been granted three continuances out of concern for his Fifth Amendment rights over the course of the six month period preceding the hearing on the motion to compel.

III. Merits Analysis

[2] Respondent argues that he cannot be held in contempt for violation of an order the trial court lacked the authority to enter. His appeal thus presents the question of whether a trial court exceeds its authority when

it enters a no-contact order under the Workplace Violence Prevention Act compelling the production of discoverable material, such as video, and then holds a party in contempt for willfully refusing to produce the material, even in the absence of a pending discovery request. We hold that it does not.

A. Standard of Review

> 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. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142 (2009) (internal marks and citation omitted). "[H]owever, our standard of review is de novo [] where a party presents a question of statutory interpretation . . . [or] where the trial court's subject matter jurisdiction to hear an issue is questioned[.]" *Smith v. Smith*, 247 N.C. App. 166, 169, 785 S.E.2d 434, 437 (2016) (internal marks and citations omitted).

B. The Workplace Violence Prevention Act

North Carolina's Workplace Violence Prevention Act authorizes "[a]n action for a civil no-contact order . . . by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace." N.C. Gen. Stat. § 95-261 (2019). The action may be brought by "filing a verified complaint . . . or by filing a motion in any existing civil action." *Id.* § 95-262(a). "Upon a finding that the employee has suffered unlawful conduct committed by the respondent [to the action], the court may issue a temporary or permanent civil no-contact order." *Id.* § 95-264(a).

North Carolina General Statute § 95-264(b) confers broad authority on trial courts to award appropriate relief in no-contact orders, including the following:

> (1) Order the respondent not to visit, assault, molest, or otherwise interfere with the employer or the employer's employee at the employer's workplace, or otherwise interfere with the employer's operations.

> (2) Order the respondent to cease stalking the employer's employee at the employer's workplace.
>
> (3) Order the respondent to cease harassment of the employer or the employer's employee at the employer's workplace.
>
> (4) Order the respondent not to abuse or injure the employer, including the employer's property, or the employer's employee at the employer's workplace.
>
> (5) Order the respondent not to contact by telephone, written communication, or electronic means the employer or the employer's employee at the employer's workplace.
>
> (6) *Order other relief deemed necessary and appropriate by the court.*

Id. § 95-264(b) (emphasis added).

In the present case, the trial court's 27 June 2018 no-contact order found that Respondent had committed the requisite unlawful conduct and awarded all five forms of relief N.C. Gen. Stat. § 95-264(b) specifies, as well as the following, other relief:

> The Respondent not contact by telephone, written communication, or electronic means any employees of MetLife Group, Inc. ("MetLife").
>
> That Respondent not be on or around the MetLife premises located at 101 MetLife Way in Cary, North Carolina.
>
> That Respondent not come within 200 feet of James Frederick Schenck, Robert Seton Harris, Francine McAllister, and Geoff Lang.
>
> That Respondent not disclose any portion of the video he recorded at MetLife on June 14, 2018.
>
> That Respondent provide to MetLife's counsel in this action a copy of the video he recorded at MetLife on June 14, 2018 within 48 hours of service of this Order.

The 3 July 2018 order also required Respondent to "provide a copy of the video [to counsel] . . . within 10 days of the entry of this Order."

The 14 February 2019 order compelling the production of the video with audio additionally provides:

> the Respondent shall provide a complete copy of all audio and video taken by the [R]espondent on June 14, 2018 at the MetLife campus to Petitioner's counsel within five (5) days of the date of this Order. The copy of [sic] shall not be encrypted, password-protected, or otherwise unavailable to be viewed and heard in full. The Respondent shall use a device that is free of any computer virus to deliver the recording to the [Petitioner].

As noted previously, although Respondent turned over a copy of the video he recorded on 14 June 2018, the video did not include audio.

C. The Trial Court's Authority to Enter the 14 February 2019 order

Our Supreme Court has held that "[t]he trial court possesses 'inherent authority' to compel discovery in certain instances in the interest of justice." *State v. Warren*, 347 N.C. 309, 325, 492 S.E.2d 609, 617 (1997). Inherent authority has been described as "essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard v. North Carolina State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). It empowers courts to do "those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction[,]" *Matter of Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citation omitted), and it extends to enforcing compliance with court orders, *see generally Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) ("The power of the trial court to sanction parties for failure to comply with court orders is essential to the prompt and efficient administration of justice."). Civil contempt is, of course, an order entered "to preserve the rights of private parties and to compel obedience to orders and decrees[.]" *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988) (citation omitted).

Respondent argues that he cannot be held in contempt of the 14 February 2019 order compelling production of the video with audio because the trial court exceeded its authority when it ordered him to produce the video with audio given that no discovery request or claim for relief remained pending in the case. This argument does not account for the fact that N.C. Gen. Stat. § 95-264(b)(6), allowing for an award of "other relief deemed necessary and appropriate by the court[,]" authorized the trial court to order Respondent to produce the video in the first instance. N.C. Gen. Stat. § 95-264(b)(6) (2019). Further, the provisions of the 3 July 2018 order, including that requiring production of the video to Petitioner's counsel, remained in effect when the subsequent

14 February 2019 order was entered, and Respondent had not complied. Petitioner was thus not required to serve a request for production on Respondent pursuant to Rule 37 of the North Carolina Rules of Civil Procedure prior to moving the court to compel Respondent to produce the video. Nor did Respondent's pre-existing obligation to produce the video excuse him from complying with the court's third order requiring production of the video, which removed any doubt whether it was to be produced "encrypted, password-protected, or otherwise unavailable to be viewed *and heard* in full." (Emphasis added.)

D. The Trial Court's Unchallenged Findings

In the 27 June 2019 order finding Respondent in civil contempt the trial court found in relevant part as follows:

> 4. Contemnor is willfully violating the Court Order by: [Respondent] was ordered to provide a copy of the full video recording he made on June 14, 2018 with any accompanying audio to [Petitioner's] counsel on or before February 14, 2019 (within five days of the entry of the Order). [Respondent] did not and has not provided the video with accompanying audio to [Petitioner's] counsel. [Respondent] was present at the hearing on February 14, 2019, and the Court heard his objections to the Order to produce the video and audio. [Respondent] testified during the Show Cause hearing that he understood that Judge Mangum had ordered him to provide the video with the accompanying audio. On March 4, 2019, [Respondent] sent [Petitioner's] counsel an email, in which he made statements that he had expected to have received a Motion and Order to Show Cause for not complying with Judge Mangum's February 14, 2019 Order, and provided information about how [Petitioner] could serve him. [Respondent's] criminal charge of Misdemeanor Breaking and Entering the Met Life Campus on June 14, 2018 has been resolved through [Respondent's] entry into a deferral agreement on November 13, 2018 in which [Respondent] acknowledged his guilt to the criminal charge and entered a plea of guilty. During the February 14, 2019 hearing, Judge Mangum heard from both parties regarding [Respondent's] concerns regarding potential self-incrimination from the audio recording, and determined that the resolution of the criminal case through entry of a plea of guilty and deferral agreement, negated those concerns. Pursuant to a prior

> Show Cause Order, [Respondent] has provided a thumb drive, which allegedly had the audio and video vile made by Defendant on June 14, 2018. However, that thumb drive was password protected and [Respondent's] refusal to provide the password resulted in a prior Order for Civil Contempt, entered on October 25, 2018. During this hearing, [Respondent] acknowledged that he still knew that password, as did his attorney, but refused to provide it to avoid being held in Civil Contempt.

We are bound by these findings because they are not challenged on appeal. *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 142-43.

IV. Conclusion

Informed by the trial court's unchallenged findings above, we hold that the trial court's order compelling the production of the video was not outside the trial court's authority. We therefore affirm the order finding Respondent in civil contempt.

AFFIRMED.

Judges TYSON and HAMPSON concur.

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND CLEAN AIR CAROLINA, PLAINTIFFS

v.

TIM MOORE, IN HIS OFFICIAL CAPACITY, AND PHILIP BERGER, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA19-384

Filed 15 September 2020

Legislature—authority to propose constitutional amendments—illegally gerrymandered districts

After a federal court had declared that some members of the North Carolina General Assembly were elected from illegally gerrymandered districts (due to too many majority-minority districts), the trial court erred by declaring that two amendments to the state constitution (an income tax cap amendment and a voter identification amendment), which were proposed by the illegally gerrymandered

General Assembly and then ratified by popular vote, were void ab initio. There was no legal support for the trial court's conclusions, and the General Assembly retained its authority to exercise all its powers granted by the state constitution.

Judge STROUD concurring, writing separately.

Judge YOUNG dissenting.

Appeal by Defendants from order entered 22 February 2019 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 31 October 2019.

Southern Environmental Law Center, by Kimberley Hunter and David Neal, and Forward Justice, by Irving Joyner and Daryl V. Atkinson, for Plaintiffs.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and Noah H. Huffstetler, III, for Defendants.

DILLON, Judge.

The people reserved for themselves the sole right to amend our state constitution, N.C. CONST. art. I, § 3, but granted to our General Assembly the authority to pass bills proposing amendments for the people's consideration, N.C. CONST. art. XIII, § 4.

Plaintiff[1] commenced this action, seeking an order to void two of the four amendments ratified by the people during the November 2018 election. These amendments were proposed by our General Assembly during its 2017-18 Session. Plaintiff argues that the people should never have been allowed to vote on the amendments based on a 2017 decision in a federal case which declared that 28 members of our 170-member General Assembly had been elected from districts that were illegally gerrymandered based on race. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd per curiam*, 137 S. Ct. 2211 (2017).

1. When the complaint was filed, Clean Air Carolina was also a plaintiff, and there were twelve defendants. Prior to the summary judgment hearing and the trial court's order, there was a determination that Clean Air Carolina did not have standing to bring this claim, and other claims, and defendants were voluntarily dismissed after the 2018 election. Thus, this appeal includes the only parties remaining in the case.

The superior court agreed and granted Plaintiff's motion for summary judgment, declaring the two challenged amendments ratified by the people void *ab initio*.[2] In its order, the superior court concluded that our "General Assembly lost its claim to popular sovereignty," did "not represent the people of North Carolina," and therefore was "not empowered to pass legislation that would [propose, for the people's consideration, amendments to] the state's constitution." The superior court, though, did not declare that our General Assembly was totally powerless to exercise powers granted by our state constitution to the legislative branch, but only the power to pass bills proposing amendments to the people.

On appeal, Defendant argues that the superior court erred. We agree and reverse the order of the superior court.

I. Background

During the 2017-18 Session, our General Assembly passed a number of bills, including six bills proposing various amendments to our state constitution. Two of those six bills proposed (1) an "income tax cap amendment," lowering the maximum income tax rate that could be imposed by our General Assembly from 10% to 7% and (2) a "voter ID amendment," which would allow our General Assembly to enact legislation requiring voters to present a valid photo ID in order to vote, but which would also allow our General Assembly to create exceptions to this requirement.

All six proposals were placed on the November 2018 ballot for the people's consideration. Over $9 million was raised by groups opposing all six proposed amendments, approximately $675,000 was raised to support the voter ID amendment, and no money was raised to support the income tax cap amendment.[3]

On 6 November 2018, the people ratified the income tax cap amendment by a margin of approximately 538,000 votes, with 57.35% voting in favor and 42.65% voting against. And the people ratified the voter ID amendment by a margin of approximately 405,000 votes, with 55.5%

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2. Plaintiff did not challenge nor did the superior court make any determination regarding the two other amendments ratified by the people that same day or any other bill passed by our General Assembly during the 2017-18 Session.

3. *Campaign Finance Report Search*, N.C. State Bd. of Elections & Ethics Enf't, https://www.ncsbe.gov/campaign-finance/search-campaign-funding-and-spending-reports-and-penalties (last visited Sept. 1, 2020).

voting in favor and 44.5% voting against. The people also ratified two of the other four proposals.[4]

Plaintiff commenced this present action challenging the income tax cap amendment and the voter ID amendment based on *Covington*. The issue before the superior court and which is now before us is not whether our General Assembly engaged in illegal gerrymandering. That issue was resolved in *Covington*. Rather, the issue here is whether, based on *Covington*, our General Assembly immediately lost its authority to exercise the power granted by our state constitution to our legislative branch to propose amendments to the people. However, a proper understanding of the issue before us requires an understanding of the gerrymandering issue resolved by *Covington*, which we now address.

Gerrymandering is the process by which the political party in control draws districts for some advantage.[5] The two main forms of gerrymandering practiced in our history are *partisan* gerrymandering and *racial* gerrymandering.

Partisan gerrymandering occurs when the majority party draws districts for the purpose of increasing a party's *political* advantage in the legislature; for example, where districts are drawn to allow that party's candidates to win a supermajority (over 60%) of the seats even though their candidates in the aggregate statewide receive a bare majority of votes.

The United States Supreme Court recently declared that partisan gerrymandering is legal, holding that the issue presents a "political question beyond the reach of the [judicial branch]." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).[6] In companion cases, the high Court

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4. The two other proposals ratified by the people dealt with gun rights and hunting and fishing rights. The two proposals rejected by the people would have transferred appointment power from our Governor to our General Assembly.

5. The term was first used in 1812 by the *Boston Gazette*, a paper which supported the Federalist Party, to describe oddly shaped state senate districts. One of the districts was shaped like a salamander, designed to ensure the election of the political allies of Democratic-Republican governor Elbridge Gerry; hence the word "gerrymander." *See Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality opinion). Though Federalists won a comfortable majority in the overall statewide vote that year, the Democratic-Republicans remained in control of the Massachusetts State Senate due to the gerrymandering scheme.

6. Of course, any redistricting plan, whether involving partisan gerrymandering or not, where there are significant *population* differences among the districts is justiciable, as such a plan would violate the concept of "one person, one vote." *Baker v. Carr*, 369 U.S. 186 (1962).

upheld maps designed by our General Assembly to reduce Democratic Party influence and maps designed by Maryland's legislature to reduce Republican Party influence. The high Court reasoned that "courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* at 2506.[7]

Racial gerrymandering, however, occurs when a "legislature's *predominant* motive for the design of [certain] district[s]" is *race*, rather than to achieve a partisan advantage. *Bethune-Hill v. Virginia*, 137 S. Ct. 788, 800 (2017) (emphasis added).

Racial gerrymandering is *generally* illegal. For example, a generation ago, the United States Supreme Court struck down maps designed by our General Assembly to *reduce* African American influence. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

But the high Court held that racial gerrymandering may be legal *if* the legislature can demonstrate that its "districting legislation is narrowly tailored to achieve a compelling interest." *Bethune-Hill*, 137 S. Ct. at 801 (citation and quotation marks omitted). But absent a compelling interest, racial gerrymandering is illegal even if designed *to favor* a minority race. This is because "[r]acial classifications *of any sort* pose the risk of lasting harm to our society [as they] reinforce the belief [] that individuals should be judged by the color of their skin." *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (emphasis added).

One "compelling interest" justifying racial gerrymandering is drawing districts to comply with Section 2 of the Voting Rights Act of 1965 ("VRA"), which prohibits districts that prevent a large group of minority voters living near each other from casting sufficient votes to elect a candidate of their choice. Accordingly, the VRA may require some "majority-minority" districts, where minority voters living near each

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7. What some consider "unfair" does not always equate to being "unconstitutional."

For instance, it may seem "unfair" to some that the allocation of United States Senators violates the "one-person, one-vote" principle; *e.g.*, Wyoming and California are allocated the same number. But such allocation is "constitutional," as the federal constitution expressly allocates two senators to each state. U.S. Const. art. I, § 3, clause 1.

And it may seem "unfair" that a political party is not entitled to a share of seats in our General Assembly in proportion to the number of votes its candidates receive statewide in the aggregate. But such allocation is constitutional, as our state constitution does not provide for such proportional representation, but expressly empowers our General Assembly discretion to draw districts. N.C. Const. art. II, §§ 3, 5.

other make up a majority in that district. *See Thornburg*, 478 U.S. at 50-51. But the VRA does not generally require a legislature *to maximize* the number of majority-minority districts that are possible when developing maps. *Johnson v. DeGrandy*, 512 U.S. 997, 1016-22 (1994). And a plan which maximizes majority-minority districts is unconstitutional if the VRA can be complied with by creating fewer such districts, especially where minority voters in an area have the opportunity to elect a candidate of their choice through some compromise with other voters (where a minority group does not quite make up a majority of voters in the district).

> [Though] society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect the candidate of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute [(the VRA)] meant to hasten the waning of racism in American politics.

Id. at 1019-20.

Our General Assembly has a robust history of gerrymandering – both political and racial. Democrats engaged in gerrymandering when they controlled our General Assembly.[8] And Republicans have engaged in gerrymandering since regaining control in 2011.[9] Indeed, gerrymandering designed to protect incumbents has resulted in fewer truly competitive races: in every election since 1996, over 90% of state legislative races have been decided by greater than 5% of the vote.[10]

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8. *Stephenson v. Bartlett*, 355 N.C. 354, 375, 562 S.E.2d 377, 392 (2002) (recognizing that "many North Carolina legislative districts have been increasingly gerrymandered to a degree inviting widespread contempt and ridicule").

9. *Rucho*, 139 S. Ct. at 2491 (quoting a legislator confessing, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." (citation omitted)).

10. *Electoral Competitiveness in North Carolina*, BALLOTPEDIA.

Until 1968, no African Americans had served in our General Assembly in the 20th century.[11] However, with the passage of the VRA in 1965, more African Americans began voting. As a result, in 1968, Henry E. Frye (later our Chief Justice) became the first African American elected to our General Assembly in the 20th century. But no more than six (6) African Americans (or 4% of the General Assembly) served at any one time over the next 15 years. This underrepresentation was due in large part to illegal racial gerrymandering designed to suppress minority influence, a scheme which continued into the 1980s. *Thornburg*, 478 U.S. at 80. Specifically, our General Assembly divided concentrations of black voters into separate districts or lumped them with a larger contingent of white voters in multi-member districts. *Id*. at 38. The few African American members serving during this period fought against these schemes.[12]

In the 1980s the situation improved: our General Assembly drew maps which included several majority-minority districts. As a result, the number of African Americans elected quadrupled. By 1990, seventeen (17) African Americans were serving, making up 10% of our General Assembly.

Between 1991 and 2010, the General Assembly continued incorporating majority-minority districts in their maps, with seventeen (17) such districts in 1991. By 2009, this number decreased to nine (9), as African Americans were having greater success in electing candidates of their choice in districts where their voting population did not quite comprise a majority. *Covington v. North Carolina*, 316 F.R.D. at 125-26. This phenomenon allowed African American voters to be spread across more districts. During the 2009 Session, the number of African Americans serving in our General Assembly stood at 27, making up 16% of that body.

In the 2010 election, the Democratic Party lost control of the General Assembly for the first time since 1898. The number of African Americans elected that year decreased slightly from 27 to 24 members.

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11. During Reconstruction (1868-1898), 111 African Americans served in our General Assembly. *See* S.J. Res. 133, 151st Leg., (N.C. 2013) (titled "A Joint Resolution Honoring the Life and Memory [of a number of past African American members of the General Assembly], In Observance of African American History Month" and passing in both houses unanimously).

12. Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, N.C. Cent. for Pub. Pol'y Rsch.. n. 6 (Dec. 1989) https://nccppr.org/wp-content/uploads/2017/02/Black_Legislators-From_Political_Novelty_to_Political_Force.pdf (noting that Rep. Kenneth "Spaulding and others fought against legislative redistricting plans preserving multi-member districts, which passed the legislature [during the 1981 Session.]").

Upon taking control, the new Republican majority set out to draw new districts (based on the 2010 census) with the predominant motivation of protecting and increasing their new-found *partisan* advantage; that is, they sought to engage in partisan gerrymandering. *Rucho*, 139 S. Ct. at 2491. However, the new majority recognized that, though it is not illegal to engage in partisan gerrymandering, *per se*, any new map would be illegal if it violated the VRA. Therefore, the new majority *increased* the number of majority-minority districts from nine (9) to thirty-two (32). As recognized in *Covington*, the "compelling purpose" of the new Republican majority in increasing majority-minority districts was to ensure that their maps would not run afoul of the VRA. *Covington v. North Carolina*, 316 F.R.D. at 125. Indeed, these new maps were ultimately approved ("pre-cleared") by the Department of Justice in 2011.

In the 2012 election, the first held under the new maps, Republicans were successful in their *partisan* gerrymandering efforts, achieving a "veto-proof" majority (over 60%) in each house.[13] At the same time, because of the increase in majority-minority districts, the number of African Americans serving in the General Assembly increased from 24 to 32 members, all Democrats.

Covington, upon which the superior court's order in this present case is based, commenced in 2015, where the plaintiffs sought a judicial order to break the gerrymandering efforts of the Republican majority. Specifically, a few dozen voters filed suit in federal court challenging 28 of the 32 majority-minority districts created by the Republican majority. *Covington v. North Carolina*, 316 F.R.D. at 128.

In 2016, a federal panel assigned to the case declared that our General Assembly had engaged in illegal racial gerrymandering when it maximized the number of majority-minority districts, when maximization was not required by the VRA. *Covington v. North Carolina*, 316 F.R.D. 117. Judge James A. Wynn, Jr., writing for the panel, suggested that the maps might have been sustained had the Republican majority drawn *fewer* majority-minority districts. *Id.* at 178 ("Nor do we suggest that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the [28] districts challenged in this case.").

13. These maps contained relatively few districts where Republican voters comprised a majority. Indeed, during this period, Republicans made up only about 30% of all voters statewide, compared to 40% being registered Democrat, and the remaining 30% registered as unaffiliated. However, Republicans drew the maps in such a way to give Republicans a greater chance of winning many districts where they could nominate a candidate more likely to appeal to unaffiliated and conservative Democratic voters.

In a second order, entered just after the November 2016 election, the federal panel fashioned a remedy for the illegal gerrymandering. Specifically, the panel ordered (1) that the terms of the 170 legislators elected in November 2016 be shortened to one year and (2) that special elections be held in 2017 based on *new*, legal maps to be drawn by the General Assembly. *Covington v. North Carolina*, No. 1:15-CV-399, 2016 WL 7667298 (M.D.N.C. Nov. 29, 2016).

The United States Supreme Court affirmed *per curiam* the panel's first order, finding the Republican maps illegally contained too many majority-minority districts. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

However, the high Court vacated the panel's remedial order, concluding that the panel did not consider all relevant factors in ordering a new election, and remanded the matter for further consideration. *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017). On remand, the federal panel entered a new remedial order, directing new maps to be drawn, but determining that there was not enough time to order a special election prior to the regular 2018 election, thus allowing the members elected in 2016 under the illegal maps to complete their two-year terms. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 899-902 (M.D.N.C. 2017).

II. Appellate Jurisdiction

All parties concede that we have appellate jurisdiction. We agree. The superior court's order granting Plaintiff's Motion for Partial Summary Judgment is a final order. The order granted Plaintiff the relief it sought. Although the Plaintiff's Amended Complaint included other claims regarding the wording of the ballot questions, Plaintiff voluntarily dismissed some claims and parties, and the other relief requested in the complaint is now moot. Accordingly, the trial court's order granted the declaratory judgment as requested by Plaintiff and is a final order.[14]

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14. We note that this appeal, as it relates to the voter ID amendment, was not mooted by our Court's opinion in *Holmes v. Moore*, 270 N.C. App. 7, 840 S.E.2d 244 (2020). That decision preliminarily enjoined the enforcement of the statute enacted by our General Assembly to give effect to the voter ID amendment previously ratified.

That is, the voter ID amendment authorized our General Assembly to implement the photo ID requirement and to provide exceptions. In response, our General Assembly passed a bi-partisan bill sponsored by three legislators. This statute provides (1) ten acceptable forms of identification for voting (*e.g.*, driver's license, passport, certain student IDs, veteran IDs, tribal enrollment cards, etc.), (2) a means by which a voter without an ID could obtain a state-issued ID for free, and (3) a means by which a voter could still

III. Analysis

Though our General Assembly has the power to enact laws, it has long been recognized that our judicial branch has the power to declare *a law* enacted by our General Assembly unconstitutional, *Bayard v. Singleton*, 1 N.C. 5 (1787), including a law which establishes unconstitutional legislative districts. *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002). But it has never been recognized that our judicial branch has the power to deprive the General Assembly of authority to pass bills which are otherwise constitutional or any other authority granted that body by our state constitution, as it has never been recognized that our General Assembly has the power to pass a law depriving our branch of a power expressly granted to us by our state constitution. Indeed, the overwhelming, if not universal, authority compels our conclusion that the superior court here erred in declaring that the members of our General Assembly duly elected in 2016 lacked authority to pass bills proposing amendments for the people's consideration, a power expressly granted to our legislative branch by our state constitution.

For instance, when setting up our state government, the people declared that "legislative [] and judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art I, § 6. Our Supreme Court recently reiterated that "the separation of powers clause requires that, as the three branches of government carry out their duties, *one branch will not prevent another branch from performing its core functions*." *Cooper v. Berger*, 370 N.C. 392, 410, 809 S.E.2d 98, 108 (2018) (emphasis added) (citations and quotation marks omitted).

More to the point, our Supreme Court has expressly addressed and rejected the argument accepted by the superior court. Specifically, our high Court recognized that "judicial power" does not extend to the power to declare retroactively that our General Assembly lacked the authority to pass bills simply because some legislators were elected from unconstitutionally-designed districts, stating, "[q]uite a devastating argument, if sound." *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d

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vote without an ID by filling out an affidavit. *Holmes* enjoined the enforcement of this implementing statute, holding that its challengers had demonstrated that they were likely to succeed in showing that it was passed with the purpose of discriminating against African American voters. The injunction, though, was not permanent in nature and otherwise did not address the amendment itself.

316, 324 (1939). The Court characterized the question as "a political one, and there is nothing courts can do about it" and that "the authorities are against" it. *Id.* at 99, 3 S.E.2d at 324 (stating that courts "do not cruise in nonjusticiable waters").

Since *Leonard*, our Supreme Court has declared laws creating legislative districts to be unconstitutional based on illegal gerrymandering, but that Court has never suggested that our General Assembly could not otherwise continue exercising the powers granted to our state's legislative branch by our state constitution. For instance, in *Pender County v. Bartlett*, the Court declared a district to be illegally gerrymandered based on race, holding that the VRA did not require the district to be drawn as a majority-minority district. 361 N.C. 491, 649 S.E.2d 364 (2007). But the Court did not enjoin our General Assembly, nor the representative elected from the illegally-drawn district, from exercising legislative authority. In fact, the Court allowed *another election* (in November 2008) to occur under the unconstitutional maps, not requiring elections under new maps until 2010. *Id.* at 510, 649 S.E.2d at 376. *See also Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (declaring certain districts to be illegally gerrymandered but not ordering a special election nor enjoining the General Assembly from exercising legislative powers).

The federal panel in *Covington* did not believe that the 2017-18 Session of our General Assembly lost legitimacy, ordering the body it declared to be illegally gerrymandered to redraw the districts. *Covington*, 267 F. Supp. 3d at 665. The *Covington* plaintiffs apparently did not believe so either, as they actually sought an order directing the General Assembly which they had successfully argued to be illegally gerrymandered to draw new districts. *Id.* And the United States Supreme Court apparently did not believe so, as it *vacated* the lower court's order to shorten the terms of those elected to the 2017-18 Session. *Covington*, 137 S. Ct. at 1625-26.

Covington is consistent with other United States Supreme Court jurisprudence, which recognizes that "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act[.]" *Baker v. Carr*, 369 U.S. 186, 250 n. 5 (1962) (Douglas, J. concurring) (citation omitted).[15] For instance, in *Connors v. Williams*,

15. Justice Douglas' footnote was cited with approval by the Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See also Ryder v. United States*, 515 U.S. 177, 183 (1995) (stating that acts passed by a malapportioned legislature are not void); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (stating that "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan" still have

the Court held that elections held under an apportionment plan which violates the Fourteenth Amendment do not need to be invalidated. 404 U.S. 549, 550-551 (1972). In so holding, the Court cited an opinion which held that an unconstitutionally apportioned legislature "should not be restrained from considering and passing such legislation as it considers necessary or proper in the public interest [until new legislators are seated]." *Mann v. Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *aff'd sub nom*, *Hughes v. WMCA*, 379 U.S. 694 (1965).

Plaintiff, though, argues that the members of our 2017-18 General Assembly were "usurpers" based on the *Covington* decision. However, we are compelled to conclude that those serving were not usurpers. Rather, they were *de jure* officers, or at worst *de facto* officers, as they each had "at least a fair color of right or title to the [] office[.]" *In re Wingler*, 231 N.C. 560, 563, 58 S.E.2d 372, 374 (1950). The offices they purportedly held (state Representatives and Senators) are clearly established under our state constitution. All were elected and received their commissions. No one else held any *de jure* claim to the seats, no election was held to replace them prior to November 2018, and no order was entered removing any of them.

Even if they were serving merely as *de facto* officers, these legislators had the authority to exercise all the power that may be exercised by a *de jure* officer under the *de facto* doctrine consistently applied by our Supreme Court:

> The de facto doctrine is indispensable to the prompt and proper dispatch of governmental affairs. . . . An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. [For example, the] administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office.

Id. at 565-66, 58 S.E.2d at 376.

Our Supreme Court has routinely applied the *de facto* doctrine to uphold the acts of government officials, including judicial officers, even

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"de facto validity"); *Maryland Committee v. Tawes*, 377 U.S. 656, 675-76 (1964) (allowing a malapportioned Maryland legislature to continue functioning and to draw new districts for the *next* election).

though performed by those statutorily ineligible to hold office. *See e.g.*, *People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978) (judge serving well past the statutory mandatory retirement age); *State v. Lewis*, 107 N.C. 967, 972, 12 S.E. 457, 458 (1890) (sustaining a criminal conviction where the judge presiding was constitutionally ineligible to his office). That Court has also applied the doctrine to uphold acts of town councils whose members were elected under unconstitutionally void schemes, which allowed only landowners to vote. *Wrenn v. Kure Beach*, 235 N.C. 292, 295, 69 S.E.2d 492, 494 (1952); *Smith v. Carolina Beach*, 206 N.C. 834, 175 S.E. 313 (1934).

The superior court, here, essentially established a rule that our General Assembly only retains the authority to exercise constitutional powers which the judiciary determines are necessary to "avoid chaos and confusion" after it has been judicially determined that certain members of that body were elected from illegally gerrymandered districts. Nothing in our jurisprudence suggests that the judiciary can unilaterally strip the legislative branch of *some* of its constitutional powers. We cannot pick and choose which laws (otherwise constitutional) we prefer, or which laws are necessary to avoid chaos and confusion. Either our General Assembly has the authority to act as our state's legislature, or it does not. Certainly, our legislative branch cannot enact a law which deprives our Supreme Court of certain powers expressly granted by the state constitution or enact a law which deprives the Governor of certain constitutional powers granted to the executive branch.

We do not agree that our "General Assembly lost its claim to popular sovereignty" based on the reasoning that "under the illegal racial gerrymandering, a large swath of North Carolina citizens lack a constitutionally adequate voice in the State's legislature." If there was a loss of popular sovereignty by our General Assembly, then *all* the laws passed by that body would be subject to attack, thus creating chaos and confusion. One might argue that our current state constitution, adopted in 1971, was void, as it was proposed by a General Assembly that had only one African American member due to the impact of gerrymandering and voter suppression measures. We do not condone the creation of more majority-minority districts than that required by the VRA as it reduces the ability of minority voters to have more influence in other districts. We note, though, notwithstanding the harm created by the illegal gerrymandering, that the maps created in 2011 resulted in more African Americans being elected to the General Assembly than ever before.

We disagree with the superior court's reasoning that "[t]he requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation" and, as such, our General Assembly can exercise the authority to propose amendments "only insofar as it has been bestowed with popular sovereignty." Rather, *each* power granted to our General Assembly is "unique and distinct." We see nothing in the language of our state constitution empowering our branch to "blue pencil" the powers of our legislative branch. Indeed, our state constitution empowers our General Assembly to pass many types of bills: bills which become law as part of our General Statutes, pursuant to Article II, § 22(1); bills which become law as part of our state constitution pursuant to Article II, § 22(2); and bills which become law as part of our federal constitution, pursuant to Article II, § 22(3).

If we had such power to engage in "blue penciling" the legislative powers contained in Article II, it might make more sense that we blue pencil our General Assembly's power to pass regular bills. The risk of a bill becoming law is much greater, as those can become law without the consent of anyone else, through veto-override. A bill proposing an amendment, however, cannot become law without the approval of the people, the source of popular sovereignty.

IV. Conclusion

We conclude that the superior court erred in holding that our General Assembly lost its power granted by our state constitution, while retaining other powers, simply because a federal court had determined that the maps contained too many majority-minority districts, such that some members elected to that body were from districts that were illegally gerrymandered based on race. It is simply beyond our power to thwart the otherwise lawful exercise of constitutional power by our legislative branch to pass bills proposing amendments. Accordingly, we reverse the order of the superior court and declare the challenged constitutional amendments duly ratified by the people to be valid.

REVERSED.

Judge STROUD concurring, writing separately.

Judge YOUNG dissenting, writing separately.

STROUD, Judge, concurring.

I concur in the result reached by majority opinion but write separately because I would reach the same result on a more limited basis. This Court is "an error-correcting body, not a policy-making or law-making one." *Connette v. Charlotte-Mecklenburg Hospital Authority*, 272 N.C. App. 1, 6, 845 S.E.2d 168, 172 (2020) (citation and quotation marks omitted). Our role is to review the trial court's order to determine if the ruling is supported by existing precedential law as stated in North Carolina's Constitution, caselaw, or statutes. *See generally id.* Neither this Court nor the trial court has the authority to declare new law which suits our own policy preferences. *See generally id*. In our role as an error-correcting court, this Court has no power to affirm the trial court's order because it is not based upon law. *See generally id*.

As noted by the majority, "[t]he superior court's rationale in declaring our General Assembly illegitimate" was based almost exclusively upon *Covington* which was affirmed by a memorandum decision from the United States Supreme Court, "in which that Court determined that 28 members of the 170-member General Assembly were elected from districts" illegally and racially gerrymandered. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017). Although *Covington* is not directly related to the plaintiff's claim in this case, also as noted by the majority, it was the legal basis for plaintiff's contention and the trial court's determination that the General Assembly "ceased to be a legislature with any *de jure* or *de facto* lawful authority, and assumed usurper status[,]" thus rendering the challenged constitutional amendments void. *See generally id*. But *Covington* does not support that trial court's conclusion that the General Assembly elected in that case had no *de jure* or *de facto* authority to act to pass a bill proposing a constitutional amendment or any other legislation. *See generally id*. To the contrary, *Covington* ultimately declined to conclude that the members of the General Assembly elected in unconstitutionally gerrymandered districts are usurpers but instead ordered the same exact General Assembly the trial court deemed without *de jure* or *de facto* authority to create new districts with no limitations on the General Assembly's authority to act. *See id.* at 176-78. There is no North Carolina law to support the trial court's legal conclusions.

Standard of Review

The summary judgment order on appeal grants a declaratory judgment. Where there is no dispute regarding the material facts, "[s]ummary judgment is an appropriate procedure in a declaratory judgment action.

Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980)." *Pine Knoll Association v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997). This Court's standard of review is *de novo*. *See Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). The legal issues presented are constitutional questions, which we also review *de novo*, but "[i]n exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *Cooper v. Berger*, 256 N.C. App. 190, 193, 807 S.E.2d 176, 178 (2017), *aff'd*, 371 N.C. 799, 822 S.E.2d 286 (2018); *see also Hinton v. Lacy*, 193 N.C. 496, 499-500, 137 S.E. 669, 671-72 (1927) (" 'While the courts have the power, and it is their duty, in proper cases to declare an act of the Legislature unconstitutional it is a well-recognized principle that the courts will not declare that this co-ordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. *If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people*. It cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly.' Every presumption is in favor of the constitutionality of an act of the Legislature, and, without the clearest showing to the contrary, it should be sustained. It is to be presumed that the law-making body were mindful of their oaths, and acted with integrity and honest purpose to keep within the constitutional limitations and restrictions. The breach of the Constitution must be so manifest as to leave no room for reasonable doubt." (emphasis in original) (citations omitted)).

Legal Basis of the Trial Court Order

A general outline of the trial court's order and a review of its conclusions of law demonstrate that *Covington* was essentially the *only* legal basis for the trial court's decree. The order's section on "Findings of Fact" includes a sub-section entitled, "2018 Constitutional Amendment Proposals[.]" The first several paragraphs of the findings recite the claims, history, and court rulings of the *Covington* case. Thereafter, many findings of fact recite the chronology of the adoption of the proposed constitutional amendments, the filing of the complaint in this case, the procedural history of this case, and a description of plaintiff and its interest in challenging the amendments.[1]

1. The trial court order notes that a three-judge panel had previously determined plaintiff CAC did not have standing in the case.

The trial court's order then makes several conclusions of law; the following are pertinent to the issues raised on appeal:

> 3. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts.
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> . . . .
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> 5. N.C. Const art I sec. 3 states that the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly-vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.
>
> 6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. At that time, following "the widespread, serious, and longstanding . . . constitutional violation–among the largest racial gerrymanders ever encountered by a federal court—" the General Assembly lost its claim to popular sovereignty. *Covington*, 270 F. Supp. 3d at 884. The three-judge panel in Covington ruled that, under the illegal racial gerrymander, "a large swath of North Carolina citizens . . . lack a constitutionally adequate voice in the State's legislature . . . ." *Covington v. North Carolina*, 1: 15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, *North Carolina v. Covington*, 137 S. Ct. 1624 (June 5, 2017)).

7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

8. Accordingly; the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, "[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were "needed to return the people of North Carolina to their sovereignty." *Id.*

9. Defendants argue that, even following the *Covington* decision, the General Assembly maintained authority to enact legislation so as to avoid "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*.

10. An illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution.

11. N.C. Session Laws 2018-119 and 2018-128, and the ensuing constitutional amendments, are therefore void *ab initio*.

Thus, the trial court relied upon *Covington* to support its conclusions of law, although the order also noted some provisions of the North Carolina Constitution. I will first address why *Covington* does not support the trial court's order.

Covington recognized the absence of state law to support Plaintiff's usurper argument.

Plaintiff's complaint here requested a declaratory judgment, specifically "a declaration that following the U.S. Supreme Court's mandate in *Covington v. North Carolina*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority and assumed usurper status." The U.S. Supreme Court's mandate affirming the *Covington* lower court's opinion was issued on 5 June 2017, *see Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655, but the unconstitutionally gerrymandered districts were created in 2011. *Covington*, 316 F.R.D. at 124. Thus, the logical conclusion of plaintiff's theory of usurper status would be that North Carolina has not had a General Assembly with any authority to act since at least 2011 as North Carolina held elections based upon the 2011 districts addressed in *Covington*, some of which were determined to have been unconstitutionally racially gerrymandered. *See generally id.*, 316 F.R.D. 117. Although only 28 districts were challenged in *Covington*, redrawing the districts would also affect other districts, so over half of the House and Senate districts would have to be redrawn. *See Covington v. North Carolina*, 270 F. Supp. 3d 881, 888 (M.D.N.C. 2017) ("In particular, although this Court's order focused on the boundaries of the twenty-eight majority-minority districts, the parties agree that the inevitable effect of any remedial plan on the lines of districts adjoining the twenty-eight districts—coupled with the North Carolina Constitution's requirement that district lines not traverse county lines, unless such a traversal is required by federal law, see Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 396–98 (2002)—means that the well over half of the state House and Senate districts must be redrawn.").

The primary problem with plaintiff's reliance upon *Covington* for its contention that North Carolina, as of August 2016, effectively had no General Assembly, is that neither the lower federal court nor the United States Supreme Court considered the General Assembly, even as elected under the rejected districting plan to be usurpers with no *de jure* or *de facto* legal authority; this is true even though the *Covington* plaintiffs made this same argument in *Covington* for limitation of the General Assembly's authority. *See Covingto*n, 316 F.R.D. 117; *see also Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655. Further, the plaintiff in *this* case, as

amicus curiae in *Covington*, made the same arguments in support of the request for special elections so a new General Assembly could be elected in new districts to take additional action. *See Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017). But the federal court ultimately rejected the request for special elections because it would "unduly harm North Carolina voters" due to "insufficient time to enact and review remedial redistricting plans[], . . . voter confusion and, likely, poor voter turnout." *Id.*

The trial court noted in its conclusions of law this case presented an issue of first impression: "Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts." The trial court then relied upon *Covington* to support its ruling, and the relevant conclusions of law stated:

> 6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. At that time, following "the widespread, serious, and longstanding . . . constitutional violation–among the largest racial gerrymanders ever encountered by a federal court—" the General Assembly lost its claim to popular sovereignty. Covington, 270 F. Supp. 3d at 884. The three-judge panel in Covington ruled that, under the illegal racial gerrymander, "a large swath of North Carolina citizens . . . lack a constitutionally adequate voice in the State's legislature . . . ." Covington v. North Carolina, 1: 15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, North Carolina v. Covington, 137 S. Ct. 1624 (June 5, 2017)).
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> 7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

> 8. *Accordingly*, the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, "[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were "needed to return the people of North Carolina to their sovereignty." *Id.*

(Emphasis added.)

And although the trial court relied almost solely upon *Covington* for its conclusion that "[a]n illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution" the fact remains that *Covington* explicitly declined to address this "unsettled question of state law[,]" and thus did not create any state law for the trial court, or this Court, to follow:

> Plaintiffs and the NAACP, as amicus curiae, nonetheless argue that the potential for disruption factor weighs in favor of ordering a special election because the Supreme Court's summary affirmance of this Court's decision calls into question, as a matter of state law, the authority of legislators elected in unconstitutional districts to legislate. Pls.' Suppl. Br. on Remedies at 5. In particular, according to Plaintiffs, "officers elected pursuant to an unconstitutional law are 'usurpers' and their acts are absolutely void." Id. (quoting In re Pittman, 151 N.C. App. 112, 564 S.E.2d 899, 901 (2002)).[2] Plaintiffs maintain that because nearly 70% of the districts must

2. *In re Pittman* does not support plaintiff's argument; it discusses the difference between *de facto* and *de jur*e authority when a former district court judge signed an order after the expiration of her term and another judge had already been sworn into the same seat. *See generally In re Pittman*, 151 N.C. App. 112, 564 S.E.2d 899 (2002).

> be redrawn to remedy the unconstitutional districting plans, the state Senate and House, as currently composed, lack the power to act. See id. at 5–8.
>
> We agree with Plaintiffs that the absence of a legislature legally empowered to act would pose a grave disruption to the ordinary processes of state government. But *Plaintiffs cite no authority from state courts definitively holding that a legislator elected in an unconstitutionally drawn district is a usurper, nor have we found any. On the contrary, Plaintiffs concede that whether the General Assembly, as currently composed, is empowered to act is an unsettled question of state law*. See id. at 7. Given that this argument implicates an unsettled question of state law, Plaintiffs and Amici's argument is more appropriately directed to North Carolina courts, the final arbiters of state law.

Id. (Emphasis added). Further, there simply is no state law to support the proposition that the legislators of North Carolina are usurpers. The trial court thus undertook to create some new state law, purportedly based upon *Covington*. But North Carolina does have law regarding *de facto* and *de jure* authority of elected officers, as discussed by the majority opinion, and that law does not support the trial court's conclusions.

Covington ordered the General Assembly to create new districts and did not limit its legislative authority.

A further problem with both plaintiff's and the trial court's reliance on *Covington* for its contention that North Carolina effectively had no General Assembly at the time the amendments were ratified by the people of North Carolina, is that neither the lower federal court nor the United States Supreme Court considered the General Assembly, even as elected under the illegally gerrymandered plans, to have assumed "usurper status" with no *de jure* or *de facto* legal authority. *See Covington*, 316 F.R.D. 117; *see also Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655.

First, in *Covington*, while the federal court acknowledged that "Plaintiffs have asked for an immediate injunction blocking the use of the unconstitutional districts in any future elections" so that the illegally constituted General Assembly would not be allowed to continue to exist and legislate any longer than absolutely necessary, the court denied this request "despite the[] unconstitutionality" of the plans:

> Based on the schedules put forth by the parties in their post-trial briefing, we regrettably conclude that due to the mechanics of state and federal election requirements, there is insufficient time, at this late date, for: the General Assembly to draw and enact remedial districts; this Court to review the remedial plan; the state to hold candidate filing and primaries for the remedial districts; absentee ballots to be generated as required by statute; and for general elections to still take place as scheduled in November 2016.
>
> When necessity so requires, the Supreme Court has authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to constitutional requirements. After careful consideration, and with much reluctance, we conclude that necessity demands such a result today. We decline to order injunctive relief to require the state of North Carolina to postpone its 2016 general elections, as such a remedy would cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials. Instead, like other courts confronted with similarly difficult circumstances, we will allow the November 2016 elections to proceed as scheduled under the challenged plans, despite their unconstitutionality.

Id. at 177–78 (citations, quotation marks, ellipses, and brackets omitted).

Second, the federal court acknowledged the authority of the unconstitutionally formed General Assembly as it ordered this very Assembly to take legislative action and redraw the plans:

> Nonetheless, Plaintiffs, and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from Defendants' creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause. These citizens are entitled to swift injunctive relief.
>
> Therefore, *we hereby order the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans*. By separate order, we

> will direct the parties to file supplemental briefs on an appropriate deadline for such action by the legislature, on whether additional or other relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief.

Id. at 177–78 (emphasis added). Thus, in summary, the federal court acknowledged the unconstitutionality of North Carolina's illegally gerrymandered districts and simultaneously ordered the Assembly elected from those districts to take legislative action to correct the issue rather than ordering a new election or limiting its authority to take further legislative actions. *See generally id.*

Acceptance of plaintiff's argument would create chaos.

Understandably, plaintiff limits its argument as to the General Assembly's lack of legal authority to the two constitutional amendments they oppose; they recognize the logical conclusion of the argument if it is not limited.[3] But there is no law to support this argument and no logical way to limit the effect of the electoral defects noted in *Covington* to one, and only one, type of legislative action, and more specifically to just these two particular amendments which plaintiff opposes. To the extent a rational argument could be made to support a theory that only one type of legislative action is without authority, such an argument would be most likely to fail regarding constitutional amendments as this is a specific type of legislative action that must be and was approved by a majority of the *voters* in North Carolina in a statewide election. The popular vote provides an additional layer of protection.

The majority opinion has addressed the General Assembly's *de facto* or *de jure* authority to pass laws, but I would note that neither plaintiff nor our dissenting colleague has cited any applicable legal authority holding a legislative body can lack *de facto* or *de jure* authority for one purpose only but retain authority for all other purposes such as regular bills and budgets, *unless* a court has so directed. For example, in *Butterworth v. Dempsey*, a federal court enjoined the Connecticut General Assembly

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3. Plaintiffs' amended complaint states their claim as follows: "Plaintiffs seek a declaratory judgment that, pursuant to the U.S. Supreme Court's June 30, 2017, mandate in Covington, the N.C.G.A. ceased to be a legislature with any de facto lawful authority and assumed usurper status. To the extent that they had any power to act, it was limited to those acts necessary to avoid chaos and confusion, such as acts necessary to conduct the day-to-day business of the state, but the usurper N.C.G.A. may not take steps to modify the N.C. Constitution. Art I § 2, 3, 35 and Art XIII § 4."

"from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Connecticut," and taking other delineated legislative actions, although the injunction was stayed so long as the General Assembly complied with the specific timeline and steps set out by the court for redistricting for elections. *See Butterworth*, 237 F. Supp. 302, 310-11 (1964). The federal court in *Covington* could have adopted this same sort of procedure used in *Butterworth* and limited the General Assembly's authority until the new districts were adopted or new elections held, *see generally id.*, but instead the *Covington* court simply directed the General Assembly to redraw the districts and did not limit the General Assembly's authority. *Covington*, 316 F.R.D. at 177-78.

The trial court also sought to limit its own ruling to specifically the two challenged amendments by rejecting in one sentence the defendants' argument as to the logical ramifications of its ruling:

> 9. Defendants argue that, even following the *Covington* decision, the General Assembly maintained authority to enact legislation so as to avoid "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*.

The trial court did not attempt to explain *why* it rejected defendants' argument of "chaos and confusion" from a ruling declaring legislative actions void, perhaps because there is no law to support this conclusion, as recognized in *Dawson v. Bomar*, 322 F.2d 445, 447–48 (6th Cir. 1963) ("As indicated by the petitioner's failure to cite authority in support of his contention, the courts have uniformly held that otherwise valid enactments of legislatures will not be set aside as unconstitutional by reason of their passage by a malapportioned legislature.").

Neither this Court nor the trial court can limit the effect of its ruling to these two amendments. Just saying the ruling is limited does not make it so. Now that the order has been appealed, its effect cannot be contained to this one case, and the precedential effect of this Court upholding the trial court's order would lead to the "chaos and confusion" the trial court was attempting to avoid. (Quotation marks omitted). If this Court were to uphold the trial court order and conclude the General Assembly was a usurper with no authority to act as to the

two constitutional amendments plaintiff opposes, this opinion would provide authority to support legal challenges to every single legislative action taken by the General Assembly as elected based upon the 2011 districts. Our ruling could also support claims challenging other laws adopted before 2011, since 2011 was far from the first time districts in North Carolina were illegally and unconstitutionally gerrymandered.

The Tenth Circuit Court of Appeals described the potential chaos and confusion from a ruling holding that a legislature elected in illegal districts has no authority in *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir. 1963). The "chaos" noted by the circuit court would *not* result from granting relief to the single petitioner in that case but from the effect such a ruling would have on other disputes. *See generally id.* The circuit court rejected an argument of the legislature's lack of authority based upon unconstitutional districts when a petitioner made a habeas corpus claim based upon the premise that the apportionment of the Colorado legislature violated both the state and federal constitutions, and thus it had no authority to convict him under the Colorado Habitual Criminal Act:

> The sole issue is one of law — whether statutes passed by an unconstitutionally apportioned legislature are constitutional. If they are, all the contentions of the petitioner fall by the wayside.
>
> . . . .
>
> *An acceptance of the contentions of the petitioner would produce chaos.* A presently unascertainable number of Colorado statutes would be nullified. Property rights would be jeopardized. The marital status of many individuals would be questionable. Tax statutes would be unenforceable. The prison gates would be thrown open. The maintenance of law and order would be imperilled. Government would exist in name only. A recognition of the consequences compels rejection of the arguments.

Id. at 431-32 (Emphasis added).

Covington acknowledges the judiciary's struggle with correcting the effects of unconstitutional gerrymandering, and there are no easy fixes, as outlined by the majority opinion. *See generally Covington*, 316 F.R.D. 117. But in this instance, acceptance of the plaintiff's contentions *would* produce chaos. In *Covington*, the federal court and the United States Supreme Court ordered corrective action but *declined* the request of

the plaintiff to direct corrective action by some means other than action by the duly elected General Assembly, despite its unconstitutionally gerrymandered districts; *Covington* does not support the trial court's order but instead supports the opposite result. *See Covington*, 316 F.R.D. 117; *see also Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655.

The North Carolina Constitution does not support the trial court's conclusions.

The trial court's order also cited some provisions of the North Carolina Constitution in support of its conclusions. The trial court noted the following constitutional provisions in its "findings of fact":

> 5. N.C. Const art I sec. 3 states that the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly-vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.

The provisions cited by the trial court's order do not support its conclusion that an illegally gerrymandered General Assembly lacks either *de facto* or *de jure* authority to approve a bill for submission of constitutional amendments to popular vote but it still has full authority to pass any other kind of legislation. As noted in *Covington*, there is *no* North Carolina law interpreting the North Carolina Constitution in a way that could support the trial court's conclusion. *See Covington*, 270 F. Supp. 3d at 901. The sections of the North Carolina Constitution cited simply address the method of adopting a constitutional amendment. True, the process for a constitutional amendment differs from the adoption of a bill or a budget, but if the General Assembly lacked authority to pass a bill for submission of a constitutional amendment to the voters, it surely lacks authority to pass other bills as well. Since passing a constitutional amendment requires a majority of the voters of North Carolina in a statewide election unaffected by illegal districts, plaintiff's argument is

actually weaker for a constitutional amendment than for other ordinary legislation without these additional protections. Ironically, despite the approval of the challenged amendments by large majorities of "the people of North Carolina," the trial court held the amendments to be invalid because the General Assembly "does not represent *the people of North Carolina* and is therefore not empowered to pass legislation that would amend the state's Constitution." If the General Assembly lacked *de jure* and *de facto* authority to pass a bill proposing a constitutional amendment for approval by popular vote, the General Assembly also lacks authority to pass any legislation or budget which must be approved only by a majority vote and which is not subject to popular vote. Thus, the North Carolina Constitution does not support the trial court's holding.

I therefore concur in the result reached by the majority based on the rationale of this concurring opinion.

YOUNG, Judge, dissenting.

For the following reasons, I must respectfully dissent.

This case presents a compelling issue of first impression before this Court, one which, due to its subject matter, demands the utmost attention and scrutiny. At issue is a narrow question, but one vital to our democracy: Can a legislature, which has been held to be unconstitutionally formed due to unlawful gerrymandering, act to amend the North Carolina Constitution?

The ramifications of such an act are clear. If an unlawfully-formed legislature could indeed amend the Constitution, it could do so to grant itself the veneer of legitimacy. It could seek, by offering amendments for public approval, to ratify and make lawful its own unlawful existence. Such an act would necessarily be abhorrent to all principles of democracy.

Indeed, I find little merit to the arguments of the defendant-appellants. They contend, for example, that this matter is a political question, forever out of the reach of the judiciary. While this was once held to be true, that is no longer the case. In 1962, the United States Supreme Court held that challenges to the apportionment of a state legislature under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution were justiciable, and therefore that the courts had a role in determining such issues. *Baker v. Carr*, 369 U.S. 186, 201, 7 L. Ed. 2d. 663, 676 (1962) (holding that "[a]n unbroken line of our precedents

sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature"). The courts of this State have since followed the example set in *Baker*. *See*, *e.g.*, *Woodard v. Carteret Cnty.*, 270 N.C. 55, 153 S.E.2d 809 (1967). Indeed, the case underlying many of the legal issues before us, *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *summarily aff'd*, 581 U.S. ___, 198 L. Ed. 2d 655 (2017) (*Covington I*), involved judicial review of the apportionment of the legislature. It cannot reasonably be said that the apportionment of the legislature remains a political question when it is clear that the courts have a role to play in the oversight of such decisions.

Likewise, with regard to the argument by defendant-appellants that the trial court erred in "determining that the General Assembly was a body of usurpers incapable of passing laws," I find these contentions unconvincing. Somewhat ironically, defendant-appellants rely upon the "chaos and confusion" argument of *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). However, the trial court relied upon this very same argument in limiting its order, noting that "[i]t will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*."

Indeed, to uphold the determination of the trial court, our holding need not be a broad one. As plaintiff-appellees recognize, the trial court's order would not impact any legislative action taken prior to the Supreme Court's determination in *Covington I* that the General Assembly was unconstitutionally formed upon unlawful gerrymandering. Those laws enacted prior to that determination would go unchallenged.

Moreover, per the "chaos and confusion" rule, we need not hold that *all* legislative acts since that determination are unlawful and void. Certainly, those actions taken in the ordinary course of legislative business must be permitted to stand, as to allow otherwise would create anarchy. For defendant-appellants to suggest that this Court's ruling would permit that is without merit.

Rather, the only relief required here – the very relief granted by the trial court – is that we must hold void only those actions taken by the legislature *which sought to amend our Constitution*. Those actions, and only those, strike the heart of our democracy. Only a legislature formed by the will of the people, representing our population in truth and fact, may commence those actions necessary to amend or alter the central document of this State's laws. For an unlawfully-formed legislature, crafted from unconstitutional gerrymandering, to attempt to do so

is an affront to the principles of democracy which elevate our State and our nation. As such, defendant-appellants' contention that the action of the trial court is an "extreme overreach" ignores the reality of the court's order, and substitutes fear-mongering rhetoric for reasoned argument.[1]

Nor is the reliance of defendant-appellants upon federal case law convincing. While such law may form a persuasive argument, it is not binding upon the courts of this State. It is true that the trial court considered federal law in its order. However, that does not require this Court, or any other court of this State, to hold those cases as sacrosanct; they are persuasive authority, nothing more.

Nor does *Covington II* stand for the principle, as defendant-appellants contend, that by not ordering a special election, the *Covington II* court approved of the legislature. *See Covington v. North Carolina*, 267 F. Supp. 3d 664 (2017) (*Covington II*). A special election, as found in *Covington II*, is a special intrusion into the ordinary proceedings of the legislature and the state. The fact that *Covington II* did not see a need to preclude the General Assembly from taking *any* legislative action by ordering an immediate special election does not mean that the General Assembly's demonstrably unlawful existence was thereafter approved. To the contrary, the court in *Covington II* criticized the General Assembly's failure to act in the wake of prior decisions. I find it doubtful that the *Covington II* court, having once more reminded the General Assembly of its tenuous position, anticipated that the General Assembly would take its words as *encouragement* to enact constitutional reform in its present state. The decision not to order a special election was one intended to prevent disruption to ordinary legislative activity; it does not follow that extraordinary legislative activity, such as constitutional amendments, would likewise be protected from scrutiny.

Finally, it bears recognizing that the act of placing these amendments on the ballot does not cure them of their unlawful origins. In his oft-quoted Gettysburg Address, President Abraham Lincoln emphasized "that government of the people, by the people, for the people, shall not perish from the earth." That it is the people, and not those they elect, who wield ultimate democratic power in this country is a principle which stems all the way back to the United States Constitution itself,

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1. I find particularly disturbing the contradiction of defendant-appellants' position. To wit: One of the amendments proposed by the General Assembly was a Voter ID law, designed to prevent citizens from unlawfully voting in our elections. And yet, this amendment was proposed by a General Assembly which was, itself, unlawfully formed.

the first words of which are "We the People[.]" Not We the Legislators, or We the Elected Officials. It is the people of our country, and of this State, who can and must determine how government power is wielded. That is precisely why it is necessary for the voters to approve any amendment to the North Carolina Constitution proposed by the General Assembly. N.C. Const. Art. XIII, § 4.

However, the people of this State cannot, by popular vote, approve an unlawful act of the General Assembly. The very provision of our Constitution which mandates review by the voting populace requires, before such a vote can take place, action by "three-fifths of all the members of each house" of the General Assembly. In other words, the popular vote as to whether to approve an amendment to the Constitution is predicated upon a preceding lawful action by the General Assembly. By necessity, once the legislature became aware that it was unconstitutionally formed, any actions taken to alter our State Constitution were void *ab initio*; the public vote could not cure that deficiency any more than it could cure any other unlawful action by the General Assembly.

The North Carolina Constitution, as the foundational document of law in this State, is more than a mere piece of legislation. It is "the rudder to keep the ship of state from off the rocks and reefs." *Hinton v. Lacy*, 193 N.C. 496, 509, 137 S.E. 669, 676 (1927). It is the fulcrum which permits the lever of our State's justice to move mountains. Altering that document is an act by the General Assembly that strikes deep into the heart of our democracy – it can change the role of government, it can alter how laws are made, it can disrupt the flow of justice, it can even change what any of those words mean in the eyes of the law. Such action is to be taken with great care and caution. Once it was determined that our General Assembly was acting in violation of the Constitution, without the proper support of the electorate, it lost the authority to alter that document. To hold otherwise would be to permit total usurpation of our democracy and our system of laws by the very body that has been admonished by our nation's highest court for having previously done so.

To be clear, I do not believe that this Court should have found the General Assembly unable to pass any laws whatsoever. Our precedent on that point is clear: The General Assembly must be permitted to engage in the ordinary business of drafting and passing legislation, regardless of any issues of gerrymandering, as to require otherwise would create "chaos and confusion." However, the amendment of our Constitution is not an ordinary matter – it is a most extraordinary matter, and one which goes beyond the day-to-day affairs of the General Assembly. That

is why such amendments are put to the public on a ballot. And I believe that our laws provide that a Constitutional amendment may only be put to the public when it is drafted by a legislature formed in conformity with the Constitution itself. This is the extent of my position – only that the General Assembly, found to be unconstitutionally formed based on unlawful gerrymandering, could not attempt to amend our Constitution without first comporting itself to the requirements thereof.

Defendant-appellants, and the majority, embrace the notion that the choice is a binary one: Either the General Assembly can perform all actions that it normally could, or none. They maintain that, because the latter is not a choice at all, the General Assembly must logically be able to undertake any action it could have had it been lawfully composed. I believe, however, that the choice is not binary – it is a spectrum, illuminated with shades of grey between "everything" and "nothing" – and that a narrow ruling that the General Assembly, being unconstitutionally formed, cannot amend the Constitution, is a reasonable interpretation of our laws.

I therefore respectfully dissent from my colleagues, and would affirm the decision of the trial court.

STATE OF NORTH CAROLINA
v.
BRIAN ROBERT GLEASON

No. COA20-80

Filed 15 September 2020

Constitutional Law—effective assistance of counsel—direct appeal—capable of being resolved on cold record—sentencing—failure to object to lack of notice of aggravating factor

Where defendant, after conviction for felony perjury, claimed on appeal that he received ineffective assistance of counsel due to his counsel's failure to object to the lack of proper notice of the aggravating factor argued by the State at sentencing, no further investigation was required and the Court of Appeals determined that defendant received ineffective assistance of counsel because the aggravating factor alleged—that defendant was on supervised probation at the time of the offense under the catchall provision of N.C.G.S. § 15A-1340.16(d)(20)—was not included in the indictment

as required by N.C.G.S. § 15A-924. Because defendant would not have received an aggravated sentence if his counsel had objected to the lack of proper notice, he was prejudiced by the failure to object and the trial court's judgment was vacated and remanded for resentencing.

Judge TYSON concurring in the result by separate opinion.

Appeal by Defendant from judgments entered 29 July 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2020.

Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for State-Appellee.

North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for Defendant-Appellant.

COLLINS, Judge.

Defendant Brian Robert Gleason appeals from judgments entered upon jury verdicts of guilty of perjury and violating a civil domestic violence protection order. Defendant contends the trial court erred by sentencing him in the aggravated range for his felony perjury conviction. We reverse judgment entered upon his conviction for perjury and remand for resentencing.

I. Background

On 30 April 2018, Defendant was indicted for stalking, making a false report to a law enforcement officer or agency, and violating a civil domestic violence protective order ("DVPO"). On 22 September 2018, the State filed a Notice of Intent to Prove Aggravating Factors or Prior Record Level Point. The notice indicated that the State intended to present evidence of the following two aggravating factors: (1) "[t]he offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws[,]" which corresponds to N.C. Gen. Stat. § 15A-1340.16(d)(5) (2019); and (2) "[t]he Defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[,]" which corresponds to N.C. Gen. Stat. § 15A-1340.16(d)(15) (2019). The notice also indicated that the State intended "to prove the existence of an additional prior record level point under N.C.G.S. § 15A-1340 (b)(7), specifically, that the offense was

committed while the Defendant . . . [w]as on supervised or unsupervised probation, parole, or post-release supervision[.]"

The State obtained superseding indictments on 22 October 2018 for stalking, making a false report to a law enforcement officer or agency, and two counts of perjury. The State obtained a superseding indictment on 22 October 2018 for violating a DVPO. The State obtained a superseding indictment on 8 July 2019 for obstruction of justice and two counts of perjury. At the 22 July 2019 trial, the State moved to join the charges for stalking, perjury, and violating a DVPO, and dismissed the first and third counts of obstruction of justice and perjury. The jury found Defendant guilty of perjury and violating a DVPO. The jury could not reach a verdict on stalking; the trial court declared a mistrial.

During sentencing proceedings, the State informed the trial court that "[t]he State has previously filed notice of an aggravating factor" and stated that "the aggravating factor would be that the Defendant was on supervised probation during the commission of this offense." The State then said to the trial court, "if [defense counsel] still plans to admit to the aggravating factor, that would be, of course, a necessary step. Otherwise, we'll prove to the Court beyond a reasonable doubt that the Defendant was on probation at the time of the offense." Defense counsel then stated, "Yeah. We do admit to that, Your Honor. . . . [W]e do admit that he was on probation."

On form AOC-CR-605, felony judgment findings of aggravating and mitigating factors, the trial court marked the check box next to aggravating factor 20, "Additional written findings of factors in aggravation: DEFENDANT WAS ON PROBATION AT THE TIME OF THE OFFENSE."

The trial court "ma[de] no findings of any mitigating factors" and found that "the factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified." The trial court determined Defendant to be a Prior Record Level II for felony sentencing purposes, with 2 prior record level points, and sentenced Defendant to an aggravated sentence of 21 to 35 months' imprisonment for perjury. The trial court also determined Defendant to be a Prior Record Level II for misdemeanor sentencing purposes, with 2 prior record level points, and sentenced Defendant to a consecutive term of 75 days' imprisonment for violating a DVPO. Defendant gave oral notice of appeal.

II. Discussion

Defendant argues that he received ineffective assistance of counsel because his counsel failed to object to a lack of notice of the aggravating

factor argued by the State at sentencing and, as a result of this failure, his sentence was increased.

On appeal, this Court reviews de novo whether a defendant was denied effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). Here, the cold record reveals that no further investigation is required; therefore, we will decide the merits of the claim.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). To meet this burden, the defendant must satisfy the following two-pronged test: First, the defendant must show that "counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the defendant "must show that the deficient performance . . . [was] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Thus, the "fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

As to the first prong, Defendant argues that his counsel's performance was deficient because counsel failed to object to the lack of notice of the aggravating factor argued by the State at sentencing. We agree.

Subsection (d) of N.C. Gen. Stat. § 15A-1340.16 enumerates 28 specific aggravating factors that, if proven beyond a reasonable doubt, can be considered by a trial court in determining whether to impose an aggravated sentence. N.C. Gen. Stat. § 15A-1340.16(a), (d) (2019). Additionally, N.C. Gen. Stat. § 15A-1340.16(d)(20) includes a catchall

provision for "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20).

Aggravating factors specifically enumerated in subsection (d) of N.C. Gen. Stat. § 15A-1340.16 "need not be included in an indictment or other charging instrument." N.C. Gen. Stat. § 15A-1340.16(a4) (2019). Under N.C. Gen. Stat. § 15A-1340.16(a6),

> [t]he State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under [N.C. Gen. Stat. §] 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

Id. at § 15A-1340.16(a6) (2019).

However, any aggravating factor alleged under the catchall provision in subsection (d)(20) of N.C. Gen. Stat. § 15A-1340.16 "shall be included in an indictment or other charging instrument, as specified in [N.C. Gen. Stat. §] 15A-924." *Id.* at § 15A-1340.16(a4). Specifically under N.C. Gen. Stat. § 15A-924, "[a] criminal pleading must contain . . . [a] statement that the State intends to use one or more aggravating factors under G.S. 15A-1340.16(d)(20), with a plain and concise factual statement indicating the factor or factors it intends to use under the authority of that subdivision." N.C. Gen. Stat. § 15A-924(a)(7) (2019).

In *State v. Ross*, 216 N.C. App. 337, 720 S.E.2d 403 (2011), *disc. review denied*, 366 N.C. 400, 735 S.E.2d 174 (2012), this Court reversed defendant's judgment and remanded it for resentencing where the State "simply served defendant with notice of its intent to prove the existence of" non-statutory aggravating factors but did not include them in an indictment. *Id.* at 350, 720 S.E.2d at 412.

Similarly, in *State v. Ortiz*, 238 N.C. App. 508, 768 S.E.2d 322 (2014), this Court explained and held as follows:

> The plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires the non-statutory aggravating factor to be included in the indictment and the State's failure to do so rendered it unusable by the State in its prosecution. Considering the plain language of N.C. Gen. Stat. § 15A-1340.16(a4), this Court's holding in *Ross*, and in the absence of authority to the contrary, we conclude that

> simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor and it was error for the trial court to so allow.

Id. at 514, 768 S.E.2d at 326.

In this case, the State presented to the trial court at sentencing that "the aggravating factor would be that the Defendant was on supervised probation during the commission of this offense." In its judgment, the trial court marked the check box next to aggravating factor 20 – which corresponds to the catchall provision in N.C. Gen. Stat. § 15A-1340.16(d)(20) – "Additional written findings of factors in aggravation: DEFENDANT WAS ON PROBATION AT THE TIME OF THE OFFENSE." Being on probation at the time of the offense is not one of the factors specifically enumerated in subsection (d) of N.C. Gen. Stat. § 15A-1340.16. Thus, the plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires this alleged aggravating factor to be included in an indictment or other charging instrument. N.C. Gen. Stat. § 15A-1340.16(a4).

The State obtained a superseding indictment for the felony perjury offense for which Defendant was found guilty. Nowhere in the indictment is it alleged that Defendant was on probation at the time of the offense. Accordingly, as in *Ross* and *Ortiz*, the State's failure to so allege rendered that aggravating factor unusable by the State in its prosecution. *Ortiz*, 238 N.C. App. at 514, 768 S.E.2d at 326.

We note that the State notified Defendant in accordance with N.C. Gen. Stat. § 15A-1340.16(a6) that the State intended to prove the existence of the aggravating factors specifically enumerated in N.C. Gen. Stat. § 1340.16(d)(5) and (d)(15). However, the State did not proceed at sentencing on either of these factors. Moreover, even had the State included the aggravating factor "Defendant was on supervised probation during the commission of this offense" in this notice, "simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) [would have been] insufficient to allow the State to proceed on the non-statutory aggravating factor and it [would have been] error for the trial court to so allow." *Ortiz*, 238 N.C. App. at 514, 768 S.E.2d at 326.

Although the State notified Defendant that the State intended "to prove the existence of an additional prior record point" based on the fact that Defendant "[wa]s on supervised or unsupervised probation, parole, or post-release supervision" at the time he committed the offenses, the State did not seek to add a record level point at sentencing. Moreover,

the addition of one record-level point to Defendant's prior record level[1] would not have changed his prior record level and, thus, could not have resulted in an enhanced sentence. *See* N.C. Gen. Stat. § 15A-1340.14(b)(7) (2019). Accordingly, Defense counsel erred by failing to object to the lack of notice of the aggravating factor the State sought to prove at sentencing.

As to prong two, Defendant contends that his counsel's failure to object to the lack of notice prejudiced him because he would not have received an aggravated sentence had the objection been made. We agree.

Had Defendant's counsel objected to the lack of notice, the State could not have proceeded on that aggravating factor and Defendant could not have received an aggravated sentence. *Ortiz*, 238 N.C. App. at 514, 768 S.E.2d at 326; *Ross*, 216 N.C. App. at 350, 720 S.E.2d at 412. Accordingly, we vacate the trial court's judgment and remand the matter for resentencing. *Id.*

III. Conclusion

For the reasons stated above, we conclude that Defendant received ineffective assistance of counsel. We vacate Defendant's sentence and remand to the trial court for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Chief Judge McGEE concurs.

Judge TYSON concurs in the result by separate opinion.

TYSON, Judge, concurring in the result.

I concur in the result reached by the majority's opinion. The "catch all" aggravating factor the State proceeded upon at sentencing, and to which his counsel stipulated, was not alleged in an indictment nor found by the jury. N.C. Gen. Stat. § 15A-1340.16(d20) (2019). The enhanced sentence entered beyond the presumptive range constitutes prejudicial error to vacate Defendant's sentence. Defendant argues, and has shown, he received ineffective assistance of counsel ("IAC"). I concur with the

1. Defendant had one prior felony class H or I conviction, giving him 2 points, which puts him at prior conviction level II. If he had received an additional point for committing an offense while on probation, he would have 3 points, which still puts him at prior conviction level II.

majority's analysis of the requisite factors to show IAC. I also vote to vacate the sentence and remand for resentencing for the reasons below.

I. N.C. Gen. Stat. § 15A-1022.1

The Due Process Clause of the Fifth Amendment and the notice and jury trial protections of the Sixth Amendment guarantee "[a]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 147 L. Ed. 2d 435, 446 (2000) (citations omitted).

These protections are codified under N.C. Gen. Stat. § 15A-1340.16 (2019). The State provided prior notice of intent to show Defendant was under probation supervision when the underlying crime occurred to enhance his prior record level points and introduced that fact as an aggravating factor post-conviction, but prior to sentencing. During the guilt-innocence phase the jury did not find any aggravating factors and was dismissed after a guilty verdict on the underlying offense. After the State offered to prove the aggravating factor beyond a reasonable doubt, Defendant's counsel conceded to Defendant's probationary status when the underlying crime was committed.

The trial court properly found this fact could serve as a "catch-all" aggravating factor. N.C. Gen. Stat. § 15A-1340.16(d20) ("Any other aggravating factor reasonably related to the purposes of sentencing"); *see State v. Moore*, 188 N.C. App. 416, 429, 656 S.E.2d 287, 295 (2008). Absent Defendant's counsel's concession or putting the State to its proof, Defendant would not be subject to an enhanced sentence from this aggravating factor at sentencing.

The Supreme Court of the United States in *Blakely v. Washington* applied *Apprendi's* requirements to the sentencing phase following a guilty plea. 542 U.S. 296, 305, 159 L. Ed. 403, 414 (2004). Our statutes codify *Blakely's* protections in N.C. Gen. Stat. § 15A-1022.1 (a)-(e), which provide:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). *The court shall also determine* whether the State has provided the notice to the

> defendant required by G.S. 15A-1340.16(a6) or *whether the defendant has waived his or her right to such notice.*
>
> (b) *In all cases* in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), *the court shall comply* with the provisions of G.S. 15A-1022(a). *In addition, the court shall address the defendant personally and advise the defendant that*:
>
> > (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
> >
> > (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> (c) Before accepting an admission to the existence of an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7), *the court shall determine* that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant. The court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.
>
> (d) *A defendant may admit to the existence of an aggravating factor* or to the existence of a prior record level point under G.S. 15A-1340.14(b)(7) *before or after the trial of the underlying felony.*
>
> (e) *The procedures* specified in this Article for the handling of pleas of guilty *are applicable to the handling of admissions to aggravating factors* and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C. Gen. Stat. § 15A-1022.1 (a)-(e) (2019) (emphasis supplied).

Our General Assembly provided additional protections above those established in *Blakely* by extending its protections to the admission of aggravating factors or prior record level points even in the absence of an underlying guilty plea. *See id.* The transcript shows the trial court failed to address Defendant personally.

This Court has interpreted N.C. Gen. Stat. § 15A-1022.1 to "require[] a trial court to inform a defendant of his or her right to have a jury

determine the existence of an aggravating factor, and the right to prove the existence of any mitigating factor." *State v. Wilson-Angeles*, 251 N.C. App. 886, 902, 795 S.E.2d 657, 669 (2017) (citation omitted).

Unlike the requirements of N.C. Gen. Stat. § 15A-1340.16(a4) cited by the majority's opinion, the trial court's failure to inquire into a knowing and voluntarily waiver of Defendant's rights appear to have prejudiced Defendant. Under subsections (c) and (d), we must reconcile the express language that: "A defendant may admit to the existence of an aggravating factor . . . *before or after the trial of the underlying felony*" with "Before accepting an admission to the existence of an aggravating factor . . . , the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1 (c), (d) (emphasis supplied).

A. Canons of Construction

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [plain meanings of the] language of the statute . . ., the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (citation, internal quotation marks, and ellipses omitted).

" '[S]tatutes *in pari materia* must be read in context with each other.' " *Publishing v. Hospital System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981) (quoting *Cedar Creek Enters. Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). " '*In pari materia*' is defined as '[u]pon the same matter or subject.' " *Id.* at 7-8, 284 S.E.2d at 546 (quoting Black's Law Dictionary 898 (4th ed. 1968)).

My review of relevant case and statutory authority fails to disclose any authority interpreting N.C. Gen. Stat. § 15A-1022.1(d) as writing out a defendant's admission under N.C. Gen. Stat. § 15A-1022.1(c). Reconciling both subsections with *Blakely* and *Apprendi*, a defendant can admit an aggravating factor or prior record level both before and

after the guilt-innocence phase after being provided the applicable protections of N.C. Gen. Stat. § 15A-1022.1(a)-(c), *Blakely*, and *Apprendi*. These protections are: "that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1(c). Generally, these protections must be addressed to and waived by the defendant, not by defendant's counsel.

B. Cases Distinguished

The State presents several cases to support their argument of a lack of error and prejudice. In *State v. Edmonds*, this Court found a trial court's failure to personally address a defendant to be harmless error, because the defendant had failed to put on mitigating evidence contesting the sole aggravating factor. 236 N.C. App. 588, 600, 763 S.E.2d 552, 560 (2014). Here, Defendant's counsel presented six mitigating factors, all of which were rejected by the trial court prior to sentencing.

This Court's decision in *State v. Marlow*, 229 N.C. App. 593, 747 S.E.2d 741 (2013), is also not controlling to the outcome here. While this Court found the lack of a personal colloquy with defendant was missing when the defendant's counsel stipulated to the prior record level, defendant was personally asked by the court about his prior convictions. *Id.* at 602, 747 S.E.2d at 748.

This Court held no error occurred. "Defense counsel had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions. Yet, even after being informed, defendant neither objected to nor hesitated when asked about such convictions." *Id.*

The transcript shows Defendant was neither informed of these rights nor gave a knowing and voluntary waiver. The trial court did not personally address Defendant on any matter regarding the aggravating factor nor was there any collateral examination as in *Marlow*. Unlike *Edmonds*, Defendant did not concede the mitigating evidence to the aggravating factor.

II. Conclusion

The indictment failed to allege, the State never proved, and the jury never found the aggravating factor to exist, as is required by *Apprendi*, *Blakely*, and N.C. Gen. Stat. § 15A-1340.16(a1). Even if counsel's waiver of the State's prior notice to use the aggravating factor was invited error by the stipulation, counsel's post-trial concession and the trial court's failure to address Defendant personally was error. Upon remand, N.C.

Gen. Stat. § 15A-1022.1(a)-(e) sets out the procedures for the disposition for resentencing, not N.C. Gen. Stat. § 15A-1340.16(a4).

This stipulation and error by counsel allowed the court to impose the maximum aggravated sentence, constitutes prejudice and shows ineffective assistance of counsel. The sentence is properly vacated. I concur in the result to remand to the trial court for resentencing.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 SEPTEMBER 2020)

HUBERT CONSTR. & REAL EST. SERVS., LLC v. MYERS No. 19-753	Mecklenburg (18CVS17224)	Vacated and Remanded
L. OFFS. OF MATTHEW K. ROGERS, PLLC v. FISHER No. 19-475	Catawba (17CVS2534)	Affirmed
ROTHFUSS v. LINEBERRY No. 19-773	Forsyth (16CVD4374)	Affirmed
SAUNDERS v. HULL PROP. GRP., LLC No. 19-728	Henderson (16CVS1001)	No Error
SNELL v. SNELL No. 19-946	Wake (17CVD2677)	Reversed
STATE v. BARROW No. 20-220	Pitt (19CRS57656)	Affirmed
STATE v. BATTS No. 19-1100	Johnston (17CRS57623)	No Plain Error
STATE v. CAIN No. 19-1095	Onslow (17CRS51315-16)	No Error
STATE v. DAVIS No. 19-546	Onslow (15CRS54715) (18CRS1315)	NO PREJUDICIAL ERROR
STATE v. JIMMISON No. 19-982	Cumberland (16CRS57973)	Dismissed
STATE v. McHENRY No. 19-628	Brunswick (17CRS50667) (17CRS50718) (17CRS707)	No Error
STATE v. MWANGI No. 19-798	Granville (17CRS52002)	Reversed and Remanded
STATE v. O'DELL No. 20-126	Mecklenburg (16CRS226716-17)	Affirmed
STATE v. OWNBY No. 19-1139	Currituck (18CRS117-118)	No Error

STATE v. REID No. 19-1113	Davidson (17CRS1955) (17CRS54524)	Vacated and Remanded
STATE v. RIVERA No. 19-592	Wake (17CRS217859)	No Error
STATE v. SIKORSKI No. 19-1098	Mecklenburg (16CRS204676)	No Error
STATE v. STOKELY No. 19-1111	Perquimans (17CRS50221) (18CRS50275)	Dismissed
STATE v. SUAREZ No. 19-1029	Randolph (18CRS051178)	Vacated and Remanded

CUNNINGHAM v. GOODYEAR TIRE & RUBBER CO.

[273 N.C. App. 497 (2020)]

DORIS G. CUNNINGHAM, EMPLOYEE-PLAINTIFF
v.
THE GOODYEAR TIRE & RUBBER CO., EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA19-909

Filed 6 October 2020

1. Appeal and Error—motion to strike supplements to record on appeal—failure to serve—motion to amend record

In an appeal from a decision by the Full Industrial Commission that plaintiff-employee failed to invoke its jurisdiction for a worker's compensation claim, the Court of Appeals denied defendants' motion to strike supplements to the record on appeal and granted plaintiff's subsequent motion to amend the record on appeal. Plaintiff's non-compliance with the service requirement of Appellate Rule 26(b) was not jurisdictional and did not rise to the level of a substantial failure or gross violation where the supplemental materials, which consisted of the briefs, transcripts, and other documents from the proceedings before the Commission, were previously accessible to defendants.

2. Workers' Compensation—jurisdiction—timeliness of filing—N.C.G.S. § 97-24(a)(ii)—last payment of medical compensation

Although plaintiff-employee filed her claim more than two years after her workplace accident at a tire plant, her claim was not time-barred under N.C.G.S. § 97-24(a)(ii) where there was evidence that her visit to the employer's dispensary a month before she filed her claim was related to her original injury, and that she had experienced chronic pain from the original injury even though there was a period of two years where she did not seek treatment. The Industrial Commission's opinion and award, in which it determined it lacked jurisdiction, was reversed and the matter remanded for consideration of the merits of plaintiff's claim.

Judge TYSON dissenting.

Appeal by Plaintiff from opinion and award entered 30 July 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 August 2020.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, and Jay A. Gervasi, Jr., for Plaintiff.

Young, Moore, and Henderson, P.A., by Angela Farag Craddock, for Defendants.

BROOK, Judge.

Doris G. Cunningham ("Plaintiff") appeals from the opinion and award of the North Carolina Industrial Commission ("the Commission") denying her claim for disability compensation from Goodyear Tire and Rubber Company ("Defendant-Employer") and Liberty Mutual Insurance Company ("Defendant-Carrier") (collectively, "Defendants"). On appeal, Plaintiff primarily argues that the Full Commission erred by dismissing her 27 May 2014 claim for lack of jurisdiction and failing to decide whether she suffered a compensable injury on that date.

After careful review, we reverse the opinion and award and remand to the Commission to decide the merits of Plaintiff's 27 May 2014 claim.

I. Factual and Procedural History

A. Factual Background

Plaintiff has worked as a press operator for Defendant-Employer continuously since 2001 where she walks an average of eight to nine miles a day and lifts "anywhere from a thousand to fourteen hundred tires" in a 12-hour shift. After she puts the tires into a loading truck, a machine picks up the tires from the pan where they are molded and pressed and then returned on a conveyer belt. In 2011, Plaintiff injured her lower back twice while lifting tires and filed claims with the Commission; both claims were settled in 2012.

On 27 May 2014, Plaintiff tried to grab a "severely stuck" tire off a flatbed truck and hurt her lower back in the process. She reported the incident to her area manager, and when she woke up the next morning, she could not move. Plaintiff filed a F159 "Associate Report of Incident" ("F159"), an internal document that is submitted with Defendant-Employer following an incident at work, and was placed on light duty for six weeks. Plaintiff returned to full duty at the end of that six weeks and did not miss any work due to the incident. At the hearing, Plaintiff testified that since the 2014 injury,[1] her pain has "never [been] better than a four" on a scale of one to ten.

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1. We refer to the 27 May 2014 claim as "the 27 May 2014 injury" or "27 May 2014 accident" or in a similar fashion. This is for ease of reading and is not an expression of our opinion as to whether Plaintiff has proven she suffered a compensable injury by accident on 27 May 2014.

After receiving Plaintiff's F159 for her 27 May 2014 alleged injury, Defendant-Carrier mailed Plaintiff a completed Form 19, Employer's Report of Employee's Injury, and a blank Form 18, Notice of Accident to Employer and Claim of Employee, per Defendants' accident-report protocol. Plaintiff testified that she never received these forms from Defendants and that she believed her claim for an injury to her back on 27 May 2014 had been accepted because she had been placed on light duty—something which had not happened with either of her 2011 incidents. She also testified that she was prepared to fill out the Form 18 in 2014 but was told by her union representative that "they" had already received her form.

Nancy Talavera, a claims processor for Defendant-Carrier, testified that the representative assigned to investigate Plaintiff's allegations attempted to contact Plaintiff three times to determine whether she wished to pursue a claim. According to Ms. Talavera, Defendant-Carrier's policy when it is unable to contact an employee and the employee has not lost time due to the incident is to presume that the employee does not wish to file a claim and close the file. Since Plaintiff never missed work for her injury, did not file a Form 18, and did not respond to Defendant-Carrier's attempts to reach her, Defendant-Carrier closed her file.

Following the 27 May 2014 injury, Plaintiff received treatment at the dispensary, an on-site medical facility that treats work-related and non-work-related injuries and ailments of Defendant-Employer's employees. Frank Anthony Murray, a physical therapist who evaluates and treats musculoskeletal injuries at the dispensary, treated Plaintiff following the 2014 incident. When Plaintiff saw Mr. Murray on 3 June 2014, she reported her pain at ten out of ten. By 9 June 2014, her pain was "five out of ten at worse [sic], to two out of ten at best." Mr. Murray testified that Plaintiff's range of motion increased between visits and that combined with her reduction in pain level indicated that she was improving. Mr. Murray treated Plaintiff on 10, 13, 18, 23, and 24 June 2014, and by the 24 June visit, her "[r]ange of motion was full and painless[.]"

On 23 February 2015, Plaintiff returned to Mr. Murray and told him that her back pain had never completely subsided since 27 May 2014 and that she felt it had increased recently, noting her pain as "eight out of ten down to four out of ten[.]" Mr. Murray diagnosed Plaintiff with chronic low back pain, and saw Plaintiff on 3 March 2015, where she reported her pain between "three out of ten to five out of ten[.]" Plaintiff did not return to Mr. Murray until 25 April 2017. She told him that she continued to have some back pain and had been treated for plantar

fasciitis since March 2016, and her doctor suggested that the pain she was having in her feet was coming from her lower back. Plaintiff told Mr. Murray that "there was no precipitating episode[,]" but rather an "ongoing, continuation of low-back pain."

Plaintiff visited nurse case manager Kelly Avants at the dispensary on 28 April 2017, and Ms. Avants informed Plaintiff that Defendant-Carrier had closed Plaintiff's file because "she reached the statute of limitations in regard to her back claims" and they could not cover any further treatment. On 8 May 2017, Plaintiff reported that she had again been injured on 25 April 2017 from a stuck tire and that she felt a sharp pain in her lower back.

Dr. David Jones, a neurosurgeon, examined and treated Plaintiff in July 2017 and found that she had some disc desiccation in her spine at L4-5 and L5-S1, that she had a small, far lateral disc bulge that could irritate her L4 nerve root, and a more focal right-sided disc protrusion that he thought could irritate her right S1 nerve root. He determined that she did not require surgery and recommended medical management, activity modification, physical therapy, and injection therapy.

Dr. Nailesh Dave, whose main practice is neurology and chronic, musculoskeletal, and neuropathic pain, began treating Plaintiff on 19 July 2017 after she was referred by Dr. Jones for pain management. Dr. Dave diagnosed Plaintiff with chronic back pain with lumbar radiculopathy and continued to see Plaintiff through 2018 for treatment. Dr. Dave testified that it was "more than likely" that a 25 April 2017 injury exacerbated Plaintiff's 27 May 2014 injury, but there was no way to determine to what extent each injury caused her current condition.

Dr. Gurvinder Deol, an orthopedic surgeon who treats lumbar spine complaints, examined Plaintiff once in March 2018. Dr. Deol testified that Plaintiff had mild degenerative disc disease at L4-5 and L5-S1, but "overall the thought was she seemed to have a MRI that probably looked a little better than people in their mid-fifties, [be]cause everybody kind of degenerates their spine over time." Based on his one-time examination of her and the review of the records, Dr. Deol testified that "it's difficult to say if there's one particular incident" from which her current pain complaints stem.

B. Procedural History

On 19 May 2017, Plaintiff filed two Form 18s with the Commission: one alleging an incident on 27 May 2014 and the other alleging an incident on 25 April 2017. Defendant filed a Form 61 denying Plaintiff's

27 May 2014 claim on the grounds that her action was time-barred because it was not filed within two years of the date of the alleged injury and moved to dismiss.

Both matters were consolidated and heard before the Deputy Commissioner on 15 February 2018. The Deputy Commissioner entered an opinion and award on 13 December 2018, dismissing Plaintiff's 27 May 2014 claim for lack of jurisdiction and denying Plaintiff's 25 April 2017 claim. For the 27 May 2014 claim, the Deputy Commissioner found that Plaintiff did not file a Form 18 or any other claim for compensation with the Commission until 29 May 2017. The Deputy Commissioner further found that Plaintiff last received related medical treatment from Defendants on 3 March 2015, which was paid for by Defendants in April 2015.[2] The Deputy Commissioner concluded that Plaintiff neither (1) filed her claim with the Commission within two years of the date of incident nor (2) within two years of the last payment of medical compensation as is required by N.C. Gen. Stat. § 97-24(a). On the 25 April 2017 claim, the Deputy Commissioner concluded that there was no evidence in the record to support injury by accident or specific traumatic incident.

Plaintiff appealed to the Full Commission, and in her Form 44 assigning specific grounds for review, argued that she last received related medical treatment for her 27 May 2014 injury on 25 April 2017 and thus filed her claim within two years of the last payment of medical compensation. The Full Commission entered an opinion and award on 30 July 2019, dismissing Plaintiff's 27 May 2014 claim for lack of jurisdiction and denying Plaintiff's 25 April 2017 claim.[3]

Plaintiff timely noticed appeal.

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2. Defendant-Employer receives monthly invoices from the dispensary and pays for expenses incurred the month prior to the invoice date.

3. Issues related to an alleged 25 April 2017 injury are not before us on review. Indeed, Plaintiff argues that the Full Commission improperly considered whether she suffered a compensable injury on 25 April 2017, arguing she had abandoned the issue by not raising it in her brief. Nowhere do the Commission's rules governing appeals state that issues not raised in briefs are treated as abandoned on appeal to the Full Commission. *Compare* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."), *with* 11 NCAC 23A.0701(f) (2019) (explaining brief requirements and failing to include a like provision). And in her Form 44 application for review to the Full Commission, Plaintiff alleged that "20. Finding of Fact Nos. 33, 34, 34 [sic], 35, 36 . . . improperly finds as fact that there was 'no evidence in the record to support' a 25 April 2017[ ] injury by accident or specific traumatic accident." This issue was thus properly before the Full Commission, *see Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 611, 723 S.E.2d 794, 796 (2012) (holding the Full Commission does not have authority to address issues other than those raised in Form 44), even though it is not before us on appeal.

II. Motion to Strike and Motion to Amend the Record on Appeal

[1] Before we reach the merits of Plaintiff's appeal, we first address Defendants' motion to strike supplements to the printed record on appeal and Plaintiff's motion to amend the record on appeal.

On 18 October 2019, Plaintiff filed under seal two supplements to the record on appeal: a Rule 18(d)(3) supplement which contained the transcripts of the hearing before the Deputy Commissioner, depositions and accompanying exhibits, and a Rule 11(c) supplement which contained the briefs that were filed by the parties before the Full Commission. Neither record supplement included a certificate of service. On 19 June 2020, Defendants moved to strike these supplements, arguing that they had not been properly served with these documents pursuant to Rule 26(b) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 26(b) ("Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal."). Defendants further moved that this Court strike all citations to the record supplement in Plaintiff's brief, impose any sanctions we deem proper, and grant Defendants any relief deemed just and proper.

In response to Defendants' motion, Plaintiff filed a motion to amend the record on 1 July 2020, which included a certificate of service dated 1 July 2020 for the hearing and deposition transcripts, a certificate of service dated 1 July 2020 for the Rule 11(c) supplement, and other documents required by Rule 11(c), which governs when one party disagrees with the inclusion of a certain document on appeal. Defendants objected to including the briefs to the Full Commission in the record on appeal. *See* N.C. R. App. P. 11(c) (requiring an index and statement that the items to which the other party objects be filed separately along with the supplement).

When a party fails to comply with a non-jurisdictional rule, we must "determin[e] whether a party's noncompliance . . . rises to the level of a substantial failure or gross violation[.]" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008). "[T]he court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Id.*, 357 S.E.2d at 366-67; *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) (discouraging review on the merits when doing so would leave the appellee "without notice of the basis upon which [the] appellate court might rule").

The service requirements of Rule 26(b) are not jurisdictional, *Henlajon, Inc. v. Branch Hwys., Inc.*, 149 N.C. App. 329, 333, 560 S.E.2d 598, 601-02 (2002), and, pursuant to *Dogwood*, we conclude that Plaintiff's noncompliance does not rise to the level of a substantial failure or gross violation. First, Plaintiff's failure does not impair our review on the merits. Nor would review on the merits leave Defendants "without notice of the basis upon which [we] might rule" given that Defendants cite both the hearing testimony and deposition transcripts throughout their brief, demonstrating they have had access to these documents. *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. And presumably Defendants have long had access to the parties' briefs filed with the Full Commission. We therefore deny Defendants' motion to strike and grant Plaintiff's motion to amend the record on appeal.

III. Analysis

[2] On appeal, Plaintiff argues that the Full Commission erred by finding as fact that she last received related medical treatment for her 27 May 2014 claim on 3 March 2015 and therefore erred in concluding that she failed to file her claim within two years of the last payment of medical compensation. Relatedly, Plaintiff argues that the Full Commission erred by failing to make any findings of fact or conclusions of law as to whether she sustained a compensable back injury on 27 May 2014.

Both of Plaintiff's arguments can be resolved by determining the primary issue raised by this appeal: whether Plaintiff properly invoked the jurisdiction of the Commission over her 27 May 2014 injury. After careful review, we conclude that she did.

A. Standard of Review

Whether a party timely filed a claim with the Commission is a question of jurisdiction, and

> [t]he finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record. . . . This Court makes determinations concerning jurisdictional facts based on the greater weight of the evidence.

Capps v. Southeastern Cable, 214 N.C. App. 225, 226-27, 715 S.E.2d 227, 229 (2011) (internal marks and citations omitted). In making

jurisdictional findings of fact, this Court must "assess the credibility of the witnesses" and weigh the evidence "using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding." *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 715, 698 S.E.2d 91, 94 (2010).

B. Merits

"[T]he timely filing of a claim for compensation is a condition precedent to the right to receive compensation[,] and failure to file timely is a jurisdictional bar for the Industrial Commission." *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991). Pursuant to N.C. Gen. Stat. § 97-24(a) (2019), a claim is

> forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

"Under section 97-24(a)(ii), a plaintiff must show that: (1) his claim was filed within two years after the last payment of 'medical compensation,' (2) no 'other compensation' was paid, and (3) the employer's liability has not otherwise been established under the Act." *Clark v. Summit Contractors Group, Inc.*, 238 N.C. App. 232, 235, 767 S.E.2d 896, 898 (2014). "Dismissal of a claim is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission." *Reinhardt*, 102 N.C. App. at 86-87, 401 S.E.2d at 140-41.

Although Plaintiff alleged an accident occurred on 27 May 2014, Plaintiff did not file a claim for compensation until 19 May 2017, more than two years after the accident. However, Plaintiff argues her claim was timely filed because she filed it within two years of the last payment of medical compensation, which she argues was on 25 April 2017. Defendants argue that the Full Commission correctly determined that

the last payment of medical compensation for Plaintiff's 27 May 2014 injury was in April 2015 and therefore Plaintiff's claim is time-barred.[4]

Though not explicitly stated, implicit in N.C. Gen. Stat. § 97-24(a)(ii) is that the medical compensation must be related to the alleged work-related injury. *See* N.C. Gen. Stat. § 97-2(19) (2019) ("The term 'medical compensation' means medical, surgical, hospital, nursing, and rehabilitative services . . . as may reasonably be required to give effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]"). We also note the general principle that "the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and [ ] this overarching purpose is not to be defeated by the overly rigorous technical, narrow and strict interpretation of its provisions." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 36, 653 S.E.2d 400, 406 (2007) (internal marks and citation omitted).

Consistent with these principles, this Court has held that employees whose original diagnoses develop into different conditions are not time-barred from bringing claims when their employers were providing medical treatment. *See*, *e.g.*, *Erickson v. Siegler*, 195 N.C. App. 513, 521-22, 672 S.E.2d 772, 778-79 (2009) (plaintiff's claim not time-barred where he was initially diagnosed with a lumbar spine injury following an accident at work and over two years later filed a claim for a cervical spine condition); *see also Wyatt v. Haldex Hydraulics*, 237 N.C. App. 599, 614, 768 S.E.2d 150, 160 (2014) ("[The plaintiff] suffers from a rare brain condition that is notoriously difficult to properly diagnose given its symptoms, and we believe it would defeat the purpose of the Act to deny him benefits because he was unable to fully diagnose his condition himself within the two-year statute of limitations period.").

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4. There is no dispute here that "(2) no 'other compensation' was paid[ ] and (3) the employer's liability has not otherwise been established under the Act." *Clark*, 238 N.C. App. at 235-38, 767 S.E.2d at 898-900 (explaining "other compensation" means the money allowance "made payable to the plaintiff pursuant to the Worker's Compensation Act") (internal marks and citation omitted). Our inquiry is singularly focused on when the last payment of medical compensation was made.

Furthermore, Defendants acknowledge that Plaintiff's 3 March 2015 medical treatment at the dispensary qualified as medical compensation for purposes of N.C. Gen. Stat. § 97-24(a)(ii). And they concede that they paid for her 25 April 2017 medical treatment at the dispensary, which is primarily used by employees for workplace injuries. Given this concession, and as discussed below in greater detail, Defendants are left to argue that the 25 April 2017 dispensary visit was unrelated to the 27 May 2014 injury to prevail in their jurisdictional argument.

Relatedly, this Court has liberally interpreted "last payment of medical compensation" when dealing with a similar provision in N.C. Gen. Stat. § 97-25.1, which states:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, . . . the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission[.]

N.C. Gen. Stat. § 97.25.1 (2019). In *Miller v. Carolinas Med. Ctr.-Northeast*, the plaintiff-employee and defendant-carrier/employer disagreed as to when the last payment of medical compensation was made where the employer paid "an administrative intermediary" to schedule an appointment for the employee after she experienced a flare-up of back pain related to her previous compensable injury. 233 N.C. App. 342, 352, 756 S.E.2d 54, 61 (2014) (almost two-year gap between original injury and increased pain). Recognizing that "while every expense paid might not be considered 'medical compensation[,]' " we held that the service provided "was necessary to ensure that [the p]laintiff received the treatment determined to be appropriate by the Commission in order to 'effect a cure or give relief for' [the p]laintiff's compensable back injury." *Id.*

Here, the Full Commission concluded that Plaintiff's 2014 claim was jurisdictionally barred because Defendant-Employer "did not pay for medical treatment beyond April 2015[,]" and Plaintiff did not file a claim within two years of April 2015. Despite the substantial overlap between Plaintiff's 2014–15 and 2017 medical treatment, discussed in greater detail below, the Full Commission did not make findings or cite evidence in support of its assertion that Defendant's payment for medical treatment stopped in April 2015. Perhaps this finding and conclusion were based on a "discontinuation note" placed in Plaintiff's dispensary file by Mr. Murray. He testified that, following her May 2014 injury, she came in for treatment in June 2014 and then again in February and March 2015. When Plaintiff did not return after the March 2015 visit, Mr. Murray put a "discontinuation note" in Plaintiff's file, which he does when "people don't come back [for treatment]."

As noted above, we are not bound by the Full Commission's jurisdictional findings of fact and indeed are tasked with making our own "independent findings . . . from [our] consideration of all the evidence in the record." *Capps*, 214 N.C. App. at 227, 715 S.E.2d at 229 (citation omitted). Based on that review and "the greater weight of the evidence[,]"

we find that the 25 April 2017 visit was related to Plaintiff's May 2014 injury. *Id.*

Mr. Murray testified that Plaintiff returned to him in April 2017 for treatment because "[s]he continued to have some back pain" and "she had also been treated for plantar fasciitis for about a year and a half prior . . . and at some point . . . towards the end of that treatment, the doctor . . . felt that maybe the pain she was having in her feet was coming from her back[.]" He further testified that it was his understanding that her back pain "had [ ] never gone away, and it had been gradually worsening over the previous . . . period of time, a few weeks where it had become painful as she was lifting tires[.]" In his note from that visit, Mr. Murray wrote, "[P]laintiff is familiar with me for treatment of a previous episode of back pain about 2 years ago. *She reports that her symptoms never completely went away*." (Emphasis added.) Dr. Dave testified that when he first saw Plaintiff on 19 July 2017 for pain management treatment, "*her current presentation was chronic pain involving the lower back for about three and a half years*[.]" (Emphasis added.) And when Plaintiff went to Dr. Jones on 18 July 2017, she reported chronic back pain with an onset date of 19 June 2014.

Based on all the evidence in the record, Plaintiff's return visit to Mr. Murray on 25 April 2017—which he related back to his 2014–15 treatment of Plaintiff and was paid for by Defendant-Employer—was related to her alleged 27 May 2014 injury. Our holding is consistent with the general principle that the Worker's Compensation Act requires liberal construction, as it would be overly rigid and technical to hold that a lapse in continuous care meant that subsequent treatment was unrelated to the original injury. This is especially so where, as here, Plaintiff received treatment for her feet with another doctor who opined that her symptoms were related to her low back, and she clearly complained of pain that had "never gone away" since 2014. *See Erickson*, 195 N.C. App. at 521, 672 S.E.2d at 778 ("Under [the] defendants' approach, an employee would be precluded from receiving compensation for not properly diagnosing h[er] own injury and informing the defendant of that diagnosis."). This Court moreover has previously recognized that a flare-up of an old back injury can not only occur but also require subsequent treatment—even where there has been a lapse in continuous care. *See*, *e.g.*, *Miller*, 233 N.C. App. at 343, 756 S.E.2d at 55-56. Finally, to the extent that the Full Commission concluded it lacked jurisdiction based on one physical therapist's "discontinuation note"—which conflicts with the same physical therapist's testimony connecting his 2014–15 and 2017 treatment of Plaintiff—that is the sort of "technical, narrow[,] and strict

interpretation" of workers' compensation provisions our case law warns against. *Gore*, 362 N.C. at 36, 653 S.E.2d at 406.

We therefore reverse the opinion and award of the Full Commission dismissing Plaintiff's 27 May 2014 claim as jurisdictionally barred.[5]

IV. Conclusion

For the above stated reasons, we hold that the Commission had jurisdiction over Plaintiff's 27 May 2014 claim because she filed within two years of the last payment of medical compensation per N.C. Gen. Stat. § 97-24(a)(ii). We reverse the opinion and award of the Full Commission and remand for a determination into the merits of Plaintiff's claim.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion ignores the standard of appellate review, reweighs the evidence to substitute its preferred, but wholly unsupported, outcome, and reverses the Commission's opinion and award without any lawful basis. I respectfully dissent.

I. Background

Pursuant to the North Carolina Rules of Appellate Procedure, a record on appeal is settled by agreement, opposing party's approval, or by operation of rule or court order after appellee's objection or amendment. N.C. R. App. P. 18(d). Plaintiff served its proposed record on appeal upon Defendants on 27 August 2019. Defendants submitted

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5. Though we hold Plaintiff's claim is not jurisdictionally barred, we express no opinion as to whether Plaintiff can or will succeed on the merits of her claim before the Commission, where she still bears the burden of proving she suffered a compensable injury by accident on 27 May 2014. *See Snead v. Sandhurst Mills, Inc.*, 8 N.C. App. 447, 451, 174 S.E.2d 699, 702 (1970) ("A person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from [an] accident."); *Whitfield v. Lab. Corp.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 785 (2003) ("To establish the necessary causal relationship for the injury to be compensable under the Act, the evidence must be such as to take the case out of the realm of conjecture and remote possibility.") (citations omitted). And if she suffered a compensable injury, the Commission must still determine whether she is entitled to compensation or benefits.

timely objections and amendments to the proposed record on appeal on 26 September 2019. The parties settled the record on appeal with this Court on 11 October 2019, after Plaintiff agreed to incorporate Defendants' amendments into the record on appeal.

> If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal.

N.C. R. App. P. 11(c). The record shows Defendants properly and timely objected to several proposed additions to the record. Plaintiff asserts the parties spoke and determined to include some portions of material to which Defendants had objected. Defendants responded saying they understood Plaintiff intended to file a supplement to the printed record on appeal containing the parties' briefs to the Full Commission. Defendants were never served nor did they receive copies of Plaintiff's proposed supplements as required by the appellate rules and by precedent in N.C. R. App. P. 26(b).

"Copies of all papers filed by any party and not required by these rules to be served by the clerk *shall*, at or before the time of filing, *be served* on all other parties to the appeal." N.C. R. App. P. 26(b) (emphasis supplied). This Court's docket sheet contains entries, which show Plaintiff's "supplements" were received by the Court on 18 October 2019. Defendants claim, as of 19 June 2020, they had not been served copies of the supplements.

> Papers presented for filing *shall contain* an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service *shall appear* on or be affixed to the papers filed. (emphasis supplied).

N.C. R. App. P. 26(d). "Appellant bears burden of seeing that record on appeal is properly settled and filed with appellate court." *McLeod v. Faust*, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

On 11 October 2019, the parties' agreed upon and settled record on appeal was filed with this Court. On 18 October 2019, Plaintiff submitted her supplemental documents. Defendants assert they are unable to access the electronic links Plaintiff provided. Defendants received

an email with instructions to view the 11 October 2019 record on appeal. Defendants received two emails with instructions to view the 18 October supplemental records. The supplemental records do not appear in the North Carolina Appellate Courts eFiling Site, and there are no 18 October 2019 entries.

N.C. R. App. P. 18(d)(3) instructs Defendants to seek an administrative tribunal within ten-days for failure of a party to file or serve properly. Plaintiff failed to comply with the mandatory procedure for amending the record on appeal and to give notice of the supplemental record to Defendants. N.C. R. App. P. 26(d). Defendants cannot timely respond if not properly notified.

Defendants' motion to strike is properly granted and the supplemental record stricken for Plaintiff's failure to follow the rules and procedures.

II. Standard of Review

This Court's proper standard of review of the Industrial Commission's order and award is long established. *See* N.C. Gen. Stat. §§ 97-18(j), 97-86 (2019). "When considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (citations and internal quotations omitted); *see also Holt v. N.C. DOT*, 245 N.C. App. 167, 174-175, 781 S.E.2d 697, 703 (2016). "The North Carolina Industrial Commission's . . . conclusions of law must be justified by its findings of fact and its findings of fact must be supported by competent evidence." *See Lauziere v. Stanley Martin Communities, LLC*, 271 N.C. App. 220, 844 S.E.2d 9, 11 (2020). (lack of competent evidence in the finding of facts showed plaintiff was unable to carry her burden).

A. Competent Evidence

> The right to compensation under this Article *shall be forever barred* unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article *within two years* after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission *within two years* after the last payment of medical compensation when no other compensation has been paid and when the employer's

> liability has not otherwise been established under this Article. (emphasis supplied).

N.C. Gen. Stat. § 97-24 (2019). The Full Commission ("Commission") is divested of jurisdiction if Plaintiff fails to establish and prove a claim under either prong (i) or (ii) of § 97-24.

The record contains competent evidence to show Plaintiff failed to meet the jurisdictional timelines of either prong in N.C. Gen. Stat. § 97-24. The Commission properly dismissed Plaintiff's 27 May 2014 claim for lack of jurisdiction.

1. N.C. Gen. Stat. § 97-24 (i)

"The right to compensation . . . shall be forever barred unless . . . (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article *within two years* after the accident." N.C. Gen. Stat. § 97-24(a)(i) (emphasis supplied).

Plaintiff experienced a prior work injury in 2011 and was familiar with the procedure to report an accident. Plaintiff was allegedly injured at work on 27 May 2014 and began receiving treatment. N.C. Gen. Stat. § 97-24(a)(i) and the Commission's rules and procedures require Plaintiff to file Forms 18 and 19 to report a work accident within two years.

Plaintiff failed to file the forms for the 27 May 2014 injury until 19 May 2017. Three years lapsed from the alleged accident causing injury until Plaintiff's filing of the required forms despite multiple attempts by the insurance carrier to contact her. The record shows competent evidence that Plaintiff failed to file a claim and failed to satisfy prong (i).

2. N.C. Gen. Stat. § 97-24 (ii)

"The right to compensation . . . shall be forever barred unless . . . (ii) a claim or memorandum of agreement . . . is filed with the Commission *within two years after* the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article." N.C. Gen. Stat. § 97-24(a)(ii) (emphasis supplied). The Commission resolved a factual issue by finding the last payment of medical compensation was paid April 2015.

Competent evidence in the record shows Plaintiff's final medical treatment regarding the 27 May 2014 injury occurred on 3 March 2015, and the final payment of medical compensation for that 2014 injury was made April 2015. Plaintiff did not return to seek any further medical

treatment from Defendant-Employer's dispensary until 25 April 2017 when Plaintiff complained to the physical therapist ("Mr. Murray") of continuing chronic back pain and plantar fasciitis.

Plaintiff told Mr. Murray that there was no precipitating event to her current back pain. Defendant-Employer's registered nurse ("Ms. Avant"), asked Plaintiff what had caused her pain at that time. Plaintiff gave conflicting information and related her pain back to her 2011 injuries "on the 1300 row." Plaintiff' asserts the 25 April 2017 appointment should be considered as the most recent medical treatment for her 27 May 2014 injury. This factual issue was resolved by the Commission.

On 28 April 2017, Plaintiff attempted to seek treatment for the alleged 2011 or 2014 injuries. Ms. Avant notified Plaintiff due to expiration of the two-year statute of limitations she would have to pay for treatment under her own insurance. While a conflict in testimony may exist, the Commission gave more weight to Mr. Murray's and Ms. Avant's credibility and testimonies than to Plaintiff.

This Court has held, "when the matter is appealed to the [F]ull Commission . . . it is the duty and responsibility of the [F]ull Commission to decide all of the matters in controversy between the parties." *Abernathy v. Sandoz Chems./Clariant Corp.*, 151 N.C. App. 252, 256, 565 S.E.2d 218, 221 (2002) (citations and internal quotations omitted).

The last payment was made in April 2015. Plaintiff did not seek *any* further medical treatment for her alleged 27 May 2014 injury until April 2017. The Commissioner found "as fact that Plaintiff did not file a claim or memorandum of agreement as provided in N.C. Gen. Stat. § 97-82 with the Commission within two (2) years after the last payment of medical compensation."

Plaintiff bears the burden of proving each and every element of compensability. She failed to show she received ongoing medical treatment for her alleged 27 May 2014 back injury and timely filed her claim within the two-year jurisdictional limit. The Commission's finding of fact is supported by competent evidence that more than two years had passed since the last medical payment was made. Plaintiff fails to assert a claim under prong (ii) of N.C. Gen. Stat. § 97-24(a).

B. Facts Justify Conclusion

The Commission found Defendants presented competent evidence to show Plaintiff failed to timely appeal a claim under either (i) and (ii) of N.C. Gen. Stat. § 97-24(a). Our standard of review of the Commission's opinion and award requires the finding of facts to support and justify the

conclusion of law. *Simmons v. Columbus Cty. Bd. Of Educ.*, 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005).

C. Undisputed Facts

Competent evidence in the record and the Commission's finding of fact show Plaintiff was injured 27 May 2014 and began receiving treatment from her employer. Plaintiff failed to provide or file Forms 18 and 19 in accordance with N.C. Gen. Stat. § 97-24. Plaintiff also failed to respond to the three attempts by the carrier to reach her to investigate Plaintiff's injury. The evidence shows Plaintiff stopped receiving treatment for the May 2014 injury on 3 March 2015. Final compensation for medical treatment for Plaintiff's 2014 injury occurred in April 2015. Plaintiff did not return to Defendant-Employer's dispensary until 25 April 2017.

At that time, Plaintiff told Mr. Murray there was "no precipitating event to her current, chronic back pain." Plaintiff offered contrary testimony to Ms. Avant and claimed her back pain had persisted for the prior two years. Plaintiff told Ms. Avant her pain was related to her 2011 injury at a wholly different work area from where the 2014 injury occurred.

Dr. Gurvinder Deol, evaluated Plaintiff on 29 March 2018. Plaintiff told Dr. Deol she had hurt her back in 2011, reinjured it in 2014, and again in 2017. Dr. Deol opined Plaintiff's complaints of pain were not related to her employment and were more likely from typical wear and tear upon the body. Upon reviewing Plaintiff's MRI, Dr. Deol and Dr. Nailesh Dave noted mild findings, but nothing "horrible." Further, Dr. Deol's review of Plaintiff's diagnostic imaging revealed minimal degenerative changes, but he noted the Plaintiff's back was objectively in better condition than the average person in their mid-fifties.

Plaintiff failed to file the appropriate form for her 27 May 2014 injury until 19 May 2017. This filing occurred nearly three years after the original injury, and 25 months after the final medical payment. The Commission's findings of facts are supported by competent evidence, and those findings justify the conclusion Plaintiff failed to abide by the statutory requirements to timely file a claim to receive further compensation for her 2014 injury.

III. Conclusion

The majority's opinion exceeds its lawful scope of appellate review, reweighs the evidence and credibility of the testimony as finders of fact, to reverse the Commission's opinion and award. "As long as there is

competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Simmons*, 171 N.C. App. at 728, 615 S.E.2d at 72 (citations omitted). Competent evidence supports the Commission's finding and conclusion to bar Plaintiff's claim.

The Commission's conclusion that Plaintiff's claim is barred under either prong of N.C. Gen. Stat. § 97-24 is supported by findings of fact, which are based upon competent evidence. Defendants' motion to strike Plaintiff's supplemental documents is properly allowed. The Commission's opinion and award is properly affirmed. I respectfully dissent.

JENNIFER GIBSON, PLAINTIFF
v.
FRANCISCO C. LOPEZ, DEFENDANT

No. COA20-151

Filed 6 October 2020

Domestic Violence—domestic violence protective order—defendant under 16—plaintiff acting in loco parentis

In a case where plaintiff obtained a domestic violence protective order against defendant, her 14-year-old stepson, the trial court erred in determining that plaintiff had never acted in loco parentis to defendant. Because plaintiff quit her job to care for defendant, provided support and maintenance for him by cooking, cleaning, taking him to school and doctor appointments, and worked with a therapist to set boundaries for him, the evidence showed she manifested her intent to assume parental status. Since plaintiff had acted in loco parentis to defendant and defendant was under the age of 16, plaintiff was prohibited by N.C.G.S. § 50B-1(b)(3) from obtaining a DVPO against him and the order was vacated and remanded.

Judge BRYANT concurring in the result.

Appeal by Defendant from order entered 23 August 2019 by Judge James T. Bryan in Chatham County District Court. Heard in the Court of Appeals 11 August 2020.

Legal Aid of North Carolina, by Rachel Ann Gessouroun, Allison Young, Heather Seals Bankert, Larissa Mañón Mervin, Gina Reyman, TeAndra M. Miller, and Celia Pistolis, for Plaintiff.

Edward Eldred for Defendant.

BROOK, Judge.

Francisco C. Lopez ("Defendant") appeals from the entry of a domestic violence protective order ("DVPO") against him. On appeal, Defendant argues that the trial court erroneously concluded as a matter of law that Jennifer Gibson ("Plaintiff") had never acted in loco parentis to Defendant, her 14-year-old stepson, and therefore erred in issuing the DVPO. For the following reasons, we vacate the order of the trial court.

I. Factual and Procedural History

In early July of 2015, Plaintiff and Philippe Lopez ("Mr. Lopez") as well as Plaintiff's mother[1] and Mr. Lopez's two children from a prior relationship, Defendant and Nan,[2] began living together. Defendant and Nan were 10 and 12, respectively, at the time. Plaintiff testified that Mr. Lopez did not want her to work so she quit her job to "take care of the children[.]" The family moved from Kentucky to North Carolina shortly thereafter. Plaintiff and Mr. Lopez married on 9 February 2018.

Plaintiff and Mr. Lopez lived together from July 2015 until the filing of this action against Defendant on 18 July 2019. On one occasion in 2015, Plaintiff cared for Defendant alone for approximately a week while Mr. Lopez was away on work. Defendant resided in court-ordered treatment facilities from 2016 to 2018, but, otherwise, lived with Plaintiff and his father until Plaintiff filed for a DVPO.

Plaintiff testified that she had "[n]ever parented a teenager before . . . [she] got with [Mr. Lopez]." Plaintiff cared for Defendant and Nan by cooking, cleaning, taking them to appointments and school, and breaking up their fights; she also participated in therapy to help set boundaries for Defendant. According to Plaintiff, Defendant repeatedly told her that she was not his mother, and she responded, per Mr. Lopez's instruction, "No. I'm here."

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1. Plaintiff's mother passed away on 5 August 2015.

2. We have used a pseudonym given that Nan was a minor when this case came on for hearing.

Plaintiff testified that she knew that Defendant suffered from mental health and anger issues, but she did not know their full extent until they moved to North Carolina. She testified that she witnessed an escalation in violence and anger from Defendant over the years, which included Defendant threatening to kill her dog in 2015 and breaking into her bedroom in 2016 and then looking for a knife in the kitchen, presumably to use against her, when she took away his iPod as punishment for getting in trouble at school. After this incident, Mr. Lopez installed a latch on their bedroom door. Defendant then spent two years in several court-ordered treatment facilities and returned home in 2018 in a "bad condition[,]" according to his father.

Defendant threatened to kill Plaintiff and made other threats in December 2018. Plaintiff responded by filing criminal charges against Defendant for communicating threats. The threats continued, however. For instance, on 11 July 2019, Defendant broke into Plaintiff's bedroom after she had locked herself in it, turned the power off to the room, and threatened her.

On 18 July 2019, Plaintiff filed for and received an ex parte DVPO against Defendant and Mr. Lopez. Plaintiff and Mr. Lopez separated on the same date. Plaintiff stayed in the home she had shared with Mr. Lopez and Defendant; they moved out.

The trial court conducted a hearing on the complaint on 7, 21, and 23 August 2019. At both the beginning of the hearing and the close of all evidence, Defendant argued that the trial court could not enter a permanent order against him because Plaintiff was acting in loco parentis to Defendant, and he was under 16 years old. The trial court disagreed and entered a DVPO against Defendant, finding, in part:

> 3. Due to the threatens [sic] and angry actions of the defendant toward the plaintiff, the defendant being out of the home for two years, and the defendant's anger toward the plaintiff worsening after his return, plaintiff was not ever able to act *in loco parentis* for the defendant.

Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant argues that the trial court could not issue a DVPO in favor of Plaintiff because she stood in loco parentis to

Defendant, who was 14 years old at the time of the filing of the complaint and motion for a DVPO.[3]

A. Standard of Review

> When reviewing a domestic violence protective order, our task is to determine whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Martin v. Martin, 266 N.C. App. 296, 302, 832 S.E.2d 191, 197 (2019) (internal marks and citation omitted). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Tyll v. Willets*, 229 N.C. App. 155, 158, 748 S.E.2d 329, 331 (2013) (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." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

B. Merits

An "aggrieved party" may seek a DVPO against "a person with whom" he or she "has or has had a personal relationship[.]" N.C. Gen.

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3. We first note that the DVPO entered on 23 August 2019 expired during the course of this appeal. DVPOs, however, can be extended for an additional year on two occasions. *See* N.C. Gen. Stat. § 50B-3(b) (2019). It is unclear from the record before us whether Plaintiff sought and received such an extension.

Regardless, Defendant's appeal is not moot. If the DVPO at issue has been extended, then Defendant remains subject to direct legal consequences flowing from the order, namely "restrictions on where [he] may or may not be located, or what personal property [he] may possess or use." *Mannise v. Harrell*, 249 N.C. App. 322, 332, 791 S.E.2d 653, 660 (2016). But, even if it has not been extended, Defendant is still subject to the "stigma that is likely to attach to a person judicially determined to have committed domestic abuse." *Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (internal marks and citation omitted). For example, "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a domestic violence protective order." *Id.*

We further note that Defendant has now reached the age of 16, and N.C. Gen. Stat. § 50B-1(b)(3)'s age limitation only applies to minors "under the age of 16[.]" However, the fact that Defendant is now 16 does not resolve the dispute at issue: whether the trial court erred in granting Plaintiff a DVPO against Defendant based on the complaint filed when Defendant was 14. Nor, as noted above, does Defendant turning 16 render the DVPO of less consequence to him. *See Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 ("[A]ppeals from expired domestic violence protective orders are not moot because of the stigma that is likely to attach to a person judicially determined to have committed domestic abuse.") (citation and internal marks omitted).

Stat. § 50B-1(a) (2019). The term "personal relationship" includes those where the parties

> (1) Are current or former spouses;
>
> (2) Are persons of opposite sex who live together or have lived together;
>
> (3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. *For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16*;
>
> (4) Have a child in common;
>
> (5) Are current or former household members;
>
> (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

Id. § 50B-1(b) (emphasis added).

We first note that § 50B-1(b)(3) excludes only three types of relationships: (1) parents and children; (2) others acting in loco parentis to a child; and (3) grandparents and grandchildren. *Id.* § 50B-1(b)(3). The statute does not include an automatic exclusion for a stepparent. In instances such as this case, the focus is on whether stepparents or others are "acting in loco parentis[.]" *Id.*

At issue in this appeal is whether Plaintiff was "acting in loco parentis" to Defendant, who was 14 years old at the time Plaintiff filed for a DVPO, rendering her unable to obtain an order against Defendant per N.C. Gen. Stat. § 50B-1(b)(3). We review this issue de novo.[4]

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4. Though the trial court labeled its determination that Plaintiff had never been able to act in loco parentis to Defendant as a finding of fact, we review it de novo because it is a conclusion of law that requires legal reasoning. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.") (citations omitted); *see also In re A.P.*, 165 N.C. App. 841, 846, 600 S.E.2d 9, 13 (2004) ("[S]uch

While N.C. Gen. Stat. § 50B-1 does not define "in loco parentis," the term has been defined by our Court to "mean[ ] in the place of a parent, and a 'person in loco parentis' . . . [is] one who has assumed the status and obligations of a parent without a formal adoption." *Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974) (citation omitted).

> A person does not stand *in loco parentis* from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child. This relationship is established only when the person with whom the child is placed intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance.

Liner v. Brown, 117 N.C. App. 44, 49, 449 S.E.2d 905, 907 (1994) (internal marks and citation omitted). Our Court has further elaborated that whether a person stands in loco parentis "is a question of intent to assume parental status and depends on all the facts and circumstances of th[e] case." *Id.* (internal marks and citation omitted).

While our appellate courts have not analyzed in loco parentis status under N.C. Gen. Stat. § 50B-1(b)(3), this Court has examined whether the evidence does or does not support concluding the status has been established in other contexts. We review three instructive instances below.

First, our Court has held that "[t]ypically, the status of in loco parentis terminates [for a stepparent] upon divorce." *Duffey v. Duffey*, 113 N.C. App. 382, 385, 438 S.E.2d 445, 447 (1994). A stepparent can, however, "voluntarily extend[ ] his [or her] status beyond the termination of the marriage" by, for example, agreeing to continue to financially support the child in question. *Id.* at 385, 438 S.E.2d at 447-48. Pertinent to this case, *Duffey* further stands for the proposition that a change in circumstances can impact the assessment of whether an in loco parentis relationship continues.[5]

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placement does not warrant the *conclusion* that respondent was standing in loco parentis to the children.") (emphasis added); *In re T.B.*, 200 N.C. App. 739, 746, 685 S.E.2d 529, 534 (2009) ("[W]e are unable to *conclude* that [r]espondent's actions are consistent with one who assumes the status and obligation of a parent[.]") (emphasis added).

5. In making this observation, we in no way suggest that such a change in circumstance can operate to similar effect when it comes to parents and grandparents who seek DVPOs against children and grandchildren under the age of 16. Parents and grandparents cannot obtain a DVPO against, respectively, their children and grandchildren under the age of 16. N.C. Gen. Stat. § 50B-1(b)(3) (2019). This is the case even if, for instance, said parents/children or grandparents/grandchildren "are current or former household members[,]" *id.* § 50B-1(b)(4), per the specific–general canon of construction, *see High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012)

Our Court has also assessed whether grandparents, who had previously served as kinship placements for their grandchildren, stand in loco parentis such that they have standing to appeal permanency planning orders related to their minor grandchildren. Where the evidence indicates that the placement was temporary, we have held that these respondent grandparents do not stand in loco parentis to their grandchildren. *See In re A.P.*, 165 N.C. App. at 846-47, 600 S.E.2d at 12-13 (noting several factors, including: (1) that the child's parents were involved and were attempting to remain involved in the child's life, and (2) that placement with the respondent step-grandfather had lasted for eight months); *see also In re T.B.*, 200 N.C. App. at 745, 685 S.E.2d at 534 (concluding there was insufficient evidence as to whether maternal grandmother stood in loco parentis to T.B. where there was insufficient evidence as to whether the child's placement "was intended to be temporary or permanent or its duration").

In loco parentis status has also been addressed in the context of whether a juvenile defendant's uncle had assumed the status for purposes of N.C. Gen. Stat. § 7B-2101(b) (2019), which prohibits the admission of a juvenile's confession "unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." In *State v. Benitez*, we concluded that the defendant's uncle had "intended to and did assume the status of a parent[,]" where the trial court's findings of fact established that the defendant's mother lived in El Salvador, his uncle provided sole support for the defendant in the United States, including his own room in the uncle's home, his food, clothing, and medical care, and his uncle had enrolled him in school, and was listed as his parent on school forms. ___ N.C. App. ___, ___, 810 S.E.2d 781, 792-93 (2018).

Here, applying the factors set out by *Liner* and further elaborated by our Court, the findings by the trial court and the record do not support the conclusion that Plaintiff "was not ever able to act in loco parentis" to Defendant. Plaintiff testified that she quit her job to take care of Defendant and his sister; her care for Defendant included cooking, cleaning, taking him to school, and making and taking him to doctors' appointments—actions this Court has previously considered "obligations incidental to the parental relationship[.]" *Liner*, 117 N.C. App. at

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("[W]hen two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls."). In contrast, and as discussed below in greater detail, those falling in the in loco parentis category are only barred from obtaining a DVPO so long as they are "*acting* in loco parentis to a minor child . . . under the age of 16[.]" N.C. Gen. Stat. § 50B-1(b)(3) (2019) (emphasis added).

49, 449 S.E.2d at 907 (citation omitted). In addition to providing support and maintenance for Defendant, Plaintiff manifested her "intent to assume parental status" by, for instance, working with a therapist to set boundaries for Defendant. Her testimony that she considered herself to be parenting Mr. Lopez's children also undermines the trial court's conclusion that she was never able to act in loco parentis to Defendant. *Id.* And, unlike *In re A.P.* and *In re T.B.*, Defendant's living arrangement with Plaintiff and Mr. Lopez was intended to be permanent, not temporary. This is evidenced by the fact that, upon being released from a two-year stay in a court-ordered treatment facility, Defendant returned to again live with his father and stepmother. Each of these facts are consistent with Plaintiff having provided for "all the needs of a juvenile [of] the defendant's age." *Benitez*, ___ N.C. App. at ___, 810 S.E.2d at 792.

Plaintiff argues (and the trial court concluded similarly) that there "was sufficient evidence that [she] did not intend to stand in loco parentis to Defendant due to his violence and threats against her." But the in loco parentis relationship is established where the person "intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance." *Liner*, 117 N.C. App. at 49, 449 S.E.2d at 907. Relatedly, Plaintiff's argument runs afoul of the statute's plain language. Instances of domestic violence between a child under the age of 16 and the person asserted to be acting in loco parentis cannot alone determine whether or not that status exists—to hold otherwise would contravene the statutory exemption categorically prohibiting those acting in loco parentis from "obtain[ing] an order of protection against a child . . . under the age of 16." N.C. Gen. Stat. § 50B-1(b)(3) (2019). Put another way, if domestic violence *by itself* could serve as the basis for concluding that an in loco parentis relationship did not exist, then the rule could swallow the exception in cases like the current controversy.

Though we vacate the order entered here because the findings and record cannot support the conclusion that Plaintiff had never formed an in loco parentis relationship with Defendant, we remand for the trial court to enter a new order with findings of fact and conclusions of law consistent with this opinion. The trial court may, in its discretion, take further evidence from the parties. As a general matter, the record before us is often less than clear about what happened when between Plaintiff and Defendant. More to the point, the effects of Defendant's domestic violence on Plaintiff's provision of support and maintenance during the critical window from Defendant's December 2018 return to the house to Plaintiff's 18 July 2019 filing of the complaint are not plain.

On the one hand, Plaintiff testified she continued "cooking, cleaning, taking [the children] to school, making doctors' appointments, seeing that they got to the doctors' appointments[, and] taking [the children] to the store when they needed to go" after she married Mr. Lopez on 9 February 2018. But, on the other hand, Defendant's threats toward her increased in these months as well. Given that this case presents a matter of first impression and because Plaintiff could have obtained (and potentially renewed) a DVPO if she were no longer acting in loco parentis to Defendant,[6] further proceedings are permissible. *Compare State v. Gordon*, 261 N.C. App. 247, 261, 820 S.E.2d 339, 349 (2018) (vacating and remanding satellite-based monitoring case of first impression for further proceedings), *with State v. Greene*, 255 N.C. App. 780, 783-84, 806 S.E.2d 343, 345 (2017) (reversing without remand for further proceedings trial court order denying defendant's application for satellite-based monitoring where case law uncertainty had resolved).

III. Conclusion

We vacate the trial court's order and remand for entry of a new order because the findings of fact do not support its conclusion that Plaintiff never acted in loco parentis to Defendant. On remand, the trial court may in its sole discretion review additional evidence and shall enter a new order consistent with this opinion.

VACATED AND REMANDED.

Judge STROUD concurs.

Judge BRYANT concurs in the result.

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6. Again, we are guided by the plain language of the statute here. The statute in some instances looks not only to current but also to past circumstances in defining those personal relationships that can serve as the basis for seeking a DVPO. *See* N.C. Gen. Stat. § 50B-1(b)(2), (5), (6) (defining "personal relationships" to include "persons of opposite sex *who live together or have lived together*[,]" "*current or former* household members[,]" and "persons of the opposite sex *who are in* a dating relationship or *have been in* a dating relationship" (emphasis added)). Notably, however, the exception prohibiting the issuance of a DVPO against a child under the age of 16 applies only, in pertinent part, to those "*acting* in loco parentis" as opposed to those "acting or who have acted in loco parentis." *Id.* § 50B-1(b)(3) (emphasis added). When construing a statute, we presume these distinctions are not arbitrary, but instead that "the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

And, as noted above, though the order at issue expired during the course of this appeal, DVPOs can be extended for an additional year on two occasions. *See* N.C. Gen. Stat. § 50B-3(b) (2019). Plaintiff therefore could obtain relief through 23 August 2021 and then again through 23 August 2022 if she can carry her burden of showing she did not provide support and maintenance in any remand proceedings the trial court deems necessary.

IN RE A.L.B.

[273 N.C. App. 523 (2020)]

IN THE MATTER OF A.L.B.

No. COA20-44

Filed 6 October 2020

Juveniles—delinquency—mental illness—commitment to Division of Adult Correction youth development center—referral to area mental health services director required

Where the trial court ordered the juvenile—who suffered from mental illness and asked to be placed in a residential psychiatric facility—be committed to a Division of Adult Correction youth development center after she had escaped six times from foster and group homes, committed five vehicle thefts, and removed her ankle monitor, the order was vacated and remanded for failure to refer the juvenile to the local area mental health services director for appropriate action as required by N.C.G.S. § 7B-2502(c). The juvenile was prejudiced by the failure to refer her for evaluation because, although some evidence of prior clinical evaluations was presented, there was a reasonable possibility that an updated assessment would have affected the trial court's ultimate disposition.

Judge BERGER dissenting.

Appeal by juvenile from order entered 20 May 2019 by Judge Michael K. Lands in Gaston County District Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Assistant Deputy Attorney General Melissa K. Walker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for respondent-appellant juvenile.

INMAN, Judge.

Amber,[1] a juvenile diagnosed with several mental disorders, appeals from an order committing her to a Division of Adult Correction youth development center after the district court found her responsible for six escapes from youth foster and group homes, at least five vehicle thefts

1. We refer to the juvenile by pseudonym to protect the identity of the minor.

(including two wrecks), and the removal of the ankle monitor that provided the only means for authorities to know her whereabouts.

She argues that the trial court erred in failing to refer her to the area mental health services director for appropriate action, as required by statute. After careful review, we agree, vacate the trial court's order, and remand for further proceedings.

I. Facts and Procedural Background

The evidence of record tends to show the following:

Amber, born on 15 September 2003, was 15 years old at the time of the proceeding below. She had lived for some time with her father, but they had "physical conflicts," and she reported that he engaged in domestic violence and abused alcohol. Eventually Amber's father kicked her out of his home.

Amber then moved in with her mother, who struggled with her own mental health issues. She was unable to control Amber's behavior, and, after Amber stole a car, surrendered her to Gaston County Department of Social Services ("DSS") custody.

DSS initially placed Amber in a series of three Level Two therapeutic foster care homes. Amber ran away from the first two homes, stealing a car on one occasion. She was found responsible and placed on probation for running away and stealing the vehicle. Amber was later transferred out of the third therapeutic foster care home due to its location.

A mental health assessment of Amber in March 2018 noted several diagnoses including post-traumatic stress disorder, depressive disorder, and unspecified disruptive, impulse-control, and conduct disorder. The mental health counselor who assessed Amber recommended that she be placed in a Level Three home, which would provide around the clock residential services including rules, routine, structure, therapeutic interventions, group activities, and additional therapy.

Amber's therapeutic care and placement was coordinated by Partners Behavioral Health Management ("Partners"), the Managed Care Organization ("MCO") for Gaston County.[2] Partners does not directly provide care, evaluate patients, or recommend appropriate treatments. Instead, licensed care providers conduct any necessary medical evaluations and make treatment recommendations; Partners then steps in, if

2. It is unclear from the record what, precisely, prompted Partners to begin coordinating Amber's care.

needed, to identify facilities that provide the recommended treatment and coordinate patient placement with those facilities.

Consistent with the assessment and recommendation in March 2018, Partners authorized placement for Amber in a Level Three group home on 27 April 2018. Partners authorized Amber's placement so that she could receive care according to her Patient Centered Plan ("PCP"), which, per Partners' Care Coordination Supervisor Kendall Higgins, is "a treatment plan that's developed by a clinician and a family . . . that really outlines their treatment goals based on what's recommended in the comprehensive clinical assessment." The group home updated Amber's treatment plan in May, June, July, August, and October 2018.

Amber stole a van from the group home and fled on 13 August 2018, leading to a juvenile petition for larceny of a motor vehicle. After a few days in detention, Amber returned to the group home. She ran away again, leading to another juvenile petition on 16 October 2018. On 5 November 2018, she admitted to delinquency in connection with the larceny petition and was placed on probation for 9 months.

Partners authorized placement in a different Level Three group home, Turn Around Group Home, on 13 November 2018. A different mental health entity, A New Place, took over responsibility for updating Amber's clinical assessment and treatment plan.

Although Amber's first few months at Turn Around seemed promising, she eventually violated the terms of her probation on 3 March 2019 when she failed to charge her ankle monitor, cut it off, and fled the home. She was located in Lincoln County in possession of her grandmother's car before being returned to Turn Around on 1 April 2019. The following morning, Amber stole a van and absconded again. She later crashed the van, stole a truck, and wrecked the truck before being apprehended on 4 April 2019. Juvenile petitions for speeding to elude arrest and felony possession of a stolen vehicle were filed on 4 April and 16 April 2019, respectively.

Amber admitted to possession of a stolen vehicle on 18 April 2019, leading the State to dismiss the petition for speeding to elude arrest. She admitted to her probation violations at a hearing on 6 May 2019. During that hearing, Amber requested placement in a Level Five psychiatric residential treatment facility ("PRTF").[3] Amber had not previously been placed in a psychiatric facility.

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3. A Level Five PRTF, unlike lower-level PRTFs, is a locked mental health treatment facility. It is the most restrictive form of therapeutic treatment short of inpatient care. Patients are monitored 24 hours a day and receive schooling, psychiatric therapy, and psychiatric medication management.

At a disposition hearing on 20 May 2019, Amber's juvenile court counselor recommended that she be committed to the Juvenile Section Division of the Division of Adult Correction for placement in a youth development center ("YDC"), the most restrictive possible disposition. The counselor noted that while in State custody, Amber could receive the same individual and group therapy, medication management, and education available in a residential psychiatric facility. Unlike psychiatric facilities, YDCs are fenced.

Ms. Higgins also appeared at the disposition hearing to testify concerning Amber's mental health history and treatment. She testified that licensed clinical care providers with A New Place had assessed Amber and recommended commitment to a Level Five PRTF, and that Amber had outstanding referrals to several of those facilities. Ms. Higgins testified that she did not have a recent clinical assessment recommending that commitment, and that the most recent clinical assessment available to Partners—from March 2018 —was out of date and "wouldn't be relevant" to determine Amber's current treatment needs. She also testified that YDCs provide psychiatric care "if the juvenile requests it."

After the presentation of evidence, Amber's counsel argued for placement in a Level Five psychiatric residential treatment facility, while the State posited that commitment to a Level Three youth detention center was more appropriate. Amber's counsel also contended that, based on evidence Amber suffered from mental illness, N.C. Gen. Stat. § 7B-2502(c) required the trial court to refer her to the local mental health services director—in this case Partners[4]—who would then be responsible for conducting an interdisciplinary evaluation, mobilizing care, and meeting Amber's needs. The trial court rejected the argument without substantive discussion and ordered a Level Three YDC disposition. Amber entered oral notice of appeal.

II. ANALYSIS

Amber contends, as she did before the trial court, that her evidence of mental illness required halting disposition for a referral to Partners

4. The statute in question requires referral to the "area mental health, developmental disabilities, and substance abuse services director," N.C. Gen. Stat. § 7B-2502(c) (2019), a position that no longer exists. *In re E.A.*, 267 N.C. App. 396, 400 n.3, 833 S.E.2d 630, 633 n.3 (2019). A separate statute, N.C. Gen. Stat. § 122C-3, makes the local MCO the "area mental health . . . services director" for purposes of N.C. Gen. Stat. § 7B-2502(c). *See* N.C. Gen. Stat. §§ 122C-3(1) and (20b) (2019) (defining "[a]rea authority" as "[t]he area mental health, developmental disabilities, and substance abuse authority" and "[l]ocal management entity (LME)" as "[a]n area authority"); *E.A.*, 267 N.C. App. at 400 n.3, 833 S.E.2d at 633 n.3 (detailing the interplay of N.C. Gen. Stat. §§ 7B-2502 and 122C-3).

for "appropriate action," namely, "an interdisciplinary evaluation and [the] mobiliz[ation] of resources to meet [her] needs." N.C. Gen. Stat. § 7B-2502(c). The State acknowledges that the statutorily mandated referral was not made but argues that Amber cannot show prejudice because Ms. Higgins, as a representative of Partners, testified at the disposition hearing. In sum, the State contends remand is not warranted because Ms. Higgins participated in the hearing, and "[r]emand would only accomplish having the court receive and consider the same information it has already heard."

We hold that Amber has demonstrated reversible error. Consistent with this Court's prior decisions, the trial court was required to refer Amber to Partners for an interdisciplinary evaluation based on her numerous mental health diagnoses. Section 7B-2502(c) provides:

> If . . . there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court *shall* refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. . . . The area mental health, developmental disabilities, and substance abuse director *shall* be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.

N.C. Gen. Stat § 7B-2502(c) (emphasis added).

In applying the statute, this Court has held that "[t]he use of the word 'shall' indicates a statutory mandate that the trial court refer the juvenile to the area mental health services director for appropriate action, and failure to do so is error." *In re E.M.*, 263 N.C. App. 476, 478, 823 S.E.2d 674, 676 (2019) (citations omitted); *see also E.A.*, 267 N.C. App. at 400, 833 S.E.2d at 632-33 (2019) (vacating and remanding a YDC commitment when the juvenile introduced evidence of mental illness but was not referred to the area mental health services director).

The referral is required if the trial court is "faced with *any* amount of evidence that a juvenile is mentally ill." *E.M.*, 263 N.C. App. at 480, 823 S.E.2d at 677. This is so regardless of the juvenile's past mental health treatment or the availability of mental health services through commitment to a YDC. *See id.* ("It is possible that the trial court was under the misapprehension that such a referral was unnecessary, because Evan had already received significant mental health services prior to this disposition and because the trial court recognized that it could order mental health services for Evan during his commitment."). Though a

representative of Partners testified at the disposition hearing, the statute "envisions the area mental health services director's involvement in the juvenile's disposition *and* 'responsib[ility] for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.' " *Id.* (quoting N.C. Gen. Stat. § 7B-2502(c)) (emphasis added). Consistent with *E.M.* and *E.A.*, we hold that the trial court erred in failing to abide by N.C. Gen. Stat. § 7B-2502(c)'s statutory mandate.

Turning to the State's argument that Amber has suffered no prejudice, we are unconvinced that remand would simply have the trial court "receive and consider the same information it has already heard" based on a close examination of the record below. We note that there was no testimony as to whether the "interdisciplinary evaluation . . . and mobiliz[ation of] resources" required by the statute is the same as or equivalent to the coordinated care assessment Amber had received through Partners at the time of disposition, making any conclusion to that effect conjecture. And, although the State contends the trial court received "Ms. Higgins['s] . . . recommendations for disposition and placement," the transcript reveals that Ms. Higgins could not offer a recommendation herself:

> [MS. HIGGINS]: If I could clarify for the record, Your Honor, our—we do not make the recommendations. These clinical recommendations are made by a licensed provider. We help link and facilitate movement from that client to the recommended level of care. So I wouldn't actually be making the recommendations.
>
> . . . .
>
> I wouldn't determine what the best placement would be. I didn't write the recommendation for the best treatment.

Instead, all that Ms. Higgins relayed to the trial court was her understanding that Amber's licensed healthcare provider's most recent recommendation was—for the first time in Amber's treatment history—placement in a Level Five PRTF. She did not provide the clinician's rationale behind the recommendation, and testified that Partners had not received the latest clinical assessment on which the recommendation was based:

> [MS. HIGGINS]: I don't have any recommendations for placement.
>
> . . . .

> [The latest clinical assessment is] not in this packet of information that I have, that was part of our medical records, that to my understanding, it was part of what was subpoenaed.
>
> . . . .
>
> We brought everything that was subpoenaed from our medical records that was available to us. . . . It just so happens that part of our medical record did not include this most recent assessment.[5]

In fact, Ms. Higgins testified that Amber's most recent clinical home, *not* Partners, had made and was responsible for pursuing the several referrals to PRTFs that were still outstanding. Ms. Higgins also confirmed that she had never spoken with the clinicians who had conducted the most recent assessment, let alone Amber.

The State notes that the trial court had the benefit of a clinical assessment of Amber dated to March of 2018. That assessment, however, was more than a year old and, according to Ms. Higgins, insufficient to support a current placement recommendation:

> [MS. HIGGINS]: These recommendations from 2018 are what recommended her for the level of care that she was most recently at, the Level Three group home.
>
> . . . .
>
> We would consider [the clinical assessment from] March 2018 to not be active . . . .
>
> . . . .
>
> It includes clinical information that we'd always want to consider, but the recommendations would not be to date. It wouldn't be relevant.

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5. We note that when asked what additional documents besides the clinical assessment she reviewed to prepare for the disposition hearing, Ms. Higgins stated she had "briefly reviewed the addendum that we just got, that was provided to you by A New Place." She later testified that the only documents she reviewed concerning Amber's recommended placement in a psychiatric facility were the March 2018 clinical assessment and treatment plan, and that her testimony was based only on those two documents. It is unclear from the record whether the addendum that Ms. Higgins "just got" pertained to the clinical assessment, treatment plan, or some other healthcare-related document. In any event, the trial court did not receive any information about the most recent clinical assessment beyond Ms. Higgins's understanding that it contained a recommendation for Level Five PRTF placement.

> [THE STATE]: Okay.
>
> [MS. HIGGINS]: In terms of a higher level of care.
>
> THE COURT: Let me make sure I understood that. So we should be considering a March [2019] evaluation?
>
> [MS. HIGGINS]: I think in terms of when we look at authorizing care, we would need a recommendation within the last 30 days.

In short, neither Ms. Higgins's testimony nor the documents introduced provided the trial court with evidence regarding why a Level Five PRTF placement, as opposed to commitment to a YDC, was appropriate for Amber based on any clinical evaluations of her mental health needs. The trial court lacked the opportunity to weigh any mental health care clinicians' reasoning against the State's recommendation for commitment to a YDC.

"Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 175, 171 L. Ed. 2d 345, 356 (2008). It is possible, then, that an updated assessment could show new diagnoses or rationales for specific treatment that would alter the trial court's ultimate disposition. A year is not insignificant in the mental development of an adolescent.

N.C. Gen. Stat. § 7B-2502(c) "envisions the area mental health services director's involvement in the juvenile's disposition and 'responsib[ility] for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.' " *E.M.*, 263 N.C. App. at 480, 823 S.E.2d at 677-78 (quoting N.C. Gen. Stat. § 7B-2502(c)).[6] While

6. While the State argues on appeal that the purpose of the statute was vindicated by Ms. Higgins's participation in the hearing, we note that the State actively sought at various points to limit Ms. Higgins's participation considerably. When Amber called Ms. Higgins as a witness, the State protested on the grounds that Amber's counsel had not listed Ms. Higgins on a witness list she voluntarily provided to the State. The State objected to Ms. Higgins's testimony concerning Amber's mental health diagnoses and objected to having her qualified as an expert witness in licensed professional counseling. It later moved to strike all of Ms. Higgins's testimony concerning the March 2018 clinical assessment on the grounds that her expert testimony disclosed the immateriality of the assessment to the most recent Level Five PRTF placement recommendation. We further note that the rules of evidence are relaxed in juvenile delinquency disposition hearings. *See* N.C. Gen. Stat. § 7B-2501(a) (2019) ("The dispositional hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the juvenile. The court may consider any evidence, including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.").

Amber had received some services from Partners—the local mental health services director—and while Ms. Higgins testified about a recent clinical recommendation, it is not evident that the "interdisciplinary evaluation of the juvenile and mobiliz[ation of] resources" called for by the statute had been completed. Given Ms. Higgins's testimony regarding a clinical recommendation that was different than the recommendation a year earlier, and that supported Amber's request to be placed in a psychiatric facility, we hold that Amber has demonstrated a reasonable possibility that compliance with the statute and review of the required evaluation would have resulted in a different disposition. *See In re Bass*, 77 N.C. App. 110, 334 S.E.2d 779, 782 (1985) (holding a juvenile failed to show prejudice because he could not demonstrate "a reasonable possibility that a different result would have been reached at his adjudicatory hearing"); *see also* N.C. Gen. Stat. § 15A-1443(a) (2019) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). We therefore vacate the disposition order and remand to the trial court for the referral, interdisciplinary evaluation, and mobilization of resources called for by the statute.

III. CONCLUSION

For the foregoing reasons, we vacate the disposition order committing Amber to a YDC and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judge COLLINS concurs.

Judger BERGER dissents by separate opinion.

BERGER, Judge, dissenting by separate opinion.

The majority correctly determined that the trial court erred when it entered a Level III disposition without first referring the juvenile to area mental health services pursuant to N.C. Gen. Stat. § 7B-2502(c). However, the juvenile has failed to show that she was prejudiced by this error, and I respectfully dissent.

N.C. Gen. Stat. § 7B-2502(c) states in part, "[i]f the court believes, or if there is evidence presented to the effect that the juvenile has a mental

illness or a developmental disability, the court shall refer the juvenile to the area mental health . . . services director for appropriate action." N.C. Gen. Stat. § 7B-2502(c) (2019). N.C. Gen. Stat. § 7B-2502(c) "envisions the area mental health services director's involvement in the juvenile's disposition and responsibility for 'arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.' " *In re E.M.*, 263 N.C. App. 476, 480, 823 S.E.2d 674, 678 (2019) (quoting N.C. Gen. Stat. § 7B-2502(c)).

Ms. Kendall Higgins testified for the juvenile at the disposition hearing. Ms. Higgins was the area mental health services director and the individual to whom the juvenile should have been referred to under Section 7B-2502(c). Ms. Higgins testified to the recommendations provided by licensed clinical care providers with "A New Place," the juvenile's current healthcare provider. Additionally, Ms. Higgins testified to the recommendations in the juvenile's person centered plan ("PCP"), and a 2018 clinical assessment of the juvenile was presented to the trial court. According to Ms. Higgins, a PCP is a treatment plan "developed by a clinician and a family. It's supposed to be a joint effort by the client, family [ ], and the provider that really outlines their treatment goals based on what's recommended in the comprehensive clinical assessment." Based on the juvenile's assessments, Ms. Higgins recommended to the trial court that the juvenile be placed in a Level V PRTV in-patient treatment facility.

The juvenile's court counselor testified that the juvenile was a flight risk and that the Department of Juvenile Justice had exhausted all efforts and available services. Based on the juvenile's disposition level, the court counselor recommended that she be placed in a secure Youth Development Center ("YDC").

According to the juvenile's court counselor, the juvenile would not be successful in an in-patient treatment facility as recommended by the area mental health services director. From the testimony of the court counselor, the juvenile's five prior documented incidents as a runaway, her three separate adjudications on new charges, and her admitted drug use, among other factors, were not compatible with the lax security at an in-patient treatment facility. Specifically, the court counselor testified that less restrictive options would not meet the juvenile's risks and needs because the juvenile had stated that "she doesn't care where we put her, she's going to take another car and run away."

The court counselor also testified that the juvenile had violated juvenile probation several times, and "[s]he could've gone to the YDC based on the violation I filed prior to her picking up this newest charge,

but we wanted to put her on an ankle monitor and give her an opportunity to be successful." The juvenile cut off the ankle monitor.

The court counselor further testified that he did not recommend commitment to YDCs often. With this juvenile, however, YDC was recommended because "our biggest concern was the number of times she's stolen a car and the danger [to] herself and the community when she's running away, and the choices that she makes when she's not being supervised."

In addition, the court counselor testified that the juvenile would receive the same or similar services at a YDC that were available at in-patient treatment facilities. The primary difference between in-patient treatment and YDC, according to the court counselor, was that a YDC afforded the juvenile and the public greater protection because it was a gated facility. The juvenile's court counselor testified that at a YDC, the juvenile would have access to education, social skills classes, living skills, medication management, and mental health services including individual therapy, group therapy, and psychological evaluations.

After hearing these recommendations and weighing the difference between the in-patient treatment facility and a secure YDC, the trial court placed the juvenile in a secure YDC.

The trial court considered Ms. Higgins' testimony and recommendations for placement of the juvenile. Ms. Higgins, the area mental health services director, is the individual to whom the juvenile should be referred to under Section 7B-2502. If this matter were remanded to the trial court, the juvenile would be referred to the area mental health services director for evaluation. Thus, the majority seeks to send this case back to the trial court for referral to Ms. Higgins so the trial court can again decide between a secure YDC facility and that of the lax security of an in-patient treatment facility. Essentially, the majority seeks to have the trial court weigh the same options.

Further, a trial court is not bound by the recommendations of the area mental health services director. *See* N.C. Gen. Stat. § 7B-2501(c). While Section 7B-2502(c) references institutionalization based on consent, or lack thereof, that Section in no way removes or eliminates a trial court's discretion for dispositional alternatives under Section 7B-2501(c), or otherwise requires a trial court to delegate its authority to the area mental health services director. *See* N.C. Gen. Stat. § 7B-2502(c) ("If the parent, guardian, or custodian refuses to consent to institutionalization after it is recommended by the area mental health [services] . . . director, the signature and consent of the court *may* be substituted for that purpose." (emphasis added)).

Pursuant to N.C. Gen. Stat. § 7B-2501(c), the court has the discretion to "select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile." N.C. Gen. Stat. § 7B-2501(c). That is precisely what the trial court did here based on the facts of the case, and the testimony provided by the area mental health services director and the juvenile's court counselor. YDC commitment was necessary to address the seriousness of the juvenile's persistent delinquent behavior, hold the juvenile accountable, protect public safety, and allow the juvenile to have rehabilitative treatment. After consideration of the factors in Section 7B-2501(c), the court placed the juvenile in a secure YDC as "the appropriate plan to meet the needs of the juvenile[.]"

Because the trial court was not required to delegate its authority to the area mental health services director, and because the trial court considered the same dispositional alternatives it will on remand, the juvenile has failed to demonstrate that she was prejudiced by the trial court's error.

IN THE MATTER OF THE ESTATE OF ANDREW ROBERT CRACKER

No. COA20-4

Filed 6 October 2020

1. Husband and Wife—separation agreement—implied waiver of elective share—deceased husband's estate

In an estate matter, where the parties had previously executed a separation agreement but were still married when the husband died, the trial court properly denied the wife's claim for an elective share of her deceased husband's estate because she implicitly waived her right to bring that claim by signing the separation agreement. The agreement's express terms—which dismissed the wife's then-existing claims for post-separation support, alimony, and related attorney fees, and which exhaustively designated specific property that each spouse would retain as their "sole and separate property"—were inconsistent with an intention that the parties each retain the right to share in the other spouse's estate upon that other spouse's death.

2. Estates—surviving spouse—waiver of elective share—trial court's discretion to hear additional evidence

IN RE CRACKER

[273 N.C. App. 534 (2020)]

In an estate matter, the trial court did not abuse its discretion by refusing to hear additional testimony from petitioner before determining that she had waived her right to an elective share of her deceased husband's estate. It was within the court's discretion under N.C.G.S. § 1-301.3(d) to receive additional evidence on the issue if the record was insufficient, but the court made a reasoned decision by referring to evidence already in the record, and there was nothing to suggest that the court found the record insufficient.

Appeal by Petitioner Pennaritta C. Cracker from order entered 26 June 2019 by Judge C.W. Bragg in New Hanover County Superior Court. Heard in the Court of Appeals 26 August 2020.

Ward and Smith, P.A., by Jenna Fruechtenicht Butler and Christopher S. Edwards, for Appellant Pennaritta C. Cracker.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Colin J. Tarrant, for Appellee Andrew John Edward Cracker.

COLLINS, Judge.

Pennaritta C. Cracker ("Petitioner") appeals from an order denying her claim to an elective share of the estate of her late husband, Andrew Robert Cracker ("Decedent"). Petitioner argues that the trial court erred because she never signed an express waiver of her elective share right, and a waiver cannot be inferred from the terms of Petitioner and Decedent's separation agreement. We affirm the order.

I. Procedural History and Factual Background

Petitioner and Decedent married in July 1990 and separated in November 2014. On 4 December 2014, Petitioner filed a complaint seeking post-separation support, alimony, equitable distribution, and attorney's fees. Following a settlement conference, Petitioner and Decedent (the "parties") executed a Mediated Settlement Agreement and Consent Judgment ("MSA"), which the trial court entered on 20 August 2015.

The parties stipulated that the MSA memorialized their agreement. The trial court found that the parties had "agreed to resolve all pending issues"; the MSA was "calculated to finally resolve their financial claims against one another"; and that "[t]he parties waive[d] further findings of fact." The MSA ordered Decedent to deed certain real property to Petitioner in exchange for Petitioner's assumption and payment of all debts associated with the property. It also provided that Petitioner and

Decedent would have as their "sole and separate property all household furniture and other personal property" at the time in their possession. Additionally, each party "acknowledge[d] sole ownership in the other" of certain personal belongings owned prior to the marriage, inherited during the marriage, or given or loaned to the party by a relative. Petitioner and Decedent each received a vehicle as "sole and separate property." Each party would be responsible for the debts associated with the assets distributed to him or her and for the debts in his or her individual name. Petitioner and Decedent retained bank accounts in their respective names as "sole and separate property," and identified retirement accounts and joint bank accounts were distributed to either Petitioner or Decedent. The MSA specified that the parties had divided all intangible property such as stocks and bonds to their satisfaction, and provided that "neither party shall make any claim against the other for any intangible personal property in the name, possession or control of the other."

Petitioner also "dismisse[d] with prejudice any claim for post-separation support, alimony and attorneys fees associated with said claims." Decedent was required to make payments of $6,900 to Petitioner in September and October of 2015. The MSA required Decedent to maintain a supplemental health insurance policy covering Petitioner at her cost. At the conclusion of the MSA, the parties agreed that it "contains the entire understanding of the parties, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein."

On 13 June 2017, Decedent executed his Last Will and Testament ("Will"). He died on 26 January 2018. At the time of Decedent's death, he and Petitioner were still married but remained separated. The Will was admitted to probate on 5 February 2018. Decedent's Will named his son, Andrew John Edward Cracker, as executor of the estate. The Will devised Decedent's entire estate to his two children. The Definitions section of the Will provided, in relevant part:

> As of the execution of this Will, I am physically separated from my spouse, Pennaritta Cherry Cracker. She and I have executed a Mediated Settlement Agreement and Consent Judgment on marital property that contains a complete and total waiver of alimony which includes a waiver of any claim for post separation support, alimony and attorney's fees associated with any claims that were raised in our separation. In addition, both Pennaritta C. Cracker and myself have executed a Release of Estate and

> Inheritance Rights, a copy of which is attached as Exhibit A and incorporated herein by reference to this Will.

No release was attached to the Will.

On 30 July 2018, Petitioner timely filed a claim for an elective share of Decedent's estate under N.C. Gen. Stat. § 30-3.1(a). The executor objected to this claim, arguing that, under N.C. Gen. Stat. § 30-3.6, the claim was barred because Petitioner had waived her elective share right in the terms of the MSA. After a hearing, by written order entered 28 November 2018, the clerk determined that the duly executed MSA waived Petitioner's right to claim any interest in Decedent's property after death.

The Clerk made the following relevant findings of fact:[1]

> 5. That the Decedent and [Petitioner] entered into a Mediated Settlement Agreement and Consent Judgment on August 20, 2015, wherein the parties settled issues of equitable distribution and alimony and the same is referenced in Decedent's Last Will and Testament;
>
> . . . .
>
> 1. That the distribution of assets between the Decedent and [Petitioner] under the Mediated Settlement Agreement and Consent Judgment stated that the parties shall have this property as his or her "sole and separate property."
>
> 2. That by execution of the Mediated Settlement Agreement and Consent Judgment both parties expressly waived any future claims "against the other for any intangible personal property in the name, possession or control of the other."
>
> 3. That the Mediated Settlement Agreement and Consent Judgment further states that "Each party hereby transfers, assigns and relinquishes unto the other party any and all right, title or interest he or she may have in the furnishings or other personal property presently

1. The order's Conclusions of Law numbers 1, 2, and 3 are more accurately categorized as findings of fact. *Dunevant v. Dunevan*t, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001) ("[A] pronouncement by the trial court which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court's order.").

> in the possession of the other party, except as otherwise designated herein."

The clerk thus denied Petitioner's claim for an elective share. Petitioner timely appealed this order to superior court.

After a hearing, by written order entered 26 June 2019, the court concluded that the clerk's decision was correct based on "the Separation Agreement as well as the language of the Will, indicating clearly that Decedent's intent was for his estate to pass only to his children and to exclude Petitioner[;]" the clerk's findings of fact were supported by sufficient evidence; the conclusions of law were supported by the findings of fact; and the denial of Petitioner's claim was consistent with the conclusions of law and applicable law. The superior court thus affirmed the clerk's order. Petitioner timely appealed to this Court.

II. Discussion

A. Waiver of Elective Share

[1] Petitioner argues that she is statutorily entitled to an elective share of Decedent's estate because she did not waive this entitlement in a signed writing as required by N.C. Gen. Stat. § 30-3.6(a).

On appeal of a probate matter decided by the clerk, the superior court reviews the clerk's order to determine "(1) [w]hether the findings of fact are supported by the evidence[,] (2) [w]hether the conclusions of law are supported by the findings of facts[, and] (3) [w]hether the order or judgment is consistent with the conclusions of law and applicable law." N.C. Gen. Stat. § 1-301.3(d) (2019). This Court applies the same standard of review as the superior court. *In re Williams*, 208 N.C. App. 148, 151, 701 S.E.2d 399, 401 (2010); *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995). The determination of a party's entitlement to an elective share, as a decision that "require[es] the exercise of judgment" and "the application of legal principles," *In re Estate of Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997), is a conclusion of law. The interpretation of a contract is also a conclusion of law. *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018). We review conclusions of law de novo. *In re Estate of Johnson*, 824 S.E.2d 857, 861 (N.C. Ct. App. 2019).

By default, "[t]he surviving spouse of a decedent who dies domiciled in this State has a right to claim an 'elective share' " in the decedent's estate. N.C. Gen. Stat. § 30-3.1(a) (2019). This statutory right "may be waived, wholly or partially, before or after marriage, with or without

consideration, by a written waiver signed by the surviving spouse . . . ." N.C. Gen. Stat. § 30-3.6(a) (2019).

"The statutory law of this state permits a married couple to execute a separation agreement 'not inconsistent with public policy which shall be legal, valid, and binding in all respects.' " *Sedberry v. Johnson*, 62 N.C. App. 425, 429, 302 S.E.2d 924, 927 (1983) (quoting N.C. Gen. Stat. § 52-10.1). Such agreements are construed according to "the same rules which govern the interpretation of contracts generally." *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973). As with contracts more broadly, in interpreting a marital agreement, "the primary purpose is to ascertain the intention of the parties at the moment of its execution." *Id.* at 409-10, 200 S.E.2d at 624. A contract "encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Id.* at 410, 200 S.E.2d at 624-25 (citing 4 Williston, Contracts § 601B (3d ed. 1961)). "The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended [the] stipulation in question." *Id.* at 410, 200 S.E.2d at 624-25 (quoting 1 Chitty, Contracts § 693 (23d ed. A.G. Guest 1968)).

In *Lane*, our Supreme Court concluded that a separation agreement, which had no specific express release of the wife's right to intestate succession, waived the wife's right to share in her deceased husband's estate. In analyzing the separation agreement, the Supreme Court recognized express terms therein, such as "[t]hey agreed . . . they would live wholly separate and apart from each other as though they had never been married"; "[wife] agreed to make no demands upon [husband] for support and to impose no obligation or responsibility upon him"; and that "[e]ach agreed that the other would thereafter hold, acquire, and dispose of all classes and kinds of property, both real and personal, as though free and unmarried." *Id.* at 411, 200 S.E.2d at 625 (quotation marks and emphasis omitted). The Court also noted that the separation agreement stated that each party "released the right to administer upon the estate of the other." *Id.*

The Court determined that "the specific terms of the contract are totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other . . . if he or she were to become the surviving spouse." *Id.* at 411, 200 S.E.2d at 625. The Court ultimately concluded: "The provisions that each would thereafter acquire, hold, and dispose of property as though unmarried and that each renounced

the right to administer upon the estate of the other refute the contention that [the wife] intended to retain any rights in her husband's estate." *Id.*

Guided by *Lane*, this Court in *Sharpe* concluded that a pre-marital agreement waived the wife's right to claim an elective share in her deceased husband's estate.

> [T]he unambiguous language of the uncontested and valid pre-marital agreement plainly establishes the parties intention, prior to their marriage, that [wife] waived any rights in [husband's] separate property and that [husband] waived any rights in [wife's] separate property. The pre-marital agreement also clearly and unambiguously states "[e]ach party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried[,]" and"[e]ach party specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state."

Sharpe, 258 N.C. App. at 608, 814 S.E.2d at 600. This Court reasoned that "[t]he only logical reading of each party specifically waives . . . any claim . . . to the other's separate property under the laws of this state, would extend, in light of the entire agreement, to include a spouse's right to claim an elective share under N.C. Gen. Stat. § 30-3.1." *Id.* at 608, 814 S.E.2d at 600 (quotation marks omitted).

Here, the MSA clearly and unambiguously states, "[e]ach party hereby transfers, assigns and relinquishes unto the other party any and all right, title or interest he or she may have in the furnishings and personal property presently in the possession of the other party, except as otherwise designated herein"; "[e]ach party hereby acknowledges sole ownership in the other party of all his or her wearing apparel, personal ornaments and other personal effects"; Petitioner shall have as her "sole and separate property" a car, and certain bank and financial accounts; Decedent shall have as his "sole and separate property" a car, and certain bank and financial accounts; "[h]ereafter, neither party shall make any claim against the other for any intangible personal property in the name, possession or control of the other"; and "[b]y her execution of this Agreement, [Petitioner] dismisses with prejudice any claim for post-separation support, alimony and attorneys fees associated with said claims."

As in *Lane* and *Sharpe*, "the specific terms of the [MSA] are totally inconsistent with an intention that the parties would each retain the

right to share in the estate of the other . . . if he or she were to become the surviving spouse." *Lane*, 284 N.C. at 411, 200 S.E.2d at 625. The MSA resolved all financial claims between the parties by exhaustively identifying the particular property that each spouse would hold as his or her "sole and separate property." *See id.* at 411, 200 S.E.2d at 625 (spouses divided the household furnishings which they jointly owned); *Sharpe*, 258 N.C. App. at 609, 814 S.E.2d at 600 (premarital agreement identified separate property of the spouses). The MSA also completely dismissed Petitioner's claims for post-separation support, alimony, and attorneys' fees. *See Lane*, 284 N.C. at 411, 200 S.E.2d at 625 (wife "agreed to make no demands upon [husband] for support and to impose no obligation or responsibility upon him"); *Sloop v. Sloop*, 24 N.C. App. 295, 297, 210 S.E.2d 262, 264 (1974) (finding waiver where, inter alia, wife waived "any and all right to alimony and support for herself"). Although the MSA does not expressly refer to the parties' rights to claim upon each other's estate, "the plain and unambiguous language does not permit us to read the agreement to mean the parties intended to waive rights to each other's separate property while they were alive, but not after one of them had pre-deceased the other." *Sharpe*, 258 N.C. App. at 610, 814 S.E.2d at 601. *See also Sloop*, 24 N.C. App. at 298, 210 S.E.2d at 264 ("It seems inconceivable that either surviving party to this deed of separation could claim upon the death of the other that which manifestly he or she could not claim while both parties were living.").

Beyond the terms of the MSA, Petitioner contends that the reference in Decedent's Will to a Release of Estate and Inheritance Rights shows that the parties did not understand the MSA to include such a waiver. We disagree. "Evidence of statements and conduct by the parties after executing a contract is admissible to show intent and meaning of the parties." *Heater v. Heater*, 53 N.C. App. 101, 104, 280 S.E.2d 19, 21 (1981). But in this case, the terms that Decedent used in the Will do not effectively reveal anything about the intent or meaning of the parties beyond what can be gleaned from the MSA. As the estate argues, the terms of the Will are equally susceptible to the interpretation that Decedent merely sought to make explicit in the Will what was already implicit in the MSA.

"[T]he intention of each party to release his or her share in the estate of the other is implicit in the express provisions of their separation agreement, their situation[,] and purpose at the time the instrument was executed." *Lane*, 284 N.C. at 412, 200 S.E.2d at 625. "The law will, therefore, imply the release and specifically enforce it." *Id.* at 412, 200 S.E.2d at 625. We hold that Petitioner released her right to share in Decedent's estate by the execution of the MSA.

B. Petitioner's Testimony

[2] Petitioner next argues that the trial court erred by finding that she had waived her elective share right without first hearing her testimony on the issue.

When a party appeals an estate matter to superior court, "[i]f the record is insufficient, the judge *may* receive additional evidence on the factual issue in question. The judge *may* continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence." N.C. Gen. Stat. § 1-301.3(d) (emphasis added).

The permissive language of Section 1-301.3(d) grants the trial court discretion to receive additional evidence if it finds a deficiency in the record. "In instances involving permissive statutory language," the trial court's decision "is reviewed on appeal using an abuse of discretion standard of review." *In re Z.T.W.*, 238 N.C. App. 365, 370, 767 S.E.2d 660, 664 (2014). An abuse of discretion occurs only where the trial court's "actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 777, 324 S.E.2d at 833.

Petitioner offered testimony to explain why there was no executed release attached to Decedent's Will, why the parties never obtained a divorce, and whether the parties intended to leave the elective share right available. The superior court declined to hear this testimony. This did not amount to an abuse of discretion.

There is no indication in the record on appeal that the superior court found the record before it insufficient, and even if it had, it was within the court's discretion to accept additional evidence. N.C. Gen. Stat. § 1-301.3(d). Moreover, the superior court was permitted to make a reasoned decision on the issue of whether the elective share right was waived by reference to the language of the MSA and the Will alone. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 7, 802 S.E.2d 888, 892 (2017) (courts "determine the intent of the parties and the nature of an agreement 'by the plain meaning of the written terms' "); *Heater*, 53 N.C. App. at 104, 280 S.E.2d at 21 ("Evidence of statements and conduct by the parties after executing a contract is admissible to show intent and meaning of the parties."). That is what the superior court explicitly did; it relied on the language of the MSA and the Will to affirm the clerk's denial of Petitioner's claim to an elective share. The Superior Court therefore did not abuse its discretion by refusing to hear additional testimony from Petitioner.

III. Conclusion

The terms of the MSA impliedly waived Petitioner's right to an elective share of Decedent's estate under N.C. Gen. Stat. § 30-3.1(a). The trial court was not required to hear Petitioner's testimony before making this determination. We therefore affirm the trial court's order.

AFFIRMED.

Judges INMAN and BERGER concur.

CASSIA FERREIRA JORDAO, PLAINTIFF
v.
NIVALDO JORDAO, DEFENDANT

No. COA19-858

Filed 6 October 2020

1. Child Visitation—in-person visitation in another country—deported parent—sufficiency of factual findings and conclusions of law

An order awarding primary custody to a mother living in North Carolina with the children and granting the father visitation in Brazil (where he lived after being deported) was affirmed where the order's conclusions of law were supported by findings of fact that were supported by substantial evidence. Notably, the trial court's finding that the father was not an "unfit caregiver" and that visitation did not go against the children's best interests supported its conclusions that the father was entitled to in-person visitation and that the only reasonable visitation possible was for the children to visit the father in Brazil.

2. Child Visitation—deported parent—entitlement to reasonable visitation—in-person visitation in another country

The trial court did not abuse its discretion by granting a father secondary physical custody of his children in the form of in-person visitation in Brazil, where the court did not find the father was an "unfit caregiver" or that visitation would not be in the children's best interests. Because the father was unable to return to the United States after being deported to Brazil, the only reasonable visitation possible was to have the children travel to Brazil to see him.

3. Child Custody and Support—custody—deported parent—consideration of statutory factors—domestic violence

An order awarding primary child custody to the mother and granting the father secondary physical custody through visitation in Brazil (where he lived after being deported) was affirmed where the trial court entered sufficient findings of fact showing it considered each factor under N.C.G.S. § 50-13.2(a), including the father's acts of domestic violence toward the mother and both the children's and the mother's safety from domestic violence by the father. To the extent section 50-13.2(b) applied, the court was required not to weigh the father's relocation to Brazil against him in determining custody or visitation.

Appeal by Plaintiff from Order for Temporary Parenting Arrangement entered 7 January 2019 and Order for Permanent Custody entered 5 April 2019 by Judge Sean P. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 3 March 2020.

Plumides, Romano & Johnson, PC, by Richard B. Johnson, for plaintiff-appellant.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellee.

MURPHY, Judge.

We review custody orders to ensure the findings of fact are supported by substantial evidence, and the conclusions of law are supported by the findings of fact. Where unsupported findings of fact do not undermine the conclusions of law, we uphold the order. Here, each of the custody order's conclusions of law are supported by findings of fact that are supported by substantial evidence; therefore, we uphold the order.

Where a trial court does not find a parent unfit, or visitation with that parent to not be in the best interest of the children, it cannot deny reasonable visitation to that parent. Here, Father was entitled to reasonable visitation, and the trial court did not abuse its discretion in granting him reasonable visitation. The trial court carefully considered the unique circumstances of the parties and did not abuse its discretion by granting visitation in Brazil since Father is unable to exercise visitation in the United States.

BACKGROUND

Cassia Ferreira Jordao ("Mother") and Nivaldo Jordao ("Father") married in Brazil in 2001, and two children were born of the marriage—"Larry,"[1] the oldest son, and "Nicholas," the youngest son (collectively "the children"). The family moved to the United States on 27 January 2016 on a six-month tourist visa. After the expiration of that visa on 27 July 2016, the family remained in the United States without documentation.

In January 2017, Mother filed for a Domestic Violence Protective Order ("DVPO") based on allegations Father assaulted, threatened, and stalked her. The parties consented to the entry of a DVPO that prohibited Father from assaulting, harassing, or threatening Mother and gave Mother primary custody of the children. However, in June 2017, Father was arrested for violating the DVPO by allegedly stalking Mother at her church. Father claimed he had asked her to meet there to pick up the youngest son. Based on these alleged acts of domestic violence, Mother applied for a U-Visa on 13 December 2017.[2] After his arrest, Father was deported to Brazil due to his illegal presence in the country.

Mother filed for divorce from Father on 24 July 2018. On 24 September 2018, Father filed his answer to the complaint which included a motion to dismiss the absolute divorce claim due to prior pending proceedings in Brazil and a motion for child custody and a temporary parenting arrangement.[3] On 12 December 2018, a hearing for a Temporary Parenting Arrangement ("TPA") was held, and, on 7 January 2019, the trial court entered its order setting out a TPA ("TPA Order"). The TPA Order granted both parties joint legal custody of the children, with Mother having temporary physical custody and Father having visitation in Brazil during the winter and summer school breaks. The TPA Order also required Mother to provide weekly emails to Father regarding the children and to allow communication between the children and Father by email, text, and telephone.

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1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identities of the minors and for ease of reading.

2. "A 'U-[V]isa' is a type of visa available to victims of serious crimes who are undocumented immigrants and cooperate with law enforcement in the investigation or prosecution of crimes." *State v. Martinez*, 253 N.C. App. 574, 584, 801 S.E.2d 356, 362 (2017) (citing 8 U.S.C. § 1101(a)(15)(U)).

3. The DVPO had expired in February 2018, so there was no child custody order in effect in July 2018.

On 22 January 2019, Father filed a *Motion for Contempt* based upon Mother's failure to comply with the TPA Order provisions regarding weekly emails and communication with the children. Father also filed another *Motion for Temporary Parenting Arrangement*. On 20 March 2019, Mother filed her reply to Father's motions and counterclaim for child custody, child support, and attorney fees.

On 20 and 21 March 2019, the trial court heard the parties' child custody claims, and on 5 April 2019 the trial court entered an *Order for Permanent Custody* awarding Mother primary legal and physical custody of the children and again granting Father visitation with the children in Brazil.[4] The order also set out detailed provisions regarding communication, decision-making, travel between the United States and Brazil, and the custodial schedule if Mother were to reside in Brazil. Mother timely appealed.

ANALYSIS

A. Standard of Review

"In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12–13, 707 S.E.2d 724, 733 (2011). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 13, 707 S.E.2d at 733. "Unchallenged findings of fact are binding on appeal." *Id.* (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006).

B. Challenged Findings of Fact

[1] Here, Mother challenges Findings of Fact 16, 21, 22, 26,[5] 28, 33, 34, 35, 36, 42, 43, and 44 as unsupported by evidence. Below we address each challenged finding of fact to determine if it is supported by substantial evidence.

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4. The order on appeal did not address Father's contempt motion but expressly scheduled that motion for hearing at a later date.

5. We note that although Mother and Father both cite to Finding of Fact 25, they refer to the content of Finding of Fact 26, and so we analyze Finding of Fact 26 as opposed to Finding of Fact 25.

1. Finding of Fact 16

Finding of Fact 16 states:

> 16. The [c]ourt received testimony from an expert in immigration law named P. Mercer Cauley. While it is possible that Mother may receive a U-Visa, it is unlikely that a decision will be made sooner than Spring of 2023, *and it is unlikely that such Visa will be granted based upon the number of application and limits that are currently in place. Although, it is possible that the limits may be increased and she may be successful. Nonetheless, it is unlikely that such a visa will be obtained by Mother that will allow her to stay beyond that point of decision by the federal courts.*

(Emphasis added). The first part of Finding of Fact 16 is supported by the testimony of P. Mercer Cauley ("Cauley"). Cauley testified it is possible Mother will receive a U-Visa, but it would not be adjudicated for 6-7 years from the time of her application because there are 10,000 granted each year and there is a significant backlog. He also testified Mother did not have to be in the United States to be granted a U-Visa, so if she were to leave the United States then she could later return to the United States if she was granted a U-Visa and a waiver. A waiver would be required for Mother to re-enter the country because she stayed past her former visa and would otherwise be prohibited from returning for 10 years. When asked if he thought the application would be granted, Cauley testified the application would probably get a request for more evidence, and under the current administration "it's probably not a slam dunk." The part of Finding of Fact 16 stating "it is unlikely that [a U-Visa] will be granted" is not supported by any evidence, at least to the extent this finding is interpreted as addressing the *merits* of Mother's waiver request. The evidence did not suggest Mother's U-Visa is unlikely to be granted but the evidence did suggest a delay of several years before this might happen. Although this portion of Finding of Fact 16 is unsupported by evidence, it is not essential to any conclusion of law in this case. *See In re A.Y.*, 225 N.C. App. 29, 41, 737 S.E.2d 160, 167 (2013) ("We agree that this finding of fact is only partially supported by competent evidence. . . . This error is, however, harmless.").

2. Findings of Fact 21 and 22

Mother challenges Findings of Fact 21 and 22 together. Findings of Facts 21 and 22 state:

> 21. The [c]ourt faces this decision on the backdrop of the parties' immigration situation, which precludes Father from entering the United States and also the Court finds that, based upon Mr. Cauley's testimony, the children will have difficulty re-entering the United States should they depart and leave the United States.
>
> 22. Additionally, should Mother leave the United States, she is likely to have difficulty to return to the United States.

Mother claims these findings of fact improperly suggest there was a possibility of Mother and the children to return, when, in reality, if they left it would be impossible for them to return. In terms of Finding of Fact 21, Cauley stated the children would not be barred from returning for 10 years because as minors "they do not accrue the same unlawful presence," but "they would have to apply for a visa," which would be very unlikely to be granted because they had overstayed one visa already. Additionally, the children would receive U-Visas if Mother was granted one in 2023, so it would be possible for them to return at that time. Although this evidence suggests it is unlikely the children could re-enter the United States, it is not impossible and characterizing this as "the children will have difficulty re-entering the United States" is supported by substantial evidence.

In terms of Finding of Fact 22, Cauley testified that absent a waiver Mother would not be able to return to the United States for 10 years once she left. The trial court heard testimony that the grant of a waiver would allow her to return sooner, and she would likely discover the status of her waiver in 2023 along with her U-Visa application. Again, this evidence suggests it is unlikely that Mother could re-enter the United States, but it is not impossible and characterizing this evidence as Mother being "likely to have difficulty to return to the United States" is supported by substantial evidence.

3. Finding of Fact 26

Finding of Fact 26 states:

> 26. The [c]ourt does not find that Father committed domestic violence upon either child.

Father testified he "[n]ever [has been violent toward his children]. They are there in the courthouse. They can testify if I've ever been violent towards them." Although there was conflicting evidence presented by Mother suggesting Father was violent toward Larry, there was sufficient evidence for the trial court to find Father did not commit domestic

violence against either child. Larry specifically corroborated there had been no domestic violence against the children in a letter read into evidence, although he also later testified this letter was generally dishonest and Father asked him to write it. Despite the conflicting evidence, the trial court found Father had not committed domestic violence against the children, and substantial evidence supported this finding in Father's testimony and Larry's testimony.

4. Finding of Fact 28

Finding of Fact 28 states:

> 28. The Court was presented with a document which describes the travel advisory for Brazil. However, the specific places which are noted do not include the area around Blumenau.

Although Mother takes issue with this finding of fact on the basis of the implication there is no travel advisory to Brazil, when in reality there is a level two travel advisory for all of Brazil, the express content of the finding of fact is supported by the evidence. Mother presented a document describing the travel advisory in Brazil, and testimony about this document showed there was a level two travel advisory throughout Brazil. However, there was no indication the area around Blumenau where Father lives was noted as having a higher travel advisory level. As a result, there was substantial evidence to support the trial court having been "presented with a document" describing "the travel advisory in Brazil," and "the specific places which are noted [did] not include the area around Blumenau."

5. Findings of Fact 33, 34, 35, and 36

Mother challenges Findings of Fact 33, 34, 35, and 36 together. These findings of fact state:

> 33. Mother ignored [Larry]'s poor performance in school that resulted in him dropping out of school and entering an E-learning environment.
>
> 34. She condoned [Larry]'s disregard of the law and did not require him to work despite stating that the reason for his withdrawal was to allow him to work.
>
> 35. Mother provided intentionally incorrect and fraudulent reasons to Charlotte-Mecklenburg Schools for [Larry's] dropout. Mother allowed and encouraged [Larry] to drop out of school and into an E-learning environment

> due to his association with others who encouraged him to engage in drug use along with them. The Court finds such decision was not in [Larry's] best interest.
>
> 36. She currently does not adequately monitor [Larry's] online progress and her work schedule precludes her from monitoring whether or not [Larry] is in fact adequately paying attention to his E-learning studies.

Finding of Fact 33 is supported by Mother's testimony characterizing Larry as an "excellent" student at Providence in 9th and 10th grade. However, in his 10th grade year Larry had only two classes with grades in the 80s or 90s, those being Math 2 with an 84 and Fitness with a 92. He also had a 71 in American History, a 56 in Biology, a 51 in English 2, a 76 in Spanish 1, a 73 in Sports and Entertainment Marketing, and a 74 in Fitness 2. Based on the disparity between Mother's characterization of Larry as an "excellent" student and his actual grades, there was substantial evidence to conclude Mother was ignoring his poor performance. Additionally, there is substantial evidence to support the finding that Larry's poor performance was part of what resulted in him dropping out of school and starting E-learning. The stated reason for him dropping out was he "need[ed] a better schedule to work and study at the same time," but very quickly Larry stopped working because "he wanted to go back to studying." The trial court could conclude from this evidence that Larry did not drop out to work, as he worked for only a very short time period after dropping out, and instead he dropped out due to his grades and school environment.

Finding of Fact 34 is also supported by substantial evidence. As mentioned above, Larry dropped out of high school because he "need[ed] a better schedule to work and study at the same time," but very quickly Larry stopped working because "he wanted to go back to studying." Mother testified Larry does not work because he has online classes that require him to be online for a long time. Thus, substantial evidence showed Mother did not require him to continue working despite his withdrawal being for the purpose of working. In terms of Mother condoning Larry's disregard for the law, substantial evidence showed Mother knew of Larry smoking marijuana, drinking alcohol, and skipping school, and did not or could not stop him from doing so.

Finding of Fact 35 is supported by substantial evidence. Mother testified it "was not such a bad thing" Larry was not going to school because he would meet with his friends at school to smoke marijuana. As stated above, Larry left high school to work, but then did not work because he needed to study. After seemingly acknowledging Larry could have gone

back to his high school after quitting his job, Mother testified "the environment at [his high school] was not good for him. He had all his friends his age all using marijuana there . . . ." This evidence supports the trial court's finding that Mother allowed and encouraged Larry to drop out of school. Furthermore, it suggests Mother intentionally provided incorrect information and Larry could have gone back to high school, but she did not require him to return nor did she update the school.

Finding of Fact 36 is partially supported by the evidence. Mother did not know all of the online classes Larry was taking, how many classes he was taking, or his grades in those classes. This constitutes substantial evidence supporting the finding that Mother was not keeping track of or monitoring Larry's online classes. Mother stated she worked from Monday through Friday, 8 A.M. to 12 P.M. If Larry should be in online schooling during this time period, Mother is unable to supervise and ensure he is adequately paying attention to his work. However, there is no evidence of Larry's school hours, and as a result there is no evidence establishing Mother's work schedule precludes her from supervising Larry's work. Although Finding of Fact 36 is partially unsupported by evidence, it is not essential to any conclusion of law in this case. *See A.Y.*, 225 N.C. App. at 41, 737 S.E.2d at 167 ("We agree that this finding of fact is only partially supported by competent evidence. . . . This error is, however, harmless.").

6. Findings of Fact 42, 43, and 44

Mother challenges Findings of Fact 42, 43, and 44 together. Findings of Fact 42, 43, and 44 state:

> 42. Mother should have primary physical custody and Father should have secondary physical custody of the minor children as outlined herein. This is in the children's best interest.
>
> 43. This Court cannot find that Father is an unfit caregiver or that in person contact is not the best interest of the children. Father desperately wants to see, speak to, and play a part in the lives of his children. Despite logistical and legal challenges, [F]ather has pursued this action in a quest to not be indefinitely cut off from his children.
>
> 44. The Court is therefore required not to deny physical visitation by Father with the children.

Findings of Fact 42 and 44 are actually more properly characterized as conclusions of law. "Generally, any determination requiring the

exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination made by logical reasoning from the evidentiary facts, however, is more properly classified a finding of fact." *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) (internal quotations and citations omitted). Findings of Fact 42 and 44 both require the exercise of judgment and the application of the law controlling custody determinations and visitation. However, Finding of Fact 43 is actually a finding of fact that requires substantial evidence to support it. Findings of Fact 42 and 44 are conclusions of law that require supporting findings of fact. Finding of Fact 43 underlies Findings of Fact 42 and 44, so we first look to Finding of Fact 43.

Finding of Fact 43 is supported by the following evidence: testimony by Luigi Luz suggested Father was a good parent who could be trusted with his children; Larry lived with Father following his parents' separation for several months; Father's consistent visitation with the younger son; Father wanted a good relationship with his older daughters from another marriage and that motivated his move to the United States; in Brazil, Father sent Larry to a private school to get a higher quality education, and later in the United States they specifically sought out good schools; Father testified to having a very good relationship with the children when they came to the United States initially; Father denied ever being violent toward his children; after he was deported, Father made arrangements to see his children and attempted to purchase flights to Brazil for the children as outlined in the TPA Order; Father testified he had a great relationship with his children, prior to his deportation, and he was trying to be there for them; Father testified "[i]t's everything I want in my life to be near my . . . children[,]" and expressed great concern over his older son's new drug use in the months following Father's deportation; and Father's home in Brazil has a room for each child were they to visit. Thus, despite conflicting evidence, the trial court had substantial evidence to support its finding that it could not find

> Father is an unfit caregiver or that in person contact [was] not the best interest of the children. Father desperately wants to see, speak to, and play a part in the lives of his children. Despite logistical and legal challenges, [F]ather has pursued this action in a quest to not be indefinitely cut off from his children.

Finding of Fact 44, which is actually a conclusion of law, is supported by Finding of Fact 43 and applies N.C.G.S. § 50-13.5(i), which requires "the trial judge, prior to denying a parent the right of reasonable

visitation, [to] make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." N.C.G.S. § 50-13.5(i) (2019). Since the trial court did not find Father to be an unfit caregiver or visitation to not be in the best interest of the children, the trial court could not deny Father reasonable visitation. Finding of Fact 42, also a conclusion of law supported by Finding of Fact 43 and N.C.G.S. § 50-13.5(i), correctly found the only reasonable visitation possible was for the children to visit Father in Brazil.

C. Visitation with Father in Brazil

[2] Mother argues the trial court abused its discretion in awarding Father visitation in Brazil. In issues of child custody, a trial court must make its decision based on the best interest of the children. N.C.G.S. § 50-13.2(a) (2019). To deny a parent custody or visitation, a trial court must find the parent "is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." N.C.G.S. § 50-13.5(i) (2019).

Mother challenges Findings of Fact 42, 43, and 44 as unsupported by substantial evidence, as well as Conclusion of Law 5 as unsupported by the findings of fact. As stated above, Finding of Fact 43 is supported by substantial evidence. Additionally, Findings of Fact 42 and 44 are conclusions of law supported by findings of fact. As a result, we look only to whether Conclusion of Law 5 is supported by the findings of fact.

Conclusion of Law 5 is supported by Findings of Fact 42, 43, and 44. Conclusion of Law 5 states:

> 5. Father shall have secondary custody of the minor children as set forth herein and these provisions are in the best interest[] of the minor children and best promote their health, education and safety pursuant to the provisions of N.C.G.S. § 50-13.2 and other relevant statutory provisions.

There was adequate evidence to support the findings of fact, and the findings of fact support the challenged conclusion of law. As outlined above, the trial court found it could not hold Father was "an unfit caregiver or that in person contact [was] not in the best interest of the children," so it could not deny Father reasonable visitation. *See* N.C.G.S. § 50-13.5(i) (2019). Therefore, Father was entitled to the only reasonable visitation possible in light of his inability to return to the United

States—the children visiting him in Brazil.[6] The trial court did not abuse its discretion in granting Father secondary physical custody in the form of visitation in Brazil.

D. N.C.G.S. § 50-13.2(a)-(b)

[3] Mother contends the trial court abused its discretion by failing to address the following relevant factors of N.C.G.S. § 50-13.2:

> (a) . . . In making the determination[of who to award child custody], *the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.* An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child. . . .
>
> (b) . . . If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of [N.C.]G.S. [§] 50B-3(a1)(1), (2), and (3). *If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation.* Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

N.C.G.S. § 50-13.2(a)-(b) (2019) (emphasis added). This statute requires the trial court to "consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party." *Id.* The trial court must "include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child." *Id.*

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6. Under N.C.G.S. § 50-13.2, the trial court was not authorized to order solely electronic visitation. "Electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation." N.C.G.S. § 50-13.2(e) (2019).

In this case, the trial court considered all relevant factors. It considered domestic violence and the past relationship between Mother and Father in Findings of Fact 9 and 10, which found Father accused Mother of dating other men while married, and Father committed domestic violence against Mother. It considered domestic violence in terms of the children in Finding of Fact 26, which found Father did not commit domestic violence against the children. The trial court addressed the safety and well-being of the children, including the effect of visitation in Brazil, in Findings of Fact 14, 21, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, and 44, which considered, *inter alia*, the children's lack of health insurance in the United States, their immigration situation, their progress in school, the safety of the home in Brazil, their behavior outside of school, and their compliance with the law in the United States. Although there are no specific findings referring to Mother's safety should she go to Brazil, it is apparent the trial court "considered" the safety of Mother. Findings of Fact 9, 10, 18, 19, 20, 24, 38, 40, and 41 all address the interactions between the parties and the attitude of Father toward Mother. These findings discuss, *inter alia*, the history of domestic violence, Father's anger toward Mother and how he has expressed that anger with criticism, vulgarity, and intimidation of Mother, Father's perception of Mother's behavior, and how the parties have communicated poorly with each other. In light of the trial court's findings considering the history between the parties, the attitudes of the parties, and the interactions between the parties in light of the domestic violence that occurred, the trial court did not err in failing to make a more specific finding of fact. Although there were not any specific findings of fact or conclusions of law referring to this factor, the trial court considered the factor as required by the statute. N.C.G.S. § 50-13.2(a) (2019) ("the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party").

Mother also claims N.C.G.S. § 50-13.2(b) was violated because "the trial court's order is directly contrary to the fourth sentence of" N.C.G.S. § 50-13.2(b), which requires that "[i]f a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation." N.C.G.S. § 50-13.2(b) (2019). This language does not apply to this situation, or to the extent it could apply, it would apply to Father, not Mother. Father is the only party who has "relocated" to Brazil, at least indirectly due to his own commission of domestic violence. Mother has not relocated or been "absent" due to domestic violence. The plain language of N.C.G.S. § 50-13.2(b)

is referring to "the party" who is "absent" or has relocated "with or without the children because of an act of domestic violence." Thus, the trial court was required not to weigh Father's absence or relocation against him in determining custody or visitation. Considering the entire order, the trial court carefully considered the difficult dilemma created by the parties' immigration status to determine the best interest of the children. Although Mother hopes to avoid a future relocation with the children to Brazil because of her fear of future domestic violence, that is not the situation addressed by this statute. The trial court did not err in failing to address this statutory language.

CONCLUSION

The findings of fact challenged by Mother that are unsupported by substantial evidence are not essential to any conclusion of law, and all conclusions of law are supported by the unchallenged or supported findings of fact. The trial court did not abuse its discretion in granting Father visitation in Brazil where the trial court did not find Father to be unfit or visitation to not be in the best interest of the children and visitation in Brazil was the only reasonable visitation available to Father. The trial court complied with N.C.G.S. § 50-13.2(a) as the custody order fully considered the safety of Mother.

AFFIRMED.

Judges BRYANT and STROUD concur.

McDONALD v. SAINI

[273 N.C. App. 557 (2020)]

THOMAS McDONALD, PLAINTIFF
v.
SAIRA H. SAINI, M.D. FACS; AND CAROLINA PLASTIC SURGERY OF FAYETTEVILLE, PC, DEFENDANTS

No. COA19-1107

Filed 6 October 2020

Medical Malpractice—expert witness—negligent act or omission—speculation—summary judgment

The trial court properly granted summary judgment for medical malpractice defendants where plaintiff's expert witness failed to identify a negligent act or omission by defendants that breached the applicable standard of care and proximately caused the scars on plaintiff's chest around the site of the liposuction procedure. The expert's theories regarding the cause of plaintiff's injuries—which the expert conceded were speculation—did not establish plaintiff's prima facie case for medical malpractice.

Appeal by Plaintiff from Order entered 13 May 2019 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 12 August 2020.

Michael R. Porter and Reed N. Noble, for plaintiff-appellant.

Batten Lee, PLLC, by Gloria T. Becker and Arienne P. Blandina, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Thomas McDonald (Plaintiff) appeals from an Order entered 13 May 2019 granting summary judgment in favor of Defendants Saira H. Saini M.D., FACS, (Dr. Saini) and Carolina Plastic Surgery of Fayetteville (collectively, Defendants) in this medical malpractice action. The Record before us tends to show the following:

On 28 May 2014, Plaintiff visited Dr. Saini at Carolina Plastic Surgery for a consultation regarding his concerns over the appearance of his chest. Dr. Saini determined Plaintiff would be a good candidate for a bilateral chest liposuction. Plaintiff again met with Dr. Saini on 30 September 2014, and 28 October 2014, to review the plan for Plaintiff's procedure

and answer any related questions. Plaintiff's surgery was scheduled for 31 October 2014, at Highsmith-Rainey Specialty Hospital in Fayetteville, North Carolina.

As scheduled, on 31 October 2014, Dr. Saini performed a bilateral chest liposuction as a part of revision gynecomastia surgery on Plaintiff at Highsmith-Rainey Hospital. Plaintiff was discharged later that afternoon and his follow-up appointment with Dr. Saini was scheduled for 4 November 2014. At Plaintiff's follow-up appointment on or about 4 November 2014, Plaintiff removed his bandages and discovered what he described as big, purplish black blisters across his chest that appeared to be filled with pus. Plaintiff continued to see Dr. Saini for post-operative care, which included injections and laser treatment for scar therapy, until March 2015.

After believing his continuing treatment with Dr. Saini was not improving the condition of his chest, in April 2015, Plaintiff met with Malcom W. Marks, M.D. (Dr. Marks), a plastic and reconstructive surgeon at Wake Forest Baptist Medical Center in Winston-Salem, North Carolina, regarding his scarring. Ultimately, in February of 2017, Plaintiff underwent a second procedure with Dr. Marks to reduce the visibility and severity of his scarring. As Plaintiff's treating physician, Dr. Marks testified Plaintiff had keloids and hypertrophic scarring.

On 27 February 2018, Plaintiff filed a Complaint alleging several medical malpractice claims against Dr. Saini and Carolina Plastic Surgery of Fayetteville.[1] Relevant to this appeal, Plaintiff's Medical Negligence Claim alleged Dr. Saini:

> a. Failed to use proper surgical techniques . . . thereby causing third degree full thickness burns and permanent scars;
>
> b. Failed to ensure that the surgical equipment she was utilizing was in proper working order . . . ;
>
> c. Failed to ensure that proper procedures were followed to prevent burning to include, inter alia, the proper injection of fluids so as to prevent burns[;]

1. Plaintiff's Complaint also named as Defendants the Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System, Amy L. Lovingood, John Harden, and Kathryn Jordan; however, Plaintiff dismissed his claims against them as Defendants with prejudice on 3 August 2018.

d. Failed to ensure that the equipment that she was utilizing was not overheating or set to a heat level that was too high to be used upon the Plaintiff;

e. . . . [F]ailed to properly supervise the nurses and/or other operating room support staff . . . to ensure that they were properly following procedures and protocol to prevent burns . . . .

Plaintiff sought compensatory and punitive damages. Defendants accepted service on 13 March 2018, and filed their Answer and Motion to Dismiss Plaintiff's Complaint on 14 May 2018.

Also on 14 May 2018, Defendants filed a Motion for Summary Judgment (Motion) arguing they were entitled to summary judgment as a matter of law because Plaintiff could not establish Defendants breached the applicable standard of care and Plaintiff had not presented evidence of a genuine issue of material fact "linking any alleged act or omission on the part of the Defendants to a cause of Plaintiff's injury." Plaintiff submitted evidence in response to Defendants' Motion, including Plaintiff's medical records and depositions from Dr. Saini, Plaintiff, Dr. Marks, surgical technicians Kathryn Jordan (Jordan) and John Harden (Harden), circulating nurse Amy Lovingood (Lovingood), and Dr. Detlev Erdmann (Dr. Erdmann), Plaintiff's designated expert witness.

Dr. Saini testified during her deposition she performed a bilateral chest liposuction on Plaintiff to remove excess fatty tissue from his chest. Dr. Saini testified she used an Aspirator II liposuction machine for Plaintiff's procedure, which is a suction device. The Operating Room Report (OR Report), included as part of Plaintiff's medical records, did not reflect any heat source was used during Plaintiff's procedure. It identified an electrocautery device known as a "Bovie" and an "Aspirator II" liposuction machine were present in the OR at the time of the procedure. Dr. Saini also testified no heat source was used during the procedure, and she reiterated it is standard for a Bovie to be present in the OR.

Depositions taken from Lovingood, Harden, and Jordan—all present during Plaintiff's procedure—reflected it was standard procedure for a Bovie to be present in the OR regardless of whether it is expected to be used in the procedure. Lovingood, Harden, and Jordan each testified Highsmith-Rainey Hospital did not have a laser-assisted liposuction machine, which uses a heat source, at the time of Plaintiff's procedure.

Plaintiff's expert witness, Dr. Erdmann, is a board-certified plastic surgeon and professor at Duke University School of Medicine. Dr.

Erdmann testified during his deposition Plaintiff's hypertrophic scarring was the result of burns Plaintiff obtained during the procedure. Dr. Erdmann testified hypertrophic scarring, such as Plaintiff's, was usually the result of trauma or burns but could also occur in the absence of physician negligence and with the best of care. In this case, it was Dr. Erdmann's opinion Dr. Saini breached the standard of care owed to Plaintiff on the basis of Plaintiff's "excessive scarring outside the surgical field." Dr. Saini's counsel requested Dr. Erdmann "pinpoint to anything that Dr. Saini did or did not do that caused the third-degree burns or excessive scarring[,]" however, Dr. Erdmann stated: "I cannot pinpoint this. It would be pure speculation."

Dr. Erdmann further testified burns, such as Plaintiff's, commonly require a heat source. Dr. Erdmann's two theories for Plaintiff's burns were either "a[n] internal heat source," such as a laser-assisted liposuction machine or an electrocautery device, or an external heat source, "such as a fire in the operating room." Dr. Erdmann conceded an electrocautery device would be an "unlikely" source for Plaintiff's alleged burns and that there was no indication the electrocautery device was used. Dr. Erdmann also agreed such device is routinely in an operating room. When questioned by Defendants' counsel that it was "just speculation that they're burns, correct?" Dr. Erdmann answered: "Um-hmm, absolutely, yeah." In an exchange with Plaintiff's own counsel Dr. Erdmann reiterated his theories about the burns "are speculation because [he] couldn't find any -- anything in the medical record that would explain the burns." Dr. Erdmann was also unable to exclude the possibility of something happening after Plaintiff's surgery.

On 29 April 2019, the trial court heard arguments on Defendants' Motion, and on 13 May 2019, the trial court entered its written Order granting Summary Judgment in favor of Defendants on all Plaintiff's remaining claims. Plaintiff timely filed written Notice of Appeal on 12 June 2019.

Issue

On appeal, the issue before this Court is whether the trial court properly granted summary judgment in favor of Defendants on the basis Plaintiff's expert testimony was insufficient to establish any genuine issue of material fact as to whether Dr. Saini breached the applicable standard of care during her surgery on Plaintiff proximately causing Plaintiff's injuries.

Analysis

I. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted). "Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent." *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 341, 770 S.E.2d 159, 162 (2015) (alterations, citations, and quotation marks omitted). "If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury." *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 302, 704 S.E.2d 540, 543 (2011) (citations omitted).

II. Medical Negligence

> In a medical malpractice action, a plaintiff has the burden of showing (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.

Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp., 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (citations and quotation marks omitted). "[E]xpert opinion testimony is required to establish proximate causation of the injury in medical malpractice actions." *Cousart*, 209 N.C. App. at 303, 704 S.E.2d at 543. However, "[a]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." *Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163 (citations and quotation marks omitted). "Not only must it meet our courts' definition of proximate cause, but evidence connecting medical negligence to injury also must be probable, not merely a remote possibility." *Cousart*, 209 N.C. App. at 302, 704 S.E.2d at 543 (citation and quotation marks omitted). Accordingly, "Plaintiffs are required to make a *prima facie* case of medical negligence during a summary judgment hearing, 'which includes articulating proximate cause with specific facts couched in

terms of probabilities.' " *Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163 (citing *Cousart*, 209 N.C. App. at 303-04, 704 S.E.2d at 343).

In the present case, Defendants moved for summary judgment on the basis Plaintiff did not forecast evidence Defendants breached the applicable standard of care or that Dr. Saini's alleged breach proximately caused Plaintiff's injury. The trial court, concluding there was no genuine issue of material fact, granted Defendants' Motion. On appeal, Plaintiff contends an issue of material fact exists regarding whether Dr. Saini used a "Vaser" or heat-assisted laser liposuction machine.[2] Plaintiff relies solely upon Dr. Erdmann's deposition testimony to support this argument. However, Dr. Erdmann's deposition testimony is—in his own words—speculative.

Dr. Erdmann agreed there was nothing in Plaintiff's medical records that would explain the presence of his burns. When asked by Defendants' counsel: "And you don't have any direct evidence that the vaser or a laser-assisted liposuction was used or an electrocautery was used other than your speculation that the resultant scars are from burns?" Dr. Erdmann conceded, "Correct. . . . I believe these are burns and I don't know what caused the burns." Meanwhile, Dr. Saini, Jordan, Harden, and Lovingood testified there was no Vaser liposuction machine available at Highsmith-Rainey Hospital and no fire occurred in the operating room. The parties do not dispute a Bovie was present during Plaintiff's procedure; however, the deposition testimony of Dr. Saini, Lovingood, Harden and Jordan, established it was standard protocol to have one available and, further, Dr. Saini did not use the Bovie. Dr. Erdmann further conceded it was an unlikely source of the burns.

Plaintiff argues a gap in the OR Report creates a question of material fact because Dr. Erdmann testified: "I reviewed the OR Report, and when I reviewed the OR Report, there is a gap in the OR Report as such as somebody erased something, and it would fit with, *I can only speculate*, the term [V]aser." (emphasis added). The parties do not dispute the presence of a blank in the OR Report where Dr. Saini described: "After waiting an appropriate amount of time for the epinephrine and lidocaine to work, a [blank] liposuction was used." However, Plaintiff does not forecast any evidence a laser-assisted liposuction machine was available at Highsmith-Rainey Hospital, and further, that such device was used

2. Dr. Erdmann testified a "Vaser" is "the most well-known company or type of machine" associated with laser-assisted liposuction and explained laser-assisted liposuction combines "a heating source that is entertained by a laser, and the idea behind it is to melt down tissue that cannot be removed with conventional liposuction only."

during Plaintiff's procedure. Instead, Dr. Saini, Harden, Jordan, and Lovingood all testified there was no Vaser available at Highsmith-Rainey Hospital at the time of Plaintiff's procedure. Further, Plaintiff's medical records, as included in the Record, reflect the liposuction machine used was an "Aspirator II" model, which Dr. Erdmann admitted does not use heat.

It is well established a forecast of specific facts supporting proximate cause is required for a plaintiff to survive a motion for summary judgment in a medical malpractice action. *Hawkins*, 240 N.C. App. at 341-42, 770 S.E.2d at 162-63. Moreover, "evidence connecting medical negligence to injury also must be probable, not merely a remote possibility." *Cousart*, 209 N.C. App. at 302, 704 S.E.2d at 543 (citation and quotation marks omitted). Thus, where a plaintiff is unable to forecast specific facts supporting proximate cause, this Court has held summary judgment proper. *See Kenyon v. Gehrig*, 183 N.C. App. 455, 459, 645 S.E.2d 125, 128 (2007) (affirming summary judgment in favor of the defendants where "several theories [were] presented to show that defendants *could* have been negligent[,]" yet "all of plaintiff's expert witnesses based their opinions only on the fact of the injury itself; their assignation of negligence on defendants' part constituted mere speculation"); *see also Campbell v. Duke Univ. Health Sys., Inc.*, 203 N.C. App. 37, 45, 691 S.E.2d 31, 36-37 (2010) (affirming summary judgment and concluding "plaintiff [was] unable to present a forecast of evidence showing the existence of a genuine issue of material fact" where the plaintiff's expert testimony "constitute[d] mere speculation as to the proximate cause of plaintiff's injuries").

In the case *sub judice*, there is no testimony from Dr. Erdmann—Plaintiff's sole expert witness—identifying a negligent act that likely caused Plaintiff's injury. Instead, Dr. Erdmann testified hypertrophic scarring can occur in the absence of physician negligence. Although Dr. Erdmann hypothesized two theories for Plaintiff's alleged burns, he conceded his theories were based on speculation. Additionally, when Dr. Saini's counsel asked Dr. Erdmann if he could "exclude the possibility of something happening after the surgery?" Dr. Erdmann answered, "I cannot exclude anything."

Defendant cites this Court's unpublished opinion in *Williams v. Humphreys* and contends Dr. Erdmann was making a differential diagnosis, thereby ruling out the possibility of other causes for Plaintiff's injuries. 227 N.C. App. 456, 744 S.E.2d 496 (2013) (COA 12-814) (unpublished). In *Williams*, this Court reversed the trial court's grant of summary judgment in favor of the defendants, concluding there

was "sufficient evidence of causation to give rise to a genuine issue of material fact." *Id.* (slip op. at 15). However, in *Williams*, the plaintiff's experts "considered the nature of the injury to identify possible causes of that injury, including analysis of medical literature relating to that type of injury; eliminated unlikely causes; and reached opinions that the likely cause was improper positioning of [the plaintiff] during the surgery." *Id.* (slip op. at 13). The *Williams* Court distinguished *Kenyon* and *Campbell* on the basis the plaintiff "presented expert testimony—and an admission from one of the defendants—identifying the precise allegedly negligent act that likely caused the injury[.]" *Id.* (slip op. at 12). In the present case, and unlike the experts' testimony in *Williams*, Dr. Erdmann did not eliminate unlikely causes of Plaintiff's injury and, in fact, concedes multiple times much of his opinion is based on speculation. Moreover, Dr. Erdmann did not identify "a precise allegedly negligent act" by Dr. Saini that likely caused Plaintiff's injuries. *Id.*

Thus, Dr. Erdmann's expert testimony, required to establish Plaintiff's *prima facie* case of medical negligence, fails to articulate any negligent act or omission by Defendants that proximately caused Plaintiff's injury beyond mere speculation. *Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163 (citation and quotation marks omitted). Accordingly, Plaintiff did not meet his burden to forecast specific facts Dr. Saini breached the applicable standard of care and was the proximate cause of Plaintiff's injury. The trial court's grant of summary judgment in favor of Defendants was proper.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order is affirmed.

AFFIRMED.

Judges MURPHY and YOUNG concur.

STATE v. AUSTIN

[273 N.C. App. 565 (2020)]

STATE OF NORTH CAROLINA
v.
JOHN FITZGERALD AUSTIN

No. COA19-1110

Filed 6 October 2020

1. Criminal Law—jury instructions—expression of judge's opinion—whether assault occurred—totality of circumstances

In an assault on a female case, the trial court did not improperly express an opinion that an assault had occurred—even though it charged the jury to "determine what the assault was"—where, under the totality of the circumstances, the instructions made clear that the jury should determine *whether* defendant had assaulted the alleged victim.

2. Criminal Law—expression of judge's opinion—element of offense—habitual misdemeanor assault—date of prior conviction

In an assault case, the trial court did not take improper judicial notice of a fact supporting an element of the charge of habitual misdemeanor assault (which requires two prior convictions within the fifteen years prior to the current violation) when, in response to a jury question about the evidence, the trial court stated, "[T]he date of conviction was March 9, 2010." In context, the trial court emphasized that it was the jury's duty to determine the facts and whether the State had met its burden of proof.

Judge BROOK dissenting.

Appeal by defendant from judgment entered 8 May 2019 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

BRYANT, Judge.

Where the trial court's instructions to the jury left the determination of whether defendant John Fitzgerald Austin had committed an assault entirely for the jury, there was no impermissible expression of opinion by the trial court. Accordingly, we hold no error.

On 27 August 2018, a Forsyth County grand jury indicted defendant on charges of assault on a female and habitual misdemeanor assault under N.C. Gen. Stat. § 14-33.2. The matter came on for trial during the 6 May 2019 session of Forsyth County Superior Court before the Honorable L. Todd Burke, Judge presiding.

The evidence presented at trial tended to show the following. Defendant was in a dating relationship with Claudette Little (Claudette) and had lived with her since January 2017. On the evening of Saturday, 7 January 2018, Claudette and her cousin went to a night club/lounge to support Claudette's younger brother, who was the DJ that night. When Claudette left her residence, defendant was asleep. Shortly after she arrived at the club, Claudette received a phone call from defendant. Claudette informed defendant where she was using her cell phone's "face-chat" to show defendant her surroundings. Defendant repeatedly indicated that "he didn't care, you know, what [she] was doing" and accused her of "doing something." Claudette invited defendant to come out and join her. An hour later, defendant appeared at the lounge with a friend.

Claudette joined defendant and she noted that he appeared to be in "a daze"—he was just "sitting looking into space . . . . He was somewhere else. Like he was just on something." Seeing defendant in a daze, "[Claudette] didn't want to deal with it, whatever it was." Claudette told defendant's friend not to bring defendant back to her residence that night. Defendant asked if Claudette was leaving with him and Claudette responded that she was not going anywhere with him that night. Defendant left the lounge half an hour after he arrived. Claudette remained at the club until it closed at 2:00am.

Claudette's cousin drove her home at 2:30 am with her brother following behind "[just] to see if everything was okay." Though defendant was not at Claudette's apartment when they arrived, Claudette's brother and cousin stayed with Claudette for an hour. "I told them, I say, 'I'm okay. [Defendant]'s not -- if he ain't in here by now, he's not coming." So, her cousin and brother left, and Claudette went to bed.

Claudette awoke to find defendant standing over her, yelling.

A. He was like, "oh, you like to go to clubs." And then he said, 'oh, yeah, you like making Jell-O shots. You like this.' I mean, he was saying so much to me." . . .

. . . .

And I kept on saying, "what are you talking about? Why are you doing this? And then he just took his belt off and he wrapped it around his hand, saying, "you want to know what I'm talking about, you want to know what I'm talking about," (demonstrating).

Q. What happened then?

A. And, you know, I just went to leap for him and we got to struggle. He took the -- he hit me upside the head with the belt on. His fist hit me. I fell back on the bed like that (demonstrating). And then he got over top of me and say, "you think I'm playing, you think I'm playing."

Claudette testified that defendant struck the right side of her face with his fist. Defendant then laid on the bed, told Claudette to take off her clothes and "get on top of him." On his demand, Claudette performed fellatio on defendant.

A. Then after that, he -- I was -- started crying. He took the belt from around his hand and put it around his neck.

. . . .

He put the belt around his back [sic] and he pulled it, and he pulled it. And I kept crying. And I said, "don't, don't." And he said, "I'll just kill myself, just kill myself." And I was like, "No. Please, don't, don't do this. I love you. Don't do this. Don't do this." I kept crying and crying right. Then he did like this (demonstrating) and he said, "Yeah, that's what I thought."

Q. Why were you saying that to him if he had just hit you previously?

A. Anything so that he -- to keep him calm. I didn't want him to keep hitting on me. I didn't want him -- I didn't know what was going on, what he was doing. Anything to keep him – I just cried "I love you. Don't do this. Don't do this." I cried. Cause I didn't know if he was getting a reaction from me, to see if I still cared or not.

Q. How many times did he hit you, to that point?

A. I can't even count them.

Claudette lay down next to defendant and waited for him to fall asleep before she got up, got dressed, and left the apartment.

At the close of the State's evidence, defendant moved to dismiss the charge against him and indicated that he would not present any evidence. The trial court denied the motion to dismiss.

The trial court instructed the jury on the charges of assault on a female and habitual misdemeanor assault. The court soon adjourned for the day. The next morning, at the jury's request, the court again instructed the jury on the charges. Thereafter, the jury returned guilty verdicts against defendant on both charges. Defendant pled guilty to attaining habitual felon status. The trial court entered a consolidated judgment against defendant on the charges of assault on a female, habitual misdemeanor assault, and attaining habitual felon status. Defendant was sentenced to an active term of 103 to 136 months. Defendant appeals.

On appeal, defendant argues the trial court erred by (1) communicating to the jury during its jury instructions that it believed an assault had occurred and (2) responding to a jury question regarding a conflict in the State's evidence by instructing the jury to accept the trial court's assertion as to when an alleged prior conviction had occurred. We disagree.

Standard of Review

Before this Court, defendant contends that the trial court violated a statutory mandate, codified within N.C. Gen. Stat. §§ 15A-1222 and 15A-1232, by improperly expressing its opinion to the jury. However, before the trial court, defendant failed to raise a challenge to the court's jury instructions.

> The statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory. A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal. *See State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985); *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925) (decided under former N.C.G.S. § 1-180).

State v. Young, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). Thus, defendant is not precluded from raising these arguments before this Court.

> It is well settled that a trial judge may not express an opinion as to the guilt or innocence of a criminal defendant, the credibility of a witness, or any other matter which lies in the province of the jury. G.S. 1-180; *State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972); *State v. Owenby*, 226 N.C. 521, 39 S.E.2d 378 (1946). An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed, and this is so even when such expression of opinion is inadvertent. *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410 (1971).

State v. Hudson, 295 N.C. 427, 434–35, 245 S.E.2d 686, 691 (1978).

> Even so, every such impropriety by the trial judge does not result in prejudicial error. Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Greene*, 285 N.C. 482, 206 S.E.2d 229 (1974). Thus, in a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results. *State v. Yellorday*, 297 N.C. 574, 256 S.E.2d 205 (1979).

State v. Blackstock, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citations omitted) (citing *Blackstock*, 314 N.C. 232, 333 S.E.2d 245); *see also State v. Summey*, 228 N.C. App. 730, 735–36, 746 S.E.2d 403, 408 (2013) (quoting *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248).

Analysis

Defendant argues that the trial court violated General Statutes, sections 15A-1222 and 15A-1232. Pursuant to section 15A-1222 ("Expression of opinion prohibited"), "[t]he judge may not express during any stage of the trial, 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). Pursuant to section 15A-1232 ("Jury instructions; explanation of law; opinion prohibited"), "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to

state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." *Id.* § 15A-1232; *see also State v. Cuthrell*, 235 N.C. 173, 174, 69 S.E.2d 233, 234 (1952) ("The rule is that the trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue." (citations omitted)).

In *Young*, 324 N.C. 489, 380 S.E.2d 94, the defendant argued that a trial court's statements before a jury amounted to an impermissible expression of opinion in violation of General Statutes, sections 15A-1222 and 15A-1232. The trial court's instructions contained the statement "*if you find* that the defendant made that confession, *then* you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give it." *Id.* at 498, 380 S.E.2d at 99. Our Supreme Court reasoned that the instruction made clear that "although there was evidence tending to show that the defendant had confessed," *the determination as to whether the defendant had actually confessed was "entirely for the jury.*" *Id.* (emphasis added) Thus, there was no error. *See also State v. Cannon*, 341 N.C. 79, 90–91, 459 S.E.2d 238, 245 (1995) (holding the defendant's argument that the trial court impermissibly expressed an opinion had no merit, citing *Young*, 324 N.C. 489, 380 S.E.2d 94, in support of its rationale).

1

[1] Here, defendant argues that during the jury instructions, the trial court indicated to the jury multiple times that it believed an assault had occurred. Defendant argues that "[t]he trial court charged the jury not with deciding *whether* an assault occurred, but, instead, with determining 'what the assault was.' " Defendant pointed to the following instruction on assault on a female:

> [THE COURT:] [D]efendant, a male person, has been charged with assault on a female. For you to find the defendant guilty of this offense, the State must prove three days beyond a reasonable doubt:
>
> First, that the defendant intentionally assaulted the alleged victim. It has been described in this case by the prosecuting witness that the defendant hit her upon her head, that he hit her on her arms, about her body.
>
> You are the finders of fact. You will determine what the assault was, ladies and gentlemen. The Court is not telling you what it is, I'm just giving you a description. And there

> was also testimony by the witness that the defendant asked her to perform, by force, another act, which could be considered an assault. But you will determine what the assault was. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection is different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

We note that the trial court's substantive instruction on assault on a female began as follows: "Now ladies and gentlemen in this case you will be determining *whether* the defendant is guilty or not guilty of assault on a female by a male person, and guilty or not guilty of habitual misdemeanor assault." (emphasis added). We further note that the trial court, at the request of the jury, instructed again on the charge of assault on a female on the second day of jury deliberation. In its second instruction, the trial court stated the following:

> You requested specifically the substantive instructions for assault on a female and habitual misdemeanor assault.
>
> Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact, it could be putting someone in fear or imminent apprehension of contact, threatening contact. . . . In this case the particular assault has been described as hitting the prosecuting witness, Ms. Claudette Little, about her body multiple times. Yesterday I mentioned some other act based upon the testimony at the trial, that she stated that she was forced to perform. But for purposes of this trial, you do not have to consider that, just that it is alleged that she was hit about her body multiple times. Whether that -- whatever part of the body that may be, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact.

Following this definition of assault, the trial court instructed the jury on the charge of assault on a female in accordance with North Carolina Pattern Jury Instruction for criminal law, 208.70 ("Assault on a Female by a Male Person"). N.C.P.I. Crim - 208.70 (2015).

Upon review of the record and the totality of the circumstances, we hold that the trial court's instruction to the jury made clear that the determination of *whether* the evidence showed defendant had committed an assault upon Claudette was left entirely for the *jury*. Accordingly, we overrule defendant's argument.

[2] Defendant also contends the trial court's statements in response to a jury question about reasonable doubt in the context of evidence relevant to defendant's habitual misdemeanor assault charge further violated General Statutes, section 15A-1232 ("Jury instructions; explanation of law; opinion prohibited") (set out above). Defendant argues "the jury likely inferred that the trial court believed that State's evidence established that the date of [defendant's prior conviction for assault on a female] was March 9, 2010." Defendant argues the trial court's statement "created more than an inescapable implication, it amounted to improper judicial notice of a fact supporting an element of the offense." We disagree.

In support of his argument, defendant cites *State v. Hensley*, 120 N.C. App. 313, 462 S.E.2d 550 (1995), where this Court held that the trial court implicitly endorsed a witness's testimony as truthful.

> While undoubtedly unintended, the inescapable implication of the court's reply to the jury's request [to rehear the testimony of a witness] is that the trial judge believed the minor child to have been a victim of sexual assault. This arises from the court's suggestion that recounting his testimony would be "very traumatic" and "injurious" to [the witness]. The court therefore violated G.S. § 15A–1232.

Id. at 323, 462 S.E.2d at 556. While a new trial was granted in *Hensley*, the trial court's error in its response to the jury's request was not the sole basis. In *Hensley*, a clinical psychologist, testifying as an expert responded to a question "about the possible cause of [the witness]'s post-traumatic stress disorder, . . . [and] replied the cause 'would be the sexual abuse that [the witness] received, [the witness] was the victim of, specifically anal penetration.' " *Id.* at 316, 462 S.E.2d at 552. This Court stated it was "le[ft with] no option but to award a new trial." *Id.* at 324, 462 S.E.2d at 556. *See also State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983) (holding that if a trial court's humorous remark made in regard to a "hotly contested issue in the case" was interpreted by any juror "as questioning the credibility of [the] defendant's evidence, that was one juror too many," and a new trial was required). We find the facts here distinguishable.

Here, defendant was indicted on the charge of habitual misdemeanor assault, in violation of General Statutes, section 14-33.2.

> A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C. Gen. Stat. § 14-33.2 (2019).

Defendant's current violation occurred on 7 January 2018. At trial, an assistant clerk who was division supervisor over district criminal records in the Forsyth County Clerk's Office, testified to conviction records maintained by the Clerk's Office. She testified to a certified judgment for assault on a female that was entered against defendant on 5 June 2017. The judgment was introduced and admitted into evidence. As for conviction records more than five years old, the clerk testified that those records were purged and stored on a computer system. The records recovered from the system were accompanied by a "purge letter" and a printout related to the charge and conviction. The State introduced its Exhibit 11, a purge letter and a printout, as "a certified true copy of records kept by the Clerk of Court." The printout reflected that a second judgment for assault on a female had been entered against defendant on 9 March 2010. State's Exhibit 11 was entered into evidence. The

After the close of the evidence and following the trial court's jury charge, the jury presented the court with a question.

> THE COURT: All right. [Foreperson], you have a question, or you've written a question on behalf of the jurors:
>
> "Do we have to be beyond a reasonable doubt on count two. And there's a typo on the document."
>
> What document are you referring to?
>
> . . . .
>
> [FOREPERSON]: The purge document from 2010.
>
> THE COURT: All right. So I -- you didn't say what it was, you just said there's a typo on there. What are you referring to?
>
> [FOREPERSON]: On the page the dates are wrong, the cover page.

THE COURT: The cover page has one date and the judgment has another date.

[FOREPERSON]: Yes, sir.

THE COURT: Well, the judgment is what you are to look at. Now, if you think that because there is an error on the cover page that potentially there could be an error in the other document that the Court is instructing you to abide by then that's just part of the proof, has the state met their burden. I'm not saying that they have not met their burden by that. But if that's – that's how you may consider that. But you've already said there's a typo and I don't know -- when you say there's a typo, you referring to there's a mistake on that cover page?

[FOREPERSON]: Yes, sir.

THE COURT: But you're not concerned about what the judgment said? The judgment has the offense date, or the conviction date as October.

[FOREPERSON]: The concern is about the mistake on the cover letter.

THE COURT: Yeah, the date of offense is October 24th. And I read that in my instruction, the date of offense is October 24, 2010. And the date of conviction was March 9, 2010. And additionally, as far as the law, you're to follow the Court's instructions as to what the law is. And when I gave you those dates, those are the Court's instructions. Now, I can't help but ask this, at the beginning of the trial all three of us articulated what the burden of proof was, proof beyond a reasonable doubt. I'm just curious, why would anyone think that proof beyond a reasonable doubt does not apply to the entire trial? We bo[re] that out at jury selection. What is it that that bec[a]me a question, that you wouldn't think it applies to count two as well as it did to count one the entire trial? Can you enlighten me, [foreperson]?

[FOREPERSON]: Yes. There is concerns because that's not an accurate document.

THE COURT: All right. Well –

[FOREPERSON]: But I think we can discuss this further and come to a conclusion.

THE COURT: Yes. I mean, that's for you to determine.

[FOREPERSON]: Yes, sir.

THE COURT: I can't make -- I cannot –

[FOREPERSON]: You've answered our questions.

THE COURT: I can answer the question but I can't tell you what to do.

[FOREPERSON]: I think you answered it, sir.

THE COURT: Okay. Approach the bench counsel.

(Off the record bench conference.)

For the record, the court repeated the concern of the jury. The court then repeated its instructions on presumption of innocence, the State's burden of proof, and reasonable doubt.

We reject defendant's assertion that the trial court's comments amounted to improper notice or expression of opinion as to any fact in evidence. Notwithstanding that some of the trial court's response may have been a bit confusing, it was not necessarily erroneous. The trial court emphasized that it was the duty of the jury to determine the facts and whether the documents at issue were sufficient to indicate the State had met its burden of proof of as to the charge of habitual misdemeanor assault beyond a reasonable doubt. Thus, upon review of defendant's challenge to these statements by the trial court and the context in which they were made, we discern no improper expression of opinion by the trial court. Accordingly, defendant's argument is overruled.

NO ERROR.

Judge STROUD concurring.

Judge BROOK dissenting by separate opinion.

BROOK, Judge, dissenting.

The majority excuses numerous references in the trial court's charge to the jury that assumed the proof of the central fact at issue in this case: namely, whether Defendant had committed the assaultive act

required for conviction of assault on a female. The majority concludes that these comments were not proscribed by N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 when considered under the totality of the circumstances, which included an attempted curative instruction by the trial court. I disagree, and therefore respectfully dissent.

The State's case against Defendant was presented over the course of a one-day trial and was based on the testimony of the complaining witness, Claudette Little, and her daughter, Lucretia Little, as well as a photograph taken by Lucretia Little. Claudette Little described a violent episode in which Defendant woke her in the middle of the night at her apartment and wrapped a belt around his hand and struck her several times, bruising her eye and arm. She testified further that Defendant demanded oral sex after striking her. Lucretia Little described injuries she observed after picking her mother up down the street from her apartment the next morning. Lucretia Little photographed injuries to her mother's head, and this photograph was published to the jury.

The trial court began its substantive instruction on the charge of assault on a female as follows:

> The defendant, a male person, has been charged with assault on a female. For you to find the defendant guilty of this offense, the State must prove three days [sic] beyond a reasonable doubt:
>
> First, that the defendant intentionally assaulted the alleged victim. It has been described in this case by the prosecuting witness that the defendant hit her upon her head, that he hit her on her arms, about her body.
>
> You are the finders of fact. *You will determine what the assault was, ladies and gentlemen.*

(Emphasis added.) By instructing the jury that it would "determine *what* the assault *was*," rather than whether the alleged assault occurred, the trial court expressed an improper opinion on the evidence; the court assumed in this instruction the proof of the assaultive act and instructed the jury to find what the predicate act was, based on the evidence presented.

The trial court went on to instruct the jury:

> The Court is not telling you what it is, I'm just giving you a description. And there was also testimony by the witness that the defendant asked her to perform, by force, another act, which could be considered an assault. *But you will*

> *determine what the assault was*. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection if different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

(Emphasis added.) Despite the court's suggestion that it was not, in fact, instructing the jury on whether an assault had occurred, by instructing the jury that "you will determine what the assault was," rather than charging the jury to determine *whether* the assault had occurred, the trial court again expressed an improper opinion on the evidence; the court again assumed in its instruction the proof of the assaultive act, instructing the jury to determine what the assaultive act was, not if the act had been committed.

The jury subsequently asked for a written copy of the instructions. Though the trial court denied this request, the court indicated it would instead orally charge the jury again the following morning. After excusing the jury but before adjourning for the day, the trial court sought feedback from counsel on this instruction. The prosecutor requested that the court instruct the jury that, consistent with the indictment, the assault at issue involved allegations Defendant hit Claudette Little about the face and head. The trial court assented to this request, indicating he would charge the jury accordingly the next morning.

The next morning the court repeated the charge:

> Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact, it could be putting someone in fear or imminent apprehension of contact, threatening contact. *But the facts of this case have demonstrated that the – there was actual contact, that's a touching of some form that is nonconsensual and unwanted by the other party*. In this case the particular assault has been described as hitting the prosecuting witness, Ms. Claudette Little, about her body multiple times. Yesterday I mentioned some other act based upon the testimony at the trial, that she stated that she was forced to perform. But for purposes of this trial, you do not have to consider that, just that it is alleged that she was hit about her body multiple times. *Whether that – whatever part of the body that may be, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact*.

> The defendant, a male person, has been charged with assault on a female. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that the defendant intentionally assaulted the alleged victim, that's described by this case by hitting her about her body multiple times.
>
> Second, that the alleged victim was a female person.
>
> And third, that the defendant was a male person at least 18 years of age.

When the court instructed the jury that "the facts of this case have demonstrated that . . . there was actual contact, that's a touching of some form that is nonconsensual and unwanted by the other party[,]" rather than charging the jury to determine whether the facts had demonstrated such an act had occurred, the court again expressed an improper opinion on the evidence, invading the province of the jury. Likewise, when the court instructed the jury that it was to determine which part of the complaining witness's body was struck – whether it was her "head, face, torso, arms, [or] legs[,]" the court's instruction took as proven the assaultive act the jury was required to find; that is, that Defendant struck the complaining witness in the first place. This too was improper and in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232.

The transcript suggests that the trial court appreciated its error in this instance. After the trial court delivered this instruction to the jury, counsel for Defendant asked to approach and a bench conference ensued. At the conclusion of this bench conference, the trial court attempted a curative instruction, including the admonition that "[t]he fact [sic] are not what I say."

The majority concludes that, under the totality of the circumstances, whether the evidence showed an assault was left entirely for the jury. In essence, the majority holds that the trial court's references to the jury as fact-finder cleansed the taint caused by the repeated improper comments on the evidence noted above.

As a general matter, this conclusion is at odds with the reality that "[t]he trial judge occupies an exalted station. Jurors entertain great respect for his [or her] opinion, and are easily influenced by any suggestion coming from him [or her]." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951); *see also State v. Holden*, 280 N.C. App. 426, 429, 185 S.E.2d 889, 892 (1972) ("Jurors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench."). This exalted status is why it is of paramount importance

that he or she "abstain from conduct or language which tends to discredit or prejudice the accused or his [or her] cause with the jury." *Carter*, 233 N.C. at 583, 65 S.E.2d at 10.

The majority also suggests the impact of repeated judicial commentary implicitly addressing witness credibility and explicitly assuming as true pivotal facts is readily undone. But our Court has not hesitated to acknowledge there is no unringing those bells, even given quantitatively and qualitatively less troubling commentary. *See State v. Guffey*, 39 N.C. App. 359, 361, 250 S.E.2d 96, 97 (1979) (ordering new trial where six words obliquely assuming defendant's guilt violated N.C. Gen. Stat. § 15A-1222 and, in the totality of the circumstances, prejudiced defendant because they "went to the heart of the trial").

The principal case upon which the majority relies, *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), does not support its conclusion regarding the trial court's improper opinions on the evidence. As noted by the majority, "[in *Young*, . . . [t]he trial court's instructions contained the statement '*if you find* that the defendant made that confession, *then* you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give it.' " *Supra* at 570, (quoting 324 N.C. at 498, 380 S.E.2d at 99 (emphasis preserved)). Despite emphasizing the conditional framing of the instruction in *Young*, the majority does not grapple with the fact that that framing explains why it passed muster. While the trial court characterized a statement made by the defendant as a "confession," a characterization our Court had previously held imported an inadvertent expression of opinion as to the truth of the alleged statement, *see State v. Bray*, 37 N.C. App. 43, 46, 245 S.E.2d 190, 192 (1978), its conditional if/then framing of the instruction did not import any improper opinion as to the confession's truth, *see Young*, 324 N.C. at 498, 380 S.E.2d at 99. This framing thus left to the jury (1) whether the confession, in fact, occurred; (2) whether the confession was truthful; and (3) if the confession was truthful, the weight to afford to it. *See id.* ("This instruction made it clear that, although there was evidence tending to show that the defendant had confessed, the trial court left it entirely for the jury to determine whether the evidence showed that the defendant in fact had confessed."). *Young* is therefore easily distinguishable from the present case.

Unlike the conditional statement challenged in *Young*, the trial court's instructions in this case repeatedly assumed the proof of a central fact at issue in the case, and one required to convict Defendant of any of the offenses with which he stood accused: the assaultive act required for conviction of assault on a female. In so doing, the trial

court's comments "went to the heart of the trial," transgressing the line articulated by *Guffey* not once but many times. 39 N.C. App. at 361, 250 S.E.2d at 97. The trial court's improper comments thus invaded the province of the jury in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232. Accordingly, Defendant is entitled to a new trial.

I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TIMOTHY BAUNGARTNER

No. COA20-95

Filed 6 October 2020

1. Appeal and Error—defect in notice of appeal—failure to identify court to which appeal taken—failure to certify service on State—petition for certiorari—civil judgment for attorney fees

In an appeal from a conviction of habitual impaired driving where the defendant's pro se written notices of appeal did not identify the court to which appeal was taken and did not certify service on the State, the Court of Appeals, in its discretion and without objection by the State, granted defendant's petition for writ of certiorari. Further, although defendant also failed to specifically identify the civil judgment for attorney fees in his handwritten notices of appeal, certiorari was appropriate to address the trial court's failure to allow defendant to be heard on the attorney fee award.

2. Appeal and Error—preservation of issues—habitual impaired driving—failure to renew motion to dismiss at the close of the evidence—Appellate Rule 2 review

Where defendant failed at the close of all of the evidence to renew his motion to dismiss the charge of habitual impaired driving for an alleged insufficiency of the evidence pertaining to his prior DWI convictions—and his counsel had stipulated to the existence of the prior convictions—the issue was not preserved for review and the Court of Appeals declined to invoke Appellate Rule 2 to review the issue on the merits.

3. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

In a case involving habitual impaired driving, the trial court's entry of a civil judgment against defendant for his appointed counsel's attorney fees was vacated and remanded where there was no evidence defendant was apprised of his right to be heard, or was given an opportunity to be heard, regarding the entry of judgment and no direct inquiry on the matter was made of defendant.

Judge TYSON dissenting.

Appeal by Defendant from Judgment entered 17 May 2019 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Laura H. McHenry, for the State.

Drew Nelson for the defendant.

HAMPSON, Judge.

Timothy Baungartner (Defendant)—acting *pro se* at the time—filed two separate written Notices of Appeal from a Judgment entered 17 May 2019 upon Defendant's conviction for Habitual Impaired Driving. In addition, Defendant's appointed appellate counsel has filed a Petition for Writ of Certiorari requesting this Court issue the Writ of Certiorari to permit appellate review of both the 17 May 2019 Judgment and a separate civil order awarding Defendant's trial counsel attorneys' fees related to the defense of Defendant's case. Relevant to this appeal, the Record before us reflects the following:

Factual and Procedural Background

On 17 December 2018, Defendant was indicted for Driving While Impaired and Habitual Impaired Driving. Defendant's case came on for a jury trial on 15 and 16 May 2019 in Guilford County Superior Court. At the close of the State's evidence, Defendant's trial counsel moved to dismiss the charges asserting the evidence was insufficient to support the State's charges against Defendant. The Motion to Dismiss was summarily denied. Defendant then presented evidence in his defense. Defendant's trial counsel did not renew the Motion to Dismiss at the close of all the evidence.

The trial court instructed the jury on the charge of Driving While Impaired and submitted that charge to the jury. While the jury was deliberating, the trial court inquired of Defendant's trial counsel whether Defendant would stipulate to the existence of prior Driving While Impaired convictions for purposes of establishing the offense of Habitual Impaired Driving. Defendant's trial counsel replied: "I haven't had a chance to ask him, but I'll do it right now." The jury then returned its verdict finding Defendant guilty of Driving While Impaired.

The trial court released the jury and proceeded to the sentencing phase of the trial. During sentencing, the State presented a Prior Record Level Worksheet showing Defendant had a Prior Record Level of IV. Included on this worksheet was a listing of fifteen prior convictions, which included three prior convictions for Driving While Impaired. Both Defendant and his trial counsel signed off on this worksheet stipulating to the worksheet calculation, including the listing of prior convictions. The trial court in rendering judgment announced: "Upon my consideration of the . . . record of [Defendant] and his stipulation that he qualifies for habitual felon status with three prior DWIs, the court will arrest judgment on the underlying DWI and will sentence [Defendant] at the bottom of the presumptive range." Additionally, the trial court announced it would reduce the attorneys' fees for Defendant's appointed trial counsel to a civil judgment. The trial court did not inquire of Defendant whether he wished to be heard on the award of attorneys' fees. Defendant's trial counsel did not give oral notice of appeal from the criminal judgment in open court.

On 17 May 2019, the trial court entered its written Judgment against Defendant for Habitual Impaired Driving and sentenced Defendant to 20-33 months incarceration. The same day, the trial court entered a civil judgment against Defendant for attorneys' fees in the amount of $2,094.00. On 24 May 2019, Defendant, acting *pro se*, filed two handwritten Notices of Appeal seeking to appeal his case.

Issues

This case requires us to resolve three issues: (I) whether this Court should exercise jurisdiction over Defendant's appeal; (II) whether Defendant's trial counsel preserved a challenge to Defendant's conviction for Habitual Impaired Driving; and (III) whether the trial court's failure to directly inquire of Defendant if he wished to be heard on the award of attorneys' fees requires the civil judgment be vacated and the matter remanded to the trial court to perform this required task.

Analysis

I. Appellate Jurisdiction

[1] Recognizing Defendant's trial counsel did not give oral notice of appeal in open court and that Defendant's *pro se* Notices of Appeal, although timely, may contain technical defects precluding appellate review of the Habitual Impaired Driving Judgment and, further, Defendant's *pro se* written Notices of Appeal—by failing to specifically identify the civil judgment for attorneys' fees—may be deemed wholly insufficient to permit appellate review of the attorneys' fee award, Defendant's appellate counsel has filed a Petition for Writ of Certiorari with this Court requesting this Court accept jurisdiction of Defendant's appeal of both the criminal conviction and the civil award of attorneys' fees. For its part, the State acknowledges a number of instances of defective Notices of Appeal in which this Court has issued our Writ of Certiorari to permit appellate review of criminal judgments and civil judgments for attorneys' fees entwined with a criminal case and, neither opposing nor conceding the point, allows issuance of the writ is within our discretion.

It is evident from the *pro se* handwritten Notices of Appeal—technical defects notwithstanding—at a minimum Defendant intended to timely preserve his right to appeal from his criminal conviction for Habitual Impaired Driving. *See State v. Locklear*, 259 N.C. App. 374, 376, 816 S.E.2d 197, 200 (2018). Moreover, the primary defects in Defendant's Notices of Appeal, as it relates to his criminal conviction, are a failure to identify the court to which appeal is taken and certifying service on the State. On at least one prior occasion, this Court has acknowledged these are not the sorts of defects requiring dismissal of an appeal on a jurisdictional basis. *State v. Miller*, 259 N.C. App. 734, 813 S.E.2d 482, *disc. rev. denied*, 371 N.C. 477, 818 S.E.2d 289 (2018) (unpublished). Rather, if the State does not object, we may deem the appeal properly taken from a jurisdictional standpoint. *Id.* Here, the State raises no objection. Nevertheless, as the adequacy of Defendant's *pro se* handwritten Notices of Appeal, at best, remains questionable, we allow Defendant's Petition for Writ of Certiorari to ensure our appellate jurisdiction over his appeal.

Further, this Court has regularly allowed certiorari in order to correct a trial court's error in failing to directly address a criminal defendant directly and afford a defendant the basic right to be heard prior to entering a civil judgment against that defendant for the attorneys' fees of defense counsel. *See, e.g.*, *State v. Mayo*, 263 N.C. App. 546, 549,

823 S.E.2d 656, 659 (2019); *see also State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018). In our discretion, we allow Defendant's Petition for Writ of Certiorari solely for purposes of ensuring appellate jurisdiction over this matter and to review Defendant's arguments as to both the civil and criminal judgments entered by the trial court.

II. Error Preservation Related to Habitual Impaired Driving

[2] The sole argument raised by Defendant on appeal challenging his criminal conviction is whether the evidence presented by the State at trial is sufficient to support his conviction for Habitual Impaired Driving. Specifically, Defendant argues the State presented no evidence of prior convictions for Driving While Impaired to support the Habitual Impaired Driving charge during the guilt/innocence phase of the trial, and there is nothing in the Record to establish the State secured any stipulation to prior convictions from Defendant before the case was submitted to the jury. Defendant concedes his trial counsel failed to preserve the issue of the sufficiency of the evidence by failing to renew his Motion to Dismiss at the close of all the evidence. Instead, Defendant requests we invoke N.C.R. App. P. 2 to suspend the rules related to error preservation and reach the merits of this singular issue. We decline to do so. Irrespective of any alleged procedural flaws under which Defendant stipulated to the existence of the requisite prior convictions for Driving While Impaired, the fact remains Defendant and his trial counsel did stipulate to the existence of these convictions as alleged in the Habitual Impaired Driving Indictment, as part of the sentencing phase of trial, undermining any substantive argument Defendant should not have been sentenced for Habitual Impaired Driving. Moreover, not only did Defendant's trial counsel not renew his Motion to Dismiss, there was also no objection to the process by which the trial court effectively bifurcated the two charges or to the trial court only instructing the jury on the underlying Driving While Impaired charge. Thus, we determine this case does not warrant suspension of the appellate rules under Rule 2 to review the merits of this issue. Therefore, we conclude there was no reversible error in the entry of Judgment against Defendant for Habitual Impaired Driving.

III. Civil Judgment for Attorneys' Fees

[3] Defendant next argues the trial court erred by entering a civil judgment against him for his appointed trial counsel's fees without first personally addressing Defendant directly as to whether Defendant wished to be heard on that issue. This Court squarely addressed this very question in *State v. Friend*, where this Court expressly and clearly

held: "before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." 257 N.C. App. at 523, 809 S.E.2d at 907. We vacated the civil judgment and remanded the matter to the trial court for the defendant to be given the opportunity to be heard on the issue. *Id.* Indeed, in *Friend*, we granted certiorari specifically because of the defendant's meritorious argument. *Id.* at 519, 809 S.E.2d at 905. Since *Friend* was decided in 2018, this Court has consistently followed *Friend* vacating civil judgments and remanding for additional proceedings time and time again. *See, e.g.*, *State v. Baker*, 260 N.C. App. 237, 244, 817 S.E.2d 907, 912 (2018); *State v. Bivens*, 266 N.C. App. 617, ___, 830 S.E.2d 702 (2019) (slip op. at 9-10) (unpublished); *State v. Manley*, 272 N.C. App. 695, ___, 845 S.E.2d 206 (2020) (slip op. at 7) (unpublished); *State v. Ray*, 271 N.C. App. 330, 336, 842 S.E.2d 647, 652 (2020); *State v. Melvin*, 268 N.C. App. 467, ___, 834 S.E.2d 452 (2019) (slip op. at 22) (unpublished), *disc. rev. allowed*, 373 N.C. 595, 837 S.E.2d 888 (2020).[1]

Our dissenting colleague reasserts his dissenting view in a recent decision on this issue. *See State v. Mangum*, 270 N.C. App. 327, ___, 840 S.E.2d 862 (2020) (Tyson, J., dissenting). As we understand our colleague's position, it is that Defendant, on the Record before us, has shown no prejudice that would change the result of the civil judgment. That, however, is precisely the point: if a defendant is not provided with the basic due process of any notice and opportunity to be heard on the award of attorneys' fees, a defendant cannot create any record which we could meaningfully review or from which we may ascertain if there is any valid challenge to the award of attorneys' fees.[2] Therein lies the prejudice. As our Court recognized in *Friend*, the award of fees to a defendant's trial counsel raises an inherent problem: the interests of appointed trial counsel and a defendant may not be aligned on this issue—including what amount of fees should reasonably be awarded.[3] *Friend*, 257 N.C. App. at 522-23, 809 S.E.2d 906-07. Thus, this is one

1. This is a selection. The list goes on. Our research reflects over thirty-five cases since *Friend* was decided in 2018 that address this aspect of its ruling in some form or fashion.

2. Our dissenting colleague assumes there is not.

3. This also perhaps informs our practice of allowing appellate counsel to seek review of this issue through issuance of the Writ of Certiorari rather than relying on trial counsel to themselves file a separate Notice of Appeal from an award of their own attorneys' fees or expecting trial counsel to inform an indigent defendant of the requirement to file a separate written Notice of Appeal from the civil judgment.

instance in which, in the absence of other evidence a defendant is aware of their right to be heard, we require the trial court to address a defendant directly rather than relying on trial counsel to either inform their client of this right or to lodge any objection to the award of their own fees. *See id.* This is done for the express purpose of permitting meaningful appellate review and ensuring a defendant understands the right to be heard on this issue before a civil judgment is entered against that defendant. *Id.*

Here, as our dissenting colleague points out, it does appear Defendant was in the courtroom and had not yet been remanded into custody when the trial court simply announced "[a]nd I will let the attorney fee and the court costs go to a civil judgment." Indeed, this was done during the trial court's rendering of its sentence. Our dissenting colleague is also correct that in the preamble to the pre-printed form (AOC-CR-225) used to enter judgment against indigent defendants for their trial attorney's fees and utilized in this case, it does in fact recite: "After due notice to the defendant named on the reverse and opportunity to be heard . . .." Notably, however, this form does not actually require the trial court to affirmatively make any such finding—for example, by checking a box as is done on other such forms—but is simply a blanket recitation.[4]

Moreover, this recitation is incongruous with the Record before us. There is no indication in either the transcript or in the Record of proceedings prior to the entry of the civil judgment that Defendant was, in fact, apprised of his right to be heard or given the opportunity to be heard on the entry of judgment against him for appointed counsel's fees.[5] Nor did the trial court, in the absence of other evidence, make a

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4. Also, nowhere on the pre-printed application is trial counsel required to certify the defendant was advised of their opportunity to be heard on this issue. Perhaps one way to assist in preventing the seemingly endless string of appeals on this issue and alleviate the additional burdens placed on trial judges, counsel, and the parties to these civil judgments would be to revise the form to require trial counsel to certify the defendant has been informed of their right to be heard on the award of attorneys' fees (and, indeed, of their right to file a separate notice of appeal from this award) and for the trial judge to make this finding by affirmatively checking a box on the form. On one hand, this would evidence such a specific finding applicable to the specific case and, on the other, serve as a cue to trial counsel to ensure there is, in fact, evidence in the record in support of this finding "demonstrating Defendant was aware of the opportunity to be heard" to support the application for their claim for attorneys' fees. *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

5. The dissent also correctly points out in the Affidavit of Indigency completed by an indigent defendant to obtain an appointed attorney, it states the affiant "may be required to repay the cost of your lawyer" and the trial court "may also enter a civil judgment against you[.]" Nobody questions the fact an indigent defendant—put in the position of applying for court-appointed counsel or facing serious criminal charges without representation—

direct inquiry of Defendant. In light of our prior precedent, we vacate the civil judgment and remand for further proceedings consistent with *State v. Friend* to either provide Defendant an opportunity to be heard directly on this issue or for the introduction of "other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* at 523, 809 S.E.2d at 907.

In so doing, we acknowledge our colleague's concern that having to repeatedly remand these cases for such additional proceedings is inefficient and creates an unnecessary burden on our trial courts. The potential, however, for unjustly depriving any person of this basic due process right to notice and an opportunity to be heard outweighs any inefficiency caused by the process of remanding these matters back to the trial court. Otherwise, the remedy is simple. Prior to entry of the civil judgment, trial counsel and trial courts should, consistent with *Friend*, ensure there is evidence in the Record demonstrating a defendant was given the opportunity to be heard directly on the fee award or was otherwise given notice of the opportunity to be heard and declined to exercise that right.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no reversible error in Defendant's criminal trial. However, we vacate the trial court's civil judgment for attorneys' fees and remand this matter for further proceedings on the award of attorneys' fees consistent with *State v. Friend*.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judge BROOK concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

It is undisputed and we all agree Defendant waived any statutory right to appeal the underlying issue he now purports to raise due to his failure to renew his motion to dismiss at the close of all the evidence.

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accepts this as a condition of the appointment. However, nowhere in this notice does it actually inform an indigent defendant they have a right to be heard prior to the entry of any such possible civil judgment.

Rule 21 of the North Carolina Rules of Appellate Procedure does not set forth the grounds Defendant asserts to issue the requested writ. N.C. R. App. P. 21. With no showing of either merit or prejudice, Defendant has shown no basis to grant his PWC or for this Court to exercise our discretion to invoke Rule 2 to suspend the Rules of Appellate Procedure to issue the writ. N.C. Gen. Stat. § 15A-1444(e) (2019).

I. Failure to Renew Motion at the Close of all Evidence

Defendant asserts this Court should overturn his jury's conviction and judgment for habitual impaired driving. At the close of the State's case, Defendant's counsel moved to dismiss the charges against him. Defendant then called a witness to testify for his defense. Defendant's counsel failed to renew his motion to dismiss after he rested his case at the close of all of the evidence.

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3). Defendant failed to renew his objection after he had introduced evidence. A "waiver precludes the defendant from urging the denial of such a motion as a ground for appeal." *Id.*

Appellate Rule 10(a)(3) further provides: "if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.* Defendant and the majority's opinion concede he is procedurally barred from attacking the sufficiency of the evidence to support his conviction on that charge, due to his failure to renew his motion at the conclusion of all evidence at trial.

Defendant and his trial counsel also stipulated to three prior DWI convictions as alleged in the Habitual Impaired Driving indictment, as part of the sentencing phase of trial. In addition to failing to renew his motion to dismiss at the close of all evidence, his prior convictions and knowing stipulation undermine any substantive argument on merit or prejudice asserting Defendant should not have been sentenced for Habitual Impaired Driving. Defendant's meritless PWC and purported appeal are properly dismissed. *Id.*

Defendant is also seeking discretionary review of his *civil judgment* in the same PWC. Defendant's assertions challenging his civil judgment are also wholly frivolous and fail to demonstrate either merit or prejudice

to invoke and allow discretionary review. I vote to deny Defendant's PWC and to dismiss his arguments. I respectfully dissent.

II. Violations of Appellate Rules

North Carolina appellate courts have repeatedly held: "It is not the role of the appellate courts to create an appeal for an appellant. . . . Our Supreme Court previously stated that the Rules of Appellate Procedure must be consistently applied; otherwise, 'the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118-19, 665 S.E.2d 493, 497-98 (2008) (quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)); *see also State v. Bursell*, 372 N.C. 196, 198-99, 827 S.E.2d 302, 304 (2019) ("[T]he Rules of Appellate Procedure are mandatory and not directory and the failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice.").

Defendant and the majority's opinion disregard our Court's long-standing policies, procedures, precedents, and rules by his asserting and by this Court allowing his PWC to review a wholly frivolous argument with no demonstrated merit or prejudice and no potential change in the outcome upon remand.

III. No Merit

We all agree Defendant filed defective notices of appeal and failed to serve them. With no right of appeal, Defendant filed a PWC to invoke appellate jurisdiction. For almost a century, our Supreme Court has held: "*Certiorari* is a discretionary writ, to be issued for good and sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927) (citations omitted).

To warrant consideration of a PWC, our Supreme Court also held Defendant's "petition for the writ must show merit, or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). Without threshold allegations of both merit and prejudice, review by certiorari is not available to Defendant by rule, statute, or by precedents. *Id.*; N.C. Gen. Stat. §§ 15A-1443, 15A-1444(g); N.C. R. App. P. 21.

Defendant's frivolous PWC is purely form over substance, alleges no potential merit, asserts no prejudice, nor offers any probability of a

different result upon remand. Defendant's meritless and non-prejudicial PWC is properly denied.

The majority's opinion does not attempt to distinguish the rules and precedents above, cites no basis or merit to allow the petition, fails to identify any prejudice suffered by Defendant, and does not forecast nor compel any different result upon remand. Their result compels the superior court to waste time, needlessly engage in an exercise of utter futility, expend scarce public resources, and to potentially increase costs to Defendant.

After Defendant is given further notice and opportunity to be heard on the imposition of the civil judgment for attorney fees for $2,094.00, the trial court can and should re-enter the civil judgment Defendant expressly agreed to pay and did not contest. Also, an additional civil judgment should be entered against Defendant for the time spent by his appointed trial counsel to prepare, re-appear, and re-present the original and an additional sheet for time spent to appear for the unnecessary hearing upon remand.

In contrast to the facts in *State v. Friend*, Defendant fails to assert any arguments towards the quality of service appointed counsel rendered or to challenge the calculation of hours for services provided or the fees earned by his requested and court-appointed counsel. *See State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018).

This review of a wholly frivolous PWC and remand to the superior court is a waste of scarce and valuable judicial resources during a time when other pressing cases and matters are delayed due to closures and restrictions from the ongoing COVID-19 pandemic. Order of the Chief Justice of North Carolina, (15 Sept. 2020), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-issues-order-extending-several-existing-emergency-directives.

IV. Notice

Defendant was represented at trial by a court-appointed attorney he requested. Prior to his attorney's appointment, Defendant would have completed and filed an Affidavit of Indigency, Form AOC-CR-226. This form states, in bold lettering and a larger font:

> **A court-appointed lawyer is not free. If you are convicted or plead guilty or no contest, you may be required to repay the cost of your lawyer as a part of your sentence.**

> **The Court may also enter a civil judgment against you, which will accrue interest at the legal rate set out in G.S. 24-1 from the date of the entry of judgment. Your North Carolina Tax Refund may be taken to pay for the cost of your court-appointed lawyer. In addition, if you are convicted or plead guilty or no contest, the Court must charge you an attorney appointment fee and may enter this fee as a civil judgment against you pursuant to G.S. 7A-455.1.**

See N.C. Gen. Stat. § 7A-455.1 (2019).

Defendant expressly requested, agreed to, and was on notice of his liability for payment of attorney fees as a consequence of his guilty plea or verdict to be entered as a civil judgment. The majority's opinion's inapplicable notice requirement from *Friend* is inconsistent with the facts before us and is not as expansive as their opinion asserts. *See Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907 ("Our holding today does not announce a new rule of constitutional law. The requirement that defendants be afforded notice and an opportunity to be heard before imposition of a civil judgment for attorneys' fees was established in *Jacobs* and *Crews*.").

Defendant's prior notice, knowledge, lack of challenge, and consent to entry of the civil judgment for the fees incurred by his appointed attorney after his express requests and acceptance of benefits obviates merit or prejudice from entry of the civil judgment. The holding in *State v. Friend* and the other cases cited by the majority do not control the outcome here, where the averments in Defendant's PWC asserts no merit or potential prejudice. *Id.*

Under different and more egregious facts, this Court in *Friend* only stated, "trial courts *should* ask defendants. . . *only if* there is [not] 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.* (emphasis supplied). It is undisputed that Defendant was in court when his counsel presented the attorney fee application.

The AOC-CR-225 Judgment Form signed by the trial court contains the following findings: "After due notice to the defendant named on the reverse and opportunity to be heard." Defendant fails to challenge these

findings, which are binding upon appeal. He contracted for and became civilly liable upon a guilty verdict. The trial court found notice and Defendant was aware of his right to be heard by the trial court regarding the imposition of the civil judgment for attorney fees and stood mute. Defendant agreed in writing that if he pled guilty or was found guilty, he was liable to pay his attorney fees, was present in court when the fee petition was presented and discussed, "and chose not to be heard." *Id.*

Defendant "chose not to be heard" by the trial court upon the imposition of a civil judgment for fees he expressly agreed to pay, and fails to challenge the Court's written findings of fact. The holding in *State v. Friend* is inapplicable. *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

V. Conclusion

We all agree Defendant failed to assert or file valid notices of appeal or to serve the State. N.C. R. App. P. 3 ("requiring written notice of appeal in a civil matter"). Defendant concedes he is procedurally barred from attacking the sufficiency of the evidence to support his conviction for Habitual Impaired Driving. He failed to renew his motion at the conclusion of his evidence at trial. N.C. R. App. P. 10(a)(3). He also stipulated to three prior DWI convictions to support the underlying criminal judgment.

Defendant's PWC "must show merit or that error was probably committed below." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9 (citation omitted). These standards mandate a PWC to be "issued only for good and sufficient cause shown." *Id.* (citation omitted). Absent Defendant's mandatory duty to "show merit" or probable prejudicial "error," there is no "good and sufficient cause shown to issue" the PWC. *Id.* Defendant has not demonstrated merit or prejudice in his PWC.

Defendant was informed and agreed appointed counsel was not free counsel. He specifically requested and is liable to pay for his counsel's fees. N.C. Gen. Stat. § 7A-455.1; *see* Form AOC-CR-226 (Affidavit of Indigency). He expressly agreed to pay his attorney's fees in the event he pled or was found guilty. *Id.*

Defendant was present in court when the fee application was presented and was ordered to pay his attorney fees after sentencing. The civil judgment specifically states it is entered "[a]fter due notice to the defendant named. . . and opportunity to be heard." Defendant was free to question or challenge, but stood mute and failed to do so when the amount of counsel's fees and his liability for this *civil* judgment was discussed and entered, and he "chose not to be heard." *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

Defendant's defective and frivolous PWC asserts no prejudice of how the result will differ upon remand, except for his appellate counsel to subject Defendant to an even higher civil judgment for his appointed trial counsel's fee to prepare for and appear at a wholly unnecessary hearing upon remand. Defendant's PWC is properly denied under our statutes, rules, procedures, and precedents. His frivolous assertions are properly dismissed.

Unlike in *Friend*, Defendant offers no challenge to the quality of counsel's services or to the proper calculation of his agreed-upon fees. The PWC does not challenge the trial court's written findings of fact. The civil judgment finds Defendant received notice and an opportunity to be heard, "chose not to be heard," and did not assert any merit or prejudice. The majority's opinion does not state any prejudice to Defendant.

Scarce judicial resources and taxpayer funds are wasted with these frivolous purported appeals and unnecessary remands, which show no jurisdiction, assert no merits, and result in no prejudice. The trial court should enter the same civil judgment of $2,094.00 upon remand, plus a judgment for any new fees incurred by trial counsel for preparing for and attending that hearing.

I vote to deny Defendant's PWC and dismiss his arguments. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ADAM RICHARD CAREY

No. COA18-1233-2

Filed 6 October 2020

1. Appeal and Error—Rule 2—issue abandoned in prior brief—jury instructions—prevention of manifest injustice

On remand from the Supreme Court, the Court of Appeals invoked Appellate Rule 2 to consider defendant's argument regarding the jury instructions issued in his prosecution for possession of a weapon of mass death and destruction, which defendant abandoned when he did not assert it in his prior brief to the Court of Appeals but which merited review to prevent manifest injustice.

2. Criminal Law—jury instructions—substantive features of case—possession of a weapon of mass death and destruction—lawful possession

In a prosecution for possession of a weapon of mass death and destruction, the trial court committed plain error by failing to instruct the jury to consider whether defendant was in lawful possession of the flash bang grenades at issue where defendant testified at trial that he was serving on active duty in the United States Marine Corps as his unit's armorer and weapons technician and that he possessed the grenades under orders.

Judge YOUNG dissenting.

Appeal by defendant from judgment entered 18 May 2018 by Judge Leonard L. Wiggins in Onslow County Superior Court. Heard in the Court of Appeals 5 June 2019. A divided panel of this Court vacated defendant's conviction and remanded for a new trial by opinion filed 16 July 2019. *State v. Carey*, 266 N.C. App. 362, 831 S.E.2d 597 (2019). By order dated 28 February 2020, the Supreme Court of North Carolina reversed and remanded to this Court "for consideration of defendant's remaining challenges to the trial court's judgments." *State v. Carey*, 373 N.C. 445, 838 S.E.2d 367 (2020).

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean ("Dean") Webster III, for the State.

Guy J. Loranger for defendant-appellant.

TYSON, Judge.

Adam Richard Cary ("Defendant") appeals from judgments entered upon a jury's verdict finding him guilty of one count each of possession of a weapon of mass death and destruction and impersonation of a law enforcement officer. Defendant does not challenge his conviction for impersonation of a law enforcement officer, which remains undisturbed. We vacate his conviction and judgment for possession of a weapon of mass death and destruction and remand for a new trial.

I. Background

The facts underlying this case are set forth in detail in our previous opinion *State v. Carey*, 266 N.C. App. 362, 831 S.E.2d 597, and by the Supreme Court in *State v. Carey*, 373 N.C. 445, 838 S.E.2d 367. The underlying facts are as follows:

> Defendant was operating a dark-colored Dodge Charger and pulled over a speeding vehicle on 16 July 2016. Defendant had "emergency lights" flashing on his car. State Highway Patrol Trooper Cross pulled behind Defendant's vehicle and noticed the registration plate was not consistent with or issued to a law enforcement agency. After further investigation, Defendant was arrested, and his car was searched incident to arrest. Officers found a medical technician badge, firearms, magazines, ammunition, suppressors, three diversionary flash bang grenades, and other items located inside of Defendant's car. Defendant was indicted on three counts of possession of weapons of mass destruction, impersonating a law enforcement officer, following too closely, and speeding.

Carey, 266 N.C. App. at 363, 831 S.E.2d at 599.

At trial,

> a jury returned verdicts finding Defendant guilty of one count of possession of a weapon of mass death and destruction and impersonation of a law enforcement officer. For the conviction of possession of a weapon of mass death and destruction charge, the court ordered Defendant to serve a term of 16 to 29 months. The court suspended the sentence and imposed intermediate punishment, ordering Defendant to serve an active term of 120 days and placing him on supervised probation for a period of 24 months. . . . Defendant gave oral notice of appeal in open court.

Id.

II. Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019). The appeal returns to this Court upon remand from the Supreme Court. *Carey*, 373 N.C. at 452, 838 S.E.2d at 373.

III. Issues

Defendant argues the trial court erred by denying his motion to dismiss the weapon of mass death and destruction charge. Defendant also contends the trial court committed plain error by: (1) not finding he lawfully possessed and transported the flash bang grenades with his

Marine Corp command's knowledge and consent, (2) denying his motion to dismiss the charge of possession of a weapon of mass death and destruction; and, (3) failing to instruct the jury on whether Defendant fell within a category of persons permitted to lawfully possess and transport a weapon of mass death and destruction under N.C. Gen. Stat. § 14-288.8(b)(3)(2019).

IV. Standard of Review

Our Supreme Court has repeatedly held there is a duty of the trial court to instruct the jury on all of the substantive features of a case. *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). "This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction." *Id.* (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

Our Rules of Appellate Procedure provide: "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

To constitute plain error, the burden falls upon Defendant to show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Plain error should "be applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

The State has not moved to dismiss Defendant's appeal. The State also responded to and fully briefed the issues raised and argued.

V. Lawful Possession

A. Preservation

[1] In Defendant's prior brief to this Court, Defendant did not argue the trial court's instructions to the jury failed to address whether he is included within a category of persons, who are permitted to lawfully possess and transport a weapon of mass death and destruction. Where a party "does not set forth any legal argument or citation to authority to

support [the] contention [it is] deemed abandoned." *State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017). While Defendant did challenge the jury instructions, he concedes he did not argue the specific issue to this Court. He asks this Court to review this issue pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

"Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). This Court's discretionary ability to invoke Rule 2 is "intended to be limited to occasions in which a 'fundamental purpose' of the appellate rules is at stake, which will necessarily be 'rare occasions.' " *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted). In the exercise of our discretion, we invoke Rule 2 and review this issue. N.C. R. App. P. 2.

B. Analysis

[2] Our Supreme Court held "all substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury." *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989). "[W]hen instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld." *State v. Roache*, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004) (citation omitted).

"[I]t 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." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citations omitted). "In order for a new trial to be granted, the burden is on the defendant to not only show error but to also show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164 (1999) (citation omitted).

Defendant argues the trial court failed to instruct the jury to consider whether Defendant was authorized to lawfully possess and transport the flash bang grenades. N.C. Gen. Stat. § 14-288.8(b)(3) provides for lawful possession of otherwise restricted weapons and states "This section does not apply to any of the following: . . . Persons under contract with the United States, the State of North Carolina, or any agency of either government, with respect to any activities lawfully engaged in under their contracts." This language in N.C. Gen. Stat. § 14-288.8(b)(3) states the unlawful possession "does not apply," is exculpatory, and is not an underlying element of the offense. *See State v. Palmer*, 273 N.C. App. 169, 847 S.E.2d 449, 2020 WL 4758601 (2020).

1. "Under Contract with the United States"

Defendant testified and presented evidence he was serving upon active duty and under the command of the United States Marine Corps as his unit's armorer and weapons technician when he came into possession of the flash bang grenades. Defendant further testified he possessed and transported the flash bang grenades under orders and with his Corp command's knowledge and consent to an out of town training exercise, stored the unused items in his vehicle's trunk, and was returning them to base. The record shows the State returned the flash bang grenades taken from Defendant's vehicle to the owner, the Marine Corps, prior to trial.

"The jury must not only consider the case in accordance with the State's theory but also in accordance with [the] defendant's explanation." *State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) (*per curiam*). The State did not challenge nor refute these facts and testimony before the trial court and stipulates before this Court to Defendant's active duty status and military occupational specialty as his unit's armorer and weapons technician at the time of his arrest on unrelated charges.

2. State's Arguments

The State argues Defendant delayed returning the weapons and was on a detour when stopped by police. Even if the State's argument is true, this would not overcome Defendant's properly admitted testimony and his right for the jury to resolve this issue. "[A]ll substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury." *Bogle*, 324 N.C. at 196, 376 S.E.2d at 748; *see Loftin*, 322 N.C. at 381, 368 S.E.2d at 617.

Defendant is entitled proper and complete jury instructions of all properly admitted evidence under N.C. Gen. Stat. § 14-288.8. *Id.*; *see Guss*, 254 N.C. at 351, 118 S.E.2d at 907. In light of our decision to grant

a new trial on this issue, we do not address Defendant's remaining arguments, which are unlikely to arise again upon remand.

VI. Conclusion

The trial court committed plain error in not instructing the jury on all the evidence presented and admitted under N.C. Gen. Stat. § 14-288.8. The jury, if properly instructed, would have had to consider and find all attendant circumstances relevant to the charge to exonerate or to properly convict Defendant. *Bogle*, 324 N.C. at 196, 376 S.E.2d at 748.

Under plain error review, this error in instructions to the jury was prejudicial to Defendant to mandate a new trial. Defendant's conviction of possession of a weapon of mass death and destruction and the judgment entered thereon is vacated, and this cause is remanded for a new trial. *It is so ordered.*

NEW TRIAL.

Judge MURPHY concurs.

Judge YOUNG dissents with separate opinion.

YOUNG, Judge, dissenting.

I. Introduction

The majority has held that the trial court committed plain error in not instructing the jury on all the evidence presented and admitted under N.C. Gen. Stat. § 14-288.8 (2019). Because I do not believe that the Supreme Court's mandate permits us to consider this issue, I respectfully dissent from the majority's opinion vacating and remanding this case for a new trial.

II. Mandate

On his original appeal to this Court, defendant argued that the trial court erred in denying his motion to dismiss the charge of possession of a weapon of mass death and destruction, that the trial court committed plain error by failing to instruct the jury on the definition of "weapon of mass death or destruction," and that the trial court committed plain error by instructing the jury that it could find that the State satisfied the "weapon of mass death or destruction" element if it found defendant possessed a "grenade." The majority held that a flash bang grenade was not a weapon of mass death and destruction and therefore

reversed the trial court's denial of defendant's motion to dismiss. The majority did not address defendant's remaining arguments. The State appealed to the Supreme Court which held that a flash bang grenade was a weapon of mass destruction, and thus reversed the decision of this Court. Specifically, the Supreme Court held that, "we reverse the Court of Appeals' decision to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgments." *State v. Carey*, 373 N.C. 445, 838 S.E.2d 367 (2020).

Not one of defendant's "remaining challenges" included a lawful possession argument. Defendant failed to address the issue of lawful possession at trial. Likewise, in his initial appeal to this Court he did not raise the issue of lawful possession. Nor did he raise that issue on appeal to our Supreme Court. "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 (2007). It is therefore clear that the issue of lawful possession was not one of defendant's "remaining challenges" as expressed by the Supreme Court's mandate. "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962). Our review on remand is properly limited to those issues defendant previously raised—lawful possession is not among them. Nor has defendant raised any arguments aside from lawful possession.

Nor do I believe that this is the sort of general mandate which would permit us to consider other issues. It is well established that remands may be general or limited in scope. *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 283 (2015). Typically, general remands are reviewed *de novo*, and limited remands are "limited to the issue or issues remanded." *Id.* The Supreme Court mandate specifically directed this Court to consider "defendant's remaining challenges to the trial court's judgments." For this reason, I believe this is a limited mandate, and therefore, consideration of the issue of lawful possession is beyond the scope.

III. Conclusion

Because the issue of lawful possession is not properly before us, and because defendant raises no additional arguments aside from lawful possession upon remand, we are limited in accordance with the

Supreme Court's mandate to those issues previously raised. I therefore would not address the issue of lawful possession. Again, in accordance with the Supreme Court's mandate, and as I stated in my previous dissent, I would find no error in the trial court's denial of defendant's motion to dismiss, and no plain error in the trial court's instructions to the jury.

For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TIMOTHY DAVID FRENCH, DEFENDANT

No. COA19-968

Filed 6 October 2020

1. Kidnapping—child abduction—car stolen with child inside—general intent crime

Where the child abduction statute (N.C.G.S. § 14-41(a)) did not include a reference to willfulness or a mens rea element, which would have indicated that the crime required specific rather than general intent, the State was not required to prove that defendant acted willfully in abducting a child who happened to be in the back seat of the truck defendant stole. Where the State presented substantial evidence that defendant continued to abduct the child after he discovered him in the truck by leading the police on a high-speed chase and by refusing to comply with police and a 911 operator's demands to release the child, the trial court properly denied defendant's motion to dismiss.

2. Criminal Law—jury instructions—child abduction—no requirement to instruct on willfulness—general intent crime

The trial court was not required to instruct the jury that in order to convict defendant of child abduction it must find that defendant acted willfully in abducting the child (who was in the back seat of the truck defendant stole), because the charging statute did not require specific intent.

3. Kidnapping—jury instructions—instruction on theories not contained in indictment—plain error analysis

In a trial for child abduction, the trial court did not commit plain error by instructing the jury on all three theories of

kidnapping—confinement, restraint, and removal—even though only one theory was alleged in the indictment (removal), because the uncontested evidence supported all three theories and did not contain any conflicts regarding the different theories.

4. Sentencing—convictions for larceny and possession of stolen property—based on same stolen property—possession judgment arrested

The trial court erred by entering judgment against defendant on both larceny and possession of stolen property where the offenses were based on the same stolen property, a truck. The Court of Appeals arrested judgment on the conviction for felony possession of stolen property.

Judge BERGER concurring in result only.

Appeal by Defendant from judgment entered 29 November 2017 by Judge Casey M. Viser in Lincoln County Superior Court. Heard in the Court of Appeals on 26 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney Brenda Menard, for the State.

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

INMAN, Judge.

A thief who led law enforcement officers on a high-speed chase after discovering a three-year-old child in the back seat of the truck he had stolen was properly convicted of larceny of a motor vehicle, first-degree kidnapping, and abduction of a child.

Timothy David French ("Defendant") petitions this Court from a judgment following a jury verdict finding him guilty of larceny of a motor vehicle, possession of stolen property, abduction of a child, first-degree kidnapping, and obtaining habitual felon status. Defendant asserts that the trial court erred by denying his motion to dismiss the child abduction charge when the State failed to show evidence of Defendant's intent to abduct the child, by instructing the jury on theories of kidnapping not contained in the indictment, and by entering a judgment on verdicts for both larceny and possession of the same stolen property.

After careful review, we hold that Defendant has failed to show error in the denial of Defendant's motion to dismiss as to the abduction charge, or that the trial court committed plain error by instructing on theories for kidnapping not alleged in the indictment. The State concedes and we hold that the trial court erred by entering judgment on verdicts for both larceny and possession of the same stolen property.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence presented at trial tends to show the following:

On the morning of 17 December 2016, a three-year-old child was strapped into a car seat in the back of his father's truck at a gas station on Gastonia Highway. The two were on their way to a parade. The father ran inside to make a purchase. The truck remained in the father's view while he was inside the store, but when he looked away for "a split second," Defendant got into the driver's seat of the truck and sped off. The child's father ran outside screaming that his son was still in the truck and a bystander promptly called 911.

Police arrived at the gas station, obtained a description of the truck and the child, and sent a message to law enforcement to be on the lookout for both. An officer nearby saw a vehicle matching the description circulated by law enforcement and began to follow the truck. After calling in the license plate number, he confirmed it was the truck with the child likely still inside. Defendant drove normally until the officer turned on his blue lights. Defendant then accelerated, passing the car in front of him on the three-lane-road. Defendant proceeded to lead police on a high-speed chase, exceeding 100 miles-per-hour, crossing the median several times, and traversing state lines.

During the chase, Defendant called 911. He identified himself as the driver of the truck and told the operator there was a child in the back seat of the vehicle. Defendant claimed he mistakenly thought the truck was his "buddy's" and that this was all a "prank" that had gone "south." Defendant tried to bargain with the operator because he "didn't want the kid to get hurt," saying he would let "the kid" out if the officers stopped chasing him. He refused to pull over despite the operator's repeated pleas to do so. Defendant eventually hung up and continued to drive at excessive speeds for fifteen more minutes, driving into oncoming traffic at least once.

In total, Defendant drove approximately 23 miles for at least 20 minutes with the child in the truck before jumping a curb and getting stuck in a wooded area. Defendant attempted to reverse the truck, spinning

the wheels. He then tried to escape on foot and was quickly apprehended by law enforcement officers. The child was still secured in his car seat and "appeared well." Defendant told officers that he had been unaware the child was in the truck at the time he initially drove away. He said he "wanted to make a deal" and provide information about other crimes but did not make any other statements to arresting officers.

On 8 May 2017, a Lincoln County grand jury indicted Defendant on one count each of first-degree kidnapping, abduction of a child, larceny of a motor vehicle, possession of stolen property, and obtaining habitual felon status. At the pre-trial charge conference, parties agreed to instruct the jury solely on the "removal" theory for first-degree kidnapping, reflecting the language of the indictment. Defendant's trial began on 27 November 2017.

At trial, the prosecutor requested jury instructions on all three theories of kidnapping—confinement, restraint, and removal—to which Defendant's counsel responded, "I mean, it's not going to matter to me." The jury found Defendant guilty on all charges on 29 November 2017. Defendant then pled guilty to attaining status as an habitual felon. The trial court consolidated the convictions to a single judgment, sentenced Defendant to a term of 82 to 159 months of imprisonment, and ordered Defendant to register as a sex offender for 30 years upon release. Defendant did not give oral or written notice of appeal. On 7 December 2018, Defendant filed a Petition for Writ of Certiorari with this Court, which was allowed on 20 December 2018.

II. ANALYSIS

A. Defendant's Motion to Dismiss

[1] Defendant asserts that the trial court erred in denying his motion to dismiss the child abduction charge because the State did not establish that Defendant acted with the requisite intent to abduct the child. Defendant also argues that the trial court committed plain error in failing to instruct the jury on a scienter requirement. After careful review, we disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). We consider whether, viewed in the light most favorable to the State and giving the State the benefit of all reasonable inferences, the jury was presented with substantial evidence of each element of the offense charged. *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). Defining the elements of our child abduction statute also presents a question of law

subject to *de novo* review. *State v. Jones*, 237 N.C. App. 526, 530, 767 S.E.2d 341, 344 (2014).

Willfulness Requirement in Child Abduction

Defendant argues that the child abduction statute requires the State to show substantial evidence of Defendant's "willfulness" in abducting the child. The plain language of the statute compels us to disagree.

Our General Statutes provide:

> Any person who, without legal justification or defense, abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care shall be guilty of a Class F felony.

N.C. Gen. Stat. §14-41(a) (2019).

Certainly, a "common law presumption against criminal liability without a showing of *mens rea*" exists. *State v. Huckelba*, 240 N.C. App. 544, 552, 771 S.E.2d 809, 816 (2015), *rev'd on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). "Moreover, strict liability crimes are disfavored." *State v. Bowman*, 188 N.C. App. 635, 650, 656 S.E.2d 638, 650 (2008). However, in asking us to read a requirement of "willfulness" into Section 14-41, Defendant creates a false dichotomy between a strict liability offense and one requiring a specific intent, omitting the plausible alternative that the General Assembly meant for the abduction of a child to be a general intent crime.

Defendant interprets Section 14-41's narrowed criminal liability for abduction "without legal justification or defense" to include the element of willfulness, relying on this Court's definition of willfulness as "the wrongful doing of an act *without justification or excuse*, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (emphasis added). The State responds with a more probable explanation—that "without legal justification and defense" extends certain legal defenses like mistake of fact, necessity, or justification to those charged with abduction of a child. *See State v. Walker*, 35 N.C. App. 182, 186, 241 S.E.2d 89, 92 (1978) (allowing an instruction on the defense of mistake of fact where a grandfather mistakenly picked up a child he thought to be his granddaughter from school). We agree with Defendant that the General Assembly did not intend to make abduction of a child a strict liability offense because the statute includes legal defenses that negate a defendant's criminal liability through the language "without legal justification

and defense." But we disagree with Defendant's argument that the legislature must have intended to make it a specific intent crime.

State v. Barnes addressed a similar argument by a defendant that because the crime was not one of strict liability, it required some showing of specific intent. 229 N.C. App. 556, 560-63, 747 S.E.2d 912, 916-18 (2013). We agreed with the defendant that the crime in question was not a strict liability crime, but rejected his specific intent argument. *Id*. at 560-61, 747 S.E.2d at 916-17. Absent any indication to the contrary in the statute, we held that the crime in question was merely one of *general* intent, which required only a "knowing" *mens rea* and allowed a defendant to avoid liability through, for example, a mistake of fact defense. *Id*. at 562, 747 S.E.2d at 917-18. A requirement that a defendant act "willfully" creates a specific intent crime. *State v. Creech*, 128 N.C. App. 592, 598, 495 S.E.2d 752, 756 (1998); *State v. Eastman*, 113 N.C. App. 347, 353, 438 S.E.2d 460, 463 (1994).

The General Assembly is capable of imposing a specific intent, like that of willfulness, in codifying a crime and has done so in several instances. In *State v. Haskins*, this Court declined to read a criminal intent requirement into the statutory crime of possession of a weapon on educational property because the plain language of the statute included no reference to a *mens rea* element. 160 N.C. App. 349, 352, 585 S.E.2d 766, 767 (2003), *superseded by statute as recognized in State v. Huckelba*, 240 N.C. App. 544, 559-62, 771 S.E.2d 809, 821-23 (2015). Following that decision, the General Assembly added a specific intent element by amending N.C. Gen. Stat. § 14-269.2(b) to include the word "knowingly." Act of June 17, 2011, S.L. 2011-268, § 4, N.C. Sess. Laws 1002, 1003-04 (codified as amended at N.C. Gen. Stat. § 14-269.2(b) (2019)). This Court then acknowledged the amendment and recognized the added *mens rea* requirement. *Huckelba*, 240 N.C. App. at 550-52, 771 S.E.2d at 816, *rev'd on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015).

The child abduction statute does not include the word "willfully" or any other specific *mens rea* element. "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *State v. Jones*, 358 N.C. 473, 477, 598 S.E.2d 125, 128 (2004) (quoting *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988)). Because the plain language of the child abduction statute is not ambiguous, we need not consider legislative history to determine the legislature's intent.

Substantial Evidence Supported the Child Abduction Charge

Although the child abduction statute includes no element of specific intent, the State in this case presented substantial evidence that Defendant knew he abducted a child at the point he called the 911 operator, if not much earlier, and willfully led police on a high-speed chase for at least fifteen more minutes with the child strapped into his car seat in the back of the truck.

The evidence, which we must consider in the light most favorable to the State, tends to show that after discovering the young boy in the truck, Defendant continued to abduct him. It is well-established that "when the statute does not make knowledge or intent an essential element, the State may, upon proof of the commission of the act, rest and rely upon the presumption that knowledge is in accord with the fact. The duty then devolves upon the defendant to show the exculpatory facts." *State v. Powell*, 141 N.C. 780, 789, 53 S.E. 515, 518 (1906).

A defendant may exculpate a mistake through subsequent conduct. For example, in *State v. Walker*, the defendant was relieved of liability for kidnapping when he promptly returned a child—who he had thought to be his granddaughter—to school upon realizing he picked up the wrong child. 35 N.C. App. 182, 183, 241 S.E.2d 89, 90 (1978). By contrast, in *State v. Waddell*, a defendant who made no effort to return a stolen vehicle after he discovered it did not belong to him was not relieved of criminal liability on a possession of a stolen vehicle charge. No. COA01-1088, 2002 WL 31055973, at *4-5, (N.C. Ct. App. Sept. 17, 2002).

Defendant's conduct following his discovery of the child did not exculpate him in this case. While on the phone with the 911 operator, Defendant admitted the child was in the truck, but he refused to comply with police and operator demands to safely stop the vehicle. He led police on a high-speed chase for 20 minutes, swerved into oncoming traffic, refused to pull over, and eventually crashed in a park.

For all of these reasons, we conclude that the trial court did not err in denying Defendant's motion to dismiss the child abduction charge.

B. Jury Instruction Regarding Specific Intent

[2] Defendant argues in the alternative that the trial court committed plain error in failing to instruct the jury that it was required to find that he acted willfully in abducting the child. For the above-mentioned reasons, we hold that the trial court did not err, much less plainly err, in its jury instructions.

C. Jury Instruction on Theories of Kidnapping

[3] Defendant also argues the trial court plainly erred by instructing the jury on theories of kidnapping not alleged in the indictment. We disagree.

As a preliminary matter, the State argues that any error relating to the jury instruction on the kidnapping charge was invited by Defendant's conduct at trial and, therefore, is not reviewable by this Court. Generally, "[i]f at trial the defendant fails to object to a jury instruction, that instruction is reviewable on a plain error standard on appeal." *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998). However, a "defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970) (citations omitted).

The State argues that because Defendant expressly acquiesced at trial to the jury instruction he challenges on appeal, he is now barred from taking advantage of plain error review. In a case similar to this one, following a trial in which the defendant failed to object to jury instructions, actively participated in their crafting, and ultimately affirmed the instruction provided to the jury as "fine," we held that the argument was still reviewable for plain error. *State v. Harding*, 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018).

The State relies on *State v. Horner*, in which our Supreme Court denied the benefit of plain error review to a defendant whose trial counsel, after being invited by the trial court to propose any additional instructions, explicitly told the trial court that none was necessary. 310 N.C. 274, 282, 311 S.E.2d 281, 287 (1984). More recently, though, our Supreme Court has held that a defendant's failure to object to a jury instruction regarding reasonable doubt at trial despite "numerous opportunities" to do so, and affirmative statements to the trial court "indicat[ing] his satisfaction," does not waive appeal and will be reviewed for plain error. *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (citing N.C. R. App. P. 10(b)(2); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000)).

Here, Defendant's trial counsel failed to object when the instructions were placed directly in issue at trial, and when the prosecutor requested jury instructions on all three theories of kidnapping—confinement, restraint, or removal—–Defendant's trial counsel responded, "I mean, it's not going to matter to me." As in *Harding*, though, Defendant's indifference to the theories included in the jury instruction does not bar

him from seeking review for plain error before this Court and so we determine whether the jury instructions give rise to a fundamental error.

In any event, Defendant cannot demonstrate plain error because it is undisputed that the evidence at trial supported the theory of kidnapping alleged in the indictment—removal—and also supported the two additional theories of kidnapping included in the instruction—restraint and confinement.

When evidence before the jury is not conflicting as to the kidnapping theories alleged in the indictment versus those included in the jury charge, a defendant cannot show plain error—that the verdict would have changed but for the discrepancy.[1] *State v. Gainey*, 355 N.C. 73, 95, 558 S.E.2d 463, 478 (2002) ("[T]here is no reasonable basis for us to conclude any different combination of the terms 'confine,' 'restrain,' or 'remove' in the instruction would have altered the result."); *State v. Lucas*, 353 N.C. 568, 588-89, 548 S.E.2d 712, 726 (2001), *overruled in part on other grounds*, *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). Defendant concedes that in this case, "[t]here was evidence not only that [Defendant] *removed* [the child], but also that [the child] was *confined* in the truck and remained *restrained* in his car seat." Further, none of the evidence or testimony as to restraint, removal, or confinement kidnapping theories was in conflict at trial. So Defendant cannot establish plain error.

Defendant also argues the wrong legal standard to establish plain error, asserting that "[t]here is a reasonable probability that at least one juror would have relied on an impermissible theory to convict [Defendant]." Without showing a probability that the jury would have reached a different result but for the erroneous instruction, Defendant has not been denied a fair trial, nor did the instruction tilt the scales against him as the evidence was sufficient and uncontested for all theories of kidnapping. The trial court did not plainly err in submitting all three theories for kidnapping to the jury.

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1. Defendant's reliance on *State v. Smith*, 162 N.C. App. 46, 589 S.E.2d 739 (2004), is misplaced. This Court in *Smith* considered an indictment that also only alleged removal while the instructions given to the jury included confinement and restraint theories. *Id.* at 49-50, 589 S.E.2d at 742. However, much of the evidence involving the removal theory in *Smith* was directly disputed by witness testimony and other evidence. *Id.* at 51-52, 589 S.E.2d at 743-44. This Court held that the discrepancy between the indictment and the instructions amounted to plain error because it was probable that the jury would not have found Defendant guilty if only instructed on the removal theory. *Id.* at 49-53, 589 S.E.2d at 742-44.

D. Verdicts on Larceny and Possession of Same Stolen Property

[4] Finally, Defendant contends, and the State concedes, that the trial court erred in entering judgments on both larceny of a motor vehicle and possession of the same stolen property. We agree.

"[T]he Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled in part on other grounds*, *State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010). A defendant cannot be convicted of both offenses when the subject property is the same. *See id.* Further, when there are "separate convictions for mutually exclusive offenses, even though consolidated for a single judgment," a defendant may still only be convicted on one of those charges because of the "potentially severe adverse collateral consequences." *State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990) (citing *Ball v. United States*, 470 U.S. 856, 865, 84 L. Ed. 2d 740, 748 (1985)).

To remedy this error, the court is required to arrest judgment on one of the convictions. *State v. Moses*, 205 N.C. App. 629, 640, 698 S.E.2d 688, 696-97 (2010). Here, Defendant was improperly sentenced to separate punishments for the two offenses when they concerned the same stolen property—the truck. We arrest judgment on defendant's conviction for felony possession of stolen property. *See id.*

III. CONCLUSION

For the reasons explained above, we conclude that the trial court did not err by denying Defendant's motion to dismiss the child abduction charge and that the trial court did not plainly err by instructing the jury on theories of kidnapping not stated in the indictment. Because Defendant was improperly convicted for both larceny and possession of the same stolen property, we vacate defendant's judgment for felony possession of stolen property.

NO ERROR IN PART; NO PLAIN ERROR IN PART; JUDGMENT VACATED IN PART.

Judge COLLINS concurs.

Judge BERGER concurs in result only.

STATE v. JOINER

[273 N.C. App. 611 (2020)]

STATE OF NORTH CAROLINA
v.
RAYMOND DAKIM-HARRIS JOINER

No. COA19-1112

Filed 6 October 2020

1. Criminal Law—motions for appropriate relief—by the State—filed within ten days of judgment—after notice of appeal—jurisdiction

After defendant filed his written notice of appeal of his convictions stemming from the theft of electronics from two college dorms, the trial court retained jurisdiction to grant the State's motion for appropriate relief seeking to arrest judgment on two of defendant's larceny convictions (that were duplicative), which the State timely filed within ten days of the judgment pursuant to N.C.G.S. § 15A-1416.

2. Appeal and Error—mootness—relief already granted—earlier order on motion for appropriate relief

Defendant's double jeopardy argument before the Court of Appeals was dismissed as moot where the trial court's earlier order on the State's motion for appropriate relief, which arrested judgment on duplicative larceny charges, granted defendant the relief he sought on appeal.

3. Criminal Law—clerical errors—judgment forms—wrong box checked

Where a judgment form contained a clerical error, with the "habitual felon" box checked instead of the "habitual breaking and entering status offender" box, the matter was remanded for correction of the error.

Appeal by defendant from judgments entered 20 March 2014 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Forrest Fallanca, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

TYSON, Judge.

Raymond Dakim-Harris Joiner ("Defendant") appeals from judgments entered after a jury's verdict finding him guilty of two counts of felonious breaking and entering, two counts of larceny after breaking and entering, larceny of goods over $1,000, and non-felonious larceny. We find no error in the jury's verdicts and sentences imposed, but remand for the correction of a clerical error.

I. Background

Two break-ins occurred at two separate student dormitory rooms at Wake Forest University on 2 April 2012. The first break-in occurred at Bostick Hall around 1:00 p.m. While the student was asleep, Defendant stole her backpack, which contained: a Lenovo ThinkPad laptop computer, graphic calculator, textbooks and pencil case. A housekeeper and another student saw Defendant leaving the student's room.

The second break-in occurred around 1:40 p.m., on the opposite side of campus, in Taylor Hall. The student was not present in the room. Defendant stole the student's MacBook Pro laptop, laptop charger, and five Xbox games.

At approximately 2:00 p.m., two Wake Forest University officers observed Defendant. Defendant threw the backpack and ran. Inside the backpack, the officers discovered the first student's Lenovo laptop. They also found the second student's MacBook Pro laptop, computer charger, Xbox games, and earbuds. The items were eventually returned to the respective students. Defendant was arrested later that evening. He admitted he regularly sells stolen computers.

Defendant was indicted for two counts of felonious breaking and entering, two counts of larceny after breaking and entering, two counts of larceny of goods over $1,000, and habitual felony breaking and entering.

At the conclusion of the State's case-in-chief, Defendant's counsel moved to dismiss all charges "based on insufficiency of the evidence." The trial court denied the motion. Defendant did not present evidence and renewed his motion to dismiss.

On 20 March 2020, the jury convicted Defendant of: felony breaking and entering, felony larceny after breaking and entering, and felony larceny of property worth more than $1,000 for breaking into Bostick Hall.

Regarding the theft from the second student's room in Taylor Hall, the jury convicted Defendant of felony breaking and entering, felony larceny after breaking and entering, and non-felonious larceny. Defendant

was also convicted for habitual breaking and entering. The trial court consolidated the felonies and sentenced Defendant to an active sentence of two consecutive terms of 50 to 72 months.

Defendant timely filed his written notice of appeal on 21 March 2020. Four days later, the State filed a motion for appropriate relief ("MAR") seeking to arrest judgment on the felony larceny of property worth more than $1,000 and the non-felonious larceny conviction. On 14 April 2020, the trial court granted the State's MAR and amended the judgment. The amended judgment arrested judgment on Defendant's convictions of felony larceny of goods over $1,000 and for non-felonious larceny.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court erred by: (1) amending the judgments when notice of appeal had been entered; and, (2) entering a judgment for four counts of larceny when the State only proved two felonies.

IV. Jurisdiction to Amend Judgment

A. Standard of Review

"Questions of subject matter jurisdiction are reviewed *de novo*." *State v. Rogers*, 256 N.C. App. 328, 337, 808 S.E.2d 156, 162 (2017) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 609 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

B. Analysis

[1] Defendant argues the trial court erred by amending the judgment when notice of appeal had already been entered.

> A court must have subject matter jurisdiction in order to decide a case. Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act. As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, *ex mero motu*.

State v. Sellers, 248 N.C. App. 293, 300, 789 S.E.2d 459, 465 (2016) (alterations, citations, and internal quotation marks omitted).

Our general statutes provide: "The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 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). Our rules of appellate procedure allow a written notice of appeal to be filed up to fourteen days after the entry of a judgment in a criminal case. N.C. R. App. P. 4(a)(2). The trial court retains jurisdiction until a notice of appeal has been given and fourteen days have passed. *State v. Lebeau*, 271 N.C. App. 111, 113-14, 843 S.E.2d 317, 319-20 (2020). The State may file a motion for appropriate relief for any error which may be asserted on appeal within ten days of the judgment. N.C. Gen. Stat. § 15A-1416 (2019).

Defendant asserts the trial court was divested of jurisdiction when he entered the written notice of appeal. On 25 March 2014, the State filed a MAR to amend the judgments within the statutory allowed ten-day period after the judgment. N.C. Gen. Stat. § 15A-1416(a)(2019). The trial court was not divested of jurisdiction until fourteen days until after it had ruled on the State's MAR. N.C. Gen. Stat. § 15A-1448(a)(2) (2019) (when a proper motion for appropriate relief is made, the case shall remain open for the taking of an appeal until the court has ruled on the motion). We hold the State timely filed the MAR within ten days of the judgment in accordance with N.C. Gen. Stat. §15A-1416. Further, we hold the trial court properly retained jurisdiction to issue its 10 April 2014 order on the State's MAR in accordance with N.C. Gen. Stat. §15A-1448(a)(2).

V. Defendant's Motion to Dismiss

[2] Defendant argues the trial court erred by denying his motion to dismiss because the State only proved two individual takings. The State's MAR and the trial court's order address the duplicity of the charges for the same acts. "A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place. In such instances the constitutional guarantee against double jeopardy prohibits multiple convictions." *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986) (internal citations omitted).

Defendant correctly asserts the multiple larceny convictions from each breaking and entering charge was improper. In the present case, the State correctly responds this issue is moot. A case is moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citations omitted).

The State's MAR requested the court to arrest judgment on the two duplicate larceny charges, leaving one remaining larceny charge for each felonious breaking and entering charge. The trial court properly arrested judgment on the duplicate larceny charges. Defendant's motion for insufficient evidence to prove multiple larceny charges is moot because the trial court's order on the State's MAR arrested judgment of the duplicate larceny charges.

"Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation omitted). "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *Id.* (citations omitted).

Defendant offers no argument regarding our mootness doctrine or any exceptions to the mootness doctrine. The relief Defendant seeks on appeal is the same relief previously granted to him in the trial court's order. Defendant's argument is dismissed as moot.

VI. Clerical Error

[3] The jury found Defendant guilty of habitual breaking and entering. The AOC judgment form provides a numerical list of the offenses with check boxes for each item. The form states: "The Court: . . . 3. adjudges the defendant to be a habitual felon to be sentenced[.]" The next line states "4. adjudges the defendant to be an habitual breaking and entering status offender, to be sentenced as a Class E felon." Form AOC-CR-601. The judgment form should have been marked as "4" in accordance with the jury finding and sentence, but instead it was marked as "3." The amended judgments have box "3" checked adjudicating Defendant to be a habitual felon. Although Defendant was properly sentenced as a Class E felon and not under the habitual felon provisions, the trial court should have checked box "4" to correspond with Defendant being a habitual breaking and entering status offender.

"A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790 (2015) (alterations, citations, and internal quotation marks omitted).

"When, on appeal, a clerical error is discovered in the trial court judgment or order, it is appropriate to remand the case to the trial court

for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and internal quotation marks omitted). The State concedes the judgment contained a clerical error. We remand for the correction of the clerical error on the judgment forms. *Id.*

VII. Conclusion

The trial court possessed jurisdiction to rule on the State's MAR under N.C. Gen. Stat. § 15A-1416. Defendant's argument on the sufficiency of the evidence is resolved and moot.

The trial court allowed the State's MAR and arrested judgment on the duplicate larceny charges. Defendant received a fair trial, free from prejudicial errors he preserved and argued.

We find no error in the jury's verdicts and sentences imposed by the trial court. We remand for the limited purpose of correcting the above described clerical error on each AOC form for the habitual breaking and entering. *It is so ordered.*

NO ERROR; REMAND FOR THE CORRECTION OF CLERICAL ERROR.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JAMES RYAN KELLIHER, Defendant

No. COA19-530

Filed 6 October 2020

1. Appeal and Error—preservation of issues—sentencing in murder trial—Eighth Amendment argument—argument implied at MAR hearing

Defendant preserved for appellate review under Appellate Rule 10 the issue of whether the imposition of two consecutive life without parole sentences—for murders committed when defendant was seventeen—violated the Eighth Amendment, where his request for a constitutionally proportional sentence at his MAR hearing, specifically, two concurrent sentences, sufficiently raised the constitutional

question. Even if the issue was not properly preserved, the constitutional importance of the issue raised, along with the severity of the punishment imposed, rendered the appeal reviewable under Appellate Rule 2.

2. Constitutional Law—Eighth Amendment—juvenile offender—de facto life without parole—recognized as unconstitutional

The Court of Appeals recognized that de facto life sentences without parole—i.e., sentences not explicitly designated as such—constitute unconstitutional sentences barred by the Eighth Amendment and U.S. Supreme Court precedent when applied to redeemable juveniles.

3. Constitutional Law—Eighth Amendment—juvenile offender—de facto life without parole—triggered by aggregate sentences

The Court of Appeals recognized that aggregated sentences have the potential to rise to the level of a de facto life sentence without parole which, when applied to redeemable juvenile defendants, would be unconstitutional pursuant to the Eighth Amendment and U.S. Supreme Court precedent.

4. Constitutional Law—Eighth Amendment—juvenile offender—consecutive life with parole sentences—de facto life without parole

The trial court's imposition of two consecutive life sentences with the possibility of parole on defendant—who was 17 years of age when he committed the crimes and was not found by the trial court to be irredeemable—constituted a de facto life sentence without the possibility of parole. The aggregated sentences violated defendant's constitutional right under the Eighth Amendment to be free from disproportionate punishment because they required him to serve a minimum of 50 years and therefore foreclosed a meaningful opportunity for him to be rehabilitated and reenter society. The matter was remanded for the trial court to enter two concurrent sentences of life with parole.

Appeal by Defendant from judgments entered 13 December 2018 by Judge Carl R. Fox in Cumberland County Superior Court. Heard in the Court of Appeals 18 February 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

McGEE, Chief Judge.

James Ryan Kelliher ("Defendant"), following a troubled early life marked by physical abuse and substance use, participated in a robbery at age 17 that ended with the murders of a man and his pregnant girlfriend. Defendant was sentenced to two consecutive mandatory punishments of life without parole ("LWOP"). Following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and the General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19A, *et seq.* in response, Defendant sought and received a resentencing hearing. At resentencing, the trial court determined that mitigating factors outweighed the circumstances of the offenses, concluded Defendant was neither "incorrigible" nor "irredeemable," *Graham v. Florida*, 560 U.S. 48, 72, 75, 176 L. Ed. 2d 825, 844, 846 (2010), and resentenced him to two consecutive sentences of life with parole. Under the terms of these sentences, Defendant will not be eligible for parole until he has served 50 years in prison, placing his earliest possible release at age 67. Defendant now appeals, arguing that the consecutive sentences constitute *de facto* LWOP in violation of the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution. We agree with Defendant and reverse and remand for resentencing.

I. FACTUAL AND PROCEDURAL HISTORY

A. Defendant's Early Life

Defendant was born in 1984 as the youngest of three siblings. Though he had good relationships with his mother and older sisters, Defendant's father physically abused him during his childhood. Defendant began abusing substances at an early age; he began drinking alcohol at age 13, was drinking daily and using marijuana at age 15, and was under the continuous influence of some combination of alcohol, marijuana, ecstasy, acid, psilocybin, and cocaine at age 17. Defendant attempted suicide on three occasions: first by overdose at age 10, again at age 17 on the night after the murders, and a final time while awaiting trial. He dropped out of school in the ninth grade, and exhibited the equivalent of a sixth grade education at age 17.

Defendant committed several thefts in his teenage years, breaking and entering into vehicles and stores after they had closed. On one occasion, Defendant stole from a video store with the help of someone named

Jerome Branch. Defendant, Mr. Branch, and Joshua Ballard would "hang out" together during this time, drinking alcohol and doing drugs.

B. The Murders

In the days before the murders involved in this appeal, Mr. Ballard suggested to Defendant that they rob a cocaine and marijuana dealer named Eric Carpenter. The two discussed the matter several times, with Mr. Ballard stating in later conversations that he believed he would have to kill Mr. Carpenter in order to avoid being identified as one of the perpetrators of the robbery. Defendant offered to give a firearm he had previously stolen from a pawn shop to Mr. Ballard for this purpose. They continued to plan the robbery over future phone calls, ultimately agreeing that Defendant would serve as the driver while Mr. Ballard killed and robbed Mr. Carpenter. Mr. Branch was later included in the planning, though he was never given a defined role. Defendant also told his friend Liz Perry about the plans to rob and murder Mr. Carpenter.

Mr. Ballard arranged to purchase drugs from Mr. Carpenter behind a local furniture store on 7 August 2001. On the night of the drug deal, Defendant drove Mr. Ballard and Mr. Branch to the furniture store in Mr. Ballard's truck. They met with Mr. Carpenter when they arrived, but they spotted a marked police vehicle in the parking lot and arranged with Mr. Carpenter to move the deal to his apartment. Carpenter's girlfriend, Kelsea Helton, also lived at the apartment, and was present when the group reconvened in the apartment parking lot a short time later. Following introductions, everyone went inside the apartment and began talking civilly. Ms. Helton left the apartment briefly; when she returned,[1] the conversation turned to her pregnancy. What exactly occurred after that conversation is disputed; what is certain, however, is that when it came time to carry out the robbery, Defendant, Mr. Ballard, or both shot and killed Mr. Carpenter and Ms. Helton.

Defendant, Mr. Branch, and Mr. Ballard met in the parking lot after the shooting and split the drugs they had stolen from the apartment. The three met with another group, which included Defendant's friend, Ms. Perry, at a local park where they drank cognac and smoked marijuana laced with cocaine. At some point during the evening, Defendant told Ms. Perry about the robbery and murders. Defendant, Mr. Ballard and Mr. Branch were later arrested for the murders.

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1. Ms. Helton's father, in his victim impact statement, said Ms. Helton left the apartment to call her sister to finalize plans to vacate Mr. Carpenter's apartment and move in with her sister later that evening because Ms. Helton felt there were "some things that [were] happening [she] d[id]n't like."

C. Defendant's Plea and Ballard's Trials

Defendant was indicted on two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon by a grand jury on 25 March 2002. He pleaded guilty to all charges in 2004 and was sentenced to two consecutive terms of LWOP for the murders and concurrent terms of years for the robbery and conspiracy convictions.[2] Mr. Ballard was also charged with two counts of first-degree murder but pleaded not guilty.

Although his plea agreement did not require it, Defendant testified for the State at Mr. Ballard's trial,[3] as did Ms. Perry and a friend of Mr. Ballard, Lisa Boliaris. Defendant testified that he did not shoot either Mr. Carpenter or Ms. Helton, instead stating that Mr. Ballard shot both victims. Ms. Perry offered a different account, stating that Defendant had admitted to killing the couple on the night of the murders. Ms. Boliaris gave yet another recollection of events, testifying that Mr. Ballard told her he shot Mr. Carpenter while Defendant killed Ms. Helton.[4]

Mr. Ballard was convicted of the killings at the conclusion of his trial. However, his convictions were set aside on appeal and Mr. Ballard was granted a new trial. *Ballard*, 180 N.C. App. at 646, 638 S.E.2d at 481. Defendant again testified for the State on retrial, but Mr. Ballard was ultimately acquitted. The district attorney who secured Defendant's plea and prosecuted both of Mr. Ballard's trials later wrote a letter to Defendant's counsel stating that he believed Defendant "testified truthfully in both trials."

D. Defendant's Resentencing

Defendant filed a motion for appropriate relief ("MAR") in June 2013. In that motion, Defendant asserted that: (1) the United States Supreme Court's decision in *Miller* rendered his LWOP sentences unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution; (2) resentencing was required under the recently enacted N.C. Gen. Stat.

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2. Defendant has since served the terms for robbery and conspiracy.

3. Mr. Branch pled guilty to accessory after the fact and was sentenced to a six-to-eight-year term of imprisonment. He did not testify against Mr. Ballard.

4. A more detailed rendition of this testimony is available in this Court's opinion in *State v. Ballard*, 180 N.C. App. 637, 638 S.E.2d 474 (2006).

§ 15A-1340.19B;[5] and (3) life with the possibility of parole was the appropriate sentence. The MAR was denied by the trial court on the grounds that *Miller* and N.C. Gen. Stat. § 15A-1340.19B did not apply retroactively. That order was subsequently reversed by order of this Court, and Defendant received a resentencing hearing on 13 December 2018.

At the resentencing hearing, Defendant and the State consented to a recitation of the facts surrounding the murders consistent with the above history. The State called the fathers of Mr. Carpenter and Ms. Helton to give victim impact statements. Both testified to the indescribable hardship of losing a child—and future grandchild—and the enduring impact on their families. Each expressed their love for their children, their dismay at the loss of life, the sadness of lost opportunities to raise their grandchild, and the lasting emotional trauma inflicted on their families. The State rested its presentation following their testimony.

Defendant presented the testimony of several witnesses in mitigation. A clinical and forensic psychologist who had examined Defendant in January and February of 2019 testified that Defendant suffered from post-traumatic stress disorder as a result of the murders. He further reported that although Defendant had a history of antisocial behavior, Defendant had ceased to exhibit those traits since he had been imprisoned in 2004. The psychologist's report detailed Defendant's childhood physical and drug abuse, his shortened education, and his efforts at self-improvement while in prison. Specifically, the report disclosed that Defendant had earned his GED and was pursuing a bachelor's degree in ministry from Southeastern Baptist Theological Seminary ("the Seminary"). Based on Defendant's history, current diagnoses, and efforts to better himself, the psychologist determined that Defendant presented a low risk of future violence and was neither incorrigible nor irredeemable. This low risk aligned with a separate assessment conducted by the Department of Public Safety.

Defendant offered additional testimony from the director of prison programs at the Seminary. He testified that Defendant was accepted into the four-year seminary program after a rigorous application process, describing him as an active and very good student. Another witness

5. Defendant's MAR sought relief under subsection (a)(1) of the statute, which applies to juvenile felony murder convictions. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2019). Defendant was ultimately resentenced pursuant to subsection (a)(2), which applies to all other juvenile first-degree murder convictions. N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2019). Defendant did not argue the applicability of subsection (a)(1) at resentencing, conceded that this was not a felony murder case before the trial court, and does not raise the issue on appeal.

from the Seminary testified that Defendant assisted other students, was professional in his conduct, and sought to minister to inmates outside the program who were struggling with incarceration. A pastor from Redeemer Lutheran Church in Fayetteville also testified, stating he had visited with Defendant every week since his arrest and had seen a remarkable change: "[T]oday unfortunately [Defendant] makes me ashamed of my own spirituality. . . . [H]e is the one who sometimes comforts me instead of vice versa. . . . He's the one who has consoled me. So, I enjoy immensely our visits because I think frankly I get more out of it than he does."

Defendant also tendered documentary evidence in support of mitigation, including his record of two nonviolent infractions while in prison and the assessments of low risk completed by the Department of Public Safety and Defendant's psychologist. He concluded his presentation of evidence by colloquy, telling the trial court that he knew he had "failed to do anything resembling the right thing" and thought about the victims everyday with sorrow and regret. He stated that although he knew he could never undo the pain caused, he sought to improve himself so that he might help others "as harm reduction." He concluded by telling the court he "wish[ed] more than anything that [he] could somehow do something to change the events from August 7, 2001."

In closing arguments, the State asked the trial court to sentence Defendant to either LWOP, or to consecutive sentences of life with the possibility of parole as an alternative. Defendant argued for concurrent sentences of life with the possibility of parole, requesting that the Department of Correction have the opportunity to review Defendant's eligibility for parole at 25 years rather than 50 years. The trial court then announced its order, which included thirteen findings in mitigation based on Defendant's troubled early life, his immaturity and drug addictions at the time of the offenses, and the substantial evidence of rehabilitation. Based on these findings, the trial court concluded that "[t]he mitigating factors and other factors and circumstances present outweigh all the circumstances of the offense[,]" and "Defendant is neither incorrigible nor irredeemable." The trial court then sentenced Defendant to two consecutive sentences of life with the possibility of parole. Defendant appeals.

II. ANALYSIS

Defendant presents one principal argument on appeal: Defendant's two consecutive sentences, considered in the aggregate, constitute

a disproportionate *de facto* punishment of LWOP in violation of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. More specifically, he contends that because he is a juvenile defendant and is neither incorrigible nor irredeemable, this *de facto* LWOP sentence violates *Miller* and related United States Supreme Court precedents, as determined by several state and federal courts that have considered the question. The State, in response, contends that Defendant failed to preserve this issue and, in the alternative, asks us to follow a different line of state and federal decisions that have rejected arguments similar to Defendant's. We first address the State's preservation argument before reaching the merits of Defendant's appeal.

A. Preservation

[1] Our Supreme Court has made clear that the North Carolina Rules of Appellate Procedure require constitutional sentencing errors be raised before the trial court in order to be preserved for appellate review. *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). However, a party is only required to "stat[e] 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) (2020) (emphasis added), and our Supreme Court has held constitutional arguments "implicitly presented to the trial court" are preserved for review. *State v. Murphy*, 342 N.C. 813, 822, 467 S.E.2d 428, 433 (1996). Defendant insists that his argument was preserved on appeal under these precedents because: (1) his MAR sought a sentence that comported with the Eighth Amendment, *Miller*, and the North Carolina Constitution; and (2) his counsel argued for concurrent sentences based on *Miller* at the resentencing hearing. Reviewing the transcript from the resentencing hearing, Defendant's counsel did argue that concurrent sentences were appropriate, given the alternative would prohibit parole for 50 years:

> I would just say this as far as the punishment is concerned. I'm 68, if you sentence me to 50 years, I'll do the best I can but I'm going to leave most of that time on the floor. If you sentence me to 25, I may make it.
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> If you sentence a 17-year old to 25 years, he'll do 100 percent of that sentence probably. But at the end of 25 years if he's serving consecutive sentences, he doesn't get out.
>
> . . . .

> And then at some point possibly he'll be paper paroled[6] from the first one and get to serve a minimum of 25 more years before he's reviewed again and then every two years.
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> . . . .
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> Now he's going to be in prison for a while. He's only done 17 years. But we're asking the Court to put it in the hands of Department of Corrections [sic] to let them review him as they have scrutinized his life for 17 years and sentence him to life with parole and run the sentences concurrently.

Construed together with his MAR, we hold that Defendant has, at a minimum, raised an implied argument that two concurrent sentences of life—with the possibility of parole after 25 years, as opposed to 50 years—are proportional punishment under the Eighth Amendment, *Miller*, and the North Carolina Constitution. Defendant has therefore preserved his constitutional argument for review.

Although we hold Defendant has preserved his argument, we note that he has requested this Court use its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and set aside the requirements of Rule 10. *See* N.C. R. App. P. 2 (2020) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements of any of these rules in a case pending before it[.]"). Assuming *arguendo* that Defendant's constitutional question was not preserved under Rule 10, a discretionary implementation of Rule 2 is warranted under the circumstances. Our Supreme Court has employed the Rule "on several occasions to review issues of constitutional importance." *State v. Mobley*, 200 N.C. App. 570, 573, 684 S.E.2d 508, 510 (2009) (first citing *State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987); and then citing *State v. Wiley*, 355 N.C. 592, 565

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6. We note that the practice of issuing "paper parole" is no longer permitted under North Carolina law. *See Robbins v. Freeman*, 127 N.C. App. 162, 165, 487 S.E.2d 771, 773 (1997) ("[W]e can find no statutory authority for [the Department of Correction's and Parole Commission's] practice of issuing 'paper paroles.' "), *aff'd per curiam*, 347 N.C. 664, 496 S.E.2d 375 (1998). We thus understand counsel's argument as asserting that parole is not available under two consecutive sentences for life with the possibility parole until 50 years into a defendant's sentence. Both Defendant and the State agree on appeal that Defendant must serve 50 years before being eligible for parole under the consecutive sentences imposed in this case.

S.E.2d 22 (2002)). Given that multiple state appellate courts[7] and federal courts of appeal[8] have addressed the constitutional issues presented here—and there are at least four other similar cases presently pending before this Court[9]—Defendant's appeal is certainly of "constitutional importance." *Mobley*, 200 N.C. App. at 573, 684 S.E.2d at 510 (citations omitted). Furthermore, the State's alleged violation of the United States Constitution in resentencing implicates a substantial right supporting application of Rule 2. *See State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (affirming this Court's discretionary invocation of Rule 2 where the trial court "committed error relating to a substantial right," namely the right to be free from unreasonable searches and seizures under the Fourth Amendment). Our Supreme Court has invoked Rule 2 "more frequently in the criminal context when severe punishments were imposed[,]" lending further support to its application here. *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (first citing *State v. Moore*, 335 N.C. 567, 612, 440 S.E.2d 797, 823 (1994); then citing *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982); then citing *State v. Poplin*, 304 N.C. 185, 186-87, 282 S.E.2d 420, 421 (1981); and then citing *State v. Adams*, 298 N.C. 802, 804, 260 S.E.2d 431, 432 (1979)). We therefore conclude that, even if Defendant failed to preserve his constitutional argument through valid objection under Rule 10, review of his appeal is appropriate pursuant to Rule 2.

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7. *See Pedroza v. State*, 291 So.3d 541 (Fla. 2020); *State v. Slocumb*, 827 S.E.2d 148 (S.C. 2019); *Carter v. State*, 192 A.3d 695 (Md. 2018); *Veal v. State*, 810 S.E.2d 127 (Ga.), *cert. denied*, ____ U.S. ____, 139 S. Ct. 320, 202 L. Ed. 2d 218 (2018); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018); *Kinkel v. Persson*, 417 P.3d 401 (Or. 2018), *cert. denied*, ____ U.S. ____, 139 S. Ct. 789, 202 L. Ed. 2d 585 (2019); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017), *cert. denied*, ____ U.S. ____, 138 S. Ct. 641, 199 L. Ed. 2d 544 (2018); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017), *cert. denied*, ____ U.S. ____, 138 S. Ct. 640, 199 L. Ed. 2d 543 (2018); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017); *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017); *State v. Zuber*, 152 A.3d 197, (N.J. 2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017) (en banc); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State ex rel. Morgan v. State*, 217 So.3d 266 (La. 2016); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031 (Conn. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012).

8. *See United States v. Grant*, 887 F.3d 131, *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3rd Cir. 2018); *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Budder v. Addison*, 851 F.3d 1047 (10th Cir.); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

9. *See State v. Anderson*, No. COA19-841; *State v. Slade*, No. COA19-969; *State v. Conner*, No. COA19-1087; *State v. Brimmer*, No. COA19-1103.

B. The Eighth Amendment and Juveniles

Resolution of this appeal requires consideration of the Eighth Amendment as applied to juveniles under four decisions of the Supreme Court of the United States: *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ____ U.S. ____, 193 L. Ed. 2d 599 (2016).

1. *Roper* Prohibits Execution of Juveniles

In the first of these cases, the Supreme Court considered "whether it is permissible under the Eighth and Fourteenth Amendments . . . to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." *Roper*, 543 U.S. at 555-56, 161 L. Ed. 2d at 13. It examined the question first by conducting "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question[,]" before "determinin[ing], in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." *Id.* at 564, 193 L. Ed. 2d at 18. The Supreme Court ultimately answered the question in the affirmative, issuing a categorical holding that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578, 161 L. Ed. 2d at 28.

In conducting the first step of its two-pronged examination, the Supreme Court observed that, in the years leading up to the case, there was a "significant" and "consistent" trend away from the execution of juveniles amongst the States, *id.* at 565-66, 161 L. Ed. 2d at 19-20, leading to the conclusion that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18[.]" *Id.* at 568, 161 L. Ed. 2d at 21. It then turned to the second step: whether the Eighth Amendment compelled a categorical prohibition against the execution of juveniles. *Id.* The majority found the answer by recognizing that "the death penalty is reserved for a narrow category of crimes and offenders[,]" *id.* at 568-69, 161 L. Ed. 2d at 21, and then discerning that, because of their unique developmental characteristics, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569, 161 L. Ed. 2d at 21. Once these precepts were established, the Supreme Court concluded that "the penological justifications for the death penalty apply to them with lesser force than to adults[,]" *id.* at 571, 161 L. Ed. 2d. at 23, meaning that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to

attain a mature understanding of his own humanity." *Id.* at 573-74, 161 L. Ed. 2d at 24.

Roper makes clear that its logic is grounded in the fundamental recognition that juveniles are of a special character for the purposes of the Eighth Amendment. In examining juveniles as a class of criminal offenders, the Supreme Court observed that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 570, 161 L. Ed. 2d at 21. Compared to adults, juveniles possess " '[a] lack of maturity and an underdeveloped sense of responsibility . . . . These qualities often result in impetuous and ill-considered actions and decisions.' " *Id.* (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 125 L. Ed. 2d 290, 306 (1993)) (additional citation omitted). Such immaturity "means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' " *Id.* at 570, 161 L. Ed. 2d at 22 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 101 L. Ed. 2d 702, 719 (1988) (plurality opinion)). Juveniles are likewise "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . [J]uveniles have less control, or less experience with control, over their own environment," *id.* at 569, 161 L. Ed. 2d at 22 (citations omitted), providing them "a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570, 161 L. Ed. 2d at 22 (citation omitted). Lastly, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* (citation omitted). "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* This is no less true of juveniles guilty of "a heinous crime." *Id.* On the whole, juveniles are thus of "diminished culpability[.]" *Id.* at 571, 161 L. Ed. 2d at 23.

These unique qualities and resultant lesser culpability undercut the penological justifications behind the death penalty. *Id.* Death as retribution is disproportionate:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

Id. Deterrence does not even the scales:

> [I]t is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . . [T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

Id. at 571-72, 161 L. Ed. 2d at 23. The Supreme Court would later examine exactly when the "severe sanction" of LWOP may be imposed on juveniles in *Graham*.

2. *Graham* Prohibits LWOP for Juveniles in Non-Homicide Cases

In *Graham*, the Supreme Court extended the categorical rationale in *Roper* to hold that juveniles may not be sentenced to LWOP for non-homicide offenses under the Eighth Amendment. 560 U.S. at 61-62, 74, 176 L. Ed. 2d at 837, 845. Taking the same two-pronged approach, the majority first determined that, in light of actual sentencing practices rather than strict consideration of legislative prohibitions, "life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." *Id.* at 66, 176 L. Ed. 2d at 840. Thus, though the practice was permitted in many states, it was nonetheless "exceedingly rare. And 'it is fair to say that a national consensus has developed against it.' " *Id.* at 67, 176 L. Ed. 2d at 841 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316, 153 L. Ed. 2d 335, 347 (2002)).

At the second step, the *Graham* Court took *Roper*'s observations about juveniles as foundational precepts:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S., at 569. As compared to adults, juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.*, at 569–570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare

> juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson*, *supra*, at 835 (plurality opinion).

Id. at 68, 176 L. Ed. 2d at 841. The Supreme Court then deemed it "relevant to consider next the nature of the offenses to which this harsh penalty [of LWOP] might apply[,]" *id.* at 68-69, 176 L. Ed. 2d at 842, and determined that not only are juveniles fundamentally less culpable, but, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* at 69, 176 L. Ed. 2d at 842.

The Supreme Court turned next to the nature of the punishment. "[L]ife without parole is the second most severe penalty permitted by law." *Id.* (citation and quotation marks omitted). LWOP sentences thus:

> share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration[.] . . . [T]his sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit . . . he will remain in prison for the rest of his days.

Id. at 69-70, 176 L. Ed. 2d at 842 (citation and quotation marks omitted). Such lifelong permanence "is . . . especially harsh . . . for a juvenile. . . . A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." *Id.* at 70-71, 176 L. Ed. 2d at 843 (citations omitted).

As a final consideration, the Supreme Court examined the penological underpinnings as applied to non-homicide juvenile defendants. In rejecting retribution and deterrence as valid objectives, *id.* at 71-72, 176 L. Ed. 2d. at 843-44, the majority relied extensively on *Roper*, reiterating that juveniles' unique qualities render them less culpable and "less likely to take a possible punishment into consideration when making decisions." *Id.* at 72, 176 L. Ed. 2d at 844. Incapacitation, too, was an inadequate justification for related reasons; juveniles are malleable, yet

"[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. . . . [I]ncorrigibility is inconsistent with youth. . . . [LWOP] improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 72-73, 176 L. Ed. 2d at 844-45 (citation and quotation marks omitted). The Supreme Court further held rehabilitation, a fourth penological objective, is entirely irreconcilable with LWOP sentences. *Id.* at 74, 176 L. Ed. 2d at 845.

Absent any adequate penological theory, and in light of "the limited culpability of juvenile homicide offenders; and the severity of life without parole sentences[,]" the Supreme Court concluded that a categorical bar akin to *Roper* was required by the Eighth Amendment. *Id.* It further stressed that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [such] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 176 L. Ed. 2d at 845-46.

3. *Miller* Prohibits Mandatory LWOP for Juvenile Homicide Defendants

The Supreme Court, relying on *Roper* and *Graham*, held in *Miller* that mandatory LWOP for a juvenile defendant convicted of homicide crimes is a disproportionate punishment under the Eighth Amendment. 567 U.S. at 465, 183 L. Ed. 2d at 414-15. Its ruling was derived from "two strands of precedent reflecting our concern with proportionate punishment." *Id.* at 470, 183 L. Ed. 2d at 417. The first, which included *Roper* and *Graham*, announced categorical prohibitions against certain sentences "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* (citation omitted). The second line "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 470, 183 L. Ed. 2d at 418 (citations omitted). Taken together, "these two lines of precedent lead[] to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.*

The Court's analysis in *Miller* began with *Roper* and *Graham*, which "establish that children are constitutionally different from adults for purposes of sentencing." *Id.* at 471, 183 L. Ed. 2d at 418. Reiterating the three differences between adult and juvenile defendants identified in those two cases—immaturity, vulnerability to influence and lack of

control, and malleability—as observations based "on common sense . . . [and] science and social science[,]" *id.* at 471, 183 L. Ed. 2d at 418-19, the Court again acknowledged that "those findings . . . both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id.* at 472, 183 L. Ed. 2d at 419 (citations and quotation marks omitted). It once more stated that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* Also, though it acknowledged *Graham*'s categorical holding applied only to non-homicide offenses, the Supreme Court clarified that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* at 473, 183 L. Ed. 2d at 420.

In considering the penalty itself, *Miller* pulled a flat parallel out of *Graham*: the " '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment.' " *Id.* at 475, 183 L. Ed. 2d at 421 (alteration in original) (quoting *Graham*, 560 U.S. at 89, 176 L. Ed. 2d at 856 (Roberts, C.J., concurring in the judgment)). The Supreme Court thus turned to its line of death penalty cases, which require individualized sentencing "so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 475-76, 183 L. Ed. 2d at 421 (citations omitted). When that line is considered "[i]n light of *Graham*'s reasoning, th[o]se decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders." *Id.* at 476, 183 L. Ed. 2d at 422. Mandatory LWOP sentences for juvenile homicide offenders thus ran afoul of both lines as disproportionate even though such sentences did not fit squarely within their express holdings. *Id.* at 479, 183 L. Ed. 2d at 424.

4. *Montgomery: Miller* Is Substantive Rule of Retroactive Effect

The core question in *Montgomery* was whether *Miller*'s holding announced a substantive rule of retroactive effect. ___ U.S. at ___, 193 L. Ed. 2d at 610. In concluding that it did, the Supreme Court clarified the applicability of *Roper*, *Graham*, and *Miller* in several ways pertinent to this appeal. First, it explained "[t]he 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include *Graham* . . . and *Roper*." *Montgomery*, ___ U.S. at ___, 193 L. ed. 2d

at 618 (citations omitted). Second, and of particular importance to this appeal, it explained that *Miller* announced a categorical prohibition against LWOP sentences for juvenile homicide defendants who are not "irreparably corrupt":

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id.*, [567 U.S. at 472], 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407, 419. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " *Id.*, at [479], 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper*, 543 U.S., at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at [479-80], 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper*, *supra*, at 573, 126 S. Ct. 1183, 161 L. Ed. 2d 1), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry*, 492 U.S., at 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256. As a result, *Miller* announced a substantive rule of constitutional law.

Id. at ___, 193 L. Ed. 2d at 619-20. Thus, *Montgomery*, as a distillation of *Roper*, *Graham*, and *Miller*, made clear that juvenile homicide offenders who are neither incorrigible nor irreparably corrupt, are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of LWOP sentences under the Eighth Amendment.

C. Defendant's Sentence and De Facto *LWOP*

Defendant's argument asks us to apply the above principle from *Miller*, derived from *Roper* and *Graham* and plainly stated in *Montgomery*, to hold that Defendant's consecutive sentences of life with parole constitute a *de facto* LWOP sentence in violation of those precedents and the Eighth Amendment and Article I, Section 27 of the

North Carolina Constitution.[10] Specifically, he contends that because he will not be eligible for parole until age 67, he will not be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 569 U.S. at 75, 176 L. Ed. 2d. at 846, and will suffer "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 79, 176 L. Ed. 2d at 848. *See also Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424 (quoting the first excerpt from *Graham*). His ultimate argument thus consists of three constituent questions that do not appear to have been answered by the courts of this State and have caused concern in other jurisdictions: (1) are *de facto* LWOP sentences, as opposed to sentences expressly named as such, cognizable and barred as cruel and unusual when applied to redeemable juveniles under the Eighth Amendment; (2) can aggregated punishments, *i.e.* multiple consecutive sentences totaling a lengthy term of years, amount to a *de facto* LWOP sentence; and (3) must a *de facto* LWOP punishment obviously exceed a juvenile defendant's natural life, or does some term of years that may (or may not) fall short of the juvenile's full lifespan nonetheless constitute an impermissible *de facto* LWOP sentence?

1. *De Facto* LWOP Sentences

[2] The question of whether *de facto* LWOP sentences are cognizable as a cruel and unusual punishment barred under *Graham* and *Miller* has been answered by a sizeable number of state appellate courts. Of those identified by this Court as having addressed the issue, these jurisdictions predictably fall into two camps: (1) those that recognize *de facto* LWOP sentences as cognizable and may warrant relief under the Eighth Amendment;[11] and (2) those that have thus far decided not to

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10. Our Supreme Court "historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998). Our analysis therefore applies equally to both.

11. *See People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding consecutive sentences totaling 110-years-to-life was *de facto* LWOP sentence under *Graham*); *State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding a life sentence with parole eligibility after 60 years was a *de facto* LWOP sentence in violation of *Miller*); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (holding consecutive sentences, including a life sentence for homicide, with parole eligibility after 45 years was *de facto* LWOP controlled by *Miller*); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047-48 (Conn. 2015) (holding a juvenile's 50 year sentence without possibility of parole was a *de facto* LWOP sentence controlled by *Miller*); *Henry v. State*, 175 So.3d 675, 679-80 (Fla. 2015) (holding 90 year sentence for non-homicide juvenile defendant was unconstitutional under *Graham*); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (holding aggregate sentences for non-homicide offenses placing parole eligibility at 100 years are a *de facto* LWOP sentence in violation of *Graham*);

do so.[12] A clear majority of these states count themselves among the

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People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) (holding mandatory 97 year sentence with parole eligibility after 89 years is *de facto* LWOP and unconstitutional under *Miller*); *State ex rel. Morgan v. State*, 217 So.3d 266, 271 (La. 2016) ("We . . . construe the defendant's 99-year sentence as an effective life sentence, illegal under *Graham*."); *State v. Moore*, 76 N.E.3d 1127, 1140-41 (Ohio 2016) (holding consecutive terms-of-years sentences for non-homicide crimes with parole eligibility after 77 years is an unconstitutional *de facto* LWOP sentence under *Graham*); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55, 63-64 (Mo. 2017) (holding mandatory concurrent sentences with parole eligibility after 50 years constituted a *de facto* LWOP sentence subject to *Miller*'s sentencing requirements); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017) (holding *de facto* LWOP sentences are subject to constitutional protections of *Graham*, *Miller*, and *Montgomery*); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (holding "lengthy term-of-years sentences that amount to life without parole" are controlled by *Graham* and *Miller*); *State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017) (en banc) ("We now join the majority of jurisdictions that have considered the question and hold that *Miller* does apply to juvenile homicide offenders facing de facto life-without-parole sentences."); *Commonwealth v. Foust*, 180 A.3d 416, 431 (Pa. 2018) (holding a term-of-years sentence constituting a *de facto* LWOP sentence requires sentencing protections of *Miller*); *Carter v. State*, 192 A.3d 695, 735 (Md. 2018) (100-year aggregate punishment for non-homicide crimes with parole eligibility after 50 years was *de facto* LWOP sentence in violation of *Graham*); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018) (holding *Roper*, *Graham*, and *Miller* applied to term-of-years sentences); *White v. Premo*, 443 P.3d 597, 604-05 (Or. 2019) (holding juvenile's 800-month sentence for murder with parole eligibility at 54 years was *de facto* LWOP sentence subject to *Miller* protections).

12. Several state courts appear to have held that *de facto* LWOP sentences are not cognizable under any circumstances. *See State v. Kasic*, 265 P.3d 410, 414 (Ariz. Ct. App. 2011) (holding *Graham* inapplicable to term-of-years sentences); *Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014) (holding *Graham* and *Miller* do not apply to a "nonlife sentence"); *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) (refusing to recognize *de facto* LWOP sentences in part because "[l]ife without parole is a specific sentence"); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (refusing to apply *Miller* and *Montgomery* to any sentences "other than LWOP"). Another state court appears to have ignored the argument outright. *See Diamond v. State*, 419 S.W.3d 435, 441 (Tex. Ct. App. 2012) (upholding a 99-year sentence imposed on a juvenile without discussing *Graham* despite counsel's argument raising the issue). At least two states seem to have suggested *de facto* LWOP sentences may exist but have yet to hold as such. *See State v. Quevedo*, 947 N.W.2d 402, ___ (S.D. 2020) ("[O]ur cases have seemed to suggest that a juvenile sentence involving a lengthy term of years and the lack of a meaningful opportunity for release could constitute a de facto life sentence and transgress *Graham*'s categorical Eighth Amendment prohibition on life without parole[.]" (citations omitted)); *Mason v. State*, 235 So.3d 129, 134 (Miss. 2017) (suggesting the defendant may have shown a *de facto* life sentence in violation of *Miller* and *Montgomery* had he presented evidence in support, but failure to do so and concession that his life expectancy would extend beyond parole eligibility defeated claim). Another grouping of states has elected not to afford relief under a *de facto* LWOP theory by declining to answer whether aggregated sentences and/or term-of-years sentences violate the Eighth Amendment absent a Supreme Court decision to that express effect. *See State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (declining to recognize aggregated term-of-years sentences as *de facto* LWOP sentences "absent further guidance from the [Supreme] Court" on both aggregation and recognition of *de facto* LWOP); *State v. Slocumb*, 827 S.E.2d 148, 152 (S.C. 2019) (recognizing that *de facto* LWOP punishments, whether as a single sentence or aggregated punishment, exist and may violate *Graham*

former.[13] We see considerable reason to join the majority.

We, like many states in that majority, decline to stand behind the simple formalism that a sufficiently lengthy term-of-years sentence cannot be a sentence of LWOP because it does not bear the name and terminates at a date certain. Rejection of the proposition is, first, a simple "matter of common sense . . . . Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." *Carter*, 192 A.3d at 725. As was noted in *Miller*, "[t]he Eighth Amendment's prohibition of cruel and unusual punishment '*guarantees* individuals the right not to be subjected to excessive sanctions[,]' " 567 U.S. at 469, 183 L. Ed. 2d at 417 (emphasis added) (quoting *Roper*, 543 U.S. at 560, 161 L. Ed. 2d at 16), and allowing sentencers to so easily avoid its application would render it no guarantee at all. Any holding to the contrary ignores the fact that *Graham* and *Miller* declared cruel and unusual those punishments imposed against redeemable juveniles that deprive them of " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424 (quoting *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 846). Stated differently, "[t]he court in *Graham* was not barring a terminology—'life without parole'—but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." *Moore*, 76 N.E.3d at 1139-40.

Many of the states that have declined to afford relief to juveniles sentenced to *de facto* LWOP sentences have refused to do so under the rationale that the Supreme Court's decisions in *Graham* and *Miller* were limited to the specific LWOP sentences considered in those cases. *See*,

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and *Miller*, but declining to so hold "without further input from the Supreme Court"). Still another category has held that aggregated sentences cannot constitute a *de facto* LWOP sentence and resolved the defendants' appeals on that ground without affirmatively stating whether *de facto* LWOP sentences are otherwise cognizable. *See Martinez v. State*, 442 P.3d 154, 156-57 (Okla. Crim. App. 2019) (holding *Graham*, *Miller*, and *Montgomery* do not apply to aggregated sentences and concluding, without any discussion, that parole eligibility at age 79 offers a "meaningful opportunity to obtain release on parole during [the defendant's] lifetime"); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 926 (Va. 2016) (declining to grant relief under *Graham* to aggregated term-of-years sentence without addressing single term-of-years sentences that exceed natural life).

13. We note that, in *Slocumb*, the South Carolina Supreme Court stated that "jurisdictions around the country are approximately evenly split" on whether to recognize *de facto* LWOP sentences under *Graham* or *Miller*. 827 S.E.2d at 157 n. 17.

e.g., *Lucero*, 394 P.3d at 1132 ("*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense." (citations omitted)). However, such holdings ignore *Graham*'s own caution against denying the true reality of the actual punishment imposed on a juvenile when determining whether it violates the Eighth Amendment. In pointing out that adults and juveniles who receive the same sentence of LWOP do not, in fact, receive the same punishment, the majority in *Graham* stated "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. *This reality cannot be ignored.*" 560 U.S. at 70-71, 176 L. Ed. 2d at 843 (emphasis added). To hold that the factual equivalent of the punishments prohibited by *Graham* and *Miller* is not actually prohibited by those decisions is to deny the factual reality. *Roper*, *Graham*, and *Miller* are all concerned with "imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472, 183 L. Ed. 2d at 419. A *de jure* LWOP sentence is certainly as "harsh" as its functional equivalent.

The straightforward applicability of *Graham*'s reasoning to *de facto* LWOP sentences is clear from the reasoning itself. Its observations about juveniles' immaturity, underdeveloped self-control, and capacity for change are true independent of any sentence. That those characteristics undermined the punitive justifications of LWOP is thus equally true of *de facto* LWOP sentences. *See Carter*, 192 A.3d at 726 ("The same [penological] test [from *Graham*] applied to a sentence of a lengthy term of years without eligibility for parole yields the same conclusion [as *Graham*]."). Retribution concerns must be measured against the culpability of defendants, and, because juveniles—"even when they commit terrible crimes"—are inherently less culpable regardless of the sentence imposed, " 'the case for retribution is not as strong with a minor as with an adult.' " *Miller*, 567 U.S. at 472, 183 L. Ed. 2d at 419 (quoting *Graham*, 560 U.S. at 71, 176 L. Ed. 2d at 883). A *de facto* LWOP sentence is no more of a deterrent to a juvenile than its *de jure* equivalent because, in either case, "their immaturity, recklessness, and impetuosity[ ]make them less likely to consider potential punishment." *Id.* (citing *Graham*, 560 U.S. at 72, 176 L. Ed. 2d at 844). *De jure* and *de facto* LWOP sentences are also equally incapacitating; if incapacitation is inadequate to justify the former, *id.* at 472-73, 183 L. Ed. 2d at 419, then logic dictates it is inadequate for the latter. This same logic applies to rehabilitative concerns that are in irreconcilable conflict with LWOP sentences. *Id.* at 473, 183 L. Ed. 2d at 419-20. In sum, "none of what [*Graham*] said about children . . . is crime-specific. . . . So *Graham*'s reasoning implicates *any*

life-without-parole sentence imposed on a juvenile[.]" *Id.* at 473, 183 L. Ed. 2d at 420 (emphasis added).

The other authorities relied upon by those state courts that do not recognize *de facto* LWOP challenges do not dissuade us of this holding. Several rely on language from Justice Alito's dissent in *Graham* for the proposition that it was a narrow decision. *See, e.g.*, *Vasquez*, 781 S.E.2d at 925 (" 'Nothing in the Court's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.' " (quoting *Graham*, 560 U.S. at 124, 176 L. Ed. 2d at 877 (Alito, J., dissenting))). However, as other Supreme Court Justices have noted, a dissent from a singular justice is not binding on the application of Supreme Court precedent. *Georgia v. Public.Resource.Org, Inc.*, ___ U.S. ___, ___, 206 L. Ed. 2d 732, 748 (2020) ("As every judge learns the hard way, 'comments in [a] dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.' " (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177 n. 10, 66 L. Ed. 2d 368, 377 n. 10 (1980)). *See also Moore*, 76 N.E.3d at 1157-58 (O'Connor, C.J., concurring) (observing Justice Alito's dissent in *Graham* is not controlling in the application of the majority's decision). Justice Thomas's observation in a footnote to his dissent in *Graham* that the majority did not include term-of-years sentences in calculating how many juveniles nationwide had been sentenced to life without parole is similarly unpersuasive. 560 U.S. at 113 n. 11, 176 L. Ed. 2d at 870 n. 11 (Thomas, J., dissenting). We note that a narrow reading of both *Roper* and *Graham* was expressly rejected in *Miller*; there, the Arkansas Supreme Court denied a defendant's Eighth Amendment challenge on the grounds that "*Roper* and *Graham* were 'narrowly tailored' to their contexts," and the Supreme Court reversed. 567 U.S. at 467, 183 L. Ed. 2d at 416. Our Supreme Court has also instructed this Court that we must "examine each of defendant's [Eighth Amendment and analogous state Constitution] contentions *in light of the general principles enunciated* by [the North Carolina Supreme] Court and the Supreme Court [of the United States] guiding cruel and unusual punishment analysis." *Green*, 348 N.C. at 603, 502 S.E.2d at 828 (emphasis added). The "general principles enunciated" in *Graham*, *Miller*, and *Montgomery* are, as explained above, applicable to *de facto* LWOP sentences even if the specific facts of those decisions did not involve them.

Those states in the minority of jurisdictions have likewise relied on federal court decisions holding *Graham* and *Miller* do not apply to term-of-years sentences. *See, e.g.*, *Vasquez*, 781 S.E.2d at 926 (relying on *Bunch v. Smith*, 685 F.3d 546 (6th. Cir. 2012)). *Bunch*, however,

dealt with *Graham* in a specific context: whether, under the deferential standard of collateral habeas review applicable to the Antiterrorism and Effective Death Penalty Act of 1996, an Ohio court[14] that sentenced a defendant to a lengthy term-of-years sentence acted contrary to "clearly established federal law." 685 F.3d at 549. That standard presents a markedly different legal question than the one considered here. *See Atkins v. Crowell*, 945 F.3d 476, 480 (6th Cir. 2019) (Cole, C.J., concurring) (noting that *Miller* and *Graham* compelled the conclusion that a *de facto* LWOP sentence was unconstitutional but denying habeas relief because "[o]n occasion, AEDPA's onerous standards require us to deny . . . relief even though the sentence . . . is unconstitutional").

2. Aggregate Sentences As *De Facto* LWOP Sentences

[3] Having held that *de facto* LWOP sentences for redeemable juveniles are unconstitutional under *Graham*, *Miller*, and *Montgomery*, we next address whether an *aggregate* punishment of concurrent sentences may amount to that unlawful punishment. Again, state courts are sharply divided on the issue. Some states that recognize *de facto* LWOP sentences do so only when imposed as a single sentence.[15] Others who have rejected recognition of *de facto* LWOP sentences have done so on the ground that aggregated sentences do not present such a circumstance.[16] However, a majority of courts again favor recognition of aggregated sentences as *de facto* LWOP punishments subject to *Graham*, *Miller*, and *Montgomery*.[17]

We also hold that aggregated sentences may give rise to a *de facto* LWOP punishment. As other courts have observed, "[n]owhere in the *Graham* decision does the Supreme Court specifically limit its holding to offenders who were convicted for a *single* nonhomicide offense[.]"

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14. Ohio's highest court later recognized *de facto* LWOP sentences imposed on juveniles as violative of the Eighth Amendment in an appeal brought by Bunch's codefendant. *Moore*, 76 N.E.3d at 1139.

15. *See State v. Brown*, 118 So.3d 332, 342 (La. 2013) (holding *Graham* does not apply to multiple term-of-years sentences leading to release at age 86); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 246 (Mo. 2017) (en banc) (declining to extend *de facto* LWOP recognition to aggregated term-of-years sentences); *Foust*, 180 A.3d at 434 (same).

16. *Martinez*, 442 P.3d at 156-57; *Vasquez*, 781 S.E.2d at 926; *Ali*, 895 N.W.2d at 246.

17. Reviewing cases from those jurisdictions cited *supra* nn. 11-12, we identify 11 states that have rejected aggregation and 13 that have recognized it. Maryland's highest court's observation that "[m]ost of the decisions in other jurisdictions applying *Graham* and *Miller* to sentences expressed in a term of years have actually involved stacked sentences" still appears true. *Carter*, 192 A.3d at 732-33.

Boston, 363 P.3d at 457. That decision granted Eighth Amendment protection to a juvenile irrespective of his numerous offenses:

> [O]ne cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, *serious crimes* early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "*escalating pattern of criminal conduct*," but it does not follow that he would be a risk to society for the rest of his life.

Graham, 560 U.S. at 73, 176 L. Ed. 2d at 844 (emphasis added) (citation omitted). As for *Miller*, one of the appellants in that case was also convicted of two felonies, with no apparent impact on the ultimate holding. 567 U.S. at 466, 183 L. Ed. 2d at 415.

The applicability and scope of protection found in the Eighth Amendment under both decisions turned on the identity of the defendant, *not* on the crimes perpetrated. *Graham*, which followed the categorical approach used in *Roper* to invalidate death penalties against minors, noted that such categorical cases "turn[] on the characteristics of the offender[.]" 560 U.S. at 61, 176 L. Ed. at 837. Although *Graham* itself stated that "the age of the offender and the nature of the crime each bear on the analysis[,]" 560 U.S. at 69, 176 L. Ed. 2d at 842, the identity of the offender as a juvenile was of primary importance as recognized in *Miller* and *Montgomery*: "The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate *when applied to juveniles*. . . . *Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.' " *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 618 (emphasis added) (citations omitted). *Miller* appropriately recognized that "none of what [*Graham*] said about children . . . is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile[.]" 567 U.S. at 473, 183 L. Ed. 2d at 420. That is, the categorical prohibition is principally focused on the offender, not on the crime or crimes committed.

The states that have not recognized aggregate punishments as *de facto* LWOP sentences have done so on grounds that we hold distinguishable. For example, Pennsylvania rejected the argument on the basis that its caselaw "has long disavowed the concept of volume

discounts for committing multiple crimes." *Foust*, 180 A.3d at 436. North Carolina law is not so averse. To be sure, our Supreme Court has held that "[t]he imposition of consecutive life sentences, standing alone, does not constitute cruel or unusual punishment. A defendant may be convicted of and sentenced for each specific act which he commits." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983) (citations omitted). However, such consecutive sentences are not "standing alone" when they also involve a juvenile defendant. *Cf. Graham*, 560 U.S. at 70-71, 176 L. Ed. 2d at 843 ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." (citations and quotations omitted)). We note our own caselaw and statutes compel the State to consider consecutive sentences as a single punishment. *See* N.C. Gen. Stat. 15A-1354(b) (2019) ("In determining the effect of consecutive sentences . . . , the Division of Adult Correction and Juvenile Justice of the Department of Public Safety must treat the defendant as though he has been committed for a single term[.]"); *Robbins*, 127 N.C. App. at 165, 487 S.E.2d at 773 (holding parole eligibility for consecutive sentences must be calculated as if serving a single term).

Other states have found persuasive the following non-binding *dicta* from the Supreme Court's decision in *O'Neil v. Vermont*: " [']It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.['] " 144 U.S. 323, 331, 36 L. Ed. 450, 455 (1892) (quoting the Vermont Supreme Court). We do not deem this language adequate to counter *Roper*, *Graham*, *Miller*, and *Montgomery*; needless to say, *O'Neil* did not involve juveniles, and long predated the express adoption of categorical Eighth Amendment prohibitions in juvenile cases that primarily focus not on the crimes committed but instead "turn[] on the characteristics of the offender." *Graham*, 560 U.S. at 61, 176 L. Ed. 2d at 837; *see also Moore*, 76 N.E.3d at 1142 ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability." (emphasis in original)). In short, "*O'Neil* . . . does not indicate anything about the Supreme Court's view on the matter." *Ira*, 419 P.3d at 166.

3. Defendant's Sentences Are an Unconstitutional *De Facto* LWOP Punishment

[4] The final question posed by Defendant's argument is whether his consecutive sentences, which place his eligibility for parole at 50 years

and earliest possible release at age 67, are sufficiently lengthy to constitute an unconstitutional *de facto* LWOP punishment in light of the trial court's determination that he is neither irredeemable nor irreparably corrupt. Though the issue of identifying *de facto* LWOP sentences certainly presents some practical challenges, we hold that Defendant's consecutive sentences of life and parole eligibility at 50 years constitute a *de facto* LWOP punishment.

Several courts have held *de facto* LWOP sentences that do not conclusively extend beyond the juvenile's natural life are nonetheless unconstitutional sentences, and many of them have found such sentences to exist when release (either through completion of the sentence or opportunity for parole) is only available after roughly 50 years, and sometimes less.[18] Those states have adopted differing methods for their delineations, *see Carter*, 192 A.3d at 727-28 (surveying decisions and identifying five different means). Though the State rightly points out that the task of demarcating the bounds of a *de facto* LWOP sentence may be difficult, the task is not impossible.

For example, retirement age has been used to discern whether a sentence is a *de facto* LWOP punishment. *Id.* at 734. North Carolina's Constitution provides that persons' "inalienable rights" include the "enjoyment of the fruits of their own labor," N.C. Const. Art. I, § 1, and our Supreme Court has recognized that "a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life . . . is legal grotesquery." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). It is difficult, then, to deny that incarcerating a juvenile with no hope for release until or after the point at which society no longer considers them an ordinary member of the workforce seems to run afoul of the "hope for some years of life outside prison walls" required by *Graham* and *Miller*. *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 623. Stated differently:

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18. *See Zuber*, 152 A.3d at 212-13 (55 years); *State ex rel. Carr*, 527 S.W.3d at 57 (50 years); *People v. Contreras*, 411 P.3d 445, 446 (Cal. 2018) (50 years); *Carter*, 192 A.3d at 734 (50 years); *Casiano*, 115 A.3d at 1035 (50 years); *Bear Cloud*, 334 P.3d at 136 (45 years); *People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019) (40 years). Courts that have not identified an exact point at which a *de facto* LWOP sentence arises have indicated that 50 years is close to the limit. *See, e.g.*, *Ira*, 419 P.3d at 170 ("Certainly the fact that Ira will serve almost 46 years before he is given an opportunity to obtain release is the outer limit of what is constitutionally acceptable." (citation omitted)). The 50-year mark identified by several courts "seems consistent with the observation of the *Graham* Court that the defendant in that case would not be released 'even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.' " *Carter*, 192 A.3d at 728-29 (quoting *Graham*, 560 U.S. at 79, 176 L. Ed. 2d at 848).

> [T]he language of *Graham* suggests that the high court envisioned more than the mere act of release or a de minimis quantum of time outside of prison. *Graham* spoke of the chance to rejoin society in qualitative terms—"the rehabilitative ideal" ([*Graham*] at 130 S. Ct. 2011)—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The "chance for reconciliation with society" (id. at 130 S. Ct. 2011), "the right to reenter the community" (id. at 130 S. Ct. 2011), and the opportunity to reclaim one's "value and place in society" (*ibid.*) all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. . . . Confinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates.

Contreras, 411 P.3d at 454. To release an individual after their opportunity to directly contribute to society—both through a career and in other respects, like raising a family—"does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *Null*, 836 N.W.2d at 71 (quoting *Graham*, 560 U.S. at 74, 176 L. Ed. 2d at 845-46). Lastly, we observe that our General Assembly has elsewhere defined what an appropriate life with parole sentence in compliance with *Miller* looks like; N.C. Gen. Stat. § 15A-1340.19A (2019), the statute enacted for that purpose, provides that " 'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole."[19]

A holding that Defendant's sentences constitute a *de facto* LWOP sentence is in line with the above; his ineligibility for parole for 50 years falls at the limit identified by numerous other jurisdictions as constituting an unconstitutional *de facto* LWOP sentence, and it affords him

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19. Defendant asserted at oral argument, that, as a matter of statutory construction, juveniles sentenced to first-degree murder under N.C. Gen. Stat. § 15A-1340.19A, *et seq.* must be given parole eligibility at 25 years. Defendant never raised the issue before the trial court, nor did he brief any statutory interpretation arguments; any arguments as to the purported construction and interpretation of N.C. Gen. Stat. § 15A-1340.19A, *et seq.* have not been presented in this appeal. *See* N.C. R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We therefore do not address the statutory construction of N.C. Gen. Stat. § 15A-1340.19A and instead look to it as an expression of the General Assembly's judgment on what constitutes a constitutionally permissible juvenile life sentence following *Miller*—an issue that *was* expressly argued and addressed by the parties in their briefs.

release only at or after retirement age. *See United States v. Grant*, 887 F.3d 131, 151 (surveying various means of calculating retirement age and observing "by all accounts, the national age of retirement to date is between sixty-two and sixty-seven inclusive"), *reh'g en banc granted*, *opinion vacated*, 905 F.3d 285 (3rd Cir. 2018).

As far as identifying what a sentence that would *not* amount to a *de facto* LWOP punishment, our General Assembly has offered some indication. *See* N.C. Gen. Stat. § 15A-1340.19A. The definition provided therein is not strictly limited to single offenses: "If the sole basis for conviction of a count or *each count* of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2019). Defendant here has clearly abandoned any assertion that he was convicted under the felony murder rule. But N.C. Gen. Stat. § 15A-1340.19B(a)(1) nonetheless indicates that our General Assembly has determined parole eligibility at 25 years for multiple offenses sanctionable by life with parole is not so excessive as to run afoul of *Miller*. *See*, *e.g.*, *Ramos*, 387 P.3d at 661-62 (noting that "[s]tate legislatures are . . . allowed some flexibility in fashioning the methods for fulfilling *Miller*'s substantive requirements, so long as the State's approach does not 'demean the substantive character of the federal right at issue.' " (quoting *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 621)). This Court has twice held that life with the possibility of parole after 25 years does not constitute a *de facto* LWOP sentence subject to *Miller*. *See State v. Jefferson*, 252 N.C. App. 174, 181, 798 S.E.2d 121, 125 (2017) ("Defendant's sentence is neither an explicit nor a *de facto* term of life imprisonment without parole. Upon serving twenty-five years of his sentence, Defendant will become eligible for parole[.]"); *State v. Seam*, 263 N.C. App. 355, 361, 823 S.E.2d 605, 609-10 (2018) (holding *Miller*'s individualized sentencing requirement inapplicable to a single sentence of felony murder carrying mandatory punishment of life imprisonment with the opportunity for parole after 25 years), *aff'd per curiam*, 373 N.C. 529, 837 S.E.2d 870 (2020).

We stress, as the Supreme Court did in *Graham*, that nothing in our decision compels the State to actually release Defendant after 25 years. The Post-Release Supervision and Parole Commission will ultimately decide whether Defendant may be released in his lifetime. Our decision simply upholds the Eighth Amendment's constitutional requirement that Defendant, as a juvenile who is neither incorrigible nor irredeemable, have his "hope for some years of life outside prison walls . . . restored." *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 623.

III. CONCLUSION

The facts, the law, and all that results in this appeal are difficult. As shown by the victim impact statements offered at resentencing, the murders of Mr. Carpenter and Ms. Helton—two teenagers who were soon to be parents—caused irreparable loss and irrevocable harm to victims and their families. Defendant was shaped by what was a profoundly troubled childhood, leading him to actively participate in these truly heinous crimes. These facts have led this Court in reviewing Defendant's constitutional claims that have divided courts nationwide, to discuss the difficult subject of sentencing, for outrageous acts, a juvenile offender who is inherently less culpable than adults and was found by the trial court to be redeemable. "Few, perhaps no, judicial responsibilities are more difficult than sentencing." *Graham*, 560 U.S. at 77, 176 L. Ed. 2d at 847. This case is certainly no exception, as the trial court explained following resentencing: "[T]hese are real tragedies. . . . [T]hey don't put [you] in positions like this because you're weak or because you're a coward. If you can't, you know, make hard decisions, you will never last as a judge and you will never last as a prosecutor or a defense lawyer." Indeed, when it comes to sentencing juveniles for the most egregious crimes, these difficulties are heightened; in such circumstances, the (in)humanity of the perpetrator, the victims, the crimes, and the punishment are inseparable under the Eighth Amendment.

This Court's duty is to uphold the federal and state Constitutions irrespective of these difficulties. In determining Defendant's appeal, we hold under Eighth Amendment jurisprudence: (1) *de facto* LWOP sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides no opportunity for release for 50 or more years is cognizable as a *de facto* LWOP sentence. Consistent with the Eighth Amendment as interpreted by *Roper*, *Graham*, *Miller*, and *Montgomery*, these holdings compel us to reverse and remand Defendant's sentence. Under different circumstances, we would leave resentencing to the sound discretion of the trial court. *See, e.g.*, *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) (remanding for resentencing and noting that, on remand, "[w]hether the two sentences should run concurrently or consecutively rests in the discretion of the trial court"). Here, however, we hold that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional. We therefore instruct the trial court on remand to enter two concurrent sentences of life with parole as the only constitutionally permissible sentence available under the facts presented.

REVERSED AND REMANDED.

Judges BRYANT and HAMPSON concur.

STATE v. PABON

[273 N.C. App. 645 (2020)]

STATE OF NORTH CAROLINA
v.
RAFAEL ALFREDO PABON, DEFENDANT

No. COA19-741

Filed 6 October 2020

1. Kidnapping—first-degree—underlying sexual assault—distinct from felony element of kidnapping

The trial court properly denied defendant's motion to dismiss a first-degree kidnapping charge where the alleged felony that was the object of the kidnapping (second-degree rape) was a separate and distinct sexual offense from the one used to raise the charge from second-degree to first-degree kidnapping (sexual battery), and where the State presented substantial evidence that defendant committed each sexual offense against the victim.

2. Kidnapping—first-degree—simultaneous conviction for second-degree rape—double jeopardy

The trial court did not violate the constitutional prohibition against double jeopardy by convicting and sentencing defendant for both first-degree kidnapping and second-degree forcible rape, where a separate sexual battery—not the second-degree forcible rape—constituted the underlying sexual assault for the first-degree kidnapping charge.

3. Sentencing—aggravating factor—kidnapping—rape—taking advantage of position of trust

At a trial for first-degree kidnapping and second-degree rape, where the State presented substantial evidence showing defendant and the victim were close friends, they frequently had personal conversations, and the victim often relied upon defendant for advice on her home renovation business, the trial court properly denied defendant's motion to dismiss the aggravating factor alleged against him: that he took advantage of a position of trust or confidence to commit the offenses (N.C.G.S. § 15A-1340.16(d)(15)).

4. Evidence—prior bad acts—prior sexual offenses—common plan or scheme—similarity and temporal proximity

In a prosecution for second-degree forcible rape, the trial court properly admitted testimony describing prior sexual assaults by defendant as evidence of a "common plan or scheme" under Evidence Rule 404(b), where the prior acts were sufficiently similar

to the rape at issue (in each circumstance, defendant abused a position of trust to sexually assault a woman) and were performed continuously over a period of ten years.

5. Constitutional Law—Confrontation Clause—expert's independent opinion—blood and urine tests performed by non-testifying toxicologists

The trial court in a rape prosecution did not violate defendant's Confrontation Clause rights by admitting a forensic scientist's testimony about drug test results of the victim's blood and urine samples. Although two non-testifying toxicologists performed the tests, the forensic scientist personally reviewed the results and offered his independent opinions about them without reference to the toxicologists' own analysis or conclusions, and defendant had the opportunity to cross-examine the forensic scientist at trial.

6. Indictment and Information—sufficiency—second-degree rape—name of victim—first-degree kidnapping—elements

An indictment charging defendant with second-degree forcible rape was facially valid where, although it did not state the victim's full name, it sufficiently identified the victim by stating her initials. Additionally, the indictment charging defendant with first-degree kidnapping was facially valid even though it did not specify what crime satisfied the sexual assault element.

7. Criminal Law—jury instructions—aggravating factor—kidnapping and rape—plain error analysis

In a prosecution for first-degree kidnapping and second-degree rape, the trial court erred by instructing the jury to "consider all the evidence" when deciding whether an aggravating factor existed—specifically, a violation of a position of trust (N.C.G.S. § 15A-1340.16(d)(15))—because it failed to clarify that any evidence offered to prove an element of the charged crimes could not also be used to prove the aggravating factor. However, because a violation of a position of trust is not an element of kidnapping or rape, and because the State used different evidence to prove the aggravating factor and the intent element of the charged crimes, the trial court's error did not prejudice defendant and, therefore, did not constitute plain error.

8. Appeal and Error—abandonment of issues—lifetime satellite-based monitoring

When appealing his convictions for first-degree kidnapping and second-degree forcible rape, defendant abandoned his argument

challenging the trial court's imposition of lifetime satellite-based monitoring where he listed the argument in the index to his appellate brief but did not argue the issue in the body of the brief.

Judge MURPHY dissenting.

Appeal by defendant from judgments entered 14 December 2018 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan Frank Haigh, for the State.

Currin & Currin, by George B. Currin, for defendant-appellant.

BERGER, Judge.

On December 14, 2018, a Cabarrus County jury found Rafael Alfredo Pabon ("Defendant") guilty of first-degree kidnapping and second-degree forcible rape. Defendant appeals, arguing that (1) the trial court erred when it denied his motions to dismiss; (2) the trial court erred when it admitted 404(b) evidence; (3) the trial court erred when it admitted expert testimony; (4) the indictments were facially invalid; (5) the trial court committed plain error when it failed to properly instruct the jury; (6) the trial court erred when it allowed the jury to consider evidence of aggravating factors; and (7) the trial court erred when it ordered Defendant to enroll in satellite-based monitoring ("SBM"). We disagree.

Factual and Procedural Background

In November 2015, Defendant met Samantha Ivethe Camejo-Forero ("the victim") to discuss a roof repair warranty. The victim and Defendant subsequently developed a friendship, and she would ask Defendant for assistance with her home repair business.

On January 4, 2017, Defendant drove to the victim's house to take her to breakfast. At 8:36 a.m., the victim left her house in Defendant's vehicle. Defendant handed her a latte to drink. The victim drank the latte and began "feeling weird." Throughout the car ride, the victim "couldn't think[, and] couldn't move."

At 9:42 a.m., Defendant and the victim arrived at a Denny's restaurant for breakfast. The restaurant was 42 miles away from the victim's house. Defendant and the victim sat on the same side of the booth,

which the victim stated was abnormal. The victim "couldn't even read" the menu and had no recollection of what she ordered or whether she ate. She testified that she was not "in control of [her] body," and at one point, the victim appeared to be asleep at the table.

At 10:28 a.m., Defendant and the victim left the Denny's restaurant and drove to get the mail for Defendant's friend. After driving for 16 miles, they arrived at Defendant's friend's house at 11:04 a.m. While at the house, the victim testified that she was sitting on a couch when Defendant began kissing and touching her, including kissing her breast. The victim did not want to be kissed or touched by Defendant. Defendant then took the victim to a bedroom where he laid her on the bed. Defendant said, "You don't know how bad I want this," and took off the victim's clothes. Defendant then engaged in nonconsensual vaginal intercourse with the victim. Soon after, the victim went to the bathroom and saw a used condom.

At 12:48 p.m., Defendant and the victim started the drive back to the victim's house. Around 12:49 p.m., the victim talked with her mother on the phone but could not remember the conversation. Her mother testified that the victim was "speaking in a very slurred kind of way." The victim recalled that while in the car, Defendant acted "like nothing had happened."

At 1:34 p.m., the victim arrived home. Before the victim went inside, Defendant said, "Give me a kiss." The victim, appearing to her mother to be "very pale . . . like a zombie or a dead person," then went into her mother's room, without speaking, and fell asleep.

Around 5:00 p.m. that afternoon, the victim awoke. She felt "weird," "couldn't walk straight," and "knew what happen[ed]." At 5:23 p.m., the victim texted Defendant the following:

> Hi Rafa. I would like to ask you what happened at Denny's. Did I finish my breakfast? I told that you I didn't feel well, I feel weird, and I almost couldn't walk real good. I came home and I just pass out until now, and I still feel in me weird. What happen?

At 5:28 p.m., Defendant called the victim. Defendant told the victim that nothing had happened. According to her, Defendant said, "We just pick[ed] up the mail, you wait[ed] for me in the car, and -- I took you back home." Defendant told the victim that they were at his friend's house for "five minutes, no more than that." Once the parties hung up, the victim fell back asleep until the next morning.

On January 5, the victim again called Defendant because she was "still feeling weird, . . . like it was a dream[.]" The victim then contacted the Matthews Police Department and was directed to take a rape test at a hospital. The victim left for the hospital "dressed the exact same way that she was [the] night before." The victim told medical professionals and law enforcement officers what she remembered about the incident.

On January 6, 2017, the victim gave a formal statement to detectives. She granted detectives access to her phone, her location data, and subsequently provided a hair sample. On January 23, 2017, Defendant was indicted on charges of second-degree forcible rape and first-degree kidnapping.

At trial, Frank Lewallen, a forensic scientist at the North Carolina State Crime Laboratory, testified that he reviewed the procedures and the results of the victim's blood and urine samples. Lewallen testified that the initial urine test was positive for Amphetamine, Methylenedioxyamphetamine, and Benzodiazepine. The State Crime Lab then conducted confirmatory testing of the urine samples using gas chromatography mass spectrometry ("GCMS"). The victim's urine tested positive for a 7-aminoclonazepam, "a breakdown product of Clonazepam[,] which is a Benzodiazepine." Lewallen confirmed that Clonazepam is a "central nervous depressant" with side effects of "feeling like they were in a dream . . . [and] a loss of inhibition or loss of anxiety."

Dr. Ernest Lykissa, a clinical and forensic toxicologist, testified that he tested the victim's hair sample, which represented hair growth from December 22, 2016 to January 19, 2017. After testing the hair sample with a liquid chromatograph mass spectrometer, Dr. Lykissa determined the victim's hair contained Cyclobenzaprine – a muscle relaxant. Cyclobenzaprine "floods the brain with serotonin," the neurotransmitter that causes sleep, but in excess, can "numb [a person] to death." Dr. Lykissa also confirmed the State Crime Lab's conclusion that Clonazepam was in the victim's urine. Like Cyclobenzaprine, Clonazepam has numbing effects that "make [a person] very sleepy." The effect of taking Cyclobenzaprine and Clonazepam together results in a "[v]ery serious impairment of [a person's] mental and physical faculties." If a person were to take these two drugs with caffeine, they "can't see well, . . . can't hear well, . . . and [they're] very close to [their] demise." Dr. Lykissa concluded that the victim's symptoms were consistent with someone who recently took Cyclobenzaprine, Clonazepam, and caffeine.

Lucy Montminy, a sexual assault nurse examiner, testified to treating the victim at Novant Health on January 5, 2017. During in-take, the victim identified Defendant as her assailant. Montminy testified that

the victim's mannerisms were consistent with an individual who was "under the influence of impairing substances." The victim was prescribed various antibiotics to treat any potential sexually transmitted disease. None of these medications contained Cyclobenzaprine or Clonazepam. Other than these prescribed medications, the victim "was not taking any medications." Montminy testified that during her examination of the victim, she discovered an "injury to [the victim's] vaginal area" that was "consistent with penetration." Montminy's observations were consistent with drug related rape.

Kari Norquist, a forensic scientist, testified that she conducted DNA analysis on the victim's rape test samples, which included swabs of the victim's left breast. Norquist determined there were substantial amounts of Defendant's DNA on the victim's left breast sample, and that the amount of Defendant's DNA on the victim's left breast was not common with a casual transfer of DNA.

Outside the presence of the jury, the trial court conducted a voir dire hearing related to 404(b) evidence from Chanel Samonds and Elise Weyersburg. The trial court determined that their testimony was admissible, and provided a limiting instruction to the jury.

Samonds, Defendant's sister-in-law, testified that Defendant came to her house on the morning of September 8, 2008. After Samonds asked Defendant to leave, he stood up, "tried to kiss [Samonds'] neck" and "pushed [her] back down on the couch[, a]nd pinned [her] hands above [her] head so that he could start kissing [her]." Despite Samonds' objections and refusal, Defendant attempted to kiss her mouth. Defendant then removed Samonds' pants and digitally penetrated her vagina. With Samonds "half on the couch and half off the couch," Defendant then engaged in nonconsensual vaginal intercourse with Samonds.

Weyersberg, Defendant's other sister-in-law, testified that around 2006 when she was 19 or 20 years old, she was living with her parents along with Defendant and his wife. During this time, Weyersberg "felt uncomfortable with" Defendant. On one occasion, Weyersberg was in the kitchen when Defendant came behind her and rubbed her shoulders while moving his hands towards her breasts. At the same time, Defendant told her "how he had an orgy in Bolivia" while she continued to move away from him because she felt "very uncomfortable." Weyersberg did not tell her parents about the incident. On a separate occasion, Weyersberg was on the computer when Defendant approached her and asked if she wanted a massage. At the same time, Defendant was "trying to put his hand up the bottom of [her] pant leg." Weyersberg then left the room and later told her parents about the incident.

Defendant testified at trial that he picked the victim up for breakfast on January 4, went to the Denny's restaurant, and then stopped at his friend's house. Defendant testified that he and the victim engaged in sexual and physical activity at his friend's house.

A Cabarrus County jury found Defendant guilty of second-degree forcible rape and first-degree kidnapping. The jury also found as an aggravating factor that Defendant took advantage of a position of trust or confidence for each charge. Defendant was sentenced to consecutive terms of 104 to 137 months and 104 to 185 months in prison.

Defendant appeals, arguing that (1) the trial court erred when it denied his motions to dismiss; (2) the trial court erred when it admitted 404(b) evidence; (3) the trial court erred when it admitted expert testimony; (4) the indictments were facially invalid; (5) the trial court committed plain error when it failed to properly instruct the jury; (6) the trial court erred when it allowed the jury to consider evidence of aggravating factors; and (7) the trial court erred when it ordered Defendant to enroll in SBM. We disagree.

Analysis

I. Motion to Dismiss

Defendant contends the trial court erred when it denied his motion to dismiss the charge of first-degree kidnapping and the aggravating factors based on insufficient evidence.[1] Defendant also asserts that the trial court erred when it denied his motion to dismiss on double jeopardy grounds. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). "The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*,

1. Defendant states in his brief that he "moved to dismiss all charges against him" on the grounds of insufficient evidence. However, Defendant does not argue in his brief that there was insufficient evidence of the second-degree forcible rape charge. Thus, Defendant has abandoned this argument. N.C. R. App. P. 28(b)(6).

356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citation omitted). "In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997) (citation omitted).

A. First-Degree Kidnapping

[1] First-degree and second-degree kidnapping offenses are set forth in N.C. Gen. Stat. § 14-39. The relevant portions of that Section state:

> (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, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.] . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). *If the person kidnapped . . . [was] sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony*. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 (2019) (emphasis added).

Defendant argues that because there was evidence of only one sexual assault, he could not be convicted of, and sentenced for, first-degree kidnapping. Defendant correctly asserts that when the sexual assault and the felony that is the object of the kidnapping are the same, "a defendant may be convicted of first degree kidnapping and the underlying sexual offense which raised it to first degree, although the defendant cannot be punished for both." *See State v. Freeland*, 316 N.C. 13, 23-24, 340 S.E.2d 35, 40-41 (1986). The proper remedy in the event of a conviction for first-degree kidnapping and the sexual assault that constitutes an element of the first-degree kidnapping charge is to arrest judgment on the first-degree kidnapping charge and resentence defendant for

second-degree kidnapping. *See State v. Mason*, 315 N.C. 724, 737, 340 S.E.2d 430, 439 (1986).

Here, however, the State's evidence tended to show Defendant committed at least two sexual assaults against the victim. The State satisfied the sexual assault element of first-degree kidnapping with evidence of a separate and distinct sexual battery. This occurred when Defendant kissed the victim's breasts on the couch. The subsequent second-degree rape was not used to satisfy the sexual assault element of first-degree kidnapping. As such, both the first-degree kidnapping and second-degree forcible rape are properly charged and sentenced.

A defendant may be convicted of second-degree forcible rape if the State proves the Defendant engaged in vaginal intercourse

> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.22(a)(1-2) (2019).

A person is guilty of sexual battery if the person

> for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or *physically helpless*, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.33(a)(1-2) (2019) (emphasis added). "[T]he element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself." *In re: S.A.A.*, 251 N.C. App. 131, 135, 795 S.E.2d 602, 605 (2016) (*purgandum*). Sexual contact includes "[t]ouching the sexual organ, anus, breast, groin, or buttocks of any person." N.C. Gen. Stat. § 14-27.20(5)(a) (2019).

The jury could infer from Defendant's actions that he acted "for the purpose of sexual arousal, sexual gratification, or sexual abuse," *In re: S.A.A.*, 251 N.C. App. at 135, 795 S.E.2d at 605, when he touched and

kissed the victim's breasts. *See State v. Schultz*, 88 N.C. App. 197, 201, 362 S.E.2d 853, 856 (1987) (finding circumstantial evidence of intent where "the victim testified that defendant dragged her down a hallway toward a guest bedroom, and that he put his hand down over her shoulder and down the front of her shirt and grabbed her breasts."). Therefore, there was sufficient evidence from which the jury could determine that Defendant committed a sexual battery.

The fourth element of first-degree kidnapping requires that Defendant committed a sexual assault separate and distinct from the second-degree forcible rape. If the jury determines that Defendant committed both offenses, the charges will be determined to be separate and distinct since sexual battery is not an element of second-degree forcible rape. The trial court gave the following jury charge for first-degree kidnapping:

> The defendant has been charged with first degree kidnapping. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt. First, that the defendant unlawfully restrained a person; that is, restricted her freedom of movement and/or removed her from one place to another;
>
> Second, that the person did not consent;
>
> Third, that the defendant restrained and/or removed that person for the purpose of facilitating defendant's commission of second degree forcible rape. Second degree forcible rape, as I earlier instructed you, is when a defendant engages in vaginal intercourse with the alleged victim and at that time the alleged victim was so substantially incapable of resisting an act of vaginal intercourse as to be mentally incapacitated and/or so physically unavailable to resist an act of vaginal intercourse as to be physically helpless and that the defendant knew or should reasonably have known that the alleged victim was mentally incapacitated and/or physically helpless;
>
> Fourth, *that this restraint and/or removal was a separate, complete act independent of and apart from the second degree forcible rape;*
>
> And, fifth, that the person had been sexually assaulted.
>
> In this case, the State is alleging that the sexual assault committed by the defendant is sexual battery. To prove

> sexual battery, the State must prove three things beyond a reasonable doubt. First, that the defendant engaged in sexual contact with another person. Sexual contact means touching the breast of any person;
>
> Second, that the alleged victim was mentally incapacitated and/or physically helpless and the defendant knew or should reasonably have known that the alleged victim was mentally incapacitated and/or physically helpless;
>
> And, third, that the defendant acted for the purpose of sexual gratification.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully restrained a person and/or removed a person from one place to another and that the person did not consent, and that this was done for the purpose of facilitating the defendant's commission of second degree forcible rape, *and that this restraint and/or removal was a separate, complete act independent of and apart from the second degree forcible rape*, and that the person restrained and/or removed had been sexually assaulted, it would be your duty to return a verdict of guilty of first degree kidnapping. If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree kidnapping.

(Emphasis added).

For a criminal defendant to be "charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish a distinct interruption in the original assault followed by a second assault, so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). Further, this Court has previously held that "rape is not a continuing offense." *State v. Owen*, 133 N.C. App. 543, 552, 516 S.E.2d 159, 165 (1999) (*purgandum*).

At trial, Defendant admitted that he touched the victim on the couch. Further, the State's evidence tended to show that Defendant touched and kissed the victim's breasts while she was on the couch. After the first sexual battery occurred, there was a distinct and intentional interruption in the incidents when Defendant removed the victim from the couch to the bedroom where he then committed second-degree forcible rape.

Because the State presented substantial evidence of sexual battery, which was the underlying sexual assault for the first-degree kidnapping charge, the trial court did not err when it denied Defendant's motion to dismiss. In addition, the trial court's instructions to the jury correctly state the law for the jury to consider.

[2] Defendant similarly argues that his convictions and sentences for first-degree kidnapping and second-degree forcible rape violated the prohibition against double jeopardy. Defendant's argument is without merit.

> The general rule is that the double jeopardy clause of the Federal Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . If the legislature has specifically authorized cumulative punishment for the same conduct under two statutes the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. If cumulative punishment is not so authorized, a defendant may only be punished under one statute.

Freeland, 316 N.C. at 21, 340 S.E.2d at 39 (citations and quotation marks omitted). "[T]he legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault." *Id*. at 23, 340 S.E.2d at 40-41. "Therefore, it is a double jeopardy violation to convict and sentence a defendant for both first degree kidnapping and the sexual offense that constituted the sexual assault element of the first degree kidnapping charge." *State v. Barksdale*, 237 N.C. App. 464, 473, 768 S.E.2d 126, 132 (2014) (citation omitted).

Defendant was convicted for first-degree kidnapping and second-degree forcible rape. However, Defendant was not convicted of sexual battery, the underlying sexual assault for first-degree kidnapping. This is distinguishable from *Barksdale* where the defendant was convicted of both first-degree kidnapping and the underlying sexual assault. *Id*. at 474, 768 S.E.2d at 132. Thus, Defendant's conviction for first-degree kidnapping did not violate his double jeopardy protections. Moreover, the State presented sufficient evidence of two separate sexual acts – second-degree forcible rape and sexual battery. Therefore, Defendant was properly convicted of second-degree forcible rape and first-degree kidnapping where sexual battery was the underlying sexual assault, not the second-degree forcible rape.

The trial court properly instructed the jury that in order to find Defendant guilty of first-degree kidnapping, they had to find that the

victim's "restraint and/or removal was a separate, complete act independent of and apart from the intended second degree forcible rape" and that the victim "had been sexually assaulted," which the State alleged was a "sexual battery." The trial court then instructed the jury as to the elements of sexual battery. Finally, the trial court instructed the jury,

> If you do not find the defendant guilty of first degree kidnapping, you must determine whether the defendant is guilty of second degree kidnapping. Second degree kidnapping differs from first degree kidnapping only in that it is unnecessary for the State to prove that the person had been sexually assaulted.

Moreover, the verdict sheet specifically required the jury to find Defendant committed a sexual battery before finding Defendant guilty of first-degree kidnapping. The verdict sheet for first-degree kidnapping specifically stated:

> We, the jury, as to the charge of First Degree Kidnapping (*supported by a unanimous finding that the defendant committed a sexual battery*), unanimously find the Defendant, Rafael Alfredo Pabon, to be:

(Emphasis added).

For the reasons stated herein, and because the trial court limited the jury's consideration of the sexual assault element of first-degree kidnapping to sexual battery, we conclude that Defendant's constitutional protection of double jeopardy was not violated.

B. Aggravating Factors

[3] Defendant argues that the trial court erred when it denied his motion to dismiss the aggravating factors for insufficiency of the evidence. We disagree.

The only aggravating factor the trial court submitted to the jury was whether "[t]he defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." N.C. Gen. Stat. § 15A-1340.16(d)(15) (2019). "A finding of this aggravating factor depends on the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Helms*, 373 N.C. 41, 44, 832 S.E.2d 897, 899 (2019) (citation and quotation marks omitted). "We have upheld a finding of the 'trust or confidence' factor in very limited factual circumstances." *Id.* at 44, 832 S.E.2d at 899 (citation omitted). *See also State v. Potts*, 65 N.C.

App. 101, 105, 308 S.E.2d 754, 757 (1983) (finding sufficient evidence of a "position of trust" where the victim was considered one of defendant's "best friends").

Here, the State's evidence tended to show that Defendant and the victim were friends. The victim had pictures of Defendant and his family on her phone. Defendant gave Christmas presents to the victim's family. The victim asked Defendant to check on her mother while the victim was out of the country. Defendant testified that they frequently had personal conversations over coffee. The two would go shopping, see movies, and eat meals together. The victim sought out and relied on Defendant's advice for her home renovation business, and Defendant helped her improve her business.

Thus, the State presented substantial evidence that Defendant and the victim had a relationship in which the victim relied upon Defendant, that he maintained a position of trust with the victim, and he took advantage of that position to kidnap and rape the victim.

II. Rule 404(b)

[4] Defendant next argues that the trial court erred when it admitted the 404(b) evidence of prior sexual assaults against Samonds and Weyersberg. We disagree.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Under Rule 404(b) of the North Carolina Rules of Evidence,

> 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).

Rule 404(b) is "a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "[S]uch evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (citation omitted).

Admission of 404(b) evidence "is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act." *Id.* at 155, 567 S.E.2d at 123 (citation and quotation marks omitted) (emphasis in original).

Prior bad acts are sufficiently similar "if there are some unusual facts present in both crimes" that "would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (citations and quotation marks omitted). However, "[w]e do not require that the similarities rise to the level of the unique and bizarre." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation and quotation marks omitted). "[T]his Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes [outlined] in Rule 404(b)." *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (citation and quotation marks omitted).

Here, the trial court found the testimony of Samonds and Weyersberg admissible as evidence of a common plan or scheme under Rule 404(b). The trial court concluded that the evidence was sufficiently similar and satisfied the Rule 403 balancing test.

The trial court found sufficient similarities between the prior bad acts and the crime at issue in this case, highlighting that "[t]he acts between Ms. Samonds and [the victim were] rape . . . the criminal act is as identical as you can get. But . . . the act with Ms. Weyersberg was a sexual – at least a sexual battery in that matter with an intent to go further which did not occur." We agree with the trial court.

First, each woman testified that Defendant gained their trust prior to each incident. Samonds "never felt threatened" by Defendant, and she specifically testified that on the day of her assault, she "didn't really think anything about" Defendant coming over or that "he's lying to [her] just to come over." Weyersberg trusted Defendant because her parents allowed him to live with her sister in their family house, where she also lived. Likewise, the victim testified that she trusted Defendant because

she had a mentorship-like relationship with him and also spent a significant amount of time with Defendant.

Second, Defendant utilized that position of trust to sexually assault each woman. Samonds testified that she sat next to Defendant on the couch where he then began to kiss her and eventually rape her. Weyersberg testified that Defendant massaged her shoulders to then touch her breasts and that he put his hand up her pant leg while asking if she wanted to use "massage oils with him." The victim testified that she drank a coffee that Defendant gave her and immediately began feeling "feeling weird" before he sexually assaulted her.

Finally, in each situation, Defendant tried to persuade each victim that he had not sexually assaulted them. Therefore, the trial court did not err in finding the testimony was sufficiently similar because the evidence tended to show that in each circumstance the victim trusted Defendant and Defendant then abused this position of trust to assault each woman.

There is no bright line rule regarding temporal proximity for the purposes of Rule 404(b) testimony. *See State v. Maready*, 362 N.C. 614, 624-25, 669 S.E.2d 564, 570 (2008). Our courts have previously held 27 years was not too remote to satisfy this requirement. *See State v. Register*, 206 N.C. App 629, 637-39, 698 S.E.2d 464, 470-71 (2010). Here, the trial court found that the "temporal proximity [requirement was] met" despite the 10-year and 8-year attenuation, considering the "common scheme and plan or intent" of the Defendant. We agree. Our Supreme Court has held that "[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, *rather than disprove*, the existence of a plan" rendering the prior bad acts "not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually." *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (emphasis added) (citation omitted). Because these acts were performed continuously over a period of years, the acts were not too remote to be considered for the purposes of 404(b).

Finally, the trial court must consider the evidence in the context of Rule 403. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2019). This determination is left to the sound discretion of the trial court. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

"A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. We determine whether a trial court abused its discretion by looking at the totality of the circumstances." *State v. Ross*, 207 N.C. App. 379, 389, 700 S.E.2d 412, 419 (2010) (citations and quotation marks omitted). Since "[e]vidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted).

The trial court determined that the evidence should be admitted because the probative value outweighed the potentially prejudicial effect. The trial court expressly considered that the "evidence [was] not being offered to show that Mr. Pabon acted in conformity with prior acts, [but] that [the] evidence [was] being offered for a limited purpose" and gave the jury an instruction to that effect. Thus, the trial court did not abuse its discretion when it admitted the 404(b) evidence over Defendant's objection.

Defendant further asserts that Samonds' testimony was not sufficiently credible to support a finding of Defendant's prior bad acts because the Mecklenburg County District Attorney's Office did not pursue the earlier charge against Defendant. However, this Court has previously stated that a "district attorney's dismissal . . . did not result in defendant's being legally innocent of the prior assault charge" and thus would not preclude evidence from being admissible under Rule 404(b). *State v. Flaugher*, 214 N.C. App. 370, 378, 713 S.E.2d 576, 584 (2011).

For the reasons stated herein, the trial court did not err in when it admitted the State's 404(b) evidence.

III. Confrontation Clause

[5] Defendant alleges the trial court erred in admitting the testimony of Lewallen in violation of the Confrontation Clause. Specifically, Defendant contends that Lewallen failed to provide an independent opinion regarding the testing and analysis of the victim's blood and urine samples because both tests were performed by two non-testifying forensic toxicologists. Defendant also argues he did not have a prior opportunity to cross-examine the non-testifying experts, and that they were not unavailable to testify.

"We review this alleged constitutional error de novo." *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013). "The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence

unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted).

> Our courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in this case.

State v. Crumitie, 266 N.C. App. 373, 379, 831 S.E.2d 592, 596 (2019) (citation omitted).

In *Ortiz-Zape*, our Supreme Court stated:

> [W]hen an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely surrogate testimony parroting otherwise inadmissible statements.

Ortiz-Zape, 367 N.C. at 9, 743 S.E.2d at 161-62 (citations and quotation marks omitted).

During direct examination, Lewallen testified to the following:

> [LEWALLEN]. In our immunoassay or our drug screen platform we look for 12 routinely-encountered classes or specific drugs. We're looking for Amphetamine and Methylenedioxyamphetamine. We're looking for Benzodiazepines, which is a class of drugs, looking for opiates, which is also a class of drugs, cocaine metabolite, barbiturates, which is a class of drugs. We're

looking for Methadone specific drug, marijuana metabolites, Carisoprodol and Meprobamate, two specific drugs, Methamphetamine and Ectasy, Zolpidem, Tramadol and Oxycodone and Oxymorphone is our standard 12-panel test that we do.

[THE STATE]. And what type of data is produced as a result of this preliminary screening test?

[LEWALLEN]. Once the test is completed, then what happens is we get a print-off of the results of each individual case as to tell us whether or not there is an indication of one of those, having a positive indication one of those particular tests that I just laid out, or it will give a result of negative.

[THE STATE]. Okay. And were you able to review that data that was printed off?

[LEWALLEN]. Yes, ma'am, I was.

[THE STATE]. And were you able to review that data and form your own opinion about what the result of that preliminary screen was?

[LEWALLEN]. Yes, ma'am, I was.

[THE STATE]. And, actually, have you performed this test personally yourself?

[LEWALLEN]. Yes, ma'am, many times.

[THE STATE]. Okay. What opinion did you form about that initial screening test?

[LEWALLEN]. For the blood it was negative for all 12 assays. For the urine we had a positive indication for Amphetamine and Methylenedioxyamphetamine and for Benzodiazepines.

[THE STATE]. Now, when you get a positive like the positive you just described in the urine, what's the next step?

[LEWALLEN]. All cases will proceed for confirmatory testing in which we will do a specific examination to determine what particular drug is present in either the blood or the urine.

[THE STATE]. So did you on this -- on this urine sample from Samantha Forero, did you do the confirmatory analysis test?

[LEWALLEN]. No, ma'am, I did not perform the confirmatory testing on either the blood or the urine sample.

[THE STATE]. Who did?

[LEWALLEN]. That would be Megan Dietz.

[THE STATE]. And what instrument did she use to perform that test?

[LEWALLEN]. She used the GCMS that I referred to earlier.

[THE STATE]. Now, have you ever performed the same test that she performed on that urine sample yourself personally?

[LEWALLEN]. I have performed this test before, but I have not tested that -- that sample.

[THE STATE]. Right. Not that sample, but just performed that test on other samples?

[LEWALLEN]. Yes, ma'am, I've performed this test many times.

[THE STATE]. Okay. You had testified earlier a thousand times; is that fair or . . .

[LEWALLEN]. Yes, ma'am, I can't even count how many times I've performed analysis on the GCMS in my career.

[THE STATE]. Now, are there safeguards to ensure that that GCMS is working properly?

[LEWALLEN]. Yes, ma'am, there are. We have safeguards built into every one of our procedures.

[THE STATE]. What are those safeguards?

[LEWALLEN]. For the GCMS, every day it must pass a performance check in which we analyze a sample of known anolytes. Those anolytes must provide acceptable data. We get two pieces of data from a GCMS. We get a time at which the anolyte comes off of the instrument,

and we also get its unique fragmentation pattern. Kind of like – it's kind of like a puzzle, you know. You put a puzzle back together, it can only be put back together one way. That's exactly what we get. We get a chemical fingerprint of this drug, and it is unique to that drug. And so what we do is we compare that to known standards of that drug, and those have to be identical. And that's one part of our acceptability.

Another part is an internal check that is built into all GCMS's that has to be performed prior to any analysis that is performed. Also, as part of our extraction protocols at the laboratory, we have quality control samples, both positive and negative controls that are extracted in every batch of cases. They are carried through our process through the entirety of it. And when they go to the instrument, those samples are both at the beginning and the end of our analytical batches to show that the instrument is operating property.

In addition to that, prior to any sample being placed on the instrument it must be done so in tandem, and that loading of the instrument must be reviewed by another person to verify that the instrument is loaded properly and all samples were placed in their proper position. And this is then documented and signed off on the -- on the instrument sequence.

Once this is done, all of this data is compiled and is put together in a quality control packet, and that packet is reviewed and made sure that all the data that is required in our policies and procedures is present. And no data, no case data from that run may be used until that QC packet has been reviewed and approved for use.

[THE STATE]. Now, you were able to review the data for this case from the sample from Samantha Forero are (*sic*) right; is that correct?

[LEWALLEN]. Yes, ma'am, I was.

[THE STATE]. So to the best of your ability, was that policy followed, all of those safety checks and controls and all of that, was that properly followed?

[LEWALLEN]. Yes, ma'am, it was.

> [THE STATE]. And was the data properly produced as a result of the confirmatory analysis as well as the preliminary screen?
>
> [LEWALLEN]. Yes, ma'am, it was.
>
> [THE STATE]. So was this test performed in accordance with the state crime lab operating procedures?
>
> [LEWALLEN]. Yes, ma'am, it was.
>
> [THE STATE]. And you were able to personally review all of the data that the test produced?
>
> [LEWALLEN]. Yes, ma'am, I was.
>
> [THE STATE]. Okay. Were you able to form an opinion about that test?
>
> [LEWALLEN]. Yes, ma'am, I was.
>
> [THE STATE]. What was the result of that test?
>
> [LEWALLEN]. For the blood, no substances were found present in the blood sample. In the urine sample, 7-aminoclonazepam was detected.
>
> [THE STATE]. And what is 7-aminoclonazepam?
>
> [LEWALLEN]. That is a biological metabolite or breakdown product of Clonazepam which is a Benzodiazepine.

(Defendant's objections and the trial court's rulings omitted).

The record reflects that Lewallen personally reviewed machine generated data from the preliminary immunoassay drug screen and the confirmatory results produced by the GCMS. He offered his own opinion, without reference to or reliance upon the opinions or conclusions of the non-testifying technicians. *See State v. Blue*, 207 N.C. App. 267, 281, 699 S.E.2d 661, 670 (2010) (finding no violation of the Confrontation Clause where the expert "was testifying as to his own observations and providing information rationally based on his own perceptions . . . [and did not] testify as to the declarations or findings of anyone other than himself."). Thus, Lewallen's opinion was based on his own analysis and was not merely surrogate testimony for an otherwise inadmissible lab report or signed affidavit certifying the non-testifying technician's results.

Defendant further alleges that he "did not have a prior opportunity to cross-examine the expert who performed the testing and prepared

the report." However, "when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront." *Ortiz-Zape*, 367 N.C. at 12, 743 S.E.2d at 163. Here, Defendant had the opportunity to, and did, question Lewallen extensively on cross-examination.

Because Defendant's Confrontation Clause rights were not violated, the trial court did not err in admitting Lewallen's expert testimony.

IV. Subject Matter Jurisdiction

[6] Defendant contends that the second-degree rape indictment is facially invalid pursuant to N.C. Gen. Stat. § 15-144.1(c) because it failed to state the name of the victim. Second, Defendant argues the first-degree kidnapping indictment is invalid because it failed to allege all essential elements of the crime. We disagree.

"[W]e review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). "A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, and to give authority to the court to render a valid judgment." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citations and quotation marks omitted).

Defendant asserts that the use of the victim's initials in the indictment was insufficient. However, N.C. Gen. Stat. § 15-144.1(c) states:

> If the victim is a person who has a mental disability or who is mentally incapacitated or physically helpless, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who had a mental disability or who was mentally incapacitated or physically helpless, naming the victim, and concluding as required by law. Any bill of indictment containing the averments and allegations named in this section is good and sufficient in law for the rape of a person who has a mental disability or who is mentally incapacitated or physically helpless and all lesser included offenses.

N.C. Gen. Stat. § 15-144.1(c) (2019).

Defendant further argues that use of the victim's initials is impermissible pursuant to *State v. White*, 372 N.C. 248, 827 S.E.2d 80 (2019). In *White*, the North Carolina Supreme Court held that using "Victim #1"

in the indictment was insufficient to "name the victim." *Id.* at 252, 827 S.E.2d at 83. "[T]o name someone is to identify that person in a way that is unique to that individual and enables others to distinguish between the named person and all other people. The phrase 'Victim #1' does not distinguish this victim from other children or victims." *Id.* at 252, 827 S.E.2d at 83.

However,

> [w]here the statutes defining second-degree rape and second-degree sexual offense require the offenses to be against "another person," the indictments charging these offenses do not need to state the victim's full name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person.

McKoy, 196 N.C. App. at 654, 675 S.E.2d at 409-10. *White* is not applicable here. Use of the victim's initials sufficiently "identif[ies] [the victim] in a way that is unique to that individual and enables others to distinguish between the named person and all other people." *White*, 372 N.C at 252, 827 S.E.2d at 82. There is nothing in *White* which overturned "the common sense understanding that initials represent a person." *McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410. Consistent with *McKoy*, it is unnecessary to include the victim's full name. Therefore, the use of the victim's initials is proper.

Defendant also argues that the first-degree kidnapping indictment is invalid because it did not allege or specify what crime constituted the underlying "sexual assault." This argument is without merit. Although Defendant asserts that the indictment must have alleged and specified the sexual assault element of first-degree kidnapping in order to be valid, our courts have never imposed such a requirement. *See State v. Freeman*, 314 N.C. 432, 434-35, 333 S.E.2d 743, 745 (1985) (holding that the indictment need not specify the underlying felony intended to be committed in elevating the kidnapping charge to first-degree kidnapping to be valid); *State v. Byers*, 175 N.C. App. 280, 623 S.E.2d 357 (2006) (holding that a burglary indictment need not identify the felony intended to be committed to be valid).

"[T]he purposes of an indictment include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense." *Freeman*, 314 N.C. at 435, 333 S.E.2d at 745.

Because the indictments at issue here properly identified the victim and gave Defendant notice of the charges against him, both indictments were valid. Therefore, the trial court had jurisdiction over the matters.

V. Jury Instructions

[7] Defendant alleges the trial court committed plain error when it failed to instruct the jury that the evidence presented to prove an element of the offenses could not be used to also prove the aggravating factor. Specifically, Defendant contends that the totality of the State's evidence presented to demonstrate Defendant's violation of a position of trust, was identical to the evidence necessary to prove the essential element of intent for both charges. Defendant argues that the trial court's failure to properly instruct the jury had a probable impact on the jury finding the aggravating factors. We disagree.

"Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal[.]" N.C. Gen. Stat. § 15A-1446(b) (2019). Our Courts have "elect[ed] to review such unpreserved issues for plain error . . . when they involve . . . errors in the judge's instructions to the jury[.]" *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted).

"To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citations omitted). Here, Defendant concedes that he did not object to the jury instruction at trial, and argues the trial court committed plain error when it failed to properly instruct the jury.

In order to establish plain error, a defendant bears the burden of demonstrating that a fundamental error occurred at trial. *Id.* at 518, 723 S.E.2d at 334. For an error to be 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.* at 518, 723 S.E.2d at 334 (citation and quotation marks omitted).

At trial, the court provided the following jury instruction:

> Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor: The defendant took advantage of a position of trust or confidence to commit the offense? . . . . You should consider all the evidence, the arguments, contentions and positions urged by the attorneys and any other contention that arises from the evidence.

The trial court's instruction indicated the jury "should consider all the evidence." However, pursuant to N.C. Gen. Stat. § 15A-1340.16(d), "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation." N.C. Gen. Stat. § 15A-1340.16(d) (2019). "Because N.C. Gen. Stat. § 15A-1340.16(d) limits what evidence the jury can consider in deciding whether an aggravating factor exists, the trial court was required to instruct the jury in accordance with the statute—as the pattern jury instruction specifies." *State v. Barrow*, 216 N.C. App. 436, 446, 718 S.E.2d 673, 679 (2011). Here, the trial court erroneously failed to provide a limiting instruction as to the aggravating factor because the trial court instructed the jury that it could consider all of the evidence when deliberating and deciding the aggravating factor.

While the trial court's instruction was in error, Defendant must demonstrate "a reasonable possibility that had the instruction been given, the jury would have failed to find the existence of the aggravating factors." *Id.* at 446, 718 S.E.2d at 679. *See* N.C. Gen. Stat. § 15A-1443(a) (2019).

The jury shall not use "[e]vidence necessary to prove an element of the offense . . . to prove any factor in aggravation." N.C. Gen. Stat. § 15A-1340.16(d). Defendant alleges that the State's evidence tending to show a violation of a position of trust was identical to the evidence necessary to prove intent to commit second-degree forcible rape and first-degree kidnapping. However, violation of a position of trust is not an element of either first-degree kidnapping or second-degree forcible rape. Accordingly, evidence used to prove the aggravating factor was not necessary to prove that Defendant intended to commit second-degree forcible rape or first-degree kidnapping. Therefore, Defendant did not demonstrate that there was a reasonable possibility that the instructional error had an impact on the jury's verdict. Thus, Defendant was not prejudiced by the jury instruction.

VI. SBM

[8] Defendant's last argument on appeal is that the trial court erred when it overruled his objection to imposition of SBM for life. However, other than listing this argument in the index, Defendant does not argue this issue in the body of his brief.

"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). Furthermore, "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained

therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005); N.C. R. App. P. 28. Defendant has abandoned this argument.

Conclusion

For the foregoing reasons, we find that Defendant received a fair trial free of prejudicial error.

NO PREJUDICIAL ERROR.

Judge BRYANT concurs.

Judge MURPHY dissents in separate opinion.

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

Defendant argues the trial court erred in overruling Defendant's Confrontation Clause objections to the testimony of Frank Lewallen, a regional forensic scientist manager for the State Crime Lab, regarding the tests performed by a non-testifying chemical analyst. Defendant states it is

> undisputed that Lewallen . . . did not perform the testing or analysis that produced this result, that the expert who performed the testing and prepared the report was not unavailable to testify, and that Defendant did not have a prior opportunity to cross-examine the expert who performed the testing and prepared the report.

Defendant contends on appeal Lewallen failed to provide an independent opinion regarding the testing and analysis of the victim's blood and urine samples because both tests were performed by two non-testifying forensic toxicologists. I cannot join the Majority in holding "Lewallen's opinion was based on his own analysis and was not merely surrogate testimony for an otherwise inadmissible lab report or signed affidavit certifying the non-testifying technician's results." *Supra* at 666. Therefore, I respectfully dissent in part.

Rule 702(a) provides that an expert witness may testify "in the *form of an opinion*" if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a) (2019) (emphasis added). "[T]he expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting

otherwise inadmissible statements." *State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 162 (2013).

In *Bullcoming v. New Mexico*, the United States Supreme Court decided "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming v. New Mexico*, 564 U.S. 647, 652, 180 L. Ed. 2d 610, 616 (2011). The Court held "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.*

Our Supreme Court followed the *Bullcoming* holding in *State v. Craven*, ordering a new trial where a lab report was improperly admitted into evidence after a State Bureau of Investigation analyst testified about the content of lab reports that the analyst did not create. *State v. Craven*, 367 N.C. 51, 744 S.E.2d 458 (2013). The prosecutor asked:

> Q. Now did you also bring with you notes and documentation for the date of offense March 3, 2008?
>
> A. I did.
>
> Q. And who—who completed that analysis?
>
> A. Mr. Tom Shoopman completed that analysis.
>
> ….
>
> Q. And did you bring his report?
>
> A. I did.
>
> Q. Did you have a chance to review it?
>
> A. I have.
>
> Q. Do you agree with its conclusions?
>
> A. I do.
>
> ….
>
> Q. What was Mr. Shoopman's conclusion?
>
> [Objection by defense counsel]

> ….
>
> A. According to the lab report prepared by Tom Shoopman, the results for State's Exhibit Number . . . . 10 were cocaine base schedule two controlled substance with a weight of 1.4 grams.
>
> The lab report then was admitted into evidence.
>
> Similarly, regarding the 6 March 2008 sample, the State asked:
>
> Q. Now turning to State's Exhibit Number 12 and offense date March 6th of 2008, did you bring a report from the SBI regarding that date of offense?
>
> A. I did.
>
> Q. Who conducted that analysis?
>
> A. Mr. Irvin Allcox.
>
> Q. And do you have that report in your hand?
>
> A. I do.
>
> Q. And do you have the underlying data supporting that conclusion?
>
> A. I do.
>
> Q. And you do agree with the conclusion stated in that report?
>
> A. I do.
>
> ….
>
> Q. And what conclusion did [Mr. Allcox] reach?
>
> [Objection by defense counsel]
>
> A. The item . . . . twelve was cocaine base, schedule two controlled substance. And it had a weight of 2.5 grams.

Id. at 55-56, 744 S.E.2d at 461 (emphasis omitted). The testimony was not an independent opinion obtained through the analyst's own analysis. Our Supreme Court in *Craven* held the analyst "did not offer—or even purport to offer—her own independent analysis or opinion on the . . . samples. Instead, [she] merely parroted [the testing agent's] conclusions from their lab reports." *Id.* at 56-57, 744 S.E.2d at 461.

Further, in *Ortiz-Zape*, related testimony was offered by a testifying analyst, but "the reports produced by the non-testifying analyst were not admitted into evidence." *Ortiz-Zape*, 367 N.C. at 11, 743 S.E.2d at 163. In *Ortiz-Zape*, however, "the prosecutor established that [the testifying analyst's] opinion was her own, independently reasoned opinion—not 'surrogate testimony' parroting the testing analyst's opinion." *Id.* at 12, 743 S.E.2d at 163. The prosecutor in *Ortiz-Zape* asked:

> Q. Based on your training and experience in the field of forensic chemistry and your employment at the CMPD crime lab as well as other labs prior to that and your review of the file in this case, did you have a chance to form your own independent expert opinion as to the identity of the substance in control number 16826?
>
> A. Yes, I did.
>
> Q. What is your independent expert opinion?
>
> [DEFENSE COUNSEL]: Objection, your Honor. I don't need to be heard further.
>
> THE COURT: Yes, ma'am. Objection overruled, you may answer.
>
> A. My conclusion was that the substance was cocaine.
>
> Q. Is that still your opinion currently?
>
> A. Yes, it is.

Id. at 11, 743 S.E.2d at 163. The defendant argued this expert opinion was inadmissible because the expert "did not personally test or observe [the substance] being tested [which] violated his right to confront witnesses against him." *Id.* at 12, 743 S.E.2d at 163. Our Supreme Court held the expert gave *her opinion* that was "based upon facts or data of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.* (internal quotations omitted). Our Supreme Court further concluded "[t]his expert opinion, from [the testifying analyst's] own analysis of the data, constituted the substantive evidence being presented against [the] defendant[,] . . . [and the d]efendant was able to cross-examine" the testifying analyst. *Id.* at 13, 743 S.E.2d at 164 (internal citations omitted).

The proffered testimony from *Craven* is almost identical in nature to the testimony here. Lewallen's testimony is not substantially similar to that of *Ortiz-Zape* and is more similar to the testimony in *Craven* that was not admissible. Lewallen simply parroted the conclusions of a test

performed by another person not subject to the confrontation required by the United States Constitution.

The State only asked Lewallen "[w]ere you able to form an opinion about that test?" Lewallen did not actually offer an opinion as to what the substance was. The State followed up that question with, "[w]hat was the result of that test?" To that question, Lewallen parroted the results of the test he did not perform, and stated "[f]or the blood, no substances were found present in the blood sample. In the urine sample, 7-aminoclonazepam was detected." Lewallen's testimony was not his independent opinion satisfying Rule 702 safeguards. Our Supreme Court found similar statements to be inadmissible in *Craven* when the prosecutor asked the expert about the "conclusion" of the test results, to which the expert responded "[a]ccording to the lab report prepared by [the other expert], the results for State's Exhibit Number . . . . 10 were cocaine base schedule two controlled substance with a weight of 1.4 grams." *Craven*, 367 N.C. at 56, 744 S.E.2d at 461.

Unlike in *Ortiz-Zape*, where the expert gave an "independent expert opinion," *Ortiz-Zape*, 367 N.C. at 11, 743 S.E.2d at 163, Lewallen provided surrogate testimony on an otherwise inadmissible lab report. Lewallen did not provide testimony in the form of an opinion and did not present an independent opinion through his own analysis. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 62, 158 L. Ed. 2d 177 (2004). Lewallen's testimony was inadmissible and Defendant is entitled to a new trial free from this prejudicial violation of his constitutional rights. I respectfully dissent in part.

I concur in the Majority as to Parts I, II, and IV, but would hold Parts V and VI to be moot in light of my dissenting opinion as to Part III.

STATE OF NORTH CAROLINA
v.
TENEDRICK STRUDWICK

No. COA18-794-2

Filed 6 October 2020

Satellite-Based Monitoring—lifetime monitoring—reasonableness—upon release from prison—thirty to forty-three years in the future

On remand for reconsideration in light of *State v. Grady*, 372 N.C. 509 (2019), the State failed to demonstrate that requiring defendant, a sex offender, to enroll in lifetime satellite-based monitoring (SBM) upon his release from prison in thirty to forty-three years was a reasonable search where the SBM was so far in the future.

Judge TYSON dissenting.

Appeal by defendant from order entered 19 December 2017 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 February 2019, and opinion filed 6 August 2019. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

STROUD, Judge.

Defendant Tenedrick Strudwick timely appealed from the trial court's order requiring him to enroll in lifetime satellite-based monitoring following his future release from prison. On 6 August 2019, this Court filed an unpublished opinion reversing the trial court's civil order mandating lifetime satellite-based monitoring. *See State v. Strudwick*, 266 N.C. App. 619, 830 S.E.2d 703 (2019) (unpublished). The State subsequently filed a petition for discretionary review with the North Carolina Supreme Court. On 30 October 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of

remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). Upon reconsideration, we reach the same result as our previous opinion and reverse the trial court's order mandating lifetime satellite-based monitoring.

I. Background

We described the factual background of this case in our prior opinion:

> Defendant pleaded guilty to first degree rape, first degree kidnapping, and robbery with a dangerous weapon and was sentenced to 30 years minimum to 43 years maximum in prison. At a later hearing on SBM, the State presented Shakira Jones, a probation officer with the Department of Public Safety for the sex offender population. Ms. Jones testified about SBM and the Static-99 form which is used to "determine the offender's risk level . . . to determine whether they're a risk for future offenses or to re-offend." Ms. Jones filled out a Static-99 form for defendant, and he had a total score of 3, which placed him in the "Average Risk" category. At the conclusion of the State's evidence, the trial court denied defendant's motion to dismiss the SBM proceedings and subsequently ordered defendant to submit to lifetime SBM. Defendant timely appealed.

State v. Strudwick, 266 N.C. App. 619, 830 S.E.2d 703 (alteration in original).

The procedural situation in *Grady III* was quite different from this case. Mr. Grady was sentenced to imprisonment in 2006, served his sentence, and "was unconditionally released from prison on 25 January 2009 and received certification that his rights of citizenship were 'BY LAW AUTOMATICALLY RESTORED.' " *Grady III*, 372 N.C. at 511, 831 S.E.2d at 547. In March 2010, Mr. Grady was notified that a hearing was scheduled to determine whether he should be subject to SBM:

> the North Carolina Department of Correction (DOC) sent a letter to Grady informing him that it had made an initial determination that he met the statutory criteria of a "recidivist," which would require his enrollment in the SBM program, and giving him notice to appear at a hearing at which the court would determine his eligibility for SBM. Before a hearing was held, he pleaded guilty on

> 27 October 2010 to failure to maintain his address with the sex offender registry and was sentenced to twenty-four to twenty-nine months in prison. He served that term of imprisonment and was again unconditionally released on 24 August 2012. A new hearing was scheduled for 14 May 2013 in the Superior Court in New Hanover County to determine if Grady should be required to enroll in the State's SBM program.

Id. at 512, 831 S.E.2d at 547. Mr. Grady "filed a motion to deny the SBM application and dismiss the proceeding" based in part upon his contention that "the imposition of the monitoring upon Defendant violates his rights to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution." *Id.* at 515-16, 831 S.E.2d at 549. The trial court denied Mr. Grady's motion, found he was a "recidivist" as defined by statute, and ordered him to enroll in SBM for the rest of his life. *Id.* at 516 831 S.E.2d at 550.

After extended appellate proceedings, the Supreme Court ultimately held SBM was an unconstitutional search as applied to Mr. Grady and others in the same category as Mr. Grady. *Grady III* limited its holding to a particular group of defendants, "recidivists" as defined by North Carolina General Statute § 14-208.6(2b):

> In light of our analysis of the program and the applicable law, we conclude that the State's SBM program 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 through probation, parole, or post-release supervision. We decline to address the application of SBM beyond this class of individuals.

Id. at 522, 831 S.E.2d at 553 (footnote omitted).

II. Analysis

Although *Grady III's* holding does not directly apply to Defendant in this case, who was not classified as a "recidivist," the analysis of the issue described in *Grady III* does apply to this case. *See State v. Griffin*, 270 N.C. App. 98, 106, 840 S.E.2d 267, 273 (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. As conceded by the State at oral argument, *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns. (citing *Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564.")).

And although Mr. Grady had already completed his sentence when his SBM hearing was held, the order directing Defendant to enroll in SBM will not take effect until after Defendant is released from prison, when he will be in essentially the same position as Mr. Grady. If he is subject to any sort of post-release supervision, his privacy interests will be reduced during that supervision. But once he has served the sentence and completed any post-release supervision, his privacy interests will be the same as Mr. Grady's. *See Grady III*, 372 N.C. at 531, 831 S.E.2d at 559-60 ("This is especially true with respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the 'continuum of possible [criminal] punishments' and have no ongoing relationship with the State." (alteration in original)). The primary factual difference between Mr. Grady and Defendant is that Mr. Grady's SBM was to begin immediately, *id.* at 520, 831 S.E.2d at 552, and Defendant's SBM will not begin until thirty to forty-three years in the future.

In addition, this case is one of several considered by this Court after *Grady III* addressing a similar issue for defendants sentenced for a crime and simultaneously, or soon after sentencing, ordered to enroll in SBM either for a term of years or for life, with the SBM to begin only after completion of the imprisonment. This Court has already addressed this issue, and we are bound to follow those precedents. *E.g.*, *State v. Gordon*, 270 N.C. App. 468, 840 S.E.2d 907 (2020).

We are unable to distinguish the factual situation of this case, where Defendant is not a recidivist and will not be released from prison for thirty to forty-three years, from *State v. Gordon*, 270 N.C. App. 468, 840 S.E.2d 907,[1] where the defendant was not eligible to be released from

1. As was the case in *State v. Hutchens*, we acknowledge, "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[.]" 272 N.C. App. 156, 161, 846 S.E.2d 306, 311 (16 June 2020) (No. COA 19-787).

prison for fifteen to twenty years. In *Gordon*, the defendant pled guilty to "statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping" in February 2017. *Id.* at 470, 840 S.E.2d at 909. The trial court in *Gordon* determined the defendant was convicted of an " 'aggravated offense' under N.C. Gen. Stat. § 14-208.6(1A)" and ordered him to enroll in SBM "for the remainder of his natural life upon his release from prison." *Id.* at 470, 840 S.E.2d at 909.

In *Gordon*, this Court fully analyzed the effect of *Grady III* on its reconsideration. *Id.* at 474-77, 840 S.E.2d at 912-14. Although the defendant in Gordon and Defendant in this case were not convicted of the same offenses and there are factual differences in their situations, none of those differences change the legal analysis under *Grady III*. *See Grady III*, 372 N.C. at 522, 831 S.E.2d at 553. One of the factual differences is that defendant's term of SBM will not begin for at least thirty years, while Gordon's could begin in only fifteen years. *State v. Gordon*, 270 N.C. App. at 472, 840 S.E.2d at 911. This difference only reduces the State's ability to "demonstrate reasonableness" of the SBM since it

> is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis. For instance, we are unable to consider "the extent to which the search intrudes upon reasonable privacy expectations" because the search will not occur until Defendant has served his active sentence. The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison.

Id. at 475, 840 S.E.2d at 912–13 (citation omitted).

In *Gordon*, prior to its remand by the North Carolina Supreme Court, the concurring judge noted that

> this case is controlled by our recent decisions in *State v. Griffin*, —— N.C. App. ——, 818 S.E.2d 336, 2018 N.C. App. LEXIS 792 (2018), and *State v. Grady*, —— N.C. App. ——, 817 S.E.2d 18, 2018 N.C. App. LEXIS 460 (2018) (Grady II). Under this precedent, the State failed to meet its burden to justify satellite-based monitoring in this case.

261 N.C. App. 247, 261, 820 S.E.2d 339, 349 (2018), *remanded for reconsideration*, 372 N.C. 722, 839 S.E.2d 840 (2019). The concurring judge pointed out the problem this presented:

> the majority's view [is] that the State must divine all the possible future events that might occur over the ten or twenty years that the offender sits in prison and then prove that satellite-based monitoring will be reasonable in every one of those alternate future realities. That is an impossible burden and one that the State will never satisfy.

Id. at 262, 820 S.E.2d at 350.

As the quote, often attributed to Yogi Berra goes, "It's tough to make predictions, especially about the future." Although courts must still address other elements of the analysis of the reasonableness of SBM for a particular defendant, *see Grady III*, 372 N.C. at 545, 831 S.E.2d at 569, the problem of the timing of the SBM hearing could be eliminated by a simple procedural change. Our General Assembly could remedy this "impossible burden" imposed upon the State by amending the relevant statutes to direct that the hearing regarding a defendant's eligibility for SBM must be held close to the time of release from prison, particularly in cases where the defendant will be imprisoned for many years. The SBM hearing could be held at a time when all the relevant circumstances, such as the defendant's condition, situation, and the state of monitoring technology, are known. This change in procedure would also allow our current district attorneys, defense attorneys, trial judges, and appellate courts to work on addressing the urgent matters facing our courts right now instead of attempting to predict the future for defendants who will not even be able to be fitted with an SBM monitor for at least thirty years. But until we receive further guidance from our Supreme Court or new options for addressing the SBM procedure from the General Assembly, under existing law, we are required by law to reverse defendant's SBM order. "Accordingly, we necessarily conclude that the State has failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison is a reasonable search in Defendant's case. We therefore reverse the trial court's order." *State v. Gordon*, 270 N.C. App. at 477, 840 S.E.2d at 914.

REVERSED.

Judge ARROWOOD concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

The Supreme Court of the United States held North Carolina's statutory imposition of satellite-based monitoring ("SBM") effects a search, but did not rule the statute to be unconstitutional. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015). The Fourth Amendment only prohibits "unreasonable searches and seizures" and is not a blanket prohibition of state intrusions upon personal privacy. U. S. Const. Amend IV; *Terry v. Ohio*, 392 U.S. 1, 9, 20 L.Ed.2d 889, 899 (1968) (citation omitted).

The court's order of SBM of a defendant is a constitutional search, if it is reasonable, based upon the "totality of the circumstances[.]" *Grady v. North Carolina*, 575 U.S. at 310, 191 L. Ed. 2d at 462. In considering the "totality of the circumstances," a reviewing court is to consider, among other things, "the nature and purpose of the search and the extent to which the search intrudes upon reasonable expectations of privacy." *Id.*

I. *State v. Grady*

In its most recent opinion reviewing North Carolina's SBM program, our Supreme Court held that the imposition of SBM was unconstitutional only as applied to a distinct and specific class of former defendants. This holding solely applies to convicted sexual offenders, who meet the statutory definition of a "recidivist," and who are no longer under any form of current or post-release supervision, parole, or probation. *State v. Grady*, 372 N.C. 509, 545, 831 S.E.2d 542, 568-69 (2019) ("*Grady III*") (limiting its holding to post-release "recidivists" as defined by N.C. Gen. Stat. § 14-208.6(2b) (2019), and expressly not applying it to offenders under "probation, parole or post-release supervision.").

II. *State v. Strudwick*

On 30 October 2019, the Supreme Court allowed the State's petition for discretionary review of the unanimous unpublished opinion in this case "remanding to the Court of Appeals for further reconsideration in light of [that] Court's decision" in *Grady III*. Order, No. 334P19 (Oct. 30, 2019). In the previous opinion, this Court held the trial court's order was unreasonable as applied to Defendant and must be reversed. *State v. Strudwick*, 266 N.C. App. 619, 830 S.E.2d 703, 2019 WL 3562352 (unpublished) (2019).

In addition to this case, our Supreme Court has remanded to this Court at least five reversals of SBM cases and ordered reconsideration in light of *Grady III*. *See State v. Anthony*, 267 N.C. App. 45, 831 S.E.2d 905,

remanded, 373 N.C. 249, 835 S.E.2d 448 (2019); *State v. Tucker*, 266 N.C. App. 588, 832 S.E.2d 258, *remanded*, 373 N.C. 251, 835 S.E2d 442 (2019); *State v. White*, 261 N.C. App. 310, 817 S.E.2d 795, 2018 WL 4200979 (2018) (unpublished), *remanded*, 372 N.C. 726, 839 S.E.2d 839 (2019); *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), *remanded*, 372 N.C. 723, 839 S.E.2d 841 (2019); *State v. Gordon*, 261 N.C. App. 247, 820 S.E.2d 339 (2018), *remanded*, 372 N.C. 722, 839 S.E.2d 840 (2019).

This Court's analyses of the SBM statute and broad expansions of *Grady III* are clearly in error. We all agree "courts must still address other elements of the analysis of the reasonableness of SBM for a particular defendant."

In *State v. Bursell*, 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019), our Supreme Court reversed the holding of this Court, asserting the defendant had preserved his constitutional challenge to SBM, despite failing to specifically object before the trial court to the imposition of SBM on constitutional grounds. By failing to clearly raise the constitutional issue before the trial court, the defendant failed to satisfy Rule 10(a)(1) of the Rules of Appellate Procedure, which presents a "mandatory and not directory" requirement for jurisdiction. *Id.* at 199, 827 S.E.2d at 304 (citation omitted).

The majority's analysis correctly notes our Supreme Court held that the "reasonableness" calculus is different when a defendant *is* subject to State supervision. *Grady III*, 372 N.C. at 526, 831 S.E.2d at 556 (differentiating its holding to cases where there is an "ongoing supervisory relationship between defendant and the State"). For instance, in the *Grady III* Conclusion section, the Supreme Court emphasized its holding does not enjoin all of the SBM program's applications, in part, "because this provision *is still enforceable* against a [sex offender] during the period of his or her State supervision." *Id.* at 546, 831 S.E.2d at 570 (emphasis supplied). *See State v. Hilton*, 271 N.C. App. 505, 506, 845 S.E.2d 81, 83 (2020) (holding "the imposition of SBM on Defendant *during the period of his post-release supervision* constitutes a reasonable search").

A primary factual difference between the defendant in *Grady III* and Defendant here is Grady's post-release SBM was to begin immediately, while Defendant's SBM will not begin, if at all, until years into the future. It is certain, without other intervention, Defendant is and will remain in State custody and supervision in some form, whether active or community-based, for at least 30 years.

This Court cannot forecast nor substitute our judgment for the legislative findings and determinations to compel aggravated offenders to

be enrolled in SBM while under the State's supervision. The trial court determined Defendant was convicted of an " 'aggravated offense' under N.C. Gen. Stat. § 14-208.6(1A)" and, consistent with the statute, ordered him to enroll in SBM "for the remainder of his natural life."

This Court's decisions cited by the majority's opinion are neither controlling nor compel a contrary result. The Supreme Court granted the State's petitions and entered orders staying this Court's decisions in both *State v. Griffin* and *State v. Gordon*, again based upon *Grady III*. Neither case provides any precedential or binding authority on these facts before us. *Grady III* is the binding precedent.

This Court cannot anticipate nor predict what may or may not occur well into the future, and a prediction or hunch alone is not a legitimate basis to overturn the trial court's statutorily required and lawful imposition of SBM over a defendant still in custody or under state supervision on constitutional grounds. "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground. When examining the constitutional propriety of legislation, [w]e presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009) (citations omitted), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010).

Defendant will continue under the State's supervision during his minimum 30 years to maximum 40 years of some form of state supervised incarceration or restraint. If allowed humanitarian or conditional release outside of the State's prison system, *Grady III* does not prohibit as unreasonable Defendant's whereabouts being subject to monitoring. The alternative to SBM is for Defendant to return to prison, where his whereabouts are known and monitored 24 hours a day/7 days a week.

If the State's classification of a crime and imposition of an active sentence is constitutional, which it is, then any lesser restraint upon a defendant, while still under the State's supervision, is also constitutional. If Defendant's status becomes solely as a "recidivist" as defined by N.C. Gen. Stat. § 14-208.6(2b), *Grady III* controls Defendant's SBM status at that time.

III. Conclusion

Under the unrebutted presumption of constitutionality and "totality of the circumstances," Defendant's conviction of an aggravated sexual

offense supports "the nature and purpose of the search" to justify the State's supervision and search. *Grady v. North Carolina*, 575 U.S. at 310, 191 L. Ed. 2d at 462. Defendant's lowered expectation of privacy, while remaining under supervision, supports "the extent to which the search intrudes upon reasonable expectations of privacy" to impose SBM. *Id.*

The trial court's findings of fact and conclusions support the efficacy and legality of imposing SBM at this time "as applied *to this particular defendant*." *State v. Grady*, 259 N.C. App. 664, 674, 817 S.E.2d 18, 26 (2018), *aff'd as modified*, *Grady III*, 372 N.C. 509, 831 S.E.2d 542. Our Supreme Court's express limitation provides "our holding enjoins application *only to unsupervised individuals*." *Grady III*, 372 N.C. at 550, 831 S.E.2d at 572 (emphasis supplied).

Defendant was convicted of an aggravated sexual offense, as was determined by the General Assembly, and as defined in N.C. Gen. Stat. § 14-208.6(1a). A trial court has no discretion whether to order lifetime SBM enrollment. N.C. Gen. Stat. § 14-208.40B(c) (2019). Unlike here, the defendant in *Grady III* was not serving an active sentence of incarceration nor remained under State supervision post release. Grady was a prior offender whose, "rights of citizenship which were forfeited on conviction . . . [we]re by law automatically restored to him" when he was enrolled as a recidivist. *Grady*, 259 N.C. App. at 670, 817 S.E.2d at 24 (citation omitted). The trial court's ruling is presumed to be constitutional and was certainly reasonable, and is consistent with the exclusions our Supreme Court stated in *Grady III*. *Grady III*, 372 N.C. at 522, 831 S.E.2d at 553.

Defendant remains under active State incarceration and supervision. Upon remand to apply the facts from *Grady III* to those here, Defendant has failed to carry his burden to show the imposition of SBM is unconstitutional as applied to him. The constitutionality of the statute is presumed and the holding in *Grady III* does not prohibit the SBM. The trial court's judgment is properly affirmed. *Mello*, 200 N.C. App. at 564, 684 S.E.2d at 479. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
BENJAMIN EDWIN THOMPSON

No. COA19-1099

Filed 6 October 2020

1. Evidence—expert testimony—PTSD of victim—no limiting instruction—plain error analysis

The trial court's admission of expert testimony regarding one victim's post-traumatic stress disorder, without instructing the jury to consider the evidence for corroborative purposes only, did not constitute plain error in defendant's trial for multiple sexual and other offenses involving two child victims. Defendant did not specifically request a limiting instruction and could not demonstrate prejudice even if such an instruction was required, where the testimony corroborated other evidence, including the victim's testimony, and served to explain the victim's delay in reporting defendant's crimes against her.

2. Satellite-Based Monitoring—lifetime—enrollment upon future release from prison—reasonableness

The trial court's order imposing lifetime satellite-based monitoring on defendant upon his release from prison (after he completes consecutive sentences of 300 to 420 months and 240 to 348 months) was reversed where the State failed to show that lifetime monitoring upon defendant's eventual release was reasonable.

3. Satellite-Based Monitoring—period of ten years—remand for correction of clerical error

The trial court's order imposing satellite-based monitoring for a period of ten years upon defendant's release from prison was not in error but required remand for correction of a clerical error where the court failed to check a box in the order that defendant required the highest level of supervision.

Judge DIETZ concurring with respect to the criminal judgment and concurring in the result with respect to the civil judgments.

Judge BERGER concurring with respect to the criminal judgment and concurring in the result with respect to the civil judgments with a separate opinion with which Judge DIETZ concurs.

STATE v. THOMPSON

[273 N.C. App. 686 (2020)]

Appeal by defendant from judgments entered 30 January 2019 by Judge W. Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant.

ARROWOOD, Judge.

Benjamin Edwin Thompson ("defendant") appeals from judgments entered on his convictions for statutory sexual offenses with children, sexual activity by a substitute parent or custodian, and sale or delivery of controlled substances to a minor. Defendant argues the trial court plainly erred by admitting expert testimony about one victim's PTSD without a limiting instruction. Defendant also requests that this Court grant him a *writ of certiorari* to determine whether the trial court erred in ordering him to submit to satellite-based monitoring for a lifetime and for ten years. For the following reasons, we affirm in part and reverse in part.

I. Background

On 10 October 2016, a grand jury indicted defendant on several charges arising out of offenses against the minor children A.W. and A.B.[1] Defendant was indicted on two counts of statutory sexual offenses with a child against 12-year-old A.W., two counts of a sex act by a substitute parent or custodian, and two counts of selling or delivering controlled substances to a minor under 13 years of age. Regarding 13-year-old A.B., defendant was indicted on two counts of statutory sexual offenses with a child under 15 years of age and two counts of selling or delivering controlled substances to a minor under 16 years of age but more than 13 years of age. The matter came on for trial on 22 January 2019.

The State's evidence at trial tended to show the following. A.W. is defendant's step-daughter and the best friend of A.B. When A.W. was 12 and A.B. was 13, defendant provided them with alcohol, Xanax, and marijuana on several occasions. Defendant also sent the girls inappropriate messages through text and on Snapchat. In one such message, defendant insisted A.W. "owe[d] [him] a finger f***." In another, defendant

1. Initials are used to protect the identities of the juveniles and for ease of reading.

requested that A.B. send him nude photos. A.W. testified that defendant on multiple occasions put his hand down her pants and rubbed and penetrated her vagina with his fingers. A.B. gave a similar account of defendant touching her in the same manner.

The State introduced into evidence a number of messages police recovered from A.W.'s phone which corroborated her account, including several of the inappropriate messages from defendant. Several witnesses also corroborated A.W.'s and A.B.'s accounts. A.W.'s mother saw a text message from defendant to A.W. saying "you owe me a finger f***" and telling her to use Snapchat to communicate because they were "safer on there." In addition, A.B.'s mother read an entry in A.W.'s diary in which A.W. wrote that "Ben was always trying to look at their p****** and Ben was always . . . trying to finger f*** them[.]" When first confronted by their mothers about whether something was going on with defendant, A.W. and A.B. initially lied about the nature of their interactions with him. At the direction of defendant, A.W. and A.B. told their mothers that "finger f***" meant "flipping the bird." However, A.W.'s step-mother and her friend D.D. both testified A.W. confided in them about the things defendant would do and say to her. Detective Jessica Woosley of the Cleveland County Sherriff's Department testified that A.W. and A.B. again recounted the sexual abuse during investigative interviews.

The State also presented testimony of A.W.'s therapist, Jessica Talbert ("Talbert"), who was tendered as an expert licensed in clinical therapy in the area of assessment and treatment of children and adolescents in trauma. A.W. was referred to Talbert because she was cutting herself, having trouble functioning at school, was not eating or sleeping, and expressed a desire to kill herself. After assessing A.W., Talbert diagnosed her with post-traumatic stress disorder ("PTSD") and major depressive disorder. Talbert further testified that over the course of treatment A.W. discussed the details of her sexual abuse by defendant, including that he touched her vagina, told her to touch his penis, and made inappropriate comments to her of a sexual nature. Talbert also explained that, due to feelings of shame and guilt, most children either never disclose sexual abuse or only disclose a little at a time. Defendant did not object to this testimony being used for corroborative purposes, and the trial court did not issue a limiting instruction to the jury.

Defendant presented evidence including his own testimony and that of his mother, sister, son, and a coworker. He testified that A.W. suffered from mental health issues since 2013 and would lie to her parents about things. Defendant also denied exposing himself to the girls, touching them inappropriately, or providing them with any alcohol or drugs. At

the conclusion of the evidence, defendant made a motion to dismiss. The trial court denied the motion, and the jury subsequently found defendant guilty of all charges. The trial court consolidated the offenses against A.W. and A.B. into two judgments and imposed consecutive sentences of 300 to 420 months and 240 to 348 months. After considering whether satellite-based monitoring ("SBM") would be appropriate, the trial court ordered that defendant enroll in SBM for the remainder of his natural life upon his release from prison for his offenses against A.W., and for an additional 10 years for his offenses against A.B. In addition, defendant was required to register as a sex offender and made subject to a permanent no-contact order. Defendant gave oral notice of appeal in open court. No written notice of appeal of the SBM order was filed.

II. Discussion

Defendant appeals from the trial court's judgments against him, arguing in the first place that the trial court plainly erred by admitting expert testimony that A.W. suffered from PTSD without giving a limiting instruction. Defendant also filed a petition for *writ of certiorari* requesting that this Court review the trial court's order imposing SBM. He argues that the trial court erred in (1) ordering him to enroll in lifetime SBM because such order was unconstitutional, and (2) ordering him to enroll in SBM for ten years without finding that he required the highest level of supervision and monitoring.

As an initial matter, we address this Court's jurisdiction with respect to the SBM order. Due to the civil nature of SBM proceedings, defendant was required to file a written notice of appeal from the SBM order pursuant to Rule 3 of the Appellate Rules of Procedure in order to properly bring the matter before this Court. *State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019). Defendant failed to do so. 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." *State v. Hutchens*, 846 S.E.2d 306, No. COA 19-787, 2020 WL 3240947, at *3 (N.C. Ct. App. June 16, 2020) (unpublished) (citing *Lopez*, 264 N.C. App. at 504, 826 S.E.2d at 504). In our discretion, we grant defendant's petition and address the merits of his appeal.

A. Expert Testimony

[1] Defendant first argues that the trial court plainly erred in admitting expert testimony A.W. suffered from PTSD where such evidence was not accompanied by a limiting instruction. At trial, defendant objected to Talbert's testimony on hearsay grounds, arguing against its admittance

"unless it's for corroboration purposes only." The trial court found the testimony admissible under Rule 803(4), and defendant did not thereafter request a limiting instruction. Because defendant did not object to the admission of the expert testimony for corroborative purposes without a limiting instruction, he failed to preserve the matter for appeal. Nevertheless, this Court reviews unpreserved evidentiary objections for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity, or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

At trial, Talbert testified that she interviewed A.W. following a referral from law enforcement and administered certain assessments and questionnaires. Talbert thereby formed an opinion that A.W. suffered from PTSD and major depressive disorder. Defendant raised no objection to this testimony being admitted for corroborative purposes, and the trial court did not instruct the jury that it should limit its consideration of the testimony for any specific purpose.

Our Supreme Court has held that "evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred." *State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992). However, "it may be admitted for certain corroborative purposes" or "help to explain delays in reporting the crime or to refute the defense of consent." *Id.* at 821-22, 412 S.E.2d at 890-91. "If admitted, the trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted." *Id.* at 822, 412 S.E.2d at 891. "The rule, however, in this State has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Quarg*, 334 N.C. 92, 101, 431 S.E.2d 1, 5 (1993) (citing *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985)). *See also State v. Cox*, 303 N.C. 75, 83, 277 S.E.2d 376, 381 (1981)

(holding that, "when a defendant fails to specifically request an instruction restricting the use of corroborative testimony, it is not error for the trial judge to admit the evidence without a limiting instruction.").

Here, Talbert's testimony corroborated A.W.'s testimony and explained her hesitancy and delay in reporting the crime. Trial counsel for defendant failed to request that the trial court limit the instruction to restrict the admissibility of the testimony for corroborative purposes only. We thus hold that the trial court did not err in admitting Talbert's testimony that A.W. suffered from PTSD. We note that even if a limiting instruction were required in the absence of a specific request by defendant, defendant was not prejudiced by the omission such that it would amount to fundamental error. In addition to A.W.'s own testimony, the State presented text messages and several witnesses who corroborated A.W.'s accounts of sexual abuse at the hands of defendant, including A.W.'s mother, her step-mother, A.B., A.B.'s mother, D.D., and the detective who interviewed A.W and A.B. Accordingly, we find no plain error.

B. Satellite-Based Monitoring Orders

1. Constitutionality of Lifetime SBM

[2] We now turn to defendant's challenges to the trial court's SBM orders. This is the latest in a series of cases in which this Court has considered the reasonableness of lifetime and long-term SBM orders imposed upon a defendant in light of recent decisions passed down by the United States Supreme Court and our state's Supreme Court. We first address defendant's argument that the trial court erred in imposing lifetime SBM for his violations of N.C. Gen. Stat. § 14-27.28 with respect to A.W. because the State failed to establish this was a reasonable search under the Fourth Amendment.

Defendant concedes he did not raise a Fourth Amendment challenge at the sentencing hearing. Ordinarily, failure to do so would bar the matter from consideration on appeal. However, as conceded by the State, the constitutional issue of the reasonableness of lifetime SBM is nevertheless properly before this Court where, as here, the State initiates consideration of a constitutional issue and the trial court addresses it, thus preserving the issue even if the defendant did not object.[2] *Lopez*,

2. Defendant in his brief requested that, should we find that the matter was not preserved for review, this Court exercise its discretion under Rule 2 of the Rules of Appellate Procedure to review the issue. *See* N.C.R. App. P. Rule 2 (2020) (providing that, to "prevent manifest injustice to a party," an appellate court may suspend the rules and "order proceedings in accordance with its directions."). *See also State v. Bursell*, 372 N.C. 196, 197, 827 S.E.2d 302, 303 (2019) (upholding our invocation of Rule 2 to review an unpreserved

264 N.C. App. at 503-504, 826 S.E.2d at 510; *State v. Griffin*, 260 N.C. App. 629, 632-33, 818 S.E.2d 336, 339 (2018). We review the constitutionality of an SBM order *de novo*. *State v. Grady*, 372 N.C. 509, 521, 831 S.E.2d 542, 553 (2019) (*Grady III*).

North Carolina's current statutory scheme provides for "a sex offender monitoring program that uses a continuous satellite-based monitoring system" to monitor and track the locations of individuals convicted of certain sex offenses. N.C. Gen. Stat. § 14-208.40(a) (2019). This SBM program periodically reports on the individual's whereabouts, providing "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology." N.C. Gen. Stat. § 14-208.40(c)(1). In *Grady v. North Carolina*, the United States Supreme Court held that subjecting a defendant to this program constituted a Fourth Amendment search, the reasonableness of which it remanded for consideration in the first instance by North Carolina courts. 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015) (*Grady I)*. In doing so, the Supreme Court clarified that reasonableness "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id*.

Following the Supreme Court's decision in *Grady I*, this Court, in a reconsideration of *Grady* on remand, held that the State did not meet its burden of proving the imposition of SBM on that defendant was a reasonable search because "the State failed to present any evidence of its need to monitor [the] defendant, or the procedures actually used to conduct such monitoring in unsupervised cases." *State v. Grady*, 259 N.C. App. 664, 676, 817 S.E.2d 18, 28 (2018) (*Grady II*). On appeal, our Supreme Court weighed the defendant's privacy interests and the nature of the intrusion against the State's interests and the effectiveness of SBM. *State v. Grady*, 372 N.C. at 538, 831 S.E.2d at 564. Though the privacy interests of recidivists like the defendant are greatly diminished, the Court noted that "mandatory imposition of lifetime SBM on an individual in defendant's class works a deep, if not unique, intrusion upon that individual's protected Fourth Amendment interests." *Id*. The Court further reasoned that, while the State certainly has a legitimate interest

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Grady challenge where the State conceded that the trial court committed error relating to a substantial right). Because, for the reasons explained above, the issue here was preserved for review, we decline to apply Rule 2 as it is not necessary to do so in order to reach the matter.

in protecting the public from sex offenders, "a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Id.* at 539-41, 831 S.E.2d at 564-66.

Because the State failed to show that "the [SBM] program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public[,]" it did not meet "its burden of establishing the reasonableness of the [SBM] program under the Fourth Amendment balancing test required for warrantless searches." *Id.* at 544-45, 831 S.E.2d at 568. The Court expanded our holding in *Grady II* to apply not only to that defendant, but to all similarly situated individuals. Thus, its holding applied to all offenders who are unsupervised but made subject to SBM due solely to their classification as recidivists. *Id.* at 545, 831 S.E.2d at 568. The *Grady III* court made clear, however, that its holding "does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen may still be subjected to mandatory lifetime SBM[.]" 372 N.C. at 550, 831 S.E.2d at 572.

In the present case, Jason Harris ("Harris"), a probation and parole officer, testified for the State regarding the nature and scope of intrusion of the equipment currently used to monitor sex offenders under the SBM program. Harris testified that the monitor, known as an ET-1, is clamped snugly on the offender's leg, similar to how a watch attaches to a wrist. The monitor is made of rubber and has microfibers that can alert an officer to tampering if broken. It is about the size of a small pepper spray bottle, smaller than a cell phone, and weighs "[a] pound or less." It does not restrict the user's freedom of movement and can also be submerged in water, although activities such as swimming are not recommended. At all times during which it is in use, the monitor communicates with satellites and feeds information "into a base system, which tells [law enforcement] where [the user's] location is, if he leaves the location, if he's got curfews" and other such information. An officer is able to access that information "at any point in time at any day." Inside the home is a separate device called a beacon, which casts a 150-degree radius around the house and "picks up where [the user's] at if he's in that 150-degree radius." The State also noted that a STATIC-99 assessment for defendant, which measures the likelihood an offender will commit another sex crime, assigned a score of low risk.

At the time of the sentencing hearing, defendant was almost 47 years old. If he serves only the minimum of his prison sentence, defendant will

be 89 years old upon his release, at which point he would become subject to the SBM program.

In *State v. Gordon*, this Court determined that the State failed to establish the reasonableness of a lifetime SBM enrollment order under facts similar to those of the case at bar. 270 N.C. App. 468, 469, 840 S.E.2d 907, 909, *temp. stay allowed*, 374 N.C. 430, 839 S.E.2d 351 (2020). There, the defendant pleaded guilty to several charges including rape and indecent liberties with a child, and was ordered to submit to lifetime sex offender registration following a term of imprisonment of 190 to 288 months. *Id.* at 470, 840 S.E.2d at 909. Defendant was convicted of an aggravated offense under N.C. Gen. Stat. § 14-208.6(1) and ordered to enroll in the SBM program for the rest of his life upon release from prison. *Id.* At the defendant's SBM hearing a probation and parole officer testified for the State describing the technical aspects of the monitoring device and the scope of the monitoring conducted by the program. *Id.* at 470-71, 840 S.E.2d at 909-10. In addition, the State introduced into evidence a STATIC-99 risk assessment which assigned a "moderate/low" score for the defendant. *Id.* at 471, 840 S.E.2d at 910.

On reconsideration in light of our Supreme Court's decision in *Grady III*, we considered the reasonableness of subjecting the defendant to a lifetime of SBM, examining the totality of the circumstances. *Gordon*, 270 N.C. App. at 474, 840 S.E.2d at 912. In doing so, we noted that a sufficient analysis of "the extent to which the search intrudes upon reasonable privacy expectations" was not possible given the fact it was uncertain whether the nature and extent of the information revealed under the SBM program would remain unchanged by the time the defendant was released, two decades later. *Id.* at 475, 840 S.E.2d at 912 (citing *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557). In addition, the State failed to provide evidence supporting the government's need to search the defendant beyond asserting the State's general interest in deterring and preventing future sex crimes. *Id.* at 475, 840 S.E.2d at 913. Furthermore, we noted the State presented testimony the STATIC-99 risk assessment indicated the defendant was "not likely" to reoffend. *Id.* at 477, 840 S.E.2d at 914. We thus held that "the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion to continuously and perpetually monitor [the] Defendant's location information upon his release from prison." *Id.* at 477, 840 S.E.2d at 914.

In *State v. Griffin*, we considered whether it was reasonable for the trial court to subject "a felon on post-release supervision who was

convicted of an offense involving the physical, mental, or sexual abuse of a minor" to thirty years of SBM. 270 N.C. App. 98, 106, 840 S.E.2d 267, 273, *temp. stay allowed*, 374 N.C. 265, 838 S.E.2d 460 (2020). There, we held that while the defendant's expectations of privacy as a registered sex-offender subject to post-release supervision were "appreciably diminished," they were not "forever forfeit[ed]." *Id.* at 107, 840 S.E.2d at 274. In addition, we noted that the defendant would only be on post-release supervision for five of the thirty years of SBM imposed, and his constitutional rights to privacy would thus be restored throughout the remainder of the thirty-year term. *Id.* at 107, 840 S.E.2d at 274. Ultimately, we concluded that thirty years, "though less than a lifelong term, nonetheless constitutes a significantly lengthy and burdensome warrantless search[,]" and because the State "did not introduce any record evidence before the trial court showing SBM is effective in accomplishing any of the State's legitimate interests[,]" it failed to meet its burden of showing a thirty-year term of SBM was reasonable in this case. *Id.* at 108-09, 840 S.E.2d at 275-76.

Though our Supreme Court issued temporary stay orders for *Gordon* and *Griffin*, our reasoning in those cases remains instructive, and the State concedes that *Gordon* compels us to hold that the imposition of lifetime SBM on defendant in this case constitutes an unreasonable search. Similar to the *Gordon* defendant, defendant here was not a recidivist but was rather ordered to enroll in the SBM program due to the nature of his offenses against A.W. in violation of N.C. Gen. Stat. § 14-27.28. Defendant will be imprisoned for at least four decades and, as this Court noted in *Gordon*, it is therefore difficult to assess the reasonableness of subjecting him to SBM given the unknown future circumstances of the program. Notably, there was no evidence or individualized reasons given to support the State's need to "continually and perpetually monitor" defendant, who will be at least 89 years old upon his release from prison, and was assessed to be a low risk reoffender. Thus, "the State . . . simply failed to show how monitoring [defendant's] movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime." *Grady III*, 372 N.C. at 544, 831 S.E.2d at 568.

In addition, though defendant will be registered as a sex offender and placed on post-release supervision for five years for his offenses against A.W., his privacy expectations, though diminished, will not be non-existent. *See* N.C. Gen. Stat. §§ 15A-1368.2, 15A-1368.4(b1)(7) (2019); *Griffin*, 270 N.C. App. at 107, 840 S.E.2d at 274. While there may be an argument that defendant's enrollment in the SBM program for the duration of his post-release supervision is reasonable, for the reasons

discussed above, lifetime SBM is not. *See Griffin*, 270 N.C. App. at 107, 840 S.E.2d at 274. We therefore hold that the State did not meet its burden in establishing defendant's enrollment in the SBM program for the remainder of his life constitutes a reasonable Fourth Amendment search, and reverse the order of the trial court.

The State argues that consideration of the reasonableness of lifetime SBM in this case is premature, and that N.C. Gen. Stat. § 14-208.40A merely requires a determination of a defendant's *eligibility* for enrollment in the SBM program. However, we note that under our current statutes, the trial court may order a qualified individual to enroll in the SBM program during the initial sentencing phase, with the monitoring set to begin upon the defendant's release from prison. N.C. Gen. Stat. § 14-208.40A (2019). While it may make more sense in cases such as defendant's, which involve a lengthy prison sentence, for the trial court to hold such hearing after the defendant has served his active sentence and been released from prison, such a change or modification of the law is most appropriately considered and passed upon by our legislature, not the courts.

2. 10 Year SBM Order

[3] Defendant further contends that the trial court erred in imposing SBM for an additional 10 years for his offenses against A.B. in violation of N.C. Gen. Stat. § 14-27.30(a). Specifically, defendant argues that because the trial court did not expressly find that defendant "requires the highest possible level of supervision and monitoring" pursuant to N.C. Gen. Stat. § 14-208.40A(d)-(e), it could not require defendant to enroll in SBM.

N.C. Gen. Stat. § 14-208.40A provides that when a defendant is convicted of an offense against a minor or other reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4), during the sentencing phase,

> (b) . . . the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.23 or G.S. 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

. . . .

> (d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.23 or G.S. 14-27.28 and the offender is not a recidivist, the court shall order that the Division of Adult Correction do a risk assessment of the offender. . . .
>
> (e) Upon receipt of a risk assessment from the Division of Adult Correction and Juvenile Justice pursuant to subsection (d) of this section, the court shall determine whether, based on the Division of Adult Correction and Juvenile Justice's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40A(b), (d), (e) (2019).

In the present case, the trial court found that defendant had been convicted of a sexually violent offense or an attempt to commit such an offense, but had not been classified as a sexually violent predator or recidivist, and the offense was not an aggravated offense. The trial court further made oral findings that the offense did not involve the physical, mental, or sexual abuse of a minor. However, in its written order, the trial court checked box 5(a) of the Judicial Findings and Order for Sex Offenders form indicating that the offenses *did* involve the physical, mental, or sexual abuse of a minor. Additionally, the trial court gave verbal orders that

> pursuant to its finding in 5(a) [that the offenses did involve the physical, mental, or sexual abuse of a minor] and based on the risk assessment under the Division of Adult and Juvenile Services and the additional findings, which include the nature of the offense, the age of the children, the relation of the defendant to the victim, the Court is going to require that the defendant be subject to an additional period of satellite-based monitoring for a period of ten years.

The factual evidence against defendant that was considered by the court also lends support to such a finding.

Defendant further makes much of the fact that the trial court did not check box 2(c)(i)(a) in the Order indicating that, based on the risk assessment, "the defendant requires the highest possible level of supervision and monitoring." We first note that though defendant was assessed as low risk, the trial court nevertheless retained the authority to impose SBM. *See State v. Morrow*, 200 N.C. App. 123, 131-32, 683 S.E.2d 754, 761 (2009) (holding that the trial court may override a low or moderate risk rating based on the totality of the evidence). Moreover, defendant ignores the fact that though the trial court neglected to check the box, it did write on the 2(c)(i)(a) line that the SBM period would be "10 years." Thus, the trial court appears to have simply committed a clerical error, a mistake which may easily be remedied upon remand by this Court. Though defendant further argues the State failed to present any evidence in support of a finding that he required the "highest possible level of supervision and monitoring," in ordering SBM the trial court properly considered the totality of the circumstances, "includ[ing] the nature of the offense, the age of the children, [and] the relation of the defendant to the victim." In addition, unlike the thirty-year SBM order we considered in *Griffin*, ten years is not "significantly burdensome and lengthy," especially given that defendant will already be subject to post-release supervision by the State for half of that time period. Accordingly, we find no reversible error, but remand to correct the clerical error.

III. Conclusion

For the foregoing reasons, we find no error with respect to the guilt phase of the trial and affirm in part and reverse in part the judgments of the trial court with respect to satellite based monitoring for life. We further remand for correction of the clerical error in the judgment with respect to satellite based monitoring for 10 years.

NO ERROR IN PART, AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judge DIETZ concurs with respect to the criminal judgment and concurs in the result with respect to the civil judgments.

Judge BERGER concurs with respect to the criminal judgment and concurs in the result with respect to the civil judgments with a separate opinion with which Judge DIETZ concurs.

BERGER, Judge, concurring in separate opinion.

I concur with Issue A, and concur in result only with the remainder of the opinion.

The lead opinion declines to examine preservation of Defendant's Fourth Amendment argument because the State conceded the issue was preserved pursuant to *State v. Lopez*, 264 N.C. App. 496, 826 S.E.2d 498 (2019) and *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018). However, neither *State v. Lopez*, nor the State's concession, are binding on this Court.[1]

Rule 10 of the Rules of Appellate Procedure requires that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a).

"[I]n order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court." *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (citation omitted). "[I]n conformity with the well[-]established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955) (citation omitted). Further, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]" *State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (citations omitted), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008).

Lopez conjured new rules for preservation of Fourth Amendment challenges to SBM, which the lead opinion follows here. One of the

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1. In *State v. Griffin*, this Court determined that the defendant preserved his Fourth Amendment argument when he argued during the SBM hearing that the "level of intrusion was not warranted." *Griffin*, 260 N.C. App. at 632-33, 818 S.E.2d at 339 (quotation marks omitted). Here, unlike Griffin, Defendant made no argument concerning the reasonableness of the search. Defendant simply argued that he should not be required to be monitored based on the facts of the case.

Lopez rules for preservation states that if the State initiates a reasonableness inquiry, *which it must do in every SBM case*, the constitutional challenge is automatically preserved, even if the defendant does not object. *Lopez*, 264 N.C. App. at 514-15, 826 S.E.2d at 510. The *Lopez* panel reasoned that the defendant's constitutional issue was preserved because the State had the "opportunity to satisfy its burden" and "the trial court ha[d] the opportunity to rule on it." *Id.* at 514, 826 S.E.2d at 510.

Lopez flies directly in the face of Rule 10 and long-standing precedent from the Supreme Court of North Carolina cited above. Thus, *Lopez* should not bind our analysis and should be viewed as an outlier. Our Supreme Court has warned that failure to comply with the Rules of Appellate Procedure "is not only discreditable to the administration of public justice, but it leads eventually to confusion and wrong[.]" *Spence v. Tapscott*, 92 N.C. 576, 578 (1885). *Lopez* will do just that, and could ultimately gut preservation requirements for all constitutional arguments.

Here, Defendant did not preserve his Fourth Amendment argument. Ordinarily, this should end the inquiry. *See State v. Bishop*, 255 N.C. App. 767, 805 S.E.2d 367 (2017). However, "the law governing imposition of satellite-based monitoring has been anything but settled." *State v. Helms*, No. COA19-955, 2020 WL 4778169, at *5 (N.C. Ct. App. Aug. 18, 2020) (unpublished). As in *Helms*, "after the monitoring orders in this case were entered, this Court issued its opinion in *State v. Gordon*, 270 N.C. App. 468, 840 S.E.2d 907 (2020)." *Id.* at * 5.

In *Gordon*, our Court held that the trial court's imposition of SBM at sentencing was unreasonable under the Fourth Amendment because the State "failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison is a reasonable search[.]" *State v. Gordon*, 270 N.C. App. at 477, 840 S.E.2d at 914. Such is the case here.

Because Defendant did not have the benefit of this Court's holding in *Gordon* at the time SBM was imposed, Defendant could not have properly preserved his constitutional argument for appellate review.

Judge DIETZ concurs.

STATE v. TURNER

[273 N.C. App. 701 (2020)]

STATE OF NORTH CAROLINA
v.
JOHN BRONA TURNER III

No. COA19-897

Filed 6 October 2020

1. Evidence—admissibility—experimental evidence—substantial similarity test—rejected—Rule 702

On appeal from a first-degree murder conviction, where the trial court admitted expert testimony about an experiment the State conducted using the gun from the crime scene, the Court of Appeals declined to review de novo the admissibility of this "experimental evidence" under the "substantial similarity" test from case law predating the Rules of Evidence. This test, which required that the circumstances of an experiment be substantially similar to those in which the alleged crime occurred, was absorbed into the three-pronged reliability test under Evidence Rule 702, and the trial court did not abuse its discretion in admitting the expert testimony under Rule 702.

2. Evidence—expert witness—qualification—shell casing ejection patterns

The trial court did not abuse its discretion in a first-degree murder trial by qualifying a witness as an expert in shell casing ejection patterns, even though he had no specific training in that area or any prior experience conducting tests on shell casing ejection patterns. The witness was a certified forensic firearms examiner with extensive training in and knowledge of firearm mechanics and was therefore in a better position than the jury to understand the ejection patterns of shell casings from the firearm defendant used.

Appeal by defendant from judgment entered 9 November 2018 by Judge Carl R. Fox in Person County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas O. Lawton III, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant.

DIETZ, Judge.

John Turner appeals his conviction for first degree murder. He contends that the trial court wrongly admitted expert testimony about an experiment the State conducted using the gun from the crime scene.

Admission of expert testimony is governed by Rule 702 of our State's Rules of Evidence. But Turner never cites Rule 702 or any of its accompanying case law in this appeal.

Instead, Turner contends that there is a separate, stand-alone rule for the admissibility of the particular type of expert testimony at issue in this appeal, which is sometimes called "experimental evidence." Here, for example, law enforcement recovered shell casings in various locations at the scene of the crime. The State's forensic firearms expert conducted an experiment by firing the gun used in the crime at various angles and measuring the direction and distance that the shell casings traveled. The expert presented the results of that experiment to the jury so that the jury could use the information to infer the location of the shooter.

Citing cases from the 1960s and 1970s (before the Rules of Evidence existed), Turner argues that this Court must conduct a *de novo* review of the admissibility of this experimental evidence by applying a special "substantial similarity" test. We reject this argument. The concept of substantial similarity is now part of the reliability analysis that the trial court conducts under Rule 702. This Court reviews that analysis for abuse of discretion. As explained below, applying Rule 702 and its accompanying case law, the trial court was well within its sound discretion to admit this expert testimony. We therefore find no error in the trial court's judgment.

Facts and Procedural History

In August 2015, John Turner called 911 and reported that he had shot his neighbor, Nicholas Parker. When the operator asked if Parker was still alive, Turner said that Parker was moving and trying to breathe. Turner asked what to do with the gun and the operator instructed him to secure it.

Police arrived on the scene and found Parker's body lying face down in a pool of blood at the end of a driveway. Turner was standing nearby, still holding a gun. Parker had multiple bullet wounds and no pulse. He was pronounced dead at the scene.

Police recovered eight shell casings, in a generally linear formation, at different distances from Parker's body. Law enforcement arrested Turner and he waived his *Miranda* rights and gave a videotaped

statement about the shooting. The State ultimately charged Turner with first degree murder and possession of a firearm by a felon.

The case went to trial. Testimony from neighbors and family members established that Turner and Parker did not get along and had heated disputes over many issues including a shared property line.

Turner testified that the month of the shooting, a stray dog showed up in the neighborhood and was causing problems. A neighbor asked Turner to help with the dog and Turner tried to get the dog under control but was unsuccessful. One night later that month, Turner heard gunshots coming from Parker's property and then saw the stray dog limping away.

Turner believed that Parker had shot the dog. He went into his house, retrieved his semi-automatic pistol, and went looking for the wounded dog. As Turner walked down the road, he and Parker saw each other. Turner continued walking and, after chambering a round in his gun, found the dog and determined it was dead.

At that point, according to Turner, Parker started "hollering" at him. Turner responded and "everything went south from there." Turner testified that Parker was "in a rage" and shouted that he had shot the dog and would shoot Turner too, that he had been "waiting for this," and that they would "get this over with."

Turner testified that he then saw Parker make a move toward his waist. Turner responded by shooting Parker. Turner admitted that he did not see Parker grab a weapon but assumed Parker had a gun in his waistband because he knew Parker had just shot the dog. Turner testified that he was stumbling backward while shooting Parker and estimated that he shot at Parker for "less than five seconds."

The medical examiner testified that Parker was shot 11 or 12 times, with the bullets traveling through a number of his vital organs, including his lungs and heart. All but two of the entrance wounds were in Parker's back and side.

Kelby Glass, a certified forensic firearms examiner with the Cumberland County Sheriff's Department, testified as an expert witness for the State over Turner's objection. The trial court accepted Glass as an expert in "forensic firearms examination" and qualified him to give expert opinion testimony "in the area of forensic firearms testing for ejection, this is for ejection and distance purposes in this case." Glass then testified about the results of an experiment he conducted to determine the direction and average distances shell casings traveled after being ejected from Turner's gun. That experiment showed that when

the gun was fired while parallel to the ground, the shell casings traveled backward and to the right roughly eight to nine feet. When the gun was fired at 45-degree and 60-degree angles to the ground, the casings instead traveled a few feet forward and nine to eleven feet to the right.

Glass did not offer an opinion about Turner's location at the time of the shooting; he merely described the results of the experiment. But having heard this testimony, the jury could examine the location of the shell casings following the shooting and make inferences about Turner's location and the angle of the gun during the shooting.

In closing arguments, Turner's counsel argued that he should be found not guilty based on self-defense and that, at most, he should only have been charged with voluntary manslaughter. The State argued that, based on the physical evidence including the number of entrance wounds in Parker's back and side, the location of Parker's body, and the location of the shell casings, Turner did not fall down and was not backing away during the confrontation, but instead was moving toward the unarmed victim, indicating malice and premeditation. The trial court instructed the jury on first degree murder, second degree murder, voluntary manslaughter, and self-defense.

The jury returned a guilty verdict for first degree murder and possession of a firearm by a felon. The trial court consolidated the charges for judgment and sentenced Turner to life in prison without parole. Turner appealed.

Analysis

Turner argues that the trial court erred by admitting the testimony of the State's forensic firearms expert, Kelby Glass. Turner challenges that expert testimony on two grounds. First, he contends that the experiment conducted by Glass was inadmissible as a matter of law because the conditions during the experiment were not substantially similar to the conditions at the time of the shooting. Second, he argues that Glass was not qualified to testify as an expert in the field of shell casing ejection patterns. We address these arguments in turn below.

I. Use of a stand-alone "substantial similarity" test

[1] Turner first challenges the shell casing ejection pattern experiment, which Glass used to help explain what happened on the night of the crime. Turner contends that the circumstances of Glass's experiment "were not substantially similar to the circumstances at the time of the shooting" because in "some instances, the circumstances were different"

and in "other instances, circumstances that would affect the shell casing ejection pattern were not accounted for during the experiment."

At this point in our analysis, we typically would recite the applicable standard of review for this argument. But that standard of review is the heart of the legal dispute in this appeal, so that is not so simple here.

The admissibility of expert testimony in this case is governed by the North Carolina Rules of Evidence and, specifically, by Rule 702. The Rules of Evidence are statutes, enacted by our General Assembly, and the applicable portions of Rule 702 became law in 2011 as part of an amendment conforming Rule 702 with its federal counterpart. 2011 N.C. Sess. Laws 283, § 1.3 (eff. Oct. 1, 2011).

There are a number of appellate decisions interpreting the current version of Rule 702, most notably our Supreme Court's decision in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). In *McGrady*, the Court provided an outline of how to apply Rule 702 to proposed expert testimony. The Court also reaffirmed that a trial court's ruling on the admissibility of expert testimony under Rule 702 "will not be reversed on appeal absent a showing of abuse of discretion." *Id.* at 893, 787 S.E.2d at 11.

Turner's appellate brief does not cite Rule 702. Nor does it cite *McGrady* or any other case interpreting the current version of Rule 702. Instead, Turner relies on a handful of Supreme Court cases from the 1960s and early 1970s that not only predate the 2011 amendments to the Rules of Evidence, but also predate even the initial version of the rules, enacted in the early 1980s. *See* 1983 N.C. Sess. Laws, ch. 701, § 1; N.C. Gen. Stat. § 8C-1 (1983) (amended 2011).

At oral argument, Turner candidly acknowledged why he ignored Rule 702 and focused on these older cases—they differ from Rule 702 and cases interpreting the rule, such as *McGrady*, in a way that is favorable to Turner. Specifically, in 1975, our Supreme Court in *State v. Jones* discussed the admissibility of "experimental evidence," meaning expert testimony about an experiment that is used to prove something about the actual events that occurred in the case. 287 N.C. 84, 214 S.E.2d 24 (1975). In *Jones*, the Supreme Court held that that, in addition to ordinary admissibility requirements of relevancy and probative value, experimental evidence "is always subject to the further restriction that the circumstances of the experiment must be substantially similar to those of the occurrence before the court." *Id.* at 98, 214 S.E.2d at 34. And, most important to Turner's argument, the Court also held that "[w]hether substantial similarity does exist is a question which is reviewable by the appellate courts in the same manner as is any other question of law." *Id.*

Relying on this precedent, Turner argues that the admissibility of experimental evidence must satisfy a stand-alone "substantial similarity" test, in addition to any admissibility requirements in Rule 702. Turner also contends that, unlike a Rule 702 analysis, this substantial similarity analysis is subject to *de novo* review on appeal, with the appellate court freely substituting its own judgment for that of the trial court.

We reject this argument for several reasons. First, even if we agreed with Turner that experimental evidence is subject to a special test separate from the ordinary Rule 702 analysis, later Supreme Court precedent holds that this test is a flexible one and subject to appellate review for abuse of discretion. For example, in 2000, the Supreme Court held that "[e]xperimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence." *State v. Golphin*, 352 N.C. 364, 433, 533 S.E.2d 168, 215 (2000). But the Court also held that "exclusion is not required when the conditions are not exactly similar; rather, it goes to the weight of the evidence with the jury" and that "the trial court is given broad discretion to determine if the conditions are sufficiently similar." *Id.* at 434, 533 S.E.2d at 215.

Second, we do not agree that this test for "substantial similarity" persists as a separate, stand-alone test outside Rule 702, nor could it. Rule 702 uses a "three-pronged reliability test" that requires expert testimony to be based on sufficient facts or data; to be the product of reliable principles and methods; and to properly apply the principles and methods reliably to the facts of the case. *See* N.C. R. Evid. 702(a)(1)–(3).

In *McGrady*, the Supreme Court held that 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." 368 N.C. at 890, 787 S.E.2d at 9. The Court also provided "factors from a nonexhaustive list that can have a bearing on reliability" but emphasized that trial courts have "discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify" to analyze Rule 702's admissibility test. *Id.* at 890–92, 787 S.E.2d at 9–10.

The notion of "substantial similarity" for experimental evidence is one of the many "particular factors articulated in previous cases" that is now baked into the third prong of Rule 702's reliability test. Part of the process of applying otherwise reliable principles and methods from an experimental setting to the facts of the actual case is ensuring that the experimental setting and the actual one are sufficiently similar. Thus,

as the Supreme Court explained in *McGrady*, because this pre-existing "substantial similarity" test has a bearing on the reliability evaluation, it is absorbed into the Rule 702 reliability test and becomes one of many factors the trial court will consider as part of the "flexible inquiry" into admissibility. *Id.* at 890–91, 787 S.E.2d at 9. This means that the older case law requiring *de novo* appellate review of substantial similarity is no longer good law—the question of substantial similarity is part of a Rule 702 analysis subject to review for abuse of discretion. *Id.* at 893, 787 S.E.2d at 11.

Turner does not argue on appeal that the trial court abused its discretion by admitting this evidence under Rule 702. Indeed, as noted above, Turner does not even cite Rule 702 or any of its accompanying case law in his brief. Ordinarily, this would mean any argument concerning admissibility under Rule 702 is abandoned. N.C. R. App. P. 28(b)(6). But even assuming this issue were properly presented for appellate review, we would readily conclude that the trial court's decision to admit this expert testimony was within the court's sound discretion.

Before admitting the challenged testimony, the trial court conducted a lengthy *voir dire*. Turner questioned Glass extensively about possible differences between the conditions of the experiment and the conditions at the time of the shooting. For example, Glass acknowledged that, in the experiment, a trained law enforcement officer fired the gun while stationary and firmly holding the gun. Glass did not know if Turner held the gun in a similar manner or was moving while shooting. Similarly, Glass conducted the experiment on a grassy surface. Some of the shell casings at the crime scene were found in grass, but others were found on a gravel road.

Glass recognized these differences but did not view them as significant to the experiment. In his opinion, "the biggest variable in any of this would be the firearm. Some firearms, not all firearms, eject to the right and to the rear." Glass explained that the experiment was intended only to provide a "tentative estimate" of the shooter's location and the position of the firearm based on the expected trajectory of the shell casings from this particular firearm when held at various angles. The State explained that Glass's expert testimony was "very limited to how this gun operates when it's held in these positions" and that it was intended as "a demonstration as to how this particular gun operates," rather than "a scene re-creation."

At the conclusion of this *voir dire*, the trial court ruled that Glass may give expert testimony "in the area of forensic firearm ejection

patterns, and for that very limited purpose." Glass testified about the experiment consistent with his *voir dire* testimony.

As noted above, a trial court's assessment of reliability under Rule 702 "will not be reversed on appeal absent a showing of abuse of discretion." *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11. "Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary it could not have been the result of a reasoned decision." *Id.* at 899, 787 S.E.2d at 15 (citations omitted). Here, the trial court's determination that the experiment met the Rule 702 criteria was a reasoned one and not manifestly arbitrary. Thus, we cannot hold that the trial court abused its discretion.

II. Qualification as an expert in shell casing ejection patterns

[2] Turner next argues that the trial court erred when it qualified Glass as an expert. The trial court accepted Glass as an expert "in the area of forensic firearms testing for ejection, this is for ejection and distance purposes in this case." Turner argues that Glass was not qualified to be an expert in this area because "Glass had no prior training and no prior experience in shell casing ejection pattern testing."

An expert witness must be "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. Evid. 702(a). "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?" *McGrady*, 368 N.C. at 889, 787 S.E.2d at 9 (citation omitted). "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." *Id.* at 890, 787 S.E.2d at 9.

Here, Glass testified that he is a forensic firearms examiner with the Cumberland County Sheriff's Office and is certified in North Carolina Intermediate Law Enforcement. Before his law enforcement experience, Glass served in the military. He attended the National Firearms Examiner Academy, completing the course in 2017, and then became a "certified firearms examiner" through the Sheriff's Department laboratory and training program. Glass testified that "[i]n the last three years, as part of my normal duties testing firearms, I've fired over a thousand different firearms." Glass acknowledged that he had not taken any

courses in the specific area of shell casing ejection pattern testing, and that there is no certification for that specific subject matter, but Glass stated that this type of testing "would fall under the purview" of what forensic firearms examiners like him would do "during the course of their duties."

To be sure, as Turner argues in his brief, Glass had not taken any courses or training specifically on the topic of shell casing ejection patterns. Likewise, Glass had no prior experience conducting tests on the ejection patterns of shell casings. But "it is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist" as long as "the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004); *McGrady*, 368 N.C. at 889, 787 S.E.2d at 9.

Here, Glass was a certified forensic firearms examiner with extensive training in the operation of firearms. He had fired more than one thousand different firearms and was familiar both with the firearm used in this case and with the mechanics of firearms including their ejection of shell casings. The trial court was within its sound discretion to determine that Glass's specialized forensic firearms knowledge and understanding of the mechanics of firearms enabled him to reliably conduct this experiment and be in a better position than the jury to understand the ejection patterns of shell casings from the firearm at issue in this case. Accordingly, the trial court did not abuse its discretion by qualifying Glass as an expert "in the area of forensic firearms testing for ejection."

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judges BERGER and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 6 October 2020)

ARCHIE v. JENNETTE No. 20-3	Durham (18CVS2300)	Dismissed
BEBEAU v. WOODMAN No. 20-279	Jackson (19CVS625)	Reversed and remanded in part; affirmed in part.
GIBBS v. ROCA'S WELDING, LLC No. 20-121	N.C. Industrial Commission (17-000435)	Affirmed
IN RE SHEA WOODLANDS, LLC No. 19-809	Property Tax Commission (18PTC222)	Reversed
JOHNSON v. FRIESEN No. 20-67	Moore (18CVS1004)	Affirmed
ODOM v. NO. 8 ENT., LLC No. 20-169	Davidson (18CVS2014)	Affirmed
ROZUMIEI v. UHNYUK No. 19-1066	Buncombe (18CVS3470)	Affirmed
SEALEY v. FARMIN' BRANDS, LLC No. 19-583	New Hanover (17CVS4168)	Affirmed
STATE v. BANK No. 19-934	Caldwell (18CRS51130)	New Trial
STATE v. BOLTON No. 19-1145	New Hanover (18CRS3656) (18CRS54552)	No Error
STATE v. COOLEY No. 19-1141	Wake (18CRS204802) (18CRS3279)	No Error
STATE v. ENNIS No. 19-896	Duplin (15CRS51497) (15CRS51502) (17CRS103) (18CRS1)	No plain error in part; vacated in part
STATE v. FAIR No. 20-103	Lincoln (12CRS52687-88)	Dismissed

STATE v. JACKSON No. 19-952	Northampton (14CRS50129) (17CRS102-103) (17CRS123) (17CRS356)	Remanded
STATE v. LUCAS No. 19-936	Nash (17CRS53689)	Affirmed
STATE v. MARTINEZ No. 19-746	Buncombe (17CRS88632)	Affirmed
STATE v. McLYMORE No. 20-119	Sampson (16CRS52224-25)	No Error
STATE v. MEEKS No. 19-1117	Cumberland (14CRS56289) (16CRS51775)	Affirmed in Part; Vacated and Remanded in Part; Dismissed in Part
STATE v. MOSER No. 19-1014	Union (12CRS051105) (12CRS53081) (16CRS51274) (16CRS51275) (16CRS51276)	Affirmed in Part and Dismissed in Part
STATE v. RAZZAK No. 20-157	Forsyth (13CRS52220-28) (13CRS52230)	No Error
STATE v. RUFFIN No. 19-54	Wilson (16CRS50459) (17CRS51675)	No Error
STATE v. SCHMIDT No. 19-1159	Wake (16CRS216135)	No Error
STATE v. SHANE-HILL No. 19-812	Buncombe (17CRS152-153)	No error in part; remanded for resentencing.
STATE v. SMITH No. 19-1091	Catawba (18CRS50390) (18CRS50540)	Dismissed in part, no error in part, no plain error in part.
STATE v. STEPHENSON No. 20-41	Hertford (16CRS437) (16CRS455-56) (16CRS50772)	No Error

STATE v. WELLS No. 20-59	Catawba (18CRS5042) (18CRS55427)	Affirmed
STATE v. WILSON No. 19-749	Edgecombe (16CRS50181)	No Prejudicial Error
WRIGHT v. WRIGHT No. 19-1166	Harnett (15CVD2606)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

APPEAL AND ERROR—Continued

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

alcohol intoxication as a result of drinking baby formula that the mother prepared using one of the water bottles that her relatives had used to store alcohol at a family gathering, an order adjudicating the infant as neglected was reversed and remanded for further findings. The trial court did not find that the mother knew or reasonably could have discovered that the water bottle contained alcohol, or that her baby suffered "some physical, mental, or emotional impairment" or a substantial risk thereof; instead, the court based its adjudication on a conclusory analysis. **In re V.M., 294.**

Permanency planning order—constitutionally protected status as parent—findings and conclusion—In a permanency planning review matter, the trial court's conclusion that respondent-parents' actions were inconsistent with their constitutionally protected right to parent the minor child was supported by the court's findings of fact, which were in turn supported by clear and convincing evidence, including of the parents' lack of suitable and safe housing, continued substance abuse, and, regarding respondent-father, unresolved domestic violence issues. **In re I.K., 37.**

Permanency planning order—guardianship granted to grandparent—sufficiency of evidence—In a permanency planning review matter, the trial court's decision to grant guardianship of the minor child to her grandmother was supported by sufficient evidence and findings of fact regarding the parents' unresolved issues of inadequate housing, substance abuse, and domestic violence. The court's choice of permanent plan, pursuant to N.C.G.S. § 7B-906.1, which took into account the child's best interest, was not manifestly unsupported by reason and was therefore not an abuse of discretion. **In re I.K., 37.**

Permanency planning review hearing—waiver of counsel—knowing and voluntary—written findings—In a permanency planning matter, the trial court properly treated a respondent-mother's answers during a colloquy as a waiver of respondent's right to counsel, but the matter was remanded for entry of written findings regarding whether the waiver was knowing and voluntary pursuant to N.C.G.S. § 7B-602(a1). **In re J.M., 280.**

Permanency planning—ceasing reunification efforts—sufficiency of findings and conclusions—In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court's order ceasing reunification efforts with respondent-mother was supported by sufficient evidence and findings of fact that addressed the substance of the requirements contained in N.C.G.S. § 7B-906.2(b). Any contradictions in the evidence regarding respondent's progress on her case plan were for the court to resolve. **In re C.M., 427.**

Permanency planning—termination of mother's visitation—abuse of discretion analysis—In a permanency planning matter involving five children alleged to be neglected, abused, and dependent, the trial court did not abuse its discretion by terminating respondent-mother's visitation, based on sufficient competent evidence regarding respondent's lack of progress on her case plan and inability to adequately parent her children, which supported a finding that visitation was not in the children's best interests. **In re C.M., 427.**

CHILD CUSTODY AND SUPPORT

Child custody—findings of fact—challenged on appeal—weight of evidence and credibility—The trial court's findings of fact in a child custody order—related to the father's behavior, travel to India, and the minor child's care—were supported

CHILD CUSTODY AND SUPPORT—Continued

by competent evidence, and the Court of Appeals rejected the father's arguments on appeal, which went to the weight of the evidence and credibility determinations. **Jonna v. Yaramada, 93.**

Child support—calculation—retroactive—Child Support Guidelines—The trial court did not err in a child custody dispute by using the Child Support Guidelines Worksheet to calculate the retroactive child support owed by the father, because the Guidelines specifically authorize the practice. **Jonna v. Yaramada, 93.**

Child support—calculation—retroactive—childcare expenses—Child Support Guidelines—The Court of Appeals rejected a father's argument that daycare expenses incurred by the mother should not have been included in calculating the father's retroactive child support obligation (because, the father argued, his parents were willing to care for the child free of charge) where both parents were employed, the mother incurred the daycare cost due to her employment, and the father did not request that the the trial court deviate from the Child Support Guidelines. The trial court was not required to find that the costs were reasonably necessary because the support obligation was calculated in accordance with the Guidelines. **Jonna v. Yaramada, 93.**

Child support—calculation—retroactive—findings—health insurance—Because the trial court's finding of fact regarding the father's past expenses for his child's health insurance coverage was not supported by competent evidence, the child support order was remanded for appropriate findings and recalculation of the father's retroactive child support obligation. **Jonna v. Yaramada, 93.**

Child support—calculation—Worksheet B—extended international travel—To determine whether the use of Worksheet B was proper for calculating the father's prospective child support obligations, the child support order was vacated and remanded for additional findings on whether five-week trips to India were extended visitation or whether the custodial arrangement involved a true sharing of expenses. **Jonna v. Yaramada, 93.**

Child support—trial court's authority—parties to share W-2s—The trial court did not exceed its authority by ordering the parents in a child custody and support dispute to exchange their W-2s every year. **Jonna v. Yaramada, 93.**

Custody—deported parent—consideration of statutory factors—domestic violence—An order awarding primary child custody to the mother and granting the father secondary physical custody through visitation in Brazil (where he lived after being deported) was affirmed where the trial court entered sufficient findings of fact showing it considered each factor under N.C.G.S. § 50-13.2(a), including the father's acts of domestic violence toward the mother and both the children's and the mother's safety from domestic violence by the father. To the extent section 50-13.2(b) applied, the court was required not to weigh the father's relocation to Brazil against him in determining custody or visitation. **Jordao v. Jordao, 543.**

Jurisdiction—relinquishment—inconvenient forum—Uniform Child Custody and Jurisdiction Enforcement Act—The trial court properly concluded that North Carolina was an inconvenient forum in which to determine custody for the parties' youngest child and, therefore, did not abuse its discretion by relinquishing its jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). When determining that New York (the parties' prior home) was a more appropriate forum, the trial court properly considered the relevant factors under the UCCJEA and, in doing so, did not err by considering circumstances as they existed

CIVIL PROCEDURE—Continued

Rule 59(a) motion—accident or surprise—child custody—opposing party's request for primary custody—The Court of Appeals rejected a father's argument that there was a surprise in his child custody case warranting a new trial pursuant to Civil Procedure Rule 59(a). The mother's request for sole custody was not a surprise where the mother's answer and counterclaim stated that she sought "primary physical and legal care, custody and control" of the child. Further, the mother's agreement to share custody temporarily until a full hearing was not a waiver of her claim for primary custody. **Jonna v. Yaramada, 93.**

Rule 59(a) motion—irregularity—allegedly inadmissible evidence—no prejudice—The Court of Appeals rejected a father's argument that there was an irregularity in his child custody case warranting a new trial pursuant to Civil Procedure Rule 59(a). The police reports that were allegedly improperly admitted were not prejudicial where they were used to corroborate the mother's testimony about domestic violence (to which the father did not object). **Jonna v. Yaramada, 93.**

Rule 59(a) motion—newly discovered evidence—accessible—due diligence —The Court of Appeals rejected a father's argument that newly discovered evidence warranted a new trial pursuant to Civil Procedure Rule 59(a). A recording stored on the father's computer and "drop-off" records from his child's daycare were both known to exist and accessible before trial—the father merely failed to exercise due diligence to obtain them. **Jonna v. Yaramada, 93.**

Rule 60(b) relief—prior order contrary to law—improper remedy—The trial court erred by entering a Civil Procedure Rule 60(b) order to relieve a parent from the child support provisions of the court's prior custody order where the Rule 60(b) order found that the prior order was rendered contrary to law (because the prior order did not contain the required findings of fact). Erroneous orders may be addressed only by timely appeal. **Jackson v. Jackson, 305.**

CONSTITUTIONAL LAW

Confrontation Clause—expert's independent opinion—blood and urine tests performed by non-testifying toxicologists—The trial court in a rape prosecution did not violate defendant's Confrontation Clause rights by admitting a forensic scientist's testimony about drug test results of the victim's blood and urine samples. Although two non-testifying toxicologists performed the tests, the forensic scientist personally reviewed the results and offered his independent opinions about them without reference to the toxicologists' own analysis or conclusions, and defendant had the opportunity to cross-examine the forensic scientist at trial. **State v. Pabon, 645.**

Effective assistance of counsel—admission of element of charge—no structural error—The Court of Appeals declined to interpret *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), to extend *State v. Harbison*'s prohibition against admitting a client's guilt without consent to a prohibition against admitting an element of the charge without consent. Because defense counsel admitted only an element of the charge without defendant's consent, there was no structural error. **State v. Crump, 336.**

Effective assistance of counsel—admission of element of charge—no violation—Where defense counsel admitted an element of the charge against defendant (that he engaged in a sexual act with the victim—an element of second-degree forcible sexual offense) during closing argument without defendant's consent, defendant's Sixth Amendment right to effective assistance of counsel was not violated.

CREDITORS AND DEBTORS—Continued

court—there was no genuine issue of material fact and the trial court's grant of summary judgment for plaintiff was affirmed. **Unifund CCR Partners v. Hoke, 401.**

CRIMINAL LAW

Clerical errors—judgment forms—wrong box checked—Where a judgment form contained a clerical error, with the "habitual felon" box checked instead of the "habitual breaking and entering status offender" box, the matter was remanded for correction of the error. **State v. Joiner, 611.**

Continuance motion—denied—right to present a defense—In a prosecution for armed robbery (a specific intent crime), the trial court did not err by denying defendant's continuance motion requesting more time to review certain evidence (recordings of jailhouse phone calls) that the State intended to use to rebut his diminished capacity defense—or by admitting that evidence at trial. Even though the State notified defendant of its intent to use the evidence only the day before trial, defendant was not deprived of his constitutional right to present his defense because defense counsel knew of the recordings' existence for many months before trial and defendant failed to show any prejudice resulting from the alleged errors. **State v. Johnson, 358.**

Expression of judge's opinion—element of offense—habitual misdemeanor assault—date of prior conviction—In an assault case, the trial court did not take improper judicial notice of a fact supporting an element of the charge of habitual misdemeanor assault (which requires two prior convictions within the fifteen years prior to the current violation) when, in response to a jury question about the evidence, the trial court stated, "[T]he date of conviction was March 9, 2010." In context, the trial court emphasized that it was the jury's duty to determine the facts and whether the State had met its burden of proof. **State v. Austin, 565.**

Jury instructions—aggravating factor—kidnapping and rape—plain error analysis—In a prosecution for first-degree kidnapping and second-degree rape, the trial court erred by instructing the jury to "consider all the evidence" when deciding whether an aggravating factor existed—specifically, a violation of a position of trust (N.C.G.S. § 15A-1340.16(d)(15))—because it failed to clarify that any evidence offered to prove an element of the charged crimes could not also be used to prove the aggravating factor. However, because a violation of a position of trust is not an element of kidnapping or rape, and because the State used different evidence to prove the aggravating factor and the intent element of the charged crimes, the trial court's error did not prejudice defendant and, therefore, did not constitute plain error. **State v. Pabon, 645.**

Jury instructions—child abduction—no requirement to instruct on willfulness—general intent crime—The trial court was not required to instruct the jury that in order to convict defendant of child abduction it must find that defendant acted willfully in abducting the child (who was in the back seat of the truck defendant stole), because the charging statute did not require specific intent. **State v. French, 601.**

Jury instructions—expression of judge's opinion—whether assault occurred—totality of circumstances—In an assault on a female case, the trial court did not improperly express an opinion that an assault had occurred—even though it charged the jury to "determine what the assault was"—where, under the