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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JONATHAN DREW ESTES, PLAINTIFF
v.
JOHN J. BATTISTON, JR., DEFENDANT

No. COA19-699

Filed 20 October 2020

Appeal and Error—interlocutory appeal—no substantial right—subject to dismissal

Defendant's appeal from an order denying his motion to refer the case against him (for alienation of affection, criminal conversation, and punitive damages) to a three-judge panel to review the claims' constitutionality was dismissed as interlocutory where he failed to establish a substantial right would be affected absent appellate review. The statute relied on by defendant, N.C.G.S. § 1-267.1, did not apply to common law torts.

Appeal by defendant from order entered 6 May 2019 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 17 March 2020.

Marshall Hurley, PLLC, by Marshall Hurley, and W. Wallace Respess, Jr., for plaintiff-appellee.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for defendant-appellant.

BRYANT, Judge.

Because defendant's appeal of a trial court order is interlocutory and where defendant fails to establish a substantial right is detrimentally affected absent our review, we dismiss this appeal.

On 2 March 2018, plaintiff Jonathan Drew Estes filed a complaint against defendant John J. Battiston, Jr., alleging that defendant intentionally sabotaged the relationship between plaintiff and his wife and seeking recovery on the basis of alienation of affection, criminal conversation, and punitive damages. On 15 May 2018, defendant filed an answer and multiple motions. The motions included several motions to dismiss, the first of which alleged that plaintiff's claims were "facially unconstitutional[.]" Defendant moved to have the determination of that motion, concerning the constitutionality of plaintiff's claims, referred to a three-judge panel for consideration.

On 6 May 2019, the trial court entered an order on defendant's motion to refer the matter to a three-judge panel. The trial court noted defendant's reliance on N.C. Gen. Stat. § 1-267.1 and held that the statute "does not apply to common law torts." Accordingly, the trial court denied defendant's motion to refer the matter to a three-judge panel.

From the order denying his motion to refer the matter to a three-judge panel, defendant appeals.

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to refer the case to a three-judge panel for consideration of the constitutionality of the claims against him. We dismiss this appeal as interlocutory.

Interlocutory Appeal

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted).

> [I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final

> judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations and quotation marks omitted).

In the instant case, the trial court did not certify the order for appeal. Thus, defendant must show a substantial right has been affected in order to proceed on his interlocutory appeal.

> [A]n interlocutory order affects a substantial right if the order deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered. Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.

Id. at 162, 522 S.E.2d at 579 (alterations in original) (citation and quotations marks omitted).

Defendant acknowledges his appeal is interlocutory. In support of his contention that a substantial right has been affected, defendant offers two arguments: first, that a three-judge panel has exclusive jurisdiction to hear constitutional challenges; and second, that defendant has a right to avoid duplicative trials.

Regarding his first substantial right argument, defendant cites N.C. Gen. Stat. § 1-267.1, which provides that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]" N.C. Gen. Stat. § 1-267.1(a1) (2019). Notably, however, defendant's argument fails to take into account key language of that statutory provision. The statute, by its language, applies to "an act of the General Assembly[.]" *Id.* As the trial court held, plaintiff's claims did not arise under acts of the General Assembly – alienation of affection and criminal conversation are torts arising under common law. Defendant offers no cogent explanation as to why this statute, whose clear and unambiguous language applies only to legislative acts, should apply to common law torts, nor does he offer any relevant citation of statutory or case law which might support such a position. Therefore, defendant has not shown that exclusive jurisdiction is vested in a three-judge panel.

With regard to his second substantial right argument, defendant asserts that because a three-judge panel has exclusive jurisdiction, failing to grant his motion would result in duplicative litigation. As we have held, however, the statute upon which defendant relies does not vest exclusive jurisdiction in a three-judge panel, where, as here, it concerns acts of the legislature, not common law torts. Accordingly, we hold that defendant has not shown a risk of duplicative litigation.

Because defendant has failed to demonstrate that the deprivation of a substantial right would potentially work injury to him if not corrected before an appeal from a final judgment, we dismiss his appeal as interlocutory. *See Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579.

Cursory Review

In the event this panel did reach the merits of defendant's argument, we would likely affirm the trial court.

"Alleged violation of a statutory mandate presents a question of law, which we review *de novo* on appeal." *Dion v. Batten*, 248 N.C. App. 476, 488, 790 S.E.2d 844, 852 (2016).

Defendant contends all common law torts were brought under the purview of the General Assembly via N.C. Gen. Stat. § 4-1. This statute provides that "[a]ll such parts of the common law as were heretofore in force and use within this State, . . . are hereby declared to be in full force within this State." N.C. Gen. Stat. § 4-1 (2019). Defendant contends the trial court failed to acknowledge that this renders common law torts subject to N.C. Gen. Stat. § 1-267.1.

While N.C. Gen. Stat. § 4-1 codified common law torts, those torts themselves, insofar as they were not subsequently altered or updated by legislative action, were not the result of legislative action such that N.C. Gen. Stat. § 1-267.1 would apply. Nor does such a ruling deprive defendant of a remedy: a party may nonetheless challenge the facial constitutionality of a common law tort before a trial court via a Rule 12(b)(6) motion. *See Malecek v. Williams*, 255 N.C. App. 300, 804 S.E.2d 592 (2017) (reversing an order which dismissed claims for torts of alienation of affection and criminal conversation as facially unconstitutional).

Finally, even assuming *arguendo* that the trial court erred in denying the motion on the basis that N.C. Gen. Stat. § 1-267.1 did not apply, such error is harmless. Defendant's motion alleged no specific basis, only the facial unconstitutionality of the torts. And as this Court held in *Malacek*, those torts are not facially unconstitutional. A three-judge panel would

have been bound by the precedent of this Court and ruled accordingly. As a matter of law, then, defendant cannot show that he was in any way prejudiced by the trial court's denial.

For these reasons, had we reached the merits of defendant's appeal, we would likely affirm the trial court's denial of defendant's motion to refer the constitutionality of the torts at issue to a three-judge panel. However, having determined defendant's appeal to be interlocutory and not affecting a substantial right, we dismiss this appeal.

DISMISSED.

Judges INMAN and ARROWOOD concur.

IN THE MATTERS OF N.K. AND D.K.

No. COA19-1027

Filed 20 October 2020

1. Child Abuse, Dependency, and Neglect—adjudication—abuse and neglect—sufficiency of evidence

The trial court properly adjudicated respondent-mother's son as abused where clear and convincing evidence supported its findings that respondent-mother took and distributed pornographic photos of the child and tried to frame her brother for it. Additionally, the trial court properly adjudicated both of respondent-mother's children as neglected where her abuse of the one child established that both children lived in an environment injurious to their welfare (N.C.G.S. § 7B-101(15)).

2. Child Abuse, Dependency, and Neglect—dispositional order—visitation—improper delegation of judicial authority to third parties

In an abuse and neglect case, the visitation provisions of a dispositional order were vacated and remanded where, by forbidding respondent-mother to have any contact with her children until agreed upon by her therapist and the children's therapists, the trial court seemingly—and improperly—delegated its authority to allow and set the terms for visitation to third parties.

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

The trial court properly adjudicated the parties' children as abused and neglected where clear and convincing evidence supported its finding that respondent-father knew about respondent-mother's criminal charges (she took and distributed pornographic photos of one of the children and, at one point, burned down the family home) but did nothing to protect the children. Whether respondent-father believed in respondent-mother's guilt was irrelevant.

4. Child Abuse, Dependency, and Neglect—dispositional order—placement with a relative—statutory requirements

In an abuse and neglect case, the trial court did not abuse its discretion by declining to place the parties' children with a relative where, although respondent-father presented his half-sister and the children's great aunt as potential placements, the evidence showed that neither woman was able to provide "proper care and supervision" or a "safe home" (N.C.G.S. § 7B-903(a1)). Because the court found no relative who met the statutory requirements under section 7B-903(a1), the court was not required to make findings of fact about whether placement with a relative would be in the children's best interests.

5. Child Abuse, Dependency, and Neglect—dispositional order—visitation—right to file motion for review

In an abuse and neglect case, the trial court erred when it failed to advise and give notice to respondent-father of his right to file a motion for review of the visitation plan set forth in the court's dispositional order.

6. Child Abuse, Dependency, and Neglect—dispositional order—custody remaining with department of social services—best interests of the children

In an abuse and neglect case, the trial court did not abuse its discretion by ordering that the children remain in the department of social services' custody rather than placing them together in a home with relatives and frequent access to respondent-father, where the court's unchallenged findings of fact showed that it properly considered the children's best interests while evaluating all available placement options.

Appeal by respondent-mother and respondent-father from order entered 12 August 2019 by Judge Sarah C. Seaton in District Court, Onslow County. Heard in the Court of Appeals 25 August 2020.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Jackson W. Moore, Jr., for guardian ad litem.

Patrick S. Lineberry, for respondent-mother.

Steven S. Nelson, for respondent-father.

STROUD, Judge.

Respondent-parents appeal a juvenile adjudication and disposition order for their two children. We affirm the adjudication order and vacate in part the disposition and remand only the provisions regarding visitation. As to respondent-mother, the district court may not leave visitation in the discretion of third parties; as to respondent-father, the court must clarify his right to file a motion to review.

I. Background

On 7 November 2018, the Onslow County Department of Social Services ("DSS") filed a juvenile petition alleging Norm[1] was an abused and neglected juvenile and Doug was a neglected juvenile. The petition alleged respondent-mother burned down the family home and took and distributed pornographic photos of Norm; as to respondent-father, the petition alleged he had full knowledge of respondent-mother's criminal behavior but had been unwilling to protect the children. After hearings on 13 and 17 May 2019, on 12 August 2019, the district court entered an order with extensive findings of fact and ultimately adjudicated Norm as abused and both children as neglected. The court ordered that respondent-mother was not allowed to have any contact with the children until agreed upon by her and the children's therapists; respondent-father's visitation was supervised. Both respondent-mother and respondent-father appeal.

II. Respondent-Mother

Respondent-mother makes three arguments on appeal.

A. Sufficiency of Evidence to Support Findings

[1] Respondent-mother first contends "the trial court's order relies on a vacuum of evidence for adjudicating . . . [the children] as neglected and [Norm] as abused[.]" (Original in all caps.)

1. Pseudonyms are used throughout the opinion.

> We review an adjudication under N.C. Gen. Stat. § 7B-807 to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings support its conclusions of law. The clear and convincing standard is greater than the preponderance of the evidence standard required in most civil cases. Clear and convincing evidence is evidence which should fully convince. Whether a child is dependent is a conclusion of law, and we review a trial court's conclusions of law de novo.

In re M.H., 272 N.C. App. 283, 286, 845 S.E.2d 908, 911 (July 7, 2020) (No. COA19-1132) (citations and quotation marks omitted).

Mother argues most of the substantive findings of fact regarding her abuse of Norm are not supported by the evidence. But respondent-mother does not challenge finding of fact 2(j) determining that

> [o]n or about August 31, 2018, the respondent mother was arrested for several charges relating to her taking pornographic pictures of the juvenile . . . [Norm] and distributing them, under the guise of their production and distribution by her brother, who resides in Alamance County. The respondent mother took the photographs to the Jacksonville Police Department, alleging that they were taken by her brother, and the law enforcement investigation revealed that they had in fact been taken and distributed by her.

Evidence of the creation, dissemination, or maintenance of pornographic photos of a child is evidence of abuse. *See* N.C. Gen. Stat. § 7B-101(1)(d) (2017) (defining an "[a]bused juvenile[]" in part as "preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17[.]").[2]

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2. There have been several versions of North Carolina General Statute § 7B-101 between 2017-2019 but all have classified creating, disseminating, or otherwise maintaining pornographic photos of a child as abuse of that child. *See generally* N.C. Gen. Stat. § 7B-101(1)(3) (2017-2019).

Respondent-mother's argument that there was no substantive evidence to support the findings of her abuse of Norm is not supported by the record. Detective Daniel Karratti of the Jacksonville Police Department extensively testified regarding the investigation which led to respondent-mother's criminal charges that form the basis for the adjudication of Norm as an abused child. We will not discuss Detective Karratti's testimony in detail here or the crimes and related file numbers under which respondent-mother was criminally charged. The question in this case is not whether respondent-mother is guilty of the alleged crimes; we are only considering whether the district court findings are supported by clear and convincing evidence. *See M.H.*, 272 N.C. App. at ___, 845, S.E.2d at ___.

The evidence shows respondent-mother admitted to the detective that she had sent a pornographic photo of Norm to her aunt.[3] Respondent-mother claimed her brother had taken the photographs, although Detective Karratti determined respondent-mother had taken them. In any event, even if respondent-mother's brother took the photographs, respondent-mother admitted she disseminated them, regardless of her purpose for the distribution.

The evidence thus supported the district court's finding of fact

> that the respondent mother's cell phone had a number of pictures of the juvenile . . . [Norm] unclothed and in seductive poses, which the respondent mother disseminated to a number of people as an elaborate hoax to indicate that her brother had taken and sent the pictures, when in fact the pictures were taken and sent by her. The respondent father should have been aware that the respondent mother put their child in substantial harm by taking and disseminating these pictures. The Court further finds that these pictures are now released into an electronic space where they may be disseminated again, causing significant harm to the juvenile [Norm] now, and in the future.

Detective Karratti's testimony was "clear, and convincing competent evidence[,]" *see In re M.H.*, 272 N.C. App. at 286, 845 S.E.2d at 911,

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3. Upon further questioning respondent-mother recanted her statement but her admission coupled with the photos on her phone are evidence that Norm was an abused juvenile. *See generally* N.C. Gen. Stat. § 7B-101(1)(d). The trial court determines the credibility and weight of that evidence. *See generally Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.").

supporting the district court's findings. The evidence supports the district court's findings that respondent-mother had knowingly distributed a pornographic photo of Norm, and this finding is sufficient to support the district court's adjudication of abuse. *See generally* N.C. Gen. Stat. § 7B-101(d)(1).

A neglected juvenile is defined in part as a child who lives in an environment injurious to his welfare. *See* N.C. Gen. Stat. § 7B-101(15) (2017). The proper adjudication of the recent and disturbing abuse of Norm while Doug was in the same environment is clear and convincing competent evidence of the neglect of Doug. *See In re C.M.*, 198 N.C. App. 53, 65–66, 678 S.E.2d 794, 801 (2009) ("Since the statutory definition of a neglected child includes living with a person who has abused or neglected other children, and since this Court has held that the weight to be given that factor is a question for the trial court, the trial court, in this case, was permitted, although not required, to conclude that Tess was neglected based on evidence that respondent-father had abused Alexander. *See, e.g.*, *In re A.S.*, 190 N.C. App. 679, 691, 661 S.E.2d 313, 321 (2008) (affirming the trial court's adjudication of neglect of one child based on evidence that respondent had abused another child by intentionally burning her), *affirmed per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009); *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and lack of accepting responsibility). *With this Court's determination supra that Alexander was properly adjudicated abused, any weight given by the trial court to the abuse adjudication in determining Tess's neglect was proper*." (emphasis added)). Further, the evidence establishing Norm's abuse is enough to substantiate that he lived in an environment injurious to his welfare, *see* N.C. Gen. Stat. § 7B-101(15) (2017), and thus was also a neglected juvenile. The district court properly adjudicated Norm as abused and both children as neglected. This argument is overruled.

B. Visitation

[2] The district court's order does not allow respondent-mother to have any contact with the children "until agreed upon and recommended by both the children's therapists and therapist of [respondent-mother] only after court recommendations for her bond conditions or probation terms change." Respondent-mother next contends "the trial court erred in denying [respondent-mother] visitation with . . . [the children] and otherwise leaving visitation in the discretion of the therapists." (Original in all caps.) The *guardian ad litem* has requested we vacate and remand the order as to respondent-mother's visitation for "greater clarity" as

one potential reading of the order "would be to delegate the visitation authority to certain therapists without court intervention."

"We review a dispositional order only for abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Matter of S.G.*, 268 N.C. App. 360, 368, 835 S.E.2d 479, 486 (2019) (citation, quotation marks, and brackets omitted).

North Carolina General Statute §7B-905.1(a) addresses the requirements for court orders regarding visitation with a child who has been removed from the home:

> An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. §7B-905.1 (2017).[4]

Although the district court may deny a parent visitation with a child if it determines visitation is not in the child's best interest, *see id.*, the court must make appropriate findings to support an order denying visitation. *See generally Matter of T.W.*, 250 N.C. App. 68, 77, 796 S.E.2d 792, 798 (2016) ("The order must establish an adequate visitation plan for the parent in the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation." (citation, quotation marks, and brackets omitted)). If the district court orders visitation, the court "shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." N.C. Gen. Stat. §7B-905.1(d).

This Court has previously determined that a lower court may not delegate its authority to set visitation to the custodian of the child: "[W]hen visitation rights are awarded, it is the exercise of a judicial function." *See generally In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) ("We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody

4. North Carolina General Statute § 7B-905.1 was amended effective 1 October 2019 and will guide the district court upon remand. *See* N.C. Gen. Stat. §7B-905.1 (2019).

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 could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian."). Here, the district court neither completely denied visitation nor set out terms for visitation but instead delegated both the authority to allow visitation and the terms of that visitation to three therapists who worked with respondent-mother and each child.

While there is more than one way to interpret the court's order regarding respondent-mother's visitation, we agree the order seems to delegate the decision to allow visitation, as well as the conditions and schedule of visitation, to three therapists, as it was to be "agreed upon" by the children's therapists and respondent-mother's therapist. Under the terms of the order, if one of the three therapists fails to agree, no visitation would occur. We vacate and remand the visitation portion of the order as it applies to respondent-mother for the district court to exercise its own discretion regarding visitation and to enter an order with provisions as required by North Carolina General Statute § 7B-905.1.

C. Relative Placement

Lastly, respondent-mother incorporates respondent-father's first argument on appeal regarding relative placement. As the substance of the argument is in respondent-father's brief, we will address it in the portion of the opinion regarding his appeal.

D. Summary

In summary, the district court properly adjudicated Norm as abused and the children as neglected, but we vacate the portion of the order regarding respondent-mother's visitation and remand entry of an order addressing visitation in accord with North Carolina General Statute §7B-905.1.

III. Respondent-Father

Respondent-father makes five arguments on appeal. We will address respondent-father's arguments regarding the adjudication first.

A. Sufficiency of Evidence to Support Findings for Adjudication

[3] Like respondent-mother, respondent-father also contends "the trial court[']s order relies on a vacuum of evidence for adjudicating [Doug] and [Norm] as neglected and [Norm] as abused[,]" (original in all caps), and the entirety of this portion of his argument is the incorporation of

respondent-mother's argument. We have already addressed this argument and overrule it.

Respondent-father raises an additional argument regarding the sufficiency of the evidence to support the trial court's findings regarding his knowledge of Respondent-mother's actions. Respondent-father contends "the trial court erred when it found during the children's adjudication, that [respondent-father] had prior knowledge of [respondent-mother's] prior criminal behavior and knowledge of her current criminal behavior and that he failed to protect his children from their abuse and neglect. Respondent-father testified about respondent-mother's criminal behavior. In his brief, he contends that he "knew" what respondent-mother was *accused* of but he did not "know" she actually did these things. We need not list the findings of fact regarding respondent-father's knowledge, as he does not challenge the findings as unsupported by the evidence. Regardless of respondent-father's beliefs about respondent-mother's actions, the record supports the district court's determination that respondent-father was aware of respondent-mother's criminal charges *and* the actions which led to the charges, and we read the findings of fact as addressing his awareness of respondent-mother's actions and not whether he knew or believed she was guilty of a particular crime. This argument is without merit.

B. Relative Placement

[4] Respondent-father first contends "the trial court erred and abused its discretion when it failed to place the children with family members and failed to comply with the statutory mandates contained in N.C. Gen. Stat. §§ 7B-903(a1) (2015) and 7B-506(h)(2) (2017)." (Original in all caps.) We first note that North Carolina General Statute § 7B-506 (2017) is entitled "Hearing to determine need for continued nonsecure custody[.]" None of the orders for continued nonsecure custody are at issue on appeal, and therefore we address only respondent-father's argument as to relative placement under North Carolina General Statute § 7B-903. We review statutory compliance *de novo*. *See generally In re M.S.*, 247 N.C. App. 89, 91, 785 S.E.2d 590, 592 (2016) ("We consider matters of statutory interpretation *de novo*." (citation omitted)).

As to North Carolina General Statute § 7B-903(a1), respondent-father argues that the court did not make findings of fact regarding why the best interests of the children would not be served by placing them with relatives, as he contends is required by the statute. North Carolina General Statute § 7B-903(a1) provides,

> In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative

> of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

N.C. Gen. Stat. § 7B-903 (2019). Thus, the district court must first consider whether a "relative is willing and able to provide proper care and supervision in a safe home[.]" *Id.* If so, "*then* the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." *Id.*

Respondent-father argues placement with a relative would be in the best interest of the children, but he ignores the first portion of the statute. The district court must first determine there is a relative who is willing to care for the children and "able to provide proper care and supervision in a safe home[.]" *Id.* Here, the court found there was no relative available who met these statutory requirements, so there was no need to consider whether placement with a relative would be in the children's best interests.

Father contends there were two relatives available to care for the children: a maternal great aunt, Ms. Smith, and the children's paternal half-sister, Ms. Adams.[5] As to Ms. Smith, DSS had reported that her placement was not suitable: "Home Study for . . . [the Smiths] w[as] denied." The DSS report was admitted as evidence at the disposition hearing. Further, a prior continuation of nonsecure custody order from March of 2019 had found "the [Smiths] had their home assessment denied by Alamance County." Neither respondent challenged the DSS report, the nonsecure custody order finding, or presented any evidence indicating Ms. Smith was available and able to care for the children.

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5. We have used pseudonyms for these relatives to protect the identity of the juveniles.

As to Ms. Adams, the district court found that

> [t]he juveniles were removed from the home of their paternal sister . . . [Ms. Adams] after a hearing on March 25, 2019 when the Court found that [Ms. Adams] was allowing the juveniles to sleep overnight at the home of their paternal grandmother, who has prior child protective services history and is not an appropriate caregiver to these juveniles[;]

Respondent-father does not challenge this finding of fact but contends it is not sufficient to establish that Ms. Adams was not "willing and able to provide proper care and supervision of the juvenile in a safe home." Yet all of the evidence before the court showed that neither Ms. Smith nor Ms. Adams were able to provide "proper care and supervision" or a "safe home." *Id.* Respondent-father presented no evidence to counter DSS's evidence or the home studies of the relatives. There was no need for the district court to make findings of fact as to why it was not in the children's best interests to be placed with Ms. Smith and Ms. Adams since neither was able to provide a safe and appropriate home.

Based upon the evidence and binding finding of fact, *see In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016) ("Unchallenged findings are binding on appeal."), there was not an appropriate relative placement available for the children. The court *only* engages in a best interests analysis as to relative placement, after "*first* consider[ing] whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home" and upon determining "the relative *is* willing and able to provide proper care and supervision in a safe home[.]" *Id.* (emphasis added). Here, the uncontroverted evidence and findings in this and a prior order establish Ms. Smith and Ms. Adams were not "able to provide proper care and supervision of the juvenile in a safe home[,]" and thus the court did not need to take the next step of considering the children's best interests. *Id.* The district court complied with North Carolina General Statute § 7B-903(a1).[6] Further, the court did not abuse its discretion regarding its disposition of non-relative placement. *See S.G.*, 268 N.C. App. at ___, 835 S.E.2d at 486. This argument is overruled.

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6. Respondent-father also contends it is in the best interests of the children to be in placement together, and this would be accomplished by the children staying with relatives, but again, such an analysis specifically under North Carolina General Statute § 7B-903(a1) as is at issue on appeal, is only required *after* a determination that relative placement is possible and appropriate. *See generally* N.C. Gen. Stat. § 7B-903(a1).

C. Motion for Review

[5] Respondent next contends "the trial court erred when it failed to advise and give notice to [respondent-father] of his right to file a motion for review of the visitation plan." (Original in all caps.) As with the provisions regarding respondent-mother's visitation, the *guardian ad litem* also requests this Court vacate the provisions of the order regarding visitation and remand for explicit compliance with North Carolina General Statute § 7B-905.1(d). As we are already remanding the visitation provision regarding respondent-mother and as the *guardian ad litem* requests the same remedy as respondent-father, we also remand the rest of the visitation provision as all parties have contended the entirety of the visitation determinations made by the court lacked clarity regarding who had discretion over visitation and a right to review. *See, e.g.*, *Matter of J.L.*, 264 N.C. App. 408, 422-23, 826 S.E.2d 258, 268-69 (2019) (vacating and remanding for compliance with N.C. Gen. Stat. § 7B-905.1(d)).

D. Best Interests

[6] Respondent-father next contends "the trial court erred when it failed to comply with the statutory mandates required to satisfy the children's best interests in the initial disposition." (Original in all caps.) The only statute cited and quoted by respondent-father is a federal one regarding "reasonable efforts" to place siblings together. For the remainder of the argument, respondent-father essentially reasserts his points regarding relative placement and rather than challenging any findings of fact contends that the district court was simply wrong about what was in the children's best interests.

Respondent-father contends "[t]he children's best interests require that they be kept together in a home with family and with frequent access to their father." As a general proposition, North Carolina's statutes recognize "family autonomy" as an ideal goal for all families. *See* N.C. Gen. Stat. § 7B-100 (2019).

> Some of the purposes of Chapter 7B, subchapter I are
>
> > (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and
> >
> > (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the

> unnecessary or inappropriate separation of juveniles from their parents.

Id.

Unfortunately, it is not always possible for children to be safe "in a home with family and with frequent access to their father." The district court properly considered the children's interests while evaluating the alternatives that were *actually* available to them. The court made many findings of fact which are not at issue on appeal supporting the court's adjudication and its determination that the children should remain in the custody of DSS. The court did not abuse its discretion in its extensive dispositional analysis regarding best interests. *See S.G.*, 268 N.C. App. at ___, 835 S.E.2d at 486. This argument is overruled.

E. Summary

In summary, we vacate and remand only regarding the visitation provisions for respondent-father and remand for the district court to enter a new order addressing visitation, including provisions regarding respondent-father's right to file a motion for review.

IV. Conclusion

We affirm the order as to adjudication and vacate in part the provisions regarding disposition, specifically as to visitation. On remand, the trial court shall enter a new order addressing respondent-mother's visitation and clarifying respondent-father's right to file a motion to review.

AFFIRMED in part; VACATED and REMANDED in part.

Judges DIETZ and ZACHARY concur.

BRADLEY E. PARKER, Plaintiff
v.
EMMA GRACE PFEFFER, Defendant

No. COA19-1151

Filed 20 October 2020

1. Civil Procedure—multiple Rule 12 motions to dismiss—priority given to personal jurisdiction issue

The trial court in a negligence action did not err by issuing an order granting defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction before addressing defendant's Rule 12(b)(4) and 12(b)(5) motions to dismiss for insufficient process or service of process. Because of the fundamental nature of the personal jurisdiction issue, the court was free to review the Rule 12(b)(2) motion first, and, at any rate, the court concluded in its order that plaintiff properly served sufficient process on defendant.

2. Jurisdiction—personal—long-arm statute—substantial activity within the state

After a car accident in Texas involving a North Carolina resident (plaintiff) and a Texas resident (defendant), a North Carolina trial court properly dismissed plaintiff's negligence action for lack of personal jurisdiction where plaintiff failed to show under the state's long-arm statute that defendant "engaged in substantial activity" within North Carolina. Although defendant exchanged text messages with plaintiff about the car accident while plaintiff was in North Carolina, had taken six vacations to North Carolina in the past, and was planning to visit North Carolina in the future to attend her brother's wedding, none of these contacts satisfied the "substantial activity" requirement under the long-arm statute.

Appeal by plaintiff from judgment entered 7 August 2019 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 26 August 2020.

Williams Mullen, by Michael C. Lord, for plaintiff-appellant.

Teague Rotenstreich Stanaland Fox & Holt PLLC, by Camilla F. DeBoard and Kara V. Bordman, for defendant-appellee.

BERGER, Judge.

On August 7, 2019, the trial court granted Emma Grace Pfeffer's ("Defendant") motion to dismiss for lack of personal jurisdiction. Bradley E. Parker ("Plaintiff") appeals, arguing the trial court erred when it (1) failed to address Defendant's Rule 12(b)(4) and 12(b)(5) motions before issuing its order on Defendant's Rule 12(b)(2) motion; (2) determined that it lacked personal jurisdiction over Defendant; and (3) concluded that it did not maintain personal jurisdiction over Defendant when Defendant's contacts with North Carolina were continuous and systematic. We disagree.

Factual and Procedural Background

On April 19, 2018, Plaintiff and Defendant were in a two-car accident in Austin, Texas. In September 2018, Plaintiff filed an action for negligence in Wake County District Court, and Defendant filed a motion in lieu of answer seeking dismissal under North Carolina Rules of Civil Procedure 12(b)(2), (4), (5), and (6). On October 31, 2018, Defendant filed an amended motion in lieu of answer and an affidavit executed by Defendant. The affidavit asserted that Defendant is a citizen of the State of Texas, and did not operate a business, possess property, maintain financial accounts, or regularly visit North Carolina.

On January 8, 2019, the trial court denied Defendant's motion in lieu of answer "because, absent any service of process, the [trial court did] not have subject matter jurisdiction[,]" but "[o]nce the Complaint is served, Defendant [was] not barred from asserting any Rule 12 defense she may have." On February 22, 2019, Plaintiff filed an unverified amended complaint accompanied by a certificate and affidavit of service. Defendant responded with a second motion in lieu of answer and an appended affidavit contesting personal jurisdiction.

On July 18, 2019, this matter came on for hearing. In granting Defendant's 12(b)(2) motion, the trial court made the following undisputed findings of fact:

> 1. On or about April 19, 2018, Defendant and Plaintiff were involved in a motor vehicle accident (the "Accident") that occurred at the intersection of East 7th Street and North Interstate 35 Frontage Road located in Austin, Travis County, Texas.
>
> 2. Plaintiff resides in North Carolina.
>
> 3. Defendant resides in Texas.
>
> 4. Defendant does not operate any business or conduct any business in the State of North Carolina.

5. Defendant founded a charity that performs annual bike rides. Defendant solicits donations for this charity online and through social media. Residents of North Carolina are not excluded from these solicitations.

6. Defendant does not maintain any financial accounts including bank accounts in the State of North Carolina.

7. Defendant does not own or lease any real property in the State of North Carolina.

8. Defendant visited the state of North Carolina on six occasions prior to the accident on April 19, 2018, that is the basis for the allegations in the Complaint. Her only intention to return to the state of North Carolina is for her brother's wedding in October of 2019.

9. Defendant has no current intention to engage in business in North Carolina, drive through the state of North Carolina, or use the roads of North Carolina other than for her vacation in October of 2019 for her brother's wedding.

10. Defendant has not shipped anything to Plaintiff in North Carolina.

11. Defendant exchanged twelve (12) text messages with Plaintiff between May 1, 2018 and June 29, 2018 and she spoke to him once on the telephone after Plaintiff returned to North Carolina. Plaintiff initiated the text message conversation and the content of the messages concerned the accident.

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

1. The Court relies on the two affidavits of Defendant and pleadings contained in the Court file in support of its decision below;

2. Plaintiff filed a Complaint on or about September 4, 2018, requesting compensatory damages arising out of a motor vehicle accident that occurred on or about April 19, 2018 in Austin, Harris County, Texas, and Plaintiff filed an amended complaint on February 22, 2019;

3. Defendant first filed a motion to dismiss pursuant to Rule 12(b)(2), (4), (5) and (6) of the North Carolina Rules of Civil Procedure that was denied without prejudice by

the Honorable Michael Denning, to be refiled after service of the Complaint;

4. The contacts Defendant has had with the state of North Carolina are not such contacts Defendant would expect to be brought into court and subject to jurisdiction in North Carolina;

5. The accident upon which the Complaint is based has no connection to the limited prior or single planned future visitation of Defendant to the state of North Carolina;

6. The use of social media by the Defendant not specifically targeted at the state of North Carolina is not enough to establish jurisdiction or minimum contact[s] in North Carolina;

7. In review of the service in the Court file, the affidavit of service appears to have [been] properly served by Federal Express the Complaint;

8. In review of the Court file and service, the motion to dismiss for personal jurisdiction is ripe and ready for determination by the Court; and

9. The Plaintiff has not established general or specific jurisdiction over the Defendant with regard to those matters alleged in the Complaint and this Action.

The trial court denied Defendant's Rule 12(b)(4) and 12(b)(5) motions to dismiss and granted Defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. On September 3, 2019, Plaintiff entered written notice of appeal. While this appeal was pending, Plaintiff filed a complaint in Travis County (Texas) District Court.

Standard of Review

"When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of America Securities LLC v. Evergreen Intern. Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (citation and quotation marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (citation omitted).

Analysis

The trial court's order dismissing this action is a final judgment, and appeal therefore lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

I. Service of Process

[1] Plaintiff first argues that the trial court erred by failing to address Defendant's Rule 12(b)(4) and 12(b)(5) motions before issuing its order on Defendant's Rule 12(b)(2) motion. Because of personal jurisdiction's fundamental nature, our courts are not prohibited from reviewing a Rule 12(b)(2) motion prior to review of a Rule 12(b)(4) or 12(b)(5) motion, and Plaintiff's argument is without merit. *See Love v. Moore*, 305 N.C. 575, 579-80, 291 S.E.2d 141, 145 (1982) (holding that the court may consider Rule 12(b)(2) motions prior to Rule 12(b)(4) and 12(b)(5) motions); *see also Prof'l Vending Servs., Inc. v. Michael D. Sifen, Inc.*, No. COA08-1383, 2009 WL 2370683, at *5 (N.C. Ct. App. Aug. 4, 2009) (unpublished) ("Although some issues concerning the adequacy of service on certain of the [d]efendants are discussed in [d]efendants' brief, we do not believe that it is necessary for us to decide those service-related issues given our resolution of the fundamental personal jurisdiction issue[.]").

Regardless, conclusions of law 7 and 8 contain mixed findings of fact and conclusions of law. "The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citation omitted). Specifically, "[w]hen this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." *Cox v. Cox*, 238 N.C. App. 22, 31, 768 S.E.2d 308, 314 (2014). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Johnson v. Johnson*, 259 N.C. App. 823, 831, 817 S.E.2d 466, 473 (2018) (citation and quotation marks omitted). Because Plaintiff does not specifically challenge conclusion of law 7 – "the affidavit of service appears to have [been] properly served by Federal Express the Complaint" and conclusion of law 8 – "the motion to dismiss for personal jurisdiction is ripe and ready for determination by the Court[,]" these mislabeled findings are binding on our Court. *See id.* at 831, 817 S.E.2d at 473 (concluding that the trial court's finding of fact was binding on appeal because it was uncontested). Therefore, Plaintiff sufficiently served Defendant to effectuate review of personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1).

II. Personal Jurisdiction

When a defendant challenges personal jurisdiction pursuant to Rule 12(b)(2),

> a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. . . . Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (citation omitted). When "the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (*purgandum*). It is not for this Court to "reweigh the evidence presented to the trial court." *Don't Do it Empire, LLC v. Tenntex*, 246 N.C. App. 46, 57, 782 S.E.2d 903, 910 (2016).

When addressing the issue of personal jurisdiction on appeal, this Court "employs a two-step analysis." *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). "First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state's long-arm statute." *Id.* at 119, 638 S.E.2d at 208 (citation omitted). "Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* at 119, 638 S.E.2d at 208.

A. Long-arm statute

[2] "[N.C. Gen. Stat. §] 1-75.4 is commonly referred to as the 'long-arm' statute." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). Specifically, N.C. Gen. Stat. § 1-75.4 permits North Carolina courts to exercise personal jurisdiction when,

> the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State; or
>
> b. Is a natural person domiciled within this State; or
>
> c. Is a domestic corporation; or
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4(1) (2019). "[B]y its plain language[, N.C. Gen. Stat. § 1-75.4(1)] requires some sort of 'activity' to be conducted by the defendant within this state." *Skinner*, 361 N.C. at 119, 638 S.E.2d at 208. "The burden is on the plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant." *Golds v. Cent. Express, Inc.*, 142 N.C. App. 664, 666, 544 S.E.2d 23, 26 (2001) (*purgandum*).

Here, the trial court reviewed Plaintiff's unverified amended complaint and Defendant's affidavit. Plaintiff alleges in his unverified amended complaint that the "Court has jurisdiction over [Defendant] due to, among other contacts, her communication with [Plaintiff] about the subject matter of this action while he was physically located in the State of North Carolina, and her visits to the State of North Carolina (including the most recent visit in 2017)." Plaintiff argues that "[t]he facts presented by the vehicular accident here fall within the circumstances outlined in . . . N.C. Gen. Stat. § 1-75.4(1)d." However, Plaintiff fails to specifically establish under N.C. Gen. Stat. § 1-75.4(1)(d), that Defendant "engaged in substantial activity within [North Carolina.]" N.C. Gen. Stat. § 1-75.4(1)(d).

Rather, Plaintiff alleged that North Carolina has jurisdiction over Defendant because she communicated with Plaintiff while he was in North Carolina. However, the trial court found that "Defendant exchanged twelve (12) text messages with Plaintiff between May 1, 2018 and June 29, 2018 and she spoke to him once on the telephone after Plaintiff returned to North Carolina. Plaintiff initiated the text message conversation and the content of the messages concerned the accident." These communications were limited to discussion about repair estimates and insurance claims which served to facilitate a potential out of court settlement without resorting to litigation.

The trial court's unchallenged findings of fact are binding on this Court. *See Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 709 (2002) ("[I]f the trial court's findings of fact resolving the defendant's jurisdictional challenge are not assigned as error, the court's findings are presumed to be correct" (citation and quotation marks omitted)). Therefore, Plaintiff has failed to demonstrate that Defendant's mere correspondence satisfies the "substantial activity" requirement of N.C. Gen. Stat. § 1-75(1)(d). *See Miller v. Szilagyi*, 221 N.C. App. 79, 92, 726 S.E.2d 873, 883 (2012) (finding no personal jurisdiction where defendant "made more than 100 telephone calls to [p]laintiff in North Carolina and that approximately 40 telephone calls and 25 emails were related to" the cause of action).

In addition, the trial court found and the record reveals that "Defendant visited the state of North Carolina on six occasions prior to the accident on April 19, 2018, that is the basis for the allegations in the Complaint[, and h]er only intention to return to the state of North Carolina is for her brother's wedding in October of 2019." Specifically, Defendant's second affidavit reveals that the prior six visits relate to family trips, visiting siblings at college, and visiting a friend from summer camp. *See Patrum v. Anderson*, 75 N.C. App. 165, 168, 330 S.E.2d 55, 57 (1985) (concluding there was no statutory basis for personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1)(d) when "[t]he record shows that on six occasions defendant ordered souvenir caps or cars from plaintiff's company in North Carolina, that defendant occasionally came to North Carolina to watch auto races, and that he owned a racing team which entered cars in North Carolina races."). Accordingly, Plaintiff has failed to show that Defendant's few vacations to North Carolina, which have no relation to the traffic accident in Texas, constituted as "substantial activity" to satisfy the purpose of N.C. Gen. Stat. § 1-75.4(1)(d).

Because Plaintiff has failed to meet his burden of proving a statutory basis for personal jurisdiction, we need not conduct a due process inquiry because any "further inquiry will be fruitless." Gray, Wilson G. *North Carolina Civil Procedure* § 85-1. *See also Skinner*, 361 N.C. at 119, 638 S.E.2d at 208-09 (ceasing personal jurisdiction analysis after review of "N.C.G.S. § 1-75.4(1)(d)'s very broad terms, the facts of this case fail to invoke jurisdiction.").

Conclusion

For the foregoing reasons, the trial court did not err when it granted Defendant's Rule 12(b)(2) motion to dismiss.

AFFIRMED.

Judges INMAN and COLLINS concur.

STAHL v. BOWDEN

[274 N.C. App. 26 (2020)]

JULIE ANN STAHL, Individually, and Julie Ann Stahl as Administratrix for the Estate of Kenneth Newton Stahl, Plaintiffs
v.
DANIEL BOWDEN, (In His Individual Capacity), Defendant

No. COA20-111

Filed 20 October 2020

Immunity—911 dispatcher—plain language of statute—interlocutory appeal

In an action arising from a 911 dispatcher's (defendant's) failure to notify the N.C. Department of Transportation of a downed stop sign, resulting in a fatal car accident, defendant's appeal of the trial court's denial of his motion for summary judgment was dismissed as interlocutory where defendant could not establish that the order affected a substantial right entitling him to immediate appeal because the plain language of N.C.G.S. § 143B-1413 did not provide defendant statutory immunity (rather, it simply provided a heightened burden of proof).

Appeal by defendant from order entered 7 October 2019 by Judge Andrew T. Heath in Pender County Superior Court. Heard in the Court of Appeals 25 August 2020.

Baker Law Firm, PLLC, by H. Mitchell Baker, III, and Collins Law Firm, by David B. Collins, Jr., for plaintiffs-appellees.

Womble Bond Dickinson (US) LLP, by Christopher J. Geis, for defendant-appellant.

ZACHARY, Judge.

Defendant Daniel Bowden appeals from an order denying his motion for summary judgment. After careful review, we dismiss his appeal as interlocutory.

Background

Defendant was employed as a dispatcher in the Pender County 911 Communications Center, which is operated by the Pender County Sheriff's Office.

On 7 February 2017, Defendant fielded a call from a person reporting a downed stop sign at the intersection of Malpass Corner Road and

U.S. Highway 421. The eastbound intersection of Malpass Corner Road and U.S. Highway 421 had two stop signs: one sign, mounted on the right shoulder of the road, and a supplemental sign, mounted on a concrete median.

The caller told Defendant, "[T]hat's a dangerous intersection for there not to be a Stop Sign up." Defendant replied: "Yes ma'am, it is." He confirmed the location of the downed sign, and then told the caller, "[w]e will definitely let DOT know." No record exists of any communication from Defendant to the North Carolina Department of Transportation ("DOT") regarding that report.

On 10 February 2017, Plaintiffs were traveling from Florida to visit family in Newport, North Carolina. Julie Stahl was driving, with her husband Kenneth riding in the front passenger seat. Plaintiffs were heading east on Malpass Corner Road when they approached Highway 421; Julie did not stop, and Plaintiffs entered the intersection traveling at approximately 40 miles per hour. The stop sign mounted on the median was down.

Plaintiffs' vehicle collided with a tractor trailer heading north on U.S. Highway 421, overturned, and came to rest in a ditch on the northbound side of U.S. Highway 421. Julie suffered serious injuries, and Kenneth died from the injuries he suffered in the collision.

The next day, on 11 February 2017, the caller who had initially reported the downed stop sign called the Pender County 911 Communications Center again. This time, the caller did not speak with Defendant; a different dispatcher fielded the call. After reporting that the stop sign was still down, the caller added: "I called earlier this week and they still haven't come to put it back up and someone was killed at that intersection last night." The dispatcher emailed DOT, and DOT engineers righted the downed stop sign within two hours.

On 7 August 2018, Plaintiffs filed suit in New Hanover Superior Court against Defendant individually, alleging both negligence and gross negligence, and seeking damages resulting from the personal injuries to Julie and the wrongful death of Kenneth. On 4 September 2018, Defendant filed his answer and a motion, as of right, to transfer venue to Pender County Superior Court. Plaintiffs consented to Defendant's motion to transfer, and on 26 September 2018, the trial court entered a consent order transferring the case to Pender County Superior Court.

On 1 July 2019, Defendant filed his motion for summary judgment. Defendant argued, *inter alia*, that Plaintiffs' claims were barred by

statutory immunity. On 11 September 2019, Plaintiffs filed their response to Defendant's motion for summary judgment and moved for summary judgment in their favor.

The parties' competing motions for summary judgment came on for hearing on 16 September 2019, before the Honorable Andrew T. Heath. On 7 October 2019, the trial court entered its order denying both motions for summary judgment. Defendant timely appealed.

Interlocutory Jurisdiction

The denial of a motion for summary judgment is not a final judgment, but rather is interlocutory in nature. *See Cushman v. Cushman*, 244 N.C. App. 555, 559, 781 S.E.2d 499, 502 (2016). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory appeal "may be taken from [a] judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat. § 1-277(a) (2019); *see also id.* § 7A-27(b)(3)(a). "A substantial right is one affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Bowling v. Margaret R. Pardee Mem'l Hosp.*, 179 N.C. App. 815, 818, 635 S.E.2d 624, 627 (2006) (citation and internal quotation marks omitted), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 206 (2007).

As a general rule, claims of immunity affect a substantial right, and therefore merit immediate appeal. *See Farrell v. Transylvania Cty. Bd. of Educ.*, 199 N.C. App. 173, 176, 682 S.E.2d 224, 227 (2009). Nonetheless, a party claiming the protection of statutory immunity must satisfy "all of the requirements" of the statute granting the claimed immunity in order to establish a substantial right entitling him to an immediate appeal. *Wallace v. Jarvis*, 119 N.C. App. 582, 585, 459 S.E.2d 44, 46, *disc. review denied*, 341 N.C. 657, 462 S.E.2d 527 (1995).

The parties assert that the case at bar is governed by N.C. Gen. Stat. § 143B-1413, which provides:

> (a) Except in cases of wanton or willful misconduct, a communications service provider, and a 911 system provider or next generation 911 system provider, and their employees, directors, officers, vendors, and agents are not liable for any damages in a civil action resulting from death or injury to any person or from

> damage to property incurred by any person in connection with developing, adopting, implementing, maintaining, or operating the 911 system or in complying with emergency-related information requests from State or local government officials. This section does not apply to actions arising out of the operation or ownership of a motor vehicle. The acts and omissions described in this section include, but are not limited to, the following:
>
> (1) The release of subscriber information related to emergency calls or emergency services.
>
> (2) The use or provision of 911 service, E911 service, or next generation 911 service.
>
> (3) Other matters related to 911 service, E911 service, or next generation 911 service.
>
> (4) Text-to-911 service.
>
> (b) In any civil action by a user of 911 services or next generation 911 services arising from an act or an omission by a PSAP, and the officers, directors, employees, vendors, agents, and authorizing government entity of the PSAP, in the performance of any lawful and prescribed actions pertaining to their assigned job duties as a telecommunicator. The plaintiff's burden of proof shall be by clear and convincing evidence.

N.C. Gen. Stat. § 143B-1413.

The parties agree that Defendant is an employee of "a 911 system provider," pursuant to Section 143B-1413(a). *Id*. However, upon careful review of Section 143B-1413, and the applicable statutory definitions contained in that chapter, we disagree.

We first note that the first portion of subsection (b) is a sentence fragment, and the period after "telecommunicator" appears to be an error. Subsection (b) was added by a 2015 amendment, which read:

> In any civil action by a user of 911 services or next generation 911 services arising from an act or an omission by a PSAP, and the officers, directors, employees, vendors, agents, and authorizing government entity of the PSAP, in the performance of any lawful and prescribed actions pertaining to their assigned job duties as a 911 or public

> safety telecommunicator or dispatcher at a PSAP or at any public safety agency to which 911 calls are transferred from a primary PSAP for dispatch of appropriate public safety agencies, the plaintiff's burden of proof shall be by clear and convincing evidence.

2015 N.C. Sess. Laws 1217, 1220, ch. 261, § 3.

This subsection was amended in 2019, when the phrase "911 or public safety telecommunicator or dispatcher at a PSAP or at any public safety agency to which 911 calls are transferred from a primary PSAP for dispatch of appropriate public safety agencies" was replaced by "telecommunicator." 2019 N.C. Sess. Laws ___, ___, ch. 200, § 7(j). The definition of "telecommunicator" was also adopted as part of the same session law. *Id.* § 7(a). The 2019 amendment included a period instead of a comma after "telecommunicator," thus creating the sentence fragment. But despite this error in punctuation, the meaning of the statute is clear.

For the purposes of this statute, a "911 system provider" is defined as "[a]n entity that provides an Enhanced 911 or NG911 system *to a PSAP*." N.C. Gen. Stat. § 143B-1400(5) (emphasis added). A PSAP—a "[p]ublic safety answering point"—is defined as "[t]he public safety agency that receives an incoming 911 call and dispatches appropriate public safety agencies to respond to the call." *Id.* § 143B-1400(25). A telecommunicator is a "person qualified to provide 911 call taking employed by a PSAP. The term applies to 911 call takers, dispatchers, radio operators, data terminal operators, or any combination of such call taking functions in a PSAP." *Id.* § 143B-1400(28a). By the plain language of these statutory definitions, Defendant—as a 911 telecommunicator—is "employed by a PSAP," rather than a 911 system provider.

Section 143B-1413(b) also does not provide statutory immunity to PSAPs or their employees. Subsection (b) provides, in pertinent part, that "[i]n any civil action by a user of 911 services . . . arising from an act or an omission by a PSAP" and its employees "pertaining to their assigned job duties as a telecommunicator[, t]he plaintiff's burden of proof shall be by clear and convincing evidence." *Id.* § 143B-1413(b). This does not grant employees of PSAPs, such as Defendant, any statutory immunity; instead, it provides a heightened burden of proof that any prospective plaintiff must meet in a suit against an employee of a PSAP under Section 143B-1413(b).

Simply put, the statutory immunity that Defendant claims is unavailable to 911 telecommunicators under the plain language of Section

143B-1413. Where a statute's "language is clear and unambiguous, . . . 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 698 (2019). This Court must apply the law as enacted by the legislature. Thus, if the statutory immunity that Defendant seeks is to be provided under our laws, it is not for this Court to provide it. *See id.* Such is the province of the General Assembly, and we defer to its judgment.

Conclusion

Defendant is unable to satisfy "all of the requirements" of Section 143B-1413 to obtain statutory immunity. *Wallace*, 119 N.C. App. at 585, 459 S.E.2d at 46. We are therefore unable to conclude that Defendant has established that the trial court's denial of his motion for summary judgment affected a substantial right entitling him to an immediate appeal. Accordingly, we dismiss Defendant's appeal as interlocutory.

DISMISSED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ISSAC ALEXANDER, Defendant

No. COA19-847

Filed 20 October 2020

1. Appeal and Error—preservation of issues—Batson challenge —evidence of prospective juror's race—sufficiency of record

The record was minimally sufficient to preserve for appellate review defendant's argument that the State committed a *Batson* violation (by peremptorily striking the sole Black member of the prospective jury pool), despite there being no direct evidence of the race of any of the prospective jurors and no verbatim transcript of the voir dire, because the parties' arguments at the *Batson* hearing showed no dispute regarding defendant's race and that of the removed prospective juror and therefore amounted to a stipulation.

2. Constitutional Law—Batson challenge—consideration of all evidence presented—totality of circumstances—remanded for further findings

In overruling defendant's *Batson* claim (based on the State peremptorily striking the sole Black member of the prospective jury pool), the trial court failed to make the necessary findings of fact demonstrating it considered all of defendant's arguments and evidence, including a comparative juror analysis and contention that the prosecutor's striking of a Black prospective juror for using a certain "tone of voice" had racial implications (as required pursuant to the clarifying principles set forth in *State v. Hobbs*, 374 N.C. 345 (2020), issued after the trial court's decision in this case). The matter was remanded for the trial court to make further findings and to explain how it weighed the totality of the circumstances in a new ruling.

3. Costs—costs assessed in multiple criminal judgments—N.C.G.S. § 7A-304—meaning of "criminal case"—multiple related charges

Although defendant's criminal case for numerous drug charges resulted in four separate judgments against him, the trial court violated N.C.G.S. § 7A-304(a) by assessing costs in each of the four judgments. *State v. Rieger*, 267 N.C. App. 647 (2019), interpreted the statute's authorization of assessment of costs "[i]n every criminal case" as meaning only one assessment of costs for a case that encompasses multiple criminal offenses arising from the same act or transaction or series of acts or transactions. In this case, the State successfully moved to join all of defendant's charges for trial on the basis that the offenses were connected. The judgments were vacated and the matter remanded for the trial court to enter new judgments, only one of which may include assessed costs.

Appeal by Defendant from judgments entered 20 March 2019 by Judge Julia Lynn Gullett in Yadkin County Superior Court. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Daniel J. Dolan for Defendant-Appellant.

INMAN, Judge.

Defendant, who is Black, challenged during his criminal trial a prosecutor's peremptory strike of the only Black juror in the venire as racially motivated and prohibited by *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Though the trial court heard thorough arguments and announced findings of fact and conclusions of law to support its ruling, it did not make a record adequately addressing the totality of circumstances presented to it as required by recent clarifying caselaw. As a result, we remand the matter for further proceedings addressing Defendant's *Batson* claim.

We also vacate three of the judgments to correct an error in the assessment of costs, and remand for the entry of judgments without costs should Defendant's *Batson* claim fail on remand.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested in February 2017 on eight drug charges. The State's evidence at trial tended to show that Defendant sold cocaine to an undercover Yadkin County law enforcement officer on at least four different occasions during April and May of 2015.

In January of 2018, Defendant was indicted by a grand jury on four counts of possession with intent to sell and deliver cocaine, four counts of selling and delivering cocaine, and one charge of attaining habitual felon status. The State filed a motion to join all the charges for trial on 5 July 2018, averring that "the offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." The trial court granted that motion without objection from Defendant during the pretrial motions hearing on 18 March 2019. Defendant pled not guilty to all charges, and the case proceeded to trial later that day.

Defendant is Black. Of the 34 people in the pool of prospective jurors, only one person, Mr. Robinson,[1] was Black. Jury selection was not transcribed, and no jurors were polled on their race or ethnicity.

Mr. Robinson was questioned after the State had accepted ten jurors and had stricken two jurors peremptorily. During *voir dire*, Mr. Robinson discussed his employment history and current employment status, his wife's classes from an online university that he could not identify, and a prior criminal charge for child abuse that was dismissed

1. The trial transcript refers to Mr. Robinson as both "Shane Robinson" and "Sean Robinson" at different times. We refer to him by his last name throughout the opinion for ease of reading.

without a conviction. The prosecutor used a peremptory strike on Mr. Robinson. Defendant objected on *Batson* grounds.

In a hearing outside the presence of the jury, Defendant's counsel asserted that the State's decision to strike the only Black prospective juror in the trial of a Black defendant constituted a *prima facie* showing of racial discrimination in jury selection under *Batson*. The State did not challenge Defendant's characterization of Mr. Robinson as Black, nor his assertion that a *prima facie* case of discrimination had been made. Instead, the prosecutor offered several "race neutral options or the reason [he] struck him."

The prosecutor noted Mr. Robinson's "tone of voice" and the "context" of his statements about his job history, which led the prosecutor to surmise that Mr. Robinson had been fired but "was reluctant to talk about it." Though the prosecutor could have confirmed this hunch through further questioning, he explained to the trial court that he declined to do so because he "didn't want to embarrass" Mr. Robinson. The prosecutor also "found troubling" Mr. Robinson's statement that he had been unemployed for a year, making him "the only juror we talked to so far that did not have a legitimate basis of employment and certainly the longest period of anybody we've talked to." The prosecutor said he was further concerned by Mr. Robinson's inability to identify which university his wife attended online. He then summarized his rationale:

> [T]he gentleman struck me as someone who was just not a reasonable citizen basically. He has no job, he has no idea what his wife was doing, [the prosecutor] found him credible on his allegation of child abuse, [which was] the most serious criminal act that we've really dealt with any specificity from anybody on the panel.

Defendant argued that the State's proffered reasons for the peremptory strike were pretextual. He pointed out that Mr. Robinson had described "some type of deferred prosecution," and that the State had accepted a white juror who had a previous marijuana possession charge resolved through a deferred prosecution. He also disagreed with the State's characterization of Mr. Robinson's testimony, contending that Mr. Robinson said he was employed.[2] Further, Defendant argued

2. Defendant contends on appeal that the prosecutor misrepresented that Mr. Robinson was unemployed. We are unable to entertain this contention; both Defendant and the State presented their differing recollections of Mr. Robinson's testimony to the trial court, and it resolved this factual issue by finding as a fact that he said he "has been out of work for a year." Without a transcript of *voir dire*, we are bound to leave that factual determination by the trial court undisturbed.

that the prosecutor's statements about Mr. Robinson's "tone of voice . . . may show some racial issues."

The prosecutor acknowledged the white juror's criminal history, but asserted that "he said he felt he had been treated fairly and implicitly admitted his guilt in that crime, and [the prosecutor] didn't get kind of the same reaction from Mr. Robinson which was the distinction there." Defendant then pointed out that "Mr. Robinson stated he felt like he was treated fairly and . . . you have two jurors that have some type of criminal history, it sounds like they both were deferred proceedings that were later dismissed. They both stated that they felt that they had been treated fairly." Defendant also noted that, like his case, the white juror's "criminal problems or issues actually dealt with drugs, so . . . that makes it even stronger as far as our argument is concerned."

The trial court found that Defendant did not prove purposeful discrimination and overruled his *Batson* objection. The trial court explained from the bench that it had heard all three steps of Defendant's *Batson* challenge before making the following oral ruling:

> THE COURT: The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this order.
>
> In making these findings of fact, the Court has made determinations as to the race of various individuals. As to the jurors, any findings of race are based upon representations during the arguments of attorneys.
>
> . . . .
>
> The Court finds that as to parties, lawyers, witness's finding of race are based upon statements of counsel. The Court finds that the Defendant in this case is black.
>
> . . . .
>
> [I]t appears that there was only one person of the African-American race on the jury in the jury pool to the best of the Court's determination.
>
> The Court finds that the only potential juror in the pool that appeared to be African-American was juror number 11, Mr. Sean Robinson.
>
> The Court finds that upon questioning juror number 11, that the prosecutor elicited that juror number 11 worked

at Lydall, until he had to make other arrangements and has been out of work for a year. That his wife was in school. That she was attending school on the computer. That he did not have any idea of what school she was attending. That the prosecutor found him credible on the child-abuse allegations, but that the prosecutor was troubled concerning his employment history and the fact that he had no idea where his wife was attending school or what school she was attending. The defense is concerned because this was the only African-American or appeared to be the only African-American person in the jury pool which would effectively be a 100 percent rejection rate of African-American jurors.

. . . .

The Court finds that the State has used a disproportionate number of preemptory challenges to strike African-American jurors in this case, and that on its face, the State's acceptance rate of potential African-American jurors indicates the likelihood of discrimination in the jury selection process. So the Defendant would've made a prima facie showing based upon the percentage.

Upon the establishment of a prima facie showing of discrimination, the Court considers the racially neutral reasons offered by the State . . . . The reasons offered by the State were the employment history of [Mr. Robinson] and his answers and tone of voice concerning that history. The fact that his wife was in college, that he had no idea what school she was attending, and the troubling situation with the child abuse issues, although the prosecutor found them to be credible in his answers to that.

The Defendant was offered the opportunity to rebut those reasons and indicated, again, that the 100 percent rejection rate was troubling, and that another juror had previous drug charges and that he was not excused.

The Court does find the prosecutor to be credible in stating racially neutral reasons for the exercise of the [peremptory] challenge. In response to such reasons, defense counsel has not shown that the Prosecutor's explanations are [pretextual].

> Based upon consideration of the presentations made by both sides and taking into account the various arguments presented, the Defendant has not proven purposeful discrimination in the jury selection process.
>
> Based on the foregoing findings of fact, the Court concludes as a matter of law that because the Defendant may have a prima facie showing in the selection process, . . . and that the reasons that the prosecutor stated were racially neutral, and the Court does find the Prosecutor to be credible in those reasonings.
>
> So taken in the totality in connection with all the findings of fact, the Court does find that he had a . . . sufficient racially neutral basis for the exercise of a [peremptory] challenge[] as to that juror. Therefore, the objection to the State's exercise of [peremptory] challenge as to potential juror number 11, Mr. Robinson . . . is overruled and the [peremptory] challenge is allowed.

Jury selection then resumed. The jury ultimately convicted Defendant on all counts, and the trial judge imposed four consecutive judgments, assessing costs in each. Defendant appeals.

II. ANALYSIS

Defendant presents two principal arguments on appeal: (1) the trial court erred in denying his *Batson* challenge or, in the alternative, failed to make adequate findings of fact under the totality of the circumstances as explained in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020); and (2) the trial court violated N.C. Gen. Stat. § 7A-304 in assessing costs in each of the four judgments rather than only once consistent with *State v. Rieger*, 267 N.C. App. 647, 833 S.E.2d 699 (2019). The State, in addition to addressing Defendant's first argument on the merits, contends that he failed to adequately preserve his *Batson* challenge for review. As to the second argument, the State recognizes that the underlying rationale of *Rieger* may require vacatur of the judgments for a single imposition of costs. We address each line of inquiry in turn.

A. Standards of Review

In evaluating a *Batson* challenge, "[t]he trial court has the ultimate responsibility of determining whether the defendant has satisfied his burden of proving purposeful discrimination." *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497 (citations and quotation marks omitted). Such a determination is afforded "great deference" on appeal, *State v. Golphin*,

352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (citations omitted), with reviewing courts "overturning it only if it is clearly erroneous." *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497 (citation omitted). Trial courts faced with resolving a *Batson* claim "must make specific findings of fact at each stage of the *Batson* inquiry that it reaches" in aid of the standard's application upon appellate review. *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (citation and quotation marks omitted).

Alleged statutory violations are, by contrast, subject to no deference whatsoever. *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 129 (2017). "Alleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citations omitted). We therefore analyze Defendant's argument that the trial court failed to comply with N.C. Gen. Stat. § 7A-304 in its imposition of costs by "considering the matter anew and freely substituting our own judgment for that of the trial court." *State v. Edgerton*, 266 N.C. App. 521, 525, 832 S.E.2d 249, 253 (2019) (citation omitted).

B. Preservation

[1] The State contends in its principal brief that Defendant's *Batson* challenge was not preserved because: (1) the record does not disclose direct evidence of Mr. Robinson's race, and Defendant failed to "make a record which shows the race of a challenged juror," *State v. Willis*, 332 N.C. 151, 162, 420 S.E.2d 158, 162 (1992) (citation omitted); and (2) jury selection was neither recorded nor reconstructed by a narrative agreed upon by the parties, leaving us with only counsels' descriptions of *voir dire*, their *Batson* arguments, and the trial court's examination of and ruling on the same. Reviewing the record and recent caselaw, we disagree with the State on both points and hold the record is "minimally sufficient to permit appellate review." *State v. Campbell*, 272 N.C. App. 554, 558, 846 S.E.2d 804, 807 (2020).

The State correctly notes that the record does not contain direct evidence of Mr. Robinson's racial identity or the racial identity of other jurors. However, such direct evidence is not strictly required where the record discloses "what amounts to a stipulation of the racial identity of the relevant prospective jurors." *State v. Bennett*, 374 N.C. 579, 595, 843 S.E.2d 222, 233 (2020).

In *Bennett*, a defendant brought a *Batson* claim but did not establish the race of the jurors struck by the State on the record through self-identification or other direct evidence. *Id.* at 591, 843 S.E.2d at 231. What the record did reveal, however, was an agreement between the

State, defendant's counsel, and the trial court that the challenged jurors were Black. *Id.* at 594, 843 S.E.2d at 233. Our Supreme Court held that this agreement was sufficient to permit appellate review because "the record reveals the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process, . . . resulting in what amounts to a stipulation of the racial identity of the relevant prospective jurors." *Id.* (citations omitted). In announcing its holding, the Supreme Court further explained that "[w]hile a stipulation must be definite and certain in order to afford a basis for judicial decision, stipulations and admissions may take a variety of forms and *may be found by implication*." *Id.* (emphasis added) (citations, alterations, and quotation marks omitted). In doing so, it distinguished its earlier decisions in *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988), *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), and *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991), wherein defendants unsuccessfully "attempted to establish the racial identities of each of the prospective jurors on the basis of the subjective impressions of a limited number of trial participants." *Bennett*, 374 N.C. at 594, 843 S.E.2d at 233.

Defendant's counsel in this case opened his *Batson* argument by asserting that "[a]s far as a prima facie case, . . . my client is African-American . . . . There was one African-American that was on the jury pool; that juror was brought to the jury box, and he was peremptorily challenged[.]" Rather than rebut Defendant's *prima facie* case—by, for example, arguing that Mr. Robinson was *not* Black or that there were other Black jurors passed by the State—the prosecutor apparently conceded the question and instead proceeded to "offer . . . a race neutral . . . reason" for striking Mr. Robinson. This absence of any dispute as to Mr. Robinson's race (or whether any other jurors were Black) continued through the parties' additional arguments back and forth, and was reflected in the trial court's determination of Mr. Robinson's race from the bench:

> In making these findings of fact, the Court has made determinations as to the race of various individuals. As to the jurors, any findings of race are based upon representations during the arguments of attorneys.
>
> . . . .
>
> The Court finds that as to parties, lawyers, witness's finding of race are based upon statements of counsel. The Court finds that the Defendant in this case is black.

. . . .

> That as of the time that the State attempted to exercise this [peremptory] challenge, 10 jurors have been accepted by the State of which to the best of the Court's determination 10 are white and zero are black. That as of the time the State attempted to exercise that [peremptory] challenge, the State had exercised two . . . [peremptory] challenges of which zero were persons of an African-American race.
>
> As a matter of fact, it appears that there was only one person of the African-American race on the jury in the jury pool to the best of the Court's determination.
>
> The Court finds that the only potential juror in the pool that appeared to be African-American was juror number 11, Mr. Sean Robinson.

We acknowledge that, unlike in *Bennett*, the prosecutor did not expressly state Mr. Robinson's race or the race of other jurors on the record below. This distinction does not alter our holding that the parties effectively entered into a stipulation to that effect. As recognized in *Bennett*, "stipulations and admissions may take a variety of forms and may be found by implication." 374 N.C. at 594, 843 S.E.2d at 233 (quotation marks and citations omitted). And, as the Supreme Court has elsewhere observed, "[s]ilence, under some circumstances, may be deemed assent." *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citations and quotation marks omitted); *see also State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006) ("Stipulations do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so." (citing *Alexander*, 359 N.C. at 828-29, 616 S.E.2d at 917-18)).[3] Stated differently, because "the record reveals

3. We also note, as the Supreme Court did in *Bennett*, that the core inquiry in a *Batson* challenge is "whether the *prosecutor* is excluding people from a jury because of their race," *Bennett*, 374 N.C. at 596 n.4, 843 S.E.2d at 234 n.4 (emphasis added), suggesting that it is the *prosecutor's* understanding of the prospective juror's race that ultimately matters for purposes of analysis. The prosecutor's tacit acknowledgment that the challenged juror was Black distinguishes this case from those in which the record contained no indication of the prosecutor's belief as to the prospective juror's race. *See Mitchell*, 321 N.C. at 655-56, 365 S.E.2d at 557 (holding a court reporter's notation as to prospective jurors' races would not create an adequate record for review because "[t]he court reporter . . . is in no better position to determine the race of each prospective juror . . . . An individual's race is not always easily discernable, and the potential for error by a court reporter acting alone is great"); *Payne*, 327 N.C. at 200, 394 S.E.2d at 161 (holding a defendant failed to establish the races of prospective jurors on the record when the only evidence was

the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process," *Bennett*, 374 N.C. at 595, 843 S.E.2d at 233, Defendant's failure to elicit direct evidence of Mr. Robinson's race or the race of other jurors does not preclude our review.

The lack of a verbatim transcript of *voir dire* also does not *per se* preclude *Batson* review. *State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989); *see also Campbell*, 272 N.C. App. at 558, 846 S.E.2d at 807 (reviewing a *Batson* claim absent a *voir dire* transcript). The transcript of the *Batson* hearing reflects the following details: (1) Defendant's race; (2) Mr. Robinson's race; (3) the absence of any other Black jurors in the jury pool; (4) the number of non-Black jurors passed by the State and the number and percentage of peremptory challenges aimed at Black jurors; (5) the State's proffered reasons for striking Mr. Robinson; and (6) Defendant's arguments and evidence that those reasons revealed racial bias. We are therefore satisfied that the record in this case suffices to permit appellate review.

C. Defendant's Batson *Challenge*

[2] A *Batson* claim is resolved in three stages:

> First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997) (citations omitted). It is imperative that "the trial court . . . make specific findings of fact at each stage of the *Batson* inquiry that it reaches." *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998) (citation omitted).

Our Supreme Court has recently explained what the third stage of a Batson inquiry requires:

> "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and

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an "affidavit . . . contain[ing] only the perceptions of one of the defendant's lawyers concerning the races of those excused" (citation omitted)); *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166 (holding an affidavit disclosing defendant's counsel's impressions of jurors' races and notations in the record by the court reporter of her impressions was inadequate to establish a reviewable record on appeal).

> circumstances, and in light of the arguments of the parties." *Flowers* [*v. Mississippi*, ___ U.S. ___, ___, 204 L. Ed. 2d 638, 656 (2019)]. At the third step, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.* at [___, 204 L. Ed. 2d. at 656]. "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Id.* (quoting *Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737, 1754, 193 L. Ed. 2d 1 (2016)).

Hobbs, 374 N.C. at 353, 841 S.E.2d at 499. It reiterated that the trial court is "requir[ed] . . . to consider *all of the evidence before it* when determining whether to sustain or overrule a *Batson* challenge." *Id.* at 358, 841 S.E.2d at 502 (citations omitted) (emphasis added). Thus, "when 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.* at 356, 841 S.E.2d at 501.

In *Hobbs*, the trial court conducted a complete *Batson* analysis after the defendant's objections to several peremptory strikes by the State. *Id.* at 348, 841 S.E.2d at 496. In the course of his arguments, the defendant pointed to several different factors demonstrating discrimination and indicating pretext in the State's explanation of its peremptory strikes, including a history of racial discrimination in jury selection in the county. *Id.* Our Supreme Court held that the trial court erred in denying the defendant's *Batson* challenge because "the trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence that Mr. Hobbs brought to the trial court's attention." *Id.* at 358, 841 S.E.2d at 502. Mr. Hobbs also argued at trial and on appeal that his *Batson* claim was supported by a comparison between white jurors who had been passed by the State and Black jurors who were peremptorily challenged. *Id.* at 357, 841 S.E.2d at 502. Although the trial court conclusively stated it " 'further considered' Mr. Hobbs's arguments in that regard[,]" *id.*, our Supreme Court held that the trial court erred in "failing to engage in a comparative juror analysis." *Id.* at 360, 841 S.E.2d at 503. This error stemmed in part from the fact that the Court "d[id] not know from the trial court's ruling how or whether these comparisons were evaluated." *Id.* at 359, 841 S.E.2d at 502. Considering

these errors together, the Supreme Court held that "[t]he trial court . . . failed to either conduct any meaningful comparative juror analysis or to weigh any of the historical evidence of racial discrimination in jury selection presented by Mr. Hobbs. This failure was erroneous and warrants reversal." *Id.* at 359-60, 841 S.E.2d at 503. As a result, the Supreme Court remanded the matter to the trial court to "conduct a new hearing on these claims." *Id.* at 360, 841 S.E.2d at 503.

Although the trial court did not have the benefit of *Hobbs* when it made its ruling, that decision requires us to remand this case to the trial court to make the findings necessary to resolve a *Batson* claim. Defendant offered several arguments in support of his *Batson* challenge, including a contention that a comparative juror analysis revealed racial bias in the State's decision to strike Mr. Robinson on the grounds of criminal history. As pointed out by Defendant, Mr. Robinson and a white juror passed by the State had prior criminal charges that had been dismissed.[4] Both parties acknowledged that, unlike Mr. Robinson, the white juror's criminal history involved drug charges, which, given Defendant was himself on trial for drug-related offenses, Defendant contended made the prosecutor's decisions all the more suspect. However, we have no indication from the trial court as to "how or whether th[is] comparison[] w[as] evaluated." *Id.* at 359, 841 S.E.2d at 502. The trial court's acknowledgement that "Defendant . . . indicated . . . that another juror had previous drug charges and that he was not excused," coupled with its conclusion "taking into account the various arguments presented [that] the Defendant has not proven purposeful discrimination in the jury selection process," sheds no more light on those questions than the trial court's conclusory statement in *Hobbs* that it had " 'further considered' Mr. Hobbs's [comparative juror] arguments." *Id.* at 357, 841 S.E.2d at 502.[5]

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4. Read in context, it appears from the transcript that both the State and Defendant agreed that the white juror's drug charges were resolved pursuant to N.C. Gen. Stat. § 90-96 (2019), which provides a procedure for discharging and dismissing a drug charge without adjudication or conviction under certain circumstances. N.C. Gen. Stat. § 90-96(a). While there is no similar outward agreement on the exact disposition of Mr. Robinson's child abuse charge in the record, the prosecutor described it as an "allegation" and did not challenge Defendant's assertion that it had been deferred and/or dismissed when attempting to distinguish Mr. Robinson from the purportedly similar white juror. The trial court's findings of fact similarly describe them as "child-abuse allegations" as opposed to a conviction.

5. The State argues that no comparative juror analysis was required because Mr. Robinson and the white juror passed by the State were too dissimilar to allow for a meaningful comparison. Defendant's comparative juror analysis is, however, at least colorable: "Evidence about similar answers between similarly situated white and nonwhite jurors is

We also hold that the trial court erred in failing to address Defendant's argument that the prosecutor's comments about "tone of voice and those types of issues . . . go to racial stereotypes also." While it is true that the trial court's oral ruling includes Mr. Robinson's "answers and tone of voice" among the prosecutor's reasons for exercising the strike, the oral ruling did not mention Defendant's specific assertion that this reason suggested racial bias. We thus cannot discern how this contention factored into the totality of the circumstances under consideration by the trial court.

To be sure, a juror's demeanor and responses to questioning may be race-neutral reasons for a peremptory challenge sufficient to satisfy the State's burden at the second step of *Batson*. *See State v. Smith*, 328 N.C. 99, 126, 400 S.E.2d 712, 727 (1991) ("[A] prospective juror's nervousness or uncertainty in response to counsel's questions may be a proper basis for a peremptory challenge, absent defendant's showing that the reason given by the State is pretextual."). But such reasons are not immune from scrutiny or implicit bias. *See Batson*, 476 U.S. at 106, 90 L. Ed. 2d at 94 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to . . . a characterization that would not have come to his mind if a white juror had acted identically."); *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) (observing that "[d]emeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination").[6] When a defendant asserts

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relevant to whether the prosecution's stated reasons for exercising a peremptory challenge are mere pretext for racial discrimination. Potential jurors do not need to be identical in every regard for this to be true." *Hobbs*, 374 N.C. at 359, 841 S.E.2d at 502-03 (citations omitted). As explained *supra*, we are unable to discern from its order "how or whether" the trial court considered Defendant's argument in its ultimate determination under the totality of the circumstances. *Id*. at 359, 841 S.E.2d at 502.

6. The transcript shows that the prosecutor relied on Mr. Robinson's "tone of voice" to justify an assumption that Mr. Robinson had been fired from his last job. However, the prosecutor declined to confirm this assumption by further questioning Mr. Robinson because his "tone of voice" also indicated to the prosecutor that he would have been embarrassed to discuss it if asked. Though we do not know how the prosecutor questioned other jurors, we agree with Defendant's observation at oral argument that the manner in which prosecutors approach the questioning of a juror may provide race-neutral cover for a biased strike. *Cf. Flowers*, ___ U.S. at ___, 204 L. Ed. 2d at 660-61 ("[D]isparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race." (citation omitted)). Just as "[p]rosecutors can decline to seek what they do not want to find about white prospective jurors" to frustrate comparative juror analyses, *id*. at ___, 204 L. Ed. 2d at 661, they can decline a full examination of a Black juror to avoid answers that would foreclose a possible race-neutral rationale to strike. A prosecutor's "legitimate hunches" may be facially valid and satisfy the State's burden at the second step of *Batson*, *Headen*, 206 N.C. App. at 116, 697 S.E.2d at 413 (citation and quotation

that a facially race-neutral reason nonetheless suggests racial bias, a trial court must consider that assertion under the totality of the circumstances. *See Flowers*, ___ U.S. at ___, 204 L. Ed. 2d at 656 ("The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties."); *Hobbs*, 374 N.C. at 356, 841 S.E.2d at 501 ("[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.").[7] The trial court must resolve a *Batson* challenge through "specific findings of fact." *Cofield*, 129 N.C. App. at 275, 498 S.E.2d at 829 (citation omitted). Without findings of fact regarding such a fact-specific issue, appellate review is impossible. *Id.* In the absence of necessary findings by the trial court, we must remand.

This case differs materially from earlier cases in which we had no transcript of the *voir dire* and upheld trial courts' denial of *Batson* challenges without further review. In *Sanders*, for example, the defendant offered no reviewable evidence or argument in response to the State's race-neutral reasons for its strikes, leaving this Court no option but to "accept the State's proffered reasons as rebutting the prima facie case of discrimination." 95 N.C. App. at 502, 383 S.E.2d at 414. Here, by contrast, Defendant presented to the trial court a comparable juror analysis and cited the prosecutor's use of particular language in justifying his strike as specific evidence to support Defendant's *Batson* challenge.[8]

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marks omitted), but they are still subject to rebuttal and review under the totality of the circumstances at the third step. *See Flowers*, ___ U.S. at ___, 204 L. Ed. 2d at 656 ("The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties."); *Hobbs*, 374 N.C. at 359, 841 S.E.2d at 503 (holding that this Court "failed to weigh all the evidence put on by Mr. Hobbs, instead basing its conclusion on the fact that the reasons articulated by the State have, in other cases, been accepted as race-neutral" (citation omitted)).

7. The totality of the circumstances in this case also includes the questionable assertion by the prosecutor that Mr. Robinson "was just not a reasonable citizen" because he had been unemployed for a year and did not know which university his wife was attending online. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 339, 154 L. Ed. 2d 931, 951 (2003) (observing that assessment of a prosecutor's race-neutral explanations turns in part on "how reasonable, or how improbable, the explanations are").

8. The trial court in *Campbell* resolved the *Batson* claim at the first stage of analysis, leading us to distinguish *Hobbs* in part on that basis. 272 N.C. App. at 559 n.2, 846 S.E.2d at 808 n.2. This case is markedly different, as it involves an order entered at the third stage of a *Batson* inquiry—after the State conceded and the trial court found that the evidence established a *prima facie Batson* challenge—that did not specifically address evidence and arguments necessary to resolve a claim at that stage.

We are unable to discern from the record how or whether the trial court considered Defendant's comparative juror argument and his contention that the prosecutor's concern about Mr. Robinson's "tone of voice" evinced racial bias. Because the trial court failed to enter findings regarding these issues, we are bound by *Hobbs* to reverse its denial of Defendant's *Batson* challenge. *Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502. We remand the matter to the trial court for further specific findings. *Id.* at 360, 841 S.E.2d at 504. On remand, the trial court may take additional evidence in its discretion, but shall in any event make specific findings of fact under the totality of *all* the circumstances at the third step of its *Batson* analysis, including, but not limited to, findings: (1) disclosing how or whether a comparative juror analysis was conducted; and (2) addressing Defendant's assertion that the prosecutor's statements regarding Defendant's answers and tone of voice evinced racial bias.

In sum, our review of Defendant's appeal is controlled by recent United States and North Carolina Supreme Court decisions not available to the lower court at the time of trial. *Flowers*, ___ U.S. ___, 204 L. Ed. 2d 638; *Hobbs*, 374 N.C. 345, 841 S.E.2d 492. The trial court can hardly be blamed for failing to follow guidance that did not exist at the time of Defendant's *Batson* challenge. But a high court's decision applying federal constitutional law to a criminal judgment controls cases pending on appeal when that decision is announced. *See Whorton v. Bockting*, 549 U.S. 406, 416, 167 L. Ed. 2d 1, 11 (2007) (noting that decisions on constitutional law governing criminal judgments apply to cases pending "on direct review" (citation omitted)); *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994) ("[A]vert[ing] to . . . federal retroactivity standards" in application of federal constitutional decisions (citations omitted)).

D. Assessment of Costs

[3] Defendant asserts the trial court's assessment of costs in each of the four judgments against him violates N.C. Gen. Stat. § 7A-304 as interpreted by *State v. Rieger*, 267 N.C. App. 647, 833 S.E.2d 699 (2019), and the State "acknowledges" *Rieger*'s interpretation of the statute. The statute provides for costs to be assessed "[i]n every criminal case," N.C. Gen. Stat. § 7A-304(a) (2019), and we have interpreted a single "criminal case" to encompass "multiple criminal charges aris[ing] from the same underlying event or transaction . . . adjudicated together in the same hearing or trial[.] . . . In this situation, the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments." *Rieger*, 267 N.C. App. at 652-53, 833 S.E.2d at 703. We adopted the interpretation in *Rieger* because "the intent of the General Assembly when it chose to require costs 'in every

criminal case' was to have those costs be proportional to the costs that this 'criminal case' imposed on the court system." *Id.*

Here, the State moved to join all of Defendant's charges for trial on the basis that "the offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." That order was granted by the trial court without objection from Defendant, and all of the charges were heard in a single three-day trial. We see no difficulty in applying the rationale and rule announced in *Rieger* to these procedural facts, and the State's brief offers no substantive argument to support a deviation. As a result, we vacate the trial court's judgments so it may enter a new judgment in Case No. 17CRS050312 that assesses costs and new judgments in Case Nos. 17CRS050313-15 that do not.

III. CONCLUSION

We hold that in its ruling denying Defendant's objection to the State's peremptory strike of Mr. Robinson, the trial court failed to satisfy the constitutional requirements mandated by the North Carolina Supreme Court. On remand, the trial court must make specific findings as to all the pertinent evidence and arguments, including findings addressing Defendant's comparative juror analysis and "tone of voice" arguments. Once those findings are made, the trial court must "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges." *Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502. The trial court may, in its discretion, undertake any evidentiary procedures it deems necessary to comply with our mandate. Should it rule in Defendant's favor on his *Batson* challenge, Defendant shall receive a new trial. *See State v. Wright*, 189 N.C. App. 346, 354, 658 S.E.2d 60, 65 (2008) (granting a new trial on a *Batson* challenge).

We also vacate Defendant's judgments assessing costs inconsistent with *Rieger*. Should the trial court again reject Defendant's *Batson* claim, it shall enter a new judgment in Case No. 17CRS050312 that assesses court costs and new judgments in Case Nos. 17CRS050313-15 that do not.

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

Judges BRYANT and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
TEVIN O'BRIAN DALTON

No. COA20-248

Filed 20 October 2020

1. Motor Vehicles—fleeing to elude arrest—reasonable suspicion for initial stop—texting while driving—plain error analysis

In a case involving felony fleeing to elude arrest, the trial court did not err—much less commit plain error—by denying defendant's pretrial motion to suppress evidence obtained after the initial stop (and to which defendant did not object at trial). The specific facts (the officer saw a glow coming from within defendant's car at night, could see it was a mobile phone being held up by defendant who was alone, and, based on his experience, it appeared defendant was texting and/or reading texts while driving), supported the officer's reasonable suspicion that defendant was texting or reading text messages while driving in violation of N.C.G.S. § 20-137.4A(a)(1)-(2). The officer was not required to clearly see text messages on the phone or see defendant type a text message prior to the stop and the fact that defendant could have been using the phone for a valid purpose did not negate the reasonable suspicion that he was using the device for a prohibited purpose.

2. Sentencing—prior record level—error in prior record level worksheet—prejudice—notice required to seek additional point for being on probation at time of offense

In a sentencing proceeding for felony fleeing to elude arrest where defendant stipulated to having six prior record level points but—as conceded by the State—the prior record level worksheet should have reflected only five prior record level points, the error was prejudicial because it raised defendant's prior record level from a two to a three and the case was remanded for resentencing. The court rejected the State's argument that an additional point was nevertheless warranted because defendant was on probation during the commission of the crime since the State never gave written notice of intent to prove the existence of the prior record point as required by N.C.G.S. § 15A-1340.16(a)(6) and defendant did not waive notice.

Appeal by defendant from judgment entered 15 November 2019 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 22 September 2020.

Joshua H. Stein Attorney General, by Assistant Attorney General Nicholas W. Yates, for the State.

BJK Legal, by Benjamin J. Kull, for defendant.

ARROWOOD, Judge.

Tevin O'Brian Dalton ("defendant") appeals from the trial court's denial of his motion to suppress certain evidence before trial and the calculation and imposition of his sentence after trial. For the following reasons, we find no error in the trial court's denial of defendant's motion to suppress; however, we remand this matter to the Iredell County Superior Court for resentencing.

I. Background

Around ten o'clock in the evening of 11 November 2014, Statesville Police Officer Ben Hardy ("Officer Hardy") observed a white Mercedes traveling with a "large glow coming from inside the vehicle." Officer Hardy proceeded to follow the vehicle at which point he noticed a "more prevalent" glow emitting from the vehicle. Upon following the vehicle to a stop sign, Officer Hardy discovered that the glow was being produced by a cellular device held by the driver and sole occupant of the car. Officer Hardy testified that at this point he could "see the phone was up in the air, almost like in the center." It appeared that the driver was texting on the phone. Officer Hardy immediately relayed tag information to communications and initiated a stop of the vehicle based on the suspicion that the driver, which later turned out to be defendant, was texting while driving.

Upon approaching the vehicle, Officer Hardy notified the driver that he had been stopped for texting while driving. The driver "kind of laughed at that notion" and claimed that he was using the phone's "maps" application as he had "somewhere to get to." The Officer asked to see the driver's phone to confirm. Defendant voluntarily retrieved his phone and "immediately as soon as he turned his phone on, it was [on] a texting screen."

Officer Hardy then asked for the driver's license and registration. The driver did not provide either but identified himself as "Tevin Dalton." Officer Hardy returned to his vehicle to confirm the provided information in a law enforcement database called "CJLEADS," which displays pictures of persons entered into the system. Officer Hardy, thus, could have confirmed at this time that the individual driving the vehicle was in fact defendant.

However, before Officer Hardy had the opportunity to enter the foregoing information into CJLEADS, defendant drove off at a high rate of speed. Officer Hardy pursued the vehicle, which was traveling "well in excess of ninety [miles-per-hour]" in a thirty-five mile-per-hour zone. Due to its high speed and dangerous maneuvering, Officer Hardy lost sight of the vehicle shortly thereafter as defendant turned onto Interstate 77. For safety reasons, Officer Hardy was ordered to stop the pursuit. Officer Hardy complied and issued a "Be on the Look Out" or "BOLO" to the North Carolina Highway Patrol and other law enforcement agencies. Shortly afterward, Officer Hardy was notified that highway patrol had located the vehicle and "got in a chase with it also on the interstate." However, similar to Officer Hardy's chase, the highway patrol officer "lost sight of the vehicle and cancelled the[] pursuit because of safety reasons[.]"

When Officer Hardy returned to the station, he entered the name and date of birth supplied by the driver during the initial stop into CJLEADS. Defendant's profile appeared with his picture thus confirming that the driver of the Mercedes was in fact defendant. CJLEADS also indicated that defendant's driver's license had been revoked in North Carolina. At this juncture, as he had ascertained the identity of the driver of the subject vehicle, Officer Hardy went to the magistrate's office and swore out warrants on defendant for felonious fleeing to elude arrest and texting while driving.

Before trial, defendant filed a motion to suppress evidence obtained during the traffic stop, particularly the evidence identifying defendant as the driver of the vehicle. The trial court denied the motion during a pretrial hearing, finding that the "officer had reasonable suspicion to stop the vehicle to investigate further." At trial, in November 2019, neither defendant nor his counsel objected to Officer Hardy's testimony regarding evidence obtained during the traffic stop (*i.e.*, the information gathered from defendant that allowed Officer Hardy to identify defendant as the driver of the vehicle).

On 15 November 2019, the jury found defendant guilty of felonious fleeing to elude but not guilty to the charge of texting while driving. The State and counsel for defendant stipulated to six sentencing points (thus level III) for felony sentencing purposes. The trial court sentenced defendant to a minimum of ten and a maximum of twenty-one months' imprisonment. Defendant gave oral notice of appeal the same day.

II. Discussion

Defendant contends that the trial court committed plain error by denying his motion to suppress evidence obtained by Officer Hardy

during the traffic stop, specifically the information conveyed by defendant identifying him as the driver of the Mercedes. Defendant also avers that the trial court erred by sentencing him based on a miscalculation of his prior record level under the guidelines. We address each issue in turn.

A. Motion to Suppress

[1] At the outset, we note that neither defendant nor his trial counsel objected to Officer Hardy's testimony concerning the evidence defendant sought to suppress before trial. The trial court's "evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (emphasis in original) (citations omitted). By failing to renew his objection at trial, defendant waived review of this issue. *See, e.g.*, *State v. Adams*, 250 N.C. App. 664, 669, 794 S.E.2d 357, 361 (2016). However, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," the Court may "suspend or vary the requirements or provisions of any of the[] [appellate] rules in a case pending before it upon application of a party or upon its own initiative[.]" N.C.R. App. P. 2 (2020). In our discretion, we elect to reach the merits of defendant's appeal.

When reviewing a motion to suppress, the trial court's findings of fact are "conclusive and binding on appeal if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). This Court reviews the trial court's conclusions of law *de novo*. *Id.* (citation omitted). But, as noted above, because defendant failed to object at trial, our standard of review of the admission of the challenged evidence is for plain error. *Adams*, 250 N.C. App. at 669, 794 S.E.2d at 361. "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.' " *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[Plain] error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378)).

In the case before us, defendant contends that the trial court committed plain error by concluding that Officer Hardy was justified in stopping the Mercedes solely based on his observation that the "operator was using a cell phone while driving." Defendant points out that merely

"using a cell phone" is not criminal activity *per se*, and, therefore, the trial court erroneously concluded that the stop was justified based on a reasonable suspicion that "*non-criminal* activity was afoot." Alternatively, defendant argues that even if this Court finds that the trial court applied the correct legal standard, the lower court's conclusions of law were not supported by its findings of fact.

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). Traffic stops, such as the one at issue here, are historically reviewed under the framework espoused in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation omitted). Under *Terry* and its progeny, a "traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). "To meet the reasonable suspicion standard, it is enough for the officer to *reasonably believe* that a driver has violated the law." *State v. Johnson*, 370 N.C. 32, 38, 803 S.E.2d 137, 141 (2017) (emphasis in original) (citations omitted).

North Carolina, like other states, has statutorily proscribed certain uses of mobile telephones while operating a motor vehicle. The relevant provision in this State reads, in pertinent portion, the following:

> (a) Offense.--It shall be unlawful for any person to operate a vehicle on a public street or highway or public vehicular area while using a mobile telephone to:
>
> (1) Manually enter multiple letters or text in the device as a means of communicating with another person; or
>
> (2) Read any electronic mail or text message transmitted to the device or stored within the device, provided that this prohibition shall not apply to any name or number stored in the device nor to any caller identification information.

N.C. Gen. Stat. § 20-137.4A(a)(1)-(2) (2019). However, the General Assembly has carved out various exceptions to these proscriptions:

(b) Exceptions.–The provisions of this section shall not apply to:

(1) The operator of a vehicle that is lawfully parked or stopped.

(2) Any of the following while in the performance of their official duties: a law enforcement officer; a member of a fire department; or the operator of a public or private ambulance.

(3) The use of factory-installed or aftermarket global positioning systems (GPS) or wireless communications devices used to transmit or receive data as part of a digital dispatch system.

(4) The use of voice operated technology.

N.C. Gen. Stat. § 20-137.4A(b)(1)-(4).

In this action, at the conclusion of the pre-trial suppression hearing, the trial judge made the following findings of fact:

> In this matter the Court makes the following findings of fact:
>
> That on November 11th, 2014 Officer Ben Hardy of the Statesville Police Department was patrolling within the city limits of Statesville.
>
> That he observed a vehicle cross over Broad Street from Green Street.
>
> That Officer Hardy observed what he thought was a glow inside the vehicle.
>
> That Officer Hardy turned onto the--onto Green Street. At that point, the vehicle in question was in front of him. At that point, Officer Hardy observed what appeared to be a cell phone screen through the back window of the vehicle, whereupon the vehicle stopped at a stop sign. That at that point, what appeared to be a cell phone screen was clear in the air toward the center of the car.
>
> That it appeared to the officer that there was only one occupant of the vehicle.

> And the officer believed that the operator was using a cell phone while driving.
>
> The Court observed the dash cam vehicle. And the Court observed in the video what the officer described.
>
> The Court therefore finds that the officer had reasonable suspicion to stop the vehicle to investigate further.

These findings and conclusions were supported, in large part, by the testimony of Officer Hardy. Based on his observations and experience, Officer Hardy testified that he did not stop defendant for merely using a cell phone; the car was stopped for actively using a mobile device while operating a motor vehicle in a manner that Officer Hardy reasonably believed was proscribed by N.C. Gen. Stat. § 20-137.4A. Officer Hardy observed defendant using and handling a cellular device while traveling on multiple streets in a manner consistent with texting or reading text messages—which is unlawful per N.C. Gen. Stat. § 20-137.4A(a)(1)-(2). Officer Hardy opined that, based on his experience, had defendant been using a "mapping system" on the device as he claimed, "it would be a look, and then [placing the phone] down as opposed to holding it up the entire street just to get to a stop sign, and then to make a left turn onto a street."

Defendant argues that as a foundation for reasonable suspicion, Officer Hardy was required to clearly see text messaging on defendant's cell phone or watch him type out a text message. However, requiring a law enforcement officer to confirm the specific use of the mobile device as a precondition to making an investigatory stop would be essentially requiring proof beyond a reasonable doubt. While reasonable suspicion is more than a mere hunch, it is surely a much less demanding standard than proof beyond a reasonable doubt. *See State v. Schiffer*, 132 N.C. App. 22, 27, 510 S.E.2d 165, 168 (1999) (finding that officer had reasonable suspicion to stop vehicle after noticing out-of-state tags and window tinting which the officer believed was darker than permitted under North Carolina law); *State v. Kincaid*, 147 N.C. App. 94, 98, 555 S.E.2d 294, 298 (2001) (holding that officer had reasonable suspicion to stop vehicle for revoked license based on his personal knowledge of defendant); *State v. Young*, 148 N.C. App. 462, 471, 559 S.E.2d 814, 821 (2002) (Greene, J. concurring) (recognizing that a "traffic stop based on an officer's mere suspicion that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop, also known as a *Terry* stop.") (citations omitted).

In sum, just because a person may be using a wireless telephone while operating a motor vehicle for a valid purpose does not, *ipso facto*, negate the reasonable suspicion that the person is using the device for a prohibited use. When reviewing N.C. Gen. Stat. § 20-137.4A(a) ("Unlawful use of mobile telephone for text messaging or electronic mail"), it is as probable that a driver using a cell phone is doing so to send or receive prohibited text messages as it is that the device is being used for one of many lawful purposes, perhaps more so. Indeed, it would be unlikely that someone, such as Officer Hardy, observing a person using a mobile device from afar, such as defendant, would be able to definitively determine the specific use of the device in hand. In any event, under the facts of this case, the trial court properly found that Officer Hardy had reasonable, articulable suspicion that defendant had violated the law such that the traffic stop was warranted.

We, therefore, hold that the trial court did not err, much less commit plain error, in denying defendant's motion to suppress. More specifically, we hold that the trial court's findings of fact, under the totality of the circumstances, support the conclusion that Officer Hardy had a reasonable, articulable suspicion to believe that criminal activity was afoot (*i.e.*, that defendant was using a cell phone in a manner proscribed by law). Having determined that the motion to suppress was properly denied, we do not address whether the alleged error had a probable impact on the jury's determination that defendant was guilty. We are cognizant that our holding may appear to create a rather perverse result: that is, either every driver using a cellular phone may be reasonably suspected of using the phone in an unlawful manner or no driver may be reasonably suspected of using a cellular phone in an unlawful manner. However, our holding is strictly limited to the facts of this case, which, as explained *supra*, indicate that there was additional indicia of criminal activity to justify the stop in addition to Officer Hardy's plain observation of defendant's use of a mobile device. Such determinations are fact specific and rely upon the evidence adduced at any trial on such a question. Our holding here should not be viewed as establishing a test sufficient to meet the reasonable suspicion test in other "texting-while-driving" cases.

B. Sentencing

[2] On 15 November 2019, following trial, the sentencing phase proceeded in this matter. Defendant stipulated to having six prior record level points and to being sentenced at prior record level three for felony sentencing purposes. Pursuant to these stipulations, the trial court

sentenced defendant within the presumptive range for the conviction of felonious fleeing to elude: ten to twenty-one months' imprisonment.

On appeal, defendant contends—and the State concedes—that defendant's prior record level worksheet should have reflected only five prior record level points, which, in that case, would have triggered sentencing under level two of the guidelines. The State, however, argues that because defendant was on probation for felonious identity theft when he committed the crime of felonious fleeing to elude, for which he was convicted in this underlying case, defendant obtained an additional sentencing point for being on probation during the commission of a felony. In other words, notwithstanding the fact that the stipulated prior record level worksheet included an extra misdemeanor point, the State contends that an additional sixth point was warranted because the underlying felony was committed while defendant was on probation in another case.

Pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), one point is added to a defendant's aggregate prior record level "[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2019). However, the "State must provide a defendant with written notice of its intent to prove the existence of the prior record point . . . as required by G.S. 15A-1340.16(a6)." N.C. Gen. Stat. § 15A-1340.14(b). Subsection 15A-1340.16(a6), in turn, requires that such notice be provided "at least 30 days before trial or the entry of a guilty or no contest plea." N.C. Gen. Stat. § 15A-1340.16(a6) (2019).

In this case, the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met, and the State never provided notice of its intent to prove a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b). *See* N.C. Gen. Stat. § 15A-1022.1(a) (2019) ("The court shall . . . 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."). Nor does the State posit that defendant waived his right to receive such notice. *See id.*; *see also* N.C. Gen. Stat. § 15A-1340.16(a6) ("A defendant may waive the right to receive such notice."). Accordingly, the trial court erred by including the extra (sixth) point in sentencing defendant as a level three.[1] *State v. Snelling*, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744

1. We note that defendant "is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating" his prior record level. *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013) (citations omitted). The "trial court's assignment of defendant's prior record level is a question of law." *Id.* at 225 N.C. App. at 167, 736 S.E.2d at 830-31 (citations omitted).

(2014) (remanding for resentencing under analogous circumstances). This error was prejudicial as it raised defendant's prior record level from a two to a three. *See id.* We therefore remand this matter to the trial court for resentencing defendant at prior record level two under the felony sentencing guidelines.

III. Conclusion

Because we have determined that the trial court did not commit plain error by denying defendant's motion to suppress, we affirm the trial court's ruling on suppression. However, the matter is remanded to the lower court for resentencing for the reasons discussed herein.

NO ERROR; REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
STERLING JAMAR DILWORTH

No. COA20-179

Filed 20 October 2020

Criminal Law—jury instructions—self-defense—defense of habitation

In a case involving assault with a deadly weapon inflicting serious injury, the trial court did not err by denying defendant's request to instruct the jury on defense of habitation. There was no evidence the victim had unlawfully entered defendant's home or its curtilage, the physical evidence showed defendant assaulted the victim outside the boundaries of his property, and, although he testified that he "felt like" the victim was on his property, defendant admitted he did not know the location of his property lines.

Appeal by Defendant from Judgment entered 21 March 2019 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 8 September 2020.

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

Assistant Public Defender Brendan O'Donnell and Public Defender Jennifer Harjo for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Sterling Jamar Dilworth (Defendant) appeals from a Judgment entered 21 March 2019 upon a jury verdict finding him guilty of Assault with a Deadly Weapon Inflicting Serious Injury. The Record before us, including evidence presented at trial, tends to show the following:

Travis Moses (Moses) and Ellsworth Jessup (Jessup) had been neighbors and had known each other since Moses was young. Moses owned an all-terrain vehicle (ATV), and Jessup granted Moses permission to ride the ATV on Jessup's approximately thirty acres of property. Jessup cleared several trails throughout the property for Moses's use. Jessup's sister owned the parcel of property adjacent to Jessup's land, on which Defendant resided.

Around 8:10 p.m. on the evening of 29 March 2018, Moses was riding his ATV along Jessup's property. As he was riding his ATV, Moses stopped to send several text messages to a friend. Suddenly and without warning, an individual later identified as Defendant began attacking Moses with a steak knife. During the attack, Defendant repeatedly screamed "I don't know who you are." Defendant briefly paused his attack when Moses identified himself and informed Defendant that Jessup granted him permission to ride on the property. However, Defendant renewed his attack when Moses got off his ATV. After being stabbed multiple times, including in and around his neck and eye, Moses made his way back onto his ATV and drove it directly home, where his wife subsequently called 911.

Deputy A.J. Hatfield (Deputy Hatfield) of the Forsyth County Sheriff's Office responded to Moses's residence after dispatch reported a suspected stabbing. Deputy Hatfield found Moses in his garage with his wife, Jessup, and another man. Deputy Hatfield observed "a tremendous amount of blood spatter on the ground, surrounding [Moses's] body [and] also all over his body." Moses described the attack to Deputy Hatfield before being transported via ambulance to Wake Forest Baptist Hospital in Winston-Salem, North Carolina. Deputy Hatfield also spoke with Jessup, who gave him directions to Defendant's house since he was identified as the most likely suspect.

Investigator James Ray, also of the Forsyth County Sheriff's Office, met Moses at the Wake Forest Baptist Hospital Emergency Room.

Moses again described the attack to Investigator Ray and provided him with the suspected location where there would likely be blood spatter and tracks from Moses's ATV. Investigator Ray testified through their conversation, Moses "was able to draw [him] a map of how he got on the land and provide a description of the most likely location of the crime scene." Moses then underwent surgery to repair damage to his eye caused by the stabbing. Before leaving the hospital to join the investigation, Investigator Ray called Deputy Hatfield to relay the suspected the location of the attack.

Investigator Ray arrived at Moses's residence soon after and assisted Deputy Hatfield in his search to determine where Moses was attacked. Investigator Ray and Deputy Hatfield located tire tracks and blood spatter on Jessup's property an estimated 200 to 250 feet from Defendant's trailer, which Investigator Ray testified was consistent with Moses's description. As Deputy Hatfield examined the ground and surrounding area, an individual, later identified as Defendant, approached Deputy Hatfield and Investigator Ray with his driver's license. Deputy Hatfield testified he asked Defendant if he knew why he was there, to which Defendant responded he had been in an altercation earlier.

Investigator Ray took over interviewing Defendant. Defendant told Investigator Ray he heard loud noises earlier that night and stepped outside to see what was going on. Then, Defendant continued, he heard music and saw Moses driving the ATV on his property. Defendant described approaching Moses from behind and stabbing him with the steak knife. During their conversation, Defendant identified to Investigator Ray the area of the attack, which Investigator Ray later confirmed with geodata to be outside Defendant's property line.[1] Investigator Ray asked Defendant where his property lines were but stated Defendant "wasn't able to identify exactly where his property lines were." Defendant accompanied Investigator Ray to the Forsyth County Sheriff's Office where Defendant provided a written statement.

On 2 July 2018, and again on 7 January 2019, Defendant was indicted for Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. On 10 May 2018, Defendant noticed his intent to put forth the affirmative defense of self-defense. Defendant's case came on for trial on 19 March 2019. At trial, Defendant testified in his defense. Defendant testified on the evening of 29 March 2018 he heard noises from the back of his house. Defendant went to his porch and saw an ATV "creeping

1. Investigator Ray testified the officers used geodata maps, which were obtained from public record websites and showed the parcels of land.

alongside [his] house." Defendant described the ATV as traveling very slowly along a "little hill" in close proximity to his house. When defense counsel asked Defendant, "So, what, about 10 feet, 15?" Defendant answered: "Somewhere along those lines."

Defendant then recounted the attack, testifying he felt threatened for his safety. Defendant grabbed a steak knife from his cabinet, and, because the ATV had stopped, Defendant approached Moses screaming "I don't know you" and stabbing him repeatedly. Once Moses eventually identified himself and told Defendant he had permission from Jessup to ride on his property, Defendant testified he "backed off of him." However, when Moses got off of his ATV and took off his shirt, Defendant stated he again felt threatened and "that's when [he] really got to him. That's when it came to his eye and neck region, and things of that nature." Defendant reiterated his purpose in the attack was to get an intruder off his premises. On cross-examination, Defendant testified prior to the attack he smelled burning vegetation and heard gunshots. Defendant conceded, however, he did not mention either the smell of burning vegetation or gunshots to investigators the night of the attack or in his written statement. Defendant also corroborated Investigator Ray's testimony, stating: "Well, I mean, like I told the investigator, I'm not aware of the property line or nothing like that. I felt like all of that land there was -- belong to us."

During the charge conference, Defendant requested the trial court instruct the jury on the affirmative defenses of self-defense, according to North Carolina Pattern Jury Instructions 308.10 and 308.45, and defense of habitation, in accordance with Pattern Jury Instruction 308.80. The trial court determined Defendant was not entitled to any instruction on self-defense or defense of habitation. In declining Defendant's requested instruction on defense of habitation, the trial court reasoned:

> [W]here the prosecuting witness is operating the all-terrain vehicle was not within the curtilage of the home. The home is not enclosed by a fence, and the -- additionally, as the Court previously said, the use of that property would not be such that it would be the immediate land or area to the home where there would be intimate living space.

The trial court also emphasized "[Defendant] has also testified he didn't even know where his property line was[.]"

The trial court instructed the jury on the charge of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury and, in accordance with Defendant's request, the lesser-included offenses of Assault

with a Deadly Weapon with Intent to Kill and Assault with a Deadly Weapon Inflicting Serious Injury. The jury returned a verdict finding Defendant guilty of the lesser-included offense of Assault with a Deadly Weapon Inflicting Serious Injury. Defendant stipulated to a prior record level of V, and the trial court sentenced him to an active sentence of 44 to 65 months. Defendant gave oral Notice of Appeal at the conclusion of his sentencing.

Issue

The sole issue on appeal is whether the trial court erred when it declined to instruct the jury on Defendant's requested instruction on the defense of habitation.

Analysis

I. Standard of Review

"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). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citation omitted). Thus, "[w]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case . . . ." *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018) (citation and quotation marks omitted). We review challenges to the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "However, an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted).

II. Defense of Habitation

In the present case, Defendant contends the trial court erred in denying his request for an instruction on defense of habitation because the evidence, taken in the light most favorable to Defendant, reflects he was asserting his right to defend his home against unlawful intrusion. North Carolina has long recognized this right—known at common law as the "castle doctrine." *See State v. Kuhns*, 260 N.C. App. 281, 284,

817 S.E.2d 828, 830 (2018). Most recently amended by our legislature in 2011, North Carolina's defense of habitation statute provides:

> (b) The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if *both* of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2019) (emphasis added); *see* An Act to Provide When a Person May Use Defensive Force and to Amend Various Laws Regarding the Right to Own, Possess, or Carry a Firearm in North Carolina, 2011 N.C. Sess. Laws 268, §1.

"Home" is defined "to include its curtilage," N.C. Gen. Stat. § 14-51.2(a)(1), and our courts have consistently defined curtilage to "include[ ] the yard around the dwelling and the area occupied by barns, cribs, and other outbuildings." *State v. Blue*, 356 N.C. 79, 86, 565 S.E.2d 133, 138 (2002) (citing *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)). "[A] rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in N.C. [Gen. Stat.] § 14-51.2(b)." *Lee*, 370 N.C. at 675, 811 S.E.2d at 566. Moreover, "a person does not have a duty to retreat, but may stand his [or her] ground." *Id.* (footnote omitted).

Defendant contends the evidence, construed in his favor, is sufficient to support such instruction because Defendant believed Moses to be unlawfully on his property at the time of the attack.[2] There is no

2. In support of his argument, Defendant cites this Court's decision in *Kuhns*, 260 N.C. App. at 283-85, 817 S.E.2d at 830-32, and our Supreme Court's recent decision in

question Defendant was the lawful occupant of his home. Nevertheless, to be entitled to the presumption articulated in Section 14-51.2(b), the statute expressly provides a defendant must meet *both* of the requirements set out in Subsections (1) and (2). N.C. Gen. Stat. § 14-51.2(b). Subsection 1 then mandates "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home[.]" *Id.* § 14-51.2(b)(1). Accordingly, to qualify for the instruction on defense of habitation Moses must have been "in the process of unlawfully and forcefully entering," or "had unlawfully and forcefully entered" Defendant's home, which on the facts of the present case would be via the curtilage. *Id.*

The question is, therefore, if there is sufficient evidence, construed in Defendant's favor, supporting Defendant's contention Moses was unlawfully on or had been on Defendant's property and was within the curtilage of Defendant's property on the evening of the attack to warrant the defense of habitation instruction. We conclude, as did the trial court, there is not. Defendant testified in his defense that on the night of 29 October 2018, he saw Moses "creeping along this little hill going very slowly" in "very close proximity of [his] household." Defense counsel inquired, "So, what, about 10 feet, 15?" and Defendant answered, "Somewhere along those lines." On cross-examination, however, Defendant emphasized: "I mean, like I told the investigator, I'm not aware of the property line or nothing like that. I felt like all of that land there was -- belong to us."

Defendant presented no actual evidence Moses was in the process of or had actually unlawfully and forcibly entered his home. Instead, the Record and evidence in this case reflects when Moses stopped on his ATV, he was outside the bounds of Defendant's property and around 200-250 feet away from Defendant's residence. Specifically: Investigator Rector and Deputy Hatfield both testified to the location of the blood spatter and ATV track marks on Jessup's property. Moses's own testimony stated he was riding his ATV along Jessup's property when Defendant attacked, and Moses's description of the attack was corroborated by

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State v. Coley, 375 N.C. 156, ___, 846 S.E.2d 455, ___ (filed 14 Aug. 2020) (No. 2A19). However, in both *Coley* and *Kuhns*, there was no question at the time of the respective incidents the defendants used defensive force against another who was actually in their home or curtilage. *Coley*, 375 N.C. at 157, 846 S.E.2d at 456 (slip op. at 2-3) (describing three separate entries into the defendant's home prior to the defendant's use of force); *Kuhns*, 260 N.C. App. at 287, 817 S.E.2d at 832 ("[T]he State conced[ed] that [decedent] was 'standing beside the porch on the ground, *within the curtilage*' of defendant's property when defendant fired the fatal shot." (emphasis added)). Thus, we conclude both cases are factually distinguishable and do not control our analysis.

Investigator Ray and, further, actually assisted the investigators in locating the blood spatter and ATV tracks. Investigator Rector also testified to his conversation with Defendant on the night of 28 March 2018, where Defendant informed him the attack occurred behind his parked cars, and two to three feet beyond some bushes, which was also outside the bounds of Defendant's property. Furthermore, the extent of Defendant's own testimony was that he "*felt like*" Defendant was on his property, but that he did not know the location of his property lines.

Thus, even if the evidence could support a determination Moses "had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred" under Section 14-51.2(b)(2), there is simply no evidence Moses was in fact "in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered, a home[.]" N.C. Gen. Stat. § 14-51.2(b)(1). Therefore, the trial court did not err in declining to instruct the jury on Defendant's requested instruction of defense of habitation. Because we conclude the trial court did not err, we do not reach Defendant's argument he was prejudiced by the denial of an instruction on defense of habitation.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

STATE v. FAROOK

[274 N.C. App. 65 (2020)]

STATE OF NORTH CAROLINA
v.
KHALIL ABDUL FAROOK

No. COA19-444

Filed 20 October 2020

Constitutional Law—right to speedy trial—Barker factors—State's burden to explain delay—reliance on privileged information

Defendant's constitutional right to a speedy trial was violated pursuant to the factors in *Barker v. Wingo*, 407 U.S. 514 (1972), where there was a six-year delay between his arrest and his trial and the State failed to meet its burden to provide a valid reason for the delay, relying solely on testimony from defendant's former counsel in the case, the admission of which constituted plain error because it consisted of privileged attorney-client communications. The trial court's order denying defendant's motion to dismiss based on the constitutional violation—which failed to recognize that the lengthy delay created a presumption of prejudice to defendant, failed to shift the burden to the State, and erroneously ascribed the prejudicial effect of the delay to the State, not to defendant—was reversed, and defendant's judgment for felony hit and run resulting in serious injury or death and two counts of second-degree murder was vacated.

Appeal by defendant from judgments entered on or about 10 October 2018 by Judge Anna M. Wagoner in Superior Court, Rowan County. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Sarah Holladay, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court's denial of his motions to dismiss his case for violation of his Sixth Amendment right to a speedy trial. Because the State failed to carry its burden of proof as to the reason for delay in defendant's trial and as defendant has demonstrated prejudice from this delay, defendant's right to a speedy trial was violated, and thus

we reverse the order denying defendant's motion to dismiss and vacate defendant's judgment.

I. Background

The State's evidence showed that on 17 June 2012, defendant was driving when his vehicle collided with Mr. and Mrs. Jones, who were riding a motorcycle; both died from the collision. A blood sample was taken from defendant and submitted to the North Carolina State Crime Laboratory ("Crime Lab") for analysis on 28 June 2012. On 18 June 2012, warrants were issued for defendant's arrest on charges of felony hit and run resulting in death, driving while impaired, and resisting a public officer. On 19 June 2012, all three of the 18 June 2012 warrants were served and additional warrants were issued and served for two counts of felony death by vehicle. On 25 June 2012, pursuant to a search warrant seeking evidence for purposes of "D.N.A. collection, latent prints, trace evidence, document in the vehicle to show ownership" and evidence to assist in the "identification of the occupants[,]" law enforcement seized various items of evidence from defendant's vehicle, including swabs from various locations, the driver seat cushion, and a broken watch face. The samples were placed into "Temporary Evidence[.]"

On 2 July 2012, defendant was indicted for driving while impaired, resisting public officer, and two counts of felony death by vehicle. On 30 July 2012, defendant was indicted for reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in two deaths. Defendant remained in jail awaiting trial from the date he was arrested, 19 June 2012.[1]

On 11 July 2012, Mr. James Randolph was appointed as defendant's counsel. On 10 December 2014, Mr. James Davis was assigned to defendant's case replacing Mr. Randolph. According to the trial court's findings of fact, on 25 March 2015, "[b]lood alcohol results [were] sent from State Crime Lab to District Attorney's Office." The blood sample was analyzed "to determine the alcohol concentration or presence of an impairing substance therein[;]" on 1 June 2015, the Crime Lab prepared the report, which did not state a blood alcohol level and was negative for all other substance tests. On 26 March 2015-- nearly three years after defendant's arrest -- a "[r]ush request [was] sent from Brandy Cook for

1. On defendant's judgment for second degree murder and attaining the status of violent habitual felon he was "given credit for 2304 days spent in confinement prior to the date of this Judgment[,]" approximately six and one-third years.

expedited testing of DNA[,]" and on 17 April 2015, the "DNA analysis [was] completed."[2]

On 30 June 2017, Mr. Davis moved to withdraw from defendant's case. In the motion to withdraw, Mr. Davis alleged that "[a]fter extensive review and numerous conferences with Defendant, he had elected this month to proceed to trial." Mr. Davis further alleged that he "has a large criminal and civil trial practice, both in and out of county and in state and federal court[,]" including "a civil marital tort jury trial currently set the week of September 25, 2017, in Stanly County, NC[;]" a "civil wrongful death jury trial tentatively set for October 23, 2017, in Davie County[;]" "four pending custody trials, a DWI trial, and many other district court trials[;]" "a capital murder trial on January 8, 2018 . . . anticipated to last four to five months[,]" along with eight mediations and one deposition in the next two months. Mr. Davis noted that under the "scheduling order" defendant had a deadline of 6 October 2017 to file motions and notices and that "the Special Prosecutor intends to calendar the trial of Defendant's cases during the latter part of 2017 or early 2018."

On 5 July 2017, Mr. Aaron Berlin and Ms. Sarah Garner, "Special Prosecutors from the North Carolina Conference of District Attorneys" eventually became the State's attorneys on this case. On 5 July 2017, defendant rejected a plea offer by the State for "RECKLESS DRIVING TO ENDANGER, FEL HIT/RUN SER INJ/DEATH, DWI, FELONY DEATH BY VHIECLE X 2, DWLR, DRIVE LEFT OF CENTER[.]" This same day, Mr. Davis's motion to withdraw as defendant's counsel was granted and Mr. David Bingham was appointed in his stead, and defendant's cases were calendared for an "administrative hearing" on 7 August 2017.

On 17 July 2017, defendant was indicted for two counts of second-degree murder and attaining the status of violent habitual felon. On 2 August 2017, defendant wrote to his attorney, Mr. Bingham, and requested he withdraw from the case. Defendant stated that his understanding was that "you are my brother-in-law['s] attorney, and have been for years. . . . This will be a conflict of interest." Defendant requested that Mr. Bingham "ask one of these attorney[s] to take my case[,]" and listed three names. Defendant wrote, "My reason I ask this is because, Mrs. Anna Mills Wagoner the Resident Judge. She ask Mr. James Davis why didn[']t he ask other attorney before he put in his withdraw from my case." On 7 September 2017, defendant sent a note to the clerk of court noting he had mailed a motion to dismiss his court-appointed

2. District Attorney Brandy Cook was handling defendant's case in 2015.

attorney, Mr. David Bingham; on 11 September 2017, the letter requesting Mr. David Bingham be dismissed was filed. On 13 September 2017, Mr. David Bingham filed a motion to be removed from the case. On 14 September 2017, Mr. Bingham filed a motion for appointment of expert and asking for appointment of an investigator to interview witnesses to the incident and to "help him locate and establish alibi witnesses." On 25 September 2017, the trial court appointed Mr. Chris Sease as defendant's counsel. On 28 September 2017, Special Prosecutor Garner filed and served upon defendant's counsel a "Motion for Reciprocal Discovery and Defenses[,]" (original in all caps), pursuant to North Carolina General Statute § 15A-905 and a "Discovery Disclosure Certificate, 15A-957 Notice, Request for and Consent to Reciprocal Discovery[.]"

On 2 October 2017, the trial court entered an order establishing dates for filing and hearing motions; all defense motions were to be filed by 4 December 2017 and motions were to be heard on 27 January 2018. On 22 January 2018, Mr. Sease and Special Prosecutor Garner entered a consent agreement noting that defendant had "no pre-trial motions" and no reciprocal discovery to provide, while the State had "provided full discovery to the defendant" and afforded defendant's attorney "the opportunity to review in person the State's complete file[.]" The defendant also stipulated that "defendant uses the name Khalil Farook and was previously known as Donald Miller[.]"

On 19 March 2018, defendant sent the clerk of court a request for "information[] (motions) concerning my tr[ia]l delay for the years of 2013, 2014, 2015, 2016, 2017. That the District Attorney office file to delay my tr[ia]l. I need cop[ies] of each year." (Original in all caps.) A notation in different handwriting, apparently as the response from the Clerk's office, appears at the bottom: "There are no written motions in any of your files."[3] On 7 August 2018, the State filed a notice of expert witness, identifying Trooper D.H. Deal as an expert in "Crash/Accident Reconstruction" and noting the trial was set for the week of 24 September 2018. On 9 August 2018, the State dismissed the charges for reckless driving to endanger, driving left of center, DWI, resisting a public officer, and both counts of felony death.

On 6 September 2018, defendant filed a *pro se* motion requesting his case be dismissed "on the grounds that the defendant, . . . was deprived of effective assistance of counsel, and on flagrant violation of the Constitution of the United States and North Carolina, Amendment VI,

3. According to the record, the notation was correct, as no written motions had been filed regarding defendant's trial delay.

VIII." (Original in all caps.) Defendant alleged that his appointed attorney, Mr. James Davis, did not speak to him until 57 months after he was appointed.[4] Defendant also alleged he never agreed to any delays in his trial and that he had been prejudiced both by his ineffective counsel and the delay. On 13 September 2018, defendant filed another *pro se* motion similar to his motion a week earlier but also added that his former counsel, Mr. David Bingham had also been ineffective.

On 18 September 2018, defendant's attorney, Mr. Chris Sease, filed a motion to dismiss defendant's case due to the violation of his constitutional rights to a speedy trial.[5] The motion to dismiss alleged, although the incident was on 17 June 2012, defendant was not charged or served with indictments for second degree murder, violent habitual felon, and habitual felon until 5 July 2017. Mr. Sease alleged that since defendant was incarcerated in the Rowan County Detention Center, he was easily accessible to the charging officer and District Attorney's Office and any failure to serve warrants on defendant was "through no fault of [defendant's] own." The motion also alleged defendant believed the warrants were "purposely held until after []he had rejected the State's plea officer and after his original counsel of record had withdrawn from this case, in an attempt to oppress, harass and punish him further." The motion to dismiss also noted when events occurred which we summarize in a timeline:

31 July, 2012	Indictment.
6 August 2012[6]	Case was calendared for this week but Mr. Randolph, counsel, withdrew.
8 August 2012	Mr. Davis appointed as counsel.

4. It is not clear how defendant calculated 57 months. Mr. Randolph, defendant's attorney, was appointed in July of 2012 and replaced by Mr. Davis in August of 2012, according to defendant's motion. Mr. Davis withdrew in July of 2017, approximately 59 months after his appointment. Mr. Davis' testimony indicates he did not have much interaction with defendant but had sent staff or other attorneys from his office to visit defendant. In any event, the general import of defendant's motion is clear.

5. In defendant's motion to dismiss he based his argument on North Carolina General Statute § 15A-954(a)(3), "the Sixth Amendment to the Constitution of the United States of America, and Section Eighteen of Article I of the North Carolina Constitution." But on appeal defendant does not address his statutory argument; in fact, according to defendant's brief's table of contents, he does not even cite N.C. Gen. Stat. § 15A-954. Therefore, we address defendant's argument only as constitutional violations.

6. 6 August 2012 is the date alleged in defendant's motion but the "ORDER OF ASSIGNMENT OR DENIAL OF COUNSEL" signed by the trial judge is dated 10 December 2014. There are discrepancies in the record, which may be clerical errors, regarding dates

13 August 2012	Defendant entered not guilty plea.
18 February 2013	Defendant's case was calendared but not reached.
19 March 2013	Defendant's case was calendared but not reached.
16 April 2013	Defendant's case was calendared. New assistant district attorney was assigned to the case.
15 July 2015	Defendant's case was calendared but not reached.
13 February 2017	Defendant's case was calendared but not reached. Assistant District Attorney was released from the case, and it was assigned to the Conference of District Attorneys.
5 July 2017	Defendant was indicted for second degree murder, habitual felon, and violent habitual felon. Defendant's case was calendared for the week and not reached. Mr. Bingham was appointed as defendant's counsel and Mr. Sease was appointed to aid Mr. Bingham in going through discovery.
29 August 2017	Defendant's case was calendared but not reached.
26 September 2017	Defendant's case was calendared and not reached. Mr. Bingham withdrew and Mr. Sease became defendant's attorney.
8 January 2018	Defendant's case was calendared but not reached. A tentative trial date was set for September 2018.

The speedy trial motion alleged due to the extensive delay defendant was "prejudiced by an inability to adequately assist his defense attorney" in preparing for trial and by the second degree murder charges brought by the State long after the offense date: "Had his case been resolved in the years of 2012 through 2017 it is arguable that he would have never been charged with Second Degree Murder."

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of appointment of defendant's attorneys. The dates shown by the actual orders appointing the attorneys are: by order signed 11 July 2012 – Mr. James Randolph was appointed; by order signed 10 December 2014, Mr. James Davis was appointed explicitly to replace Mr. Randolph; by order signed 5 July 2017, Mr. David Bingham was appointed; and by order dated 25 September 2017, Mr. Chris Sease was appointed. However, the "Case Events Inquiry" shows a "defense attorney name/type" change from James Randolph to James Davis on 8 August 2012. (Original in all caps.) It seems most likely Mr. Davis began representing defendant in 2012, despite the December 2014 order of appointment.

The State filed a brief with the trial court opposing the motion. Because the State's brief in opposition to the motion and the trial court's order are essentially identical, we will not separately address the State's contentions in its trial brief. A hearing was held regarding the alleged speedy trial violation on 24 September 2018, and on 8 October 2018, the trial court entered an order denying defendant's motion to dismiss. The order on appeal is almost entirely a verbatim copy of the State's "Brief in Opposition to Defendant's Motion to Dismiss." (Original in all caps.) The *only* obvious differences between the State's brief and the order are the headings, transitions between the various sections, and the closing and signatures. In addition, much of the State's brief was not based on the court file or calendars but instead upon information provided by Mr. Davis, defendant's second attorney. For example, the State's brief, and thus the order, notes 13 March 2014 as a date when "Attorney from Davis office met with defendant" and that "James Davis retained our original court dockets from that session and does not have record of Defendant on any calendars[;]" this information is not in the documents from the court file in our record, and information regarding a defense attorney's visits with his client and office records would *not* be in the court file so it appears Mr. Davis must have provided this information to the State prior to the hearing for use in its brief which would ultimately become the order.

The next section of the State's Brief is entitled "ARGUMENT[;];" the corresponding section of the Order is entitled "FINDINGS[.]" The *only* difference between the "argument" and the "findings" is that the order omits the first sentence of the State's brief which states, "For the foregoing reasons, the State respectfully moves this Court to deny Defendant's motion to dismiss based on a speedy trial violation." We also note that despite the title, this portion of the order includes some findings of fact but also extensively quotes cases addressing Sixth Amendment law; since the "findings" portion of the order is actually the "argument" portion of the State's brief, it naturally presents the State's legal argument and citation of cases. The actual findings of fact regarding the timeline of events are stated in the "TIMELINE" portion of the order.

Two sentences of the findings address "exhibit 1" regarding the State's "extensive backlog of . . . cases."[7] In the transcript, only two

7. The "FINDINGS" are not numbered but are paragraphs of text, just as in the State's brief. These sentences are: "In the instant case, the State had an extensive backlog in Superior Court cases. From the week of July 2nd, 2012 through June 27th, 2016 the State tried mostly cases older than Defendant's case (see attached exhibit 1.)." Exhibit 1 was not attached to the order in our record.

exhibits are noted on the "EXHIBITS" page as identified for the hearing regarding defendant's speedy trial motion: For the State, Exhibit "A," described in the transcript as "State's brief" and for defendant, Exhibit "1" described in the transcript as defendant's "ACIS printout, court dates[.]" In the body of the transcript, the State introduced ""Exhibit A"[8] and states,

> I would also introduce Exhibit A . . .
>
> . . . .
>
> I filed a brief in response to this involvement, which I've attached all -- Exhibit A, all of the cases that I've -- that are discussed in my brief as well as the timeline of -- of what Mr. Davis has discussed. I would also just ask the Court to take judicial notice of all of the motions and dates that were indicated in the Court file as well, which I'll discuss later.
>
> (State's Exhibit No. A was admitted.)

Before the trial court, the State's argument regarding Exhibit A was:

> I had introduced Exhibit A to talk about the backlog -- which shows the backlog that was in Superior Court at that time, but also to show how efficient and effective the State was at the time of making sure trials were being scheduled and heard. Mr. Davis also corroborated that during his testimony as well.

In response to the State's Exhibit A, defendant's counsel asked the trial court to take judicial notice of "Defendant's Exhibit No. 1[,]" which he described:

> This is the ACIS printout –
>
> . . . .
>
> that was given to me by the clerk's office in preparation for this motion. And it -- it details every court date that has

8. According to the text of the brief, the State's brief included an "attached exhibit 1" regarding the State's "extensive backlog in Superior Court cases." However, no exhibit was attached to the State's brief which appears in our record. At the hearing, it appears that the "exhibit 1" from the State's brief was identified as State's Exhibit A. We will refer to this exhibit as State's Exhibit A, as identified before the trial court.

entered into ACIS by the clerk's office.[9] So as a matter of an attempt to -- I call like, the term "save face," as to why these dates are a little bit in dispute.

The dates that I'm using in my motion are from that instead of the other dates. I mean, obviously, Mr. Davis kept meticulous notes in docketing to verify when it was actually calendared, so that's I thought -- I wanted to make sure I substantiated what dates I'm using.

(Defendant's Exhibit No. 1 was identified.)

THE COURT: Okay. So you[] are referring not -- not placed on the actual calendars, but on the --

MR. SEASE: Correct.

THE COURT: -- print out from the clerk's office?

MR. SEASE: From experience, if I went to the extent of going through each and every calendar to prepare this motion, I would not, for one, be compensated in time by IDS; two, I didn't have the time in my regular practice to do that at this time.

The State's brief on appeal does not address a single time defendant's case was actually calendared nor does it mention State's Exhibit A or attempt to explain how it would support its argument.[10] State's Exhibit A is *not* a copy of court dockets or calendars showing cases scheduled and heard but simply a listing of weeks of court noting one or more cases tried that week. There is no indication of how long any individual case took to be tried or how many other cases were on the calendar for the week which were not reached. For example, these are the entries for two weeks:

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9. As noted, this exhibit, the "CASE EVENTS INQUIRY" printout, shows one of the discrepancies in dates regarding defendant's counsel. It provides:

08/08/12 . . . DEFENSE ATTORNEY NAME/TYPE CHANGE
FROM: RANDOLPH, JAMES DKF
TO: DAVIS, JAMES

However, the actual "Order of Assignment or Denial of Counsel" in our record states "James Davis to replace James Randolph" and was signed on 10 December 2014. Mr. Randolph was originally appointed by order signed on 11 July 2012.

10. The State's brief failed to address either State's Exhibit A or defendant's Exhibit 1.

SUPERIOR COURT WEEK OF MARCH 31, 2014

Jury trials: Tia Livengood (2010 felony embezzlement) and William Kennedy (2012 felony habitual DWI).

SUPERIOR COURT WEEK OF APRIL 7, 2014

Jury trials: Curtis Parrigden (2009 felony possession stolen goods) and Darryl Wright (2008 misdemeanor).

State's Exhibit A lists dates from 2 July 2012 to 27 June 2016 and notes jury trials, administrative weeks, and some days when no judge was available. Some of the weeks omitted are presumably holidays, such as the last week or two of December. For many months, only two weeks of the month are addressed. State's Exhibit A does not explain why some other weeks are omitted, and the weeks listed end about two years prior to Defendant's 2018 trial. Thus, even if State's Exhibit A includes some information regarding the "backlog" of cases, it does not address the last two years of the alleged delay.

In its "findings[,]" the trial court acknowledges the length of delay before defendant's trial, but determines that the State's backlog and defendant's failure to assert his right sooner indicate there was no violation. The trial court actually determined that *the State* was "significantly prejudiced" by the delay caused by its own backlog. The last sections of the brief and the order are entitled "CONCLUSION." The brief concludes with the State's two-sentence request to deny defendant's motion to dismiss. The order concludes with its two-sentence conclusion of law and is the entirety of the trial court's conclusions "of law" section. The trial court concluded, "For the foregoing reasons, this Court finds Defendant's right to a speedy trial was not violated."

Finally, on 8 October 2018, defendant's trial began, and after a trial by jury, the jury found defendant guilty of felony hit and run resulting in serious injury or death, and two counts of second-degree murder. Defendant entered plea agreements for the charges driving while license revoked and attaining the status of violent habitual felon; the trial court entered judgment ultimately sentencing defendant to life without parole. Defendant appeals.[11]

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11. Defendant provided oral notice of appeal from his judgments but did not file a written notice of appeal from the written order denying his motion to dismiss; neither the State nor defendant addressed this issue. Upon our own initiative we exercise our discretion to invoke Rule 2 of our Rules of Appellate Procedure to consider defendant's appeal regarding the order denying his motion to dismiss for a speedy trial violation in order "[t]o prevent manifest injustice to" him. N.C. R. App. P. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division

II. Right to a Speedy Trial

In June and July of 2012, defendant was indicted for driving while impaired, resisting a public officer, two counts of felony death by vehicle, reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in two deaths. Defendant's trial did not begin until 8 October 2018, over six years after defendant was indicted and arrested. Defendant first contends his Sixth Amendment right to a speedy trial under the United States Constitution and his Article I right to a speedy trial under the North Carolina Constitution has been violated, and thus the trial court erred in denying his motion to dismiss.

A. Standard of Review

"When reviewing speedy trial claims, we employ the same analysis under both the Sixth Amendment and Article I." *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Wilkerson*, 257 N. C. App. 927, 929, 810 S.E.2d 389, 391 (2018) (citation and quotation marks omitted).

B. *Barker* Factors

We consider defendant's allegation of a speedy trial violation under the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972).

> The Supreme Court of the United States laid out a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2191–92, 33 L.Ed.2d at 116–17. These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and, (4) prejudice to the defendant. None of these factors are determinative; they must all be weighed and considered together:
>
> > We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related

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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.").

> factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.

Barker, 407 U.S. at 533, 92 S.Ct. 2182, 33 L.Ed.2d at 118–19.

Wilkerson at 929, 810 S.E.2d at 392 (citations, quotation marks, and brackets omitted). We thus turn to the *Barker* factors. *See id.*

1. Length of Delay

The delay in this case was over six years, clearly sufficient to create a presumption of prejudice to the defendant and to "trigger the *Barker* inquiry:"

> The length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial. No bright line exists to signify how much of a delay or wait is prejudicial, *but as wait times approach a year, a presumption of prejudice arises. Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S.Ct. 2686, 2690–91 n.1, 120 L.Ed.2d 520, 528 n.1 (1992). This presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry.

Id. at 930, 810 S.E.2d at 392 (emphasis added) (citation, quotation marks, and brackets omitted). The trial court's order acknowledges the length of time of the delay and the law regarding the presumption of prejudice but did not recognize the presumption of prejudice *to defendant* but instead turned to the other factors. The trial court also determined "the State has been significantly prejudiced by the length of the delay." We have been unable to find any prior case considering potential prejudice to the *State* from its own delay. The Sixth Amendment right to a speedy trial is a right granted to the *defendant*, not the State. *See* U.S. Const. amend. VI ("In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial[.]" (emphasis added)).

Six years is certainly a lengthy enough delay to create the "*prima facie* showing that the delay was caused by the negligence of the prosecutor." *Wilkerson* at 931, 810 S.E.2d at 393 ("This Court in *Chaplin* found a pre-trial delay of 1,055 days, with the case being calendared thirty-one times before being called, constituted a *prima facie* showing of prosecutorial negligence or willfulness. *Chaplin*, 122 N.C. App. at 664, 471 S.E.2d at 656. . . . This Court in *Strickland* concluded a delay of 940 days was enough to constitute a *prima facie* showing of prosecutorial negligence. *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 903."). Here, defendant's delay was over six years – over 2190 days -- and thus "a presumption of prejudice arises[,]" and this triggers the rest of the *Barker* inquiry. *Id*. at 930, 810 S.E.2d at 392.

2. Reason for Delay

Based upon the six-year delay, the burden of proof "to rebut and offer explanations for the delay" shifted to the State. *See id*. at 930, 810 S.E.2d at 392.

a. Burden of Proof of Reason for Delay

As noted above, the defendant carried his burden of showing that the "delay was particularly lengthy," as it was over six years. *Id*. at 930, 810 S.E.2d at 392. This delay creates a "*prima facie*" case that "the delay was caused by the negligence of the prosecutor[:]"

> Defendant bears the burden of showing the delay was the result of neglect or willfulness of the prosecution. *If a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor.*
>
> Once the defendant has made a *prima facie* showing of neglect or willfulness, *the burden shifts to the State to rebut and offer explanations for the delay*. The State is allowed good-faith delays which are reasonably necessary for the State to prepare and present its case, but is proscribed from purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. Different reasons for delay are assigned different weights, but only valid reasons are weighed in favor of the State. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192–93, 33 L.Ed.2d at 117.

Id. at 930-31, 810 S.E.2d at 392–93 (emphasis added and omitted) (citations, quotation marks, and brackets omitted).

We first note the trial court's order did not properly assign the shifted burden to the State. Instead, the trial court concluded *defendant* had the burden entirely and did not recognize that the six-year delay alone triggered "the burden shift[] to the State to rebut and offer explanations for the delay." *Id*. at 930, 810 S.E.2d at 392. Despite the trial court's order – which, as noted above, was a copy of the State's brief -- at the hearing, counsel for both defendant and the State recognized that the burden did shift to the State to present evidence regarding the reasons for the delay, and the State offered that evidence in the form of Mr. Davis's testimony. This brings us to one of defendant's other issues appeal, since the State presented evidence from only one witness regarding the reason for the delay: *defendant's* former attorney on this very case, Mr. Davis.

b. Testimony by Defendant's Former Counsel

Defendant argues that "WHERE THE DEFENDANT'S PRIOR ATTORNEY TESTIFIED AGAINST HIM AT THE HEARING ON THE SPEEDY TRIAL MOTION, THE TRIAL COURT PLAINLY ERRED IN ADMITTING PRIVILEGED[12] AND CONFIDENTIAL TESTIMONY[.]" The order states it was "based on the Court file and the sworn testimony of attorney James Davis on September 24, 2018 in open court[.]" Indeed, instead of presenting testimony from the clerk of court or an assistant district attorney regarding the court dockets and calendaring of defendant's case and other cases, the State relied upon testimony from defendant's former counsel. Mr. Davis testified generally about the court dockets but most of his testimony addressed his representation of defendant and his trial strategy; both of these subjects raise important questions of attorney-client privilege.[13]

We first note that according to the order appointing him as counsel, Mr. Davis was not appointed until 10 December 2014, over two years after defendant's arrest. But Mr. Davis testified that throughout 2013 part of his strategy was to give things time to "cool down."[14] Mr.

12. "A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege." *Berens v. Berens*, 247 N.C. App 12, 19, 785 S.E.2d 733, 739 (2016).

13. Mr. Davis never mentioned the specific word "backlog." Instead, the State relied on its Exhibit A. Before the trial court, the State noted: "I had introduced Exhibit A to talk about the backlog . . . . Mr. Davis also corroborated that during his testimony as well."

14. Again, as noted above, there is some uncertainty as to when Mr. Davis began representing defendant. Mr. Davis did not say anything about defendant's first attorney, other than noting he replaced him. Regardless of whether Mr. Davis was appointed in 2012 or 2014, our analysis would not change.

Davis noted that Assistant District Attorney Seth Banks had told him if defendant did not plead guilty to the initial charges, he would charge defendant as "violent habitual felon[,]" which the State later did. Mr. Davis also testified that the second-degree murder indictments were filed only after plea negotiations had failed. During cross examination, Mr. Davis also noted while he was defendant's counsel "at no time" had the case been on a trial calendar, only administrative calendars. No actual calendars, administrative or trial, were offered as evidence.

At the hearing, defendant was represented by a new court-appointed attorney, who did not object to Mr. Davis's testimony, and thus we review this issue for plain error. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of 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[.]

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

This is an exceptional case and the issue of a violation of attorney-client privilege in this context is a fundamental error which "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* The attorney-client privilege is one of the most important and well-established protections our legal system affords a criminal defendant:

> The public's interest in protecting the attorney-client privilege is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law. The privilege has its foundation in the common law and can be traced back to the sixteenth century. The attorney-client privilege is well-grounded in the jurisprudence of this State. When the relationship of attorney and client exists, all confidential communications made

by the client to his attorney on the faith of such relationship are privileged and may not be disclosed.

There are exceptions to this general rule of application to all communications between a client and his attorney . . . .

The rationale for having the attorney-client privilege is based upon the belief that only full and frank communications between attorney and client allow the attorney to provide the best counsel to his client. The privilege rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously—benefits out-weighing the risks of truth-finding posed by barring full disclosure in court.

In considering whether an attorney can be compelled to disclose confidential attorney-client communications, it is noteworthy that unlike other profession-related, privileged communications, the attorney-client privilege has not been statutorily codified. In article 7 of chapter 8 of our General Statutes, relating to competency of witnesses, the General Assembly has specifically addressed a method for disclosure of privileged communications. In N.C.G.S. § 8–53, the General Assembly has established the privilege for confidential communications between physician and patient, providing that confidential information obtained in such a relationship shall be furnished only on the authorization of the patient or, if deceased, the executor, administrator or next of kin of the patient. This statute further provides that any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to N.C.G.S. § 8–53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. Our General Assembly has also provided this same disclosure procedure and basis in its creation of the privilege for communications between psychologist and patient (N.C.G.S. § 8–53.3 (2001)), in the school counselor privilege (N.C.G.S. § 8–53.4 (2001)), in the marital and family therapy privilege (N.C.G.S. § 8–53.5 (1999)), in the social worker privilege (N.C.G.S. § 8–53.7 (1999)), in the professional counselor privilege (N.C.G.S. § 8–53.8 (2001)), and in the optometrist-patient privilege (N.C.G.S. § 8–53.9 (2001)).

> With respect to statutorily established privileges, we also find it notable that with other types of privileged communications, such as the clergyman privilege, the General Assembly has made these in essence absolute by not including any provision for a judge to compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. Significantly, our General Assembly has not seen fit to enact such statutory provisions for the attorney-client privilege, and we must look solely to the common law for its proper application.

In re Miller, 357 N.C. 316, 328–30, 584 S.E.2d 772, 782–83 (2003) (citations, quotation marks, and brackets omitted).

Both attorney-client privilege and work-product privilege apply to criminal prosecutions:

> Attorney-client communications are privileged under proper circumstances. A similar qualified privilege protects criminal defendants from disclosure of the work of attorneys produced on behalf of such defendants in connection with the investigation, preparation or defense of their cases. *Both the attorney-client privilege and the work product privilege, however, are privileges belonging to the defendant* and may be waived by him.

State v. Taylor, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) (emphasis added) (citations omitted).

Although there are exceptions to both the attorney-client privilege and work-product privilege, the State has not identified or argued that any particular exception to attorney-client privilege would apply to this case. Instead, the State responds to defendant's argument regarding violation of his attorney-client privilege by arguing that "defendant waived attorney client privilege and work . . . privilege with regard to trial strategy *when he acquiesced to the strategic delay in trial*." (Emphasis added.) (Original in all caps.) The State continues,

> [I]n the context of defendant's argument regarding a speedy trial violation, the material issue is not whether defendant and his counsel communicated about strategy. Rather, the material issue is whether or not defendant acquiesced in the delay. There is no evidence that this strategic decision was an attorney-client privileged communication. The actual employment of a trial strategy of delay does not itself constitute a communication from

> defendant such that it is afforded the protections of the attorney-client privilege. Rather, if anything, such strategy should be protected by the work product doctrine.

But the State has not argued any of the established exceptions or methods of waiver of the privilege.[15] The State cites no legal authority in support of its theory of Defendant's tacit waiver of attorney-client privilege by acquiescence to a "strategic delay in trial." The State's argument first *assumes* that defendant did in fact knowingly and intentionally acquiesce in Mr. Davis's "strategic decision" to delay trial, but it is the *State's* burden to prove this fact. The State's entire explanation of the six-year trial delay is that defendant had agreed to the delay. Since Mr. Davis did not personally meet with or talk to defendant until more than three years had passed since he was appointed, based upon the unrefuted facts, Mr. Davis could not have obtained Defendant's consent to a trial strategy of delay, nor could he have testified based upon any particular statement by defendant to him during that time period, although others from his office could have discussed these matters with defendant and communicated this to Mr. Davis. But this does not eliminate the issue of attorney-client privilege, which also extends to an attorney's agents. *See generally State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981) ("Communications between attorney and client generally are not privileged when made in the presence of a third person *who is not an agent* of either party." (emphasis added)).

And even if we assume *arguendo* that Mr. Davis's testimony regarding his "strategic decision" to let things "cool down" when he began representing defendant was not protected by attorney-client privilege, this would explain perhaps a year or two of the six-year delay; it does not address the majority of the delay. The State also has the burden to explain the additional four or five years.

The State also argues that Mr. Davis's "trial strategy" was not a protected communication but rather "work product." Although the work-product privilege normally applies to documents or other materials,

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15. A defendant waives attorney-client privilege for purposes of a motion for ineffective assistance of counsel. *See generally State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) ("By alleging in his amended motion for appropriate relief that his court-appointed attorney, the Public Defender, rendered ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel."). Defendant filed a *pro se* motion alleging ineffective assistance of counsel, but his counsel did not file a motion for ineffective assistance of counsel, and the trial court did not consider defendant's *pro se* motions.

the essence of the privilege is protection of "an attorney's impressions, opinions, and conclusions or his legal theories and strategies[:]"

> The work product doctrine applies in criminal as well as civil cases. It is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. The doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself.
>
> The doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial (in this case, by the police for the district attorney). Such a statement is not work product in the same sense that an attorney's impressions, opinions, and conclusions or his legal theories and strategies are work product.
>
> As pointed out in *United States v. Nobles*, *supra*, the work product privilege, like any other qualified privilege, can be waived. The privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. By electing to use Fragiacomo as a witness the State waived any privilege it might have had with respect to matters covered in his testimony.

State v. Hardy, 293 N.C. 105, 126, 235 S.E.2d 828, 840–41 (1977) (citations omitted).

Even if we were to assume that defendant's former counsel's "impressions, conclusions, opinions and legal theories" regarding his defense of defendant could be considered "work product," those are privileged just as a document setting forth those processes in writing would be. *See North Carolina State Bar v. Harris*, 139 N.C. App. 822, 824–25, 535 S.E.2d 74, 76 (2000) ("[T]he attorney-work product rule, which is a qualified privilege for witness statements prepared at the request of the attorney and an almost absolute privilege for attorney notes taken during a witness interview. *Also*, *under the attorney-work product rule*, *the mental impressions*, *conclusions*, *opinions and legal theories of an attorney are absolutely protected from discovery regardless of any*

showing of need. North Carolina recognizes the attorney-work product rule under N.C. Gen. Stat. § 1A–1, Rule 26(b)(3) (1990). Under that statute, attorney-work product is defined in relevant part to include, among other things, materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's agent. Such evidence may be obtained by a party "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (emphasis added) (citations, quotation marks, and ellipses omitted)).

Mr. Davis's communications with defendant and his trial strategy were protected by attorney-client privilege. *See generally in re Miller*, 357 N.C. at 328–30, 584 S.E.2d at 782–83. Even if portions of Mr. Davis's testimony regarding the court calendars in Rowan County or his other cases did not reveal privileged information, neither the State nor the trial court made any attempt to limit his testimony to this sort of public information. If the strategic trial decisions that the State contends defendant agreed to in consultation with his attorney are not protected, then it is difficult to fathom the communication or work product which *could* be protected. And even if Mr. Davis did have a trial strategy of delay, if he failed to communicate that strategy to defendant, defendant could not agree to it. To show defendant's knowing acquiescence to Mr. Davis's trial strategy – which is the basis of the State's waiver argument -- the State would have to show that defendant's counsel communicated his strategy to defendant, and he did actually agree.

The trial court thus erred in allowing Mr. Davis to testify against defendant where defendant had not waived his attorney-client privilege. To demonstrate plain error, defendant must also "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." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

The State's *only* evidence to rebut the *prima facie* showing of a violation of defendant's right to a speedy trial was erroneously admitted in violation of his attorney-client privilege, and without this evidence, the State could not carry its burden of attempting to explain the trial delay and defendant's motion should have been allowed. We conclude the erroneous admission of the State's evidence had "a probable impact" on a jury finding defendant guilty as there would have been no trial without it, since defendant's case would have been dismissed for the speedy trial violation. We therefore conclude the trial court plainly erred in allowing Mr. Davis to testify against his former client. We will thus disregard the

entirety of Mr. Davis's testimony regarding his "trial strategy" of delay and any findings of fact based upon that testimony.

c. Evidence of Reasons for Delay

Turning back now to the State's asserted reasons for the delay, without Mr. Davis's testimony, the State has given no explanation or excuse for the delay. The State could have presented testimony regarding some of the information in Mr. Davis's testimony from the assistant district attorneys who dealt with the case and who discussed the case with Mr. Davis.[16] Even if we consider the evidence and information in the court file, this simply establishes the basic timeline of events and these facts were not in dispute. Defendant's case was not scheduled for trial by the State, and it was on an administrative calendar only a few times during the six years preceding trial. The State did not even *request* analysis of the DNA evidence until approximately three years after defendant was arrested. Otherwise, the State did not present any evidence regarding the reasons for the delay other than from defendant's former counsel. The State failed to meet its burden "to rebut and offer explanations for the delay." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392.

It is important at this point that we not speculate or move beyond the evidence we have before us. The burden here was on the State, and since we must disregard Mr. Davis's testimony given in violation of defendant's attorney-client privilege, the State failed to provide any explanation for years of the delay. This Court can only conclude that prong two, the reason for the delay, weighs against the State. It was the State's burden to explain the delay or produce admissible evidence the delay was due to defendant's own actions or caused by some other valid reason, but the State presented no such competent evidence and the court file does not show this occurred.

Even on appeal, apparently recognizing the absence of evidence in the record, the State discussed no details of its case backlog as a justification for the delay of defendant's case but instead argues in a footnote of its brief:

> [t]his Court has previously noted the existence of a backlog of cases and lack of available prosecutorial staff in Rowan County during this same time period in its recent

16. The State's brief and trial court's order also includes findings in the "timeline" regarding some dates of conversations or communications between Mr. Davis and several assistant district attorneys, although the State did not present any witnesses other than Mr. Davis.

> published opinion in State v. Farmer, ___ N.C. App. ___, ___, 822 S.E.2d 556, 560 (2018). In Farmer, this court found no speedy trial violation despite a delay of approximately five and a half years between the institution of charges and the trial.

This Court cannot rely upon factual findings in *Farmer* to review the trial court's order *in this case*; the State cannot carry its burden of production of factual evidence regarding the reasons for delay in this case only by citation to other cases, even from the same judicial district and during the same general time period. One obvious reason is the difference in the facts of each case. In *Farmer*, the trial court found, and this Court also determined, that although the backlog was a "primary cause" of the delay, the defendant had also contributed to the delay by requesting funds to obtain an expert witness, and he agreed to continue the case:

> Specifically, defendant contends that the State allowed his case to be idle while there were 77 administrative sessions and 78 trial sessions between 2012 and 2017. The State acknowledged that there was a considerable delay in calendaring defendant's case. However, *the State presented evidence of crowded dockets and earlier pending cases given priority as a valid justification for the delay*.
>
> According to the record, it is undisputed that the primary cause for defendant's delayed trial was due to a backlog of pending cases in Rowan County and a shortage of staff of assistant district attorneys to try cases. The State asserts that, at minimum, defendant also played a role in the delay as the record shows defendant was still preparing his trial defense as of late 2014 when he requested funds to obtain expert witnesses. Significantly, *defendant filed his motion for a speedy trial after he agreed to continue his case to the next trial session in 2017*. Thus, defendant himself acquiesced in the delay by waiting almost five years after indictment to assert a right to speedy trial.

State v. Farmer, 262 N.C. App. 619, 623, 822 S.E.2d 556, 560 (2018) (emphasis added).

Here, the State failed to present any meaningful evidence regarding the "crowded dockets and earlier pending cases given priority as a valid

justification for the delay" and defendant did not agree to any continuances. *Contrast id*. Here, there is *no evidence* in the record supporting the backlog of cases, other than a general use in argument of the word "backlog" and the listing of cases tried during some weeks of court in State's Exhibit A. As noted above, State's Exhibit A fails to address the final two years of the delay, so even if it explained some of the delay, the State failed to address a large portion of the delay. As in *Farmer*, the State must do more than assert a general "backlog" of cases. *See id*. This factor weighs against the State heavily. We thus turn to the third prong.

3. Defendant's Assertion of His Right to a Speedy Trial

During the pendency of his case, defendant filed two *pro se* motions to dismiss his case due to speedy trial violations, and his attorney filed one, all in September of 2018. The trial court's order "weighs heavily" against defendant that he "merely filed a motion to dismiss for speedy trial" rather than "a demand for speedy trial[.]" Since, as discussed above, we must disregard the trial court's findings regarding defendant's acquiescence in any delay as well as Mr. Davis's testimony this factor carries little weight. We also note defendant sent earlier pro se communications to the trial court, and although they did not use the words "speedy trial," they do express defendant's desire for information regarding why his case was not proceeding. We turn to the final prong.

4. Prejudice

Last, as to prejudice, defendant argued in his motions to dismiss that he has been unable to adequately prepare for trial or garner witnesses in his defense. Defendant was arrested in 2012, but the State waited until 2017 to file two charges of murder -- far more serious charges than the State initially filed. We need not speculate what the prejudice of the delay might have been as the delayed murder charges resulted in life imprisonment without parole. If defendant had been tried and convicted on the charges initially filed, he could not have been subjected to life imprisonment without possibility of parole. Defendant was not charged with murder for over five years after the date of his arrest, and defendant was in jail for the entire time. Defendant's imprisonment and the State's delay in imposing far more serious charges support his claim of prejudice, as he was unable to assist in his trial preparation and attempt to find potential witnesses and other evidence which would have been more readily available six years earlier. Further, the delay of six years is so substantial, the delay alone indicates prejudice, particularly given that fact that the State presented no competent evidence justifying the delay.

Because the Sixth Amendment right to a speedy trial protects only the defendant and not the State, the trial court erred in considering alleged prejudice to the State by the delay. In addition, we note the State was ultimately not "significantly prejudiced" or even slightly prejudiced by the delay as it obtained convictions for second-degree murder and attaining the status of violent habitual felon, charges it elected to bring five years after the incident. This factor weighs heavily against the State.

C. Summary

In conducting the analysis directed by *Barker*, we find that every factor weighs either in favor of defendant, against the State, or not clearly in favor of either party. The State did not meet its burden of explaining valid reasons for the six-year delay of trial. Even if we were to assume that Mr. Davis's initial trial strategy of letting things "cool down" was proper for our consideration, this alleged strategy would explain less than half of the delay. Finally, the delay at issue here is so substantial that its duration alone speaks to prejudice, a reality only underlined by the State's failure to justify or explain it. We must therefore vacate defendant's judgments due to a violation of his constitutional rights to a speedy trial. Accordingly, we need not address defendant's other issues on appeal.

III. Conclusion

Based upon the delay of over six years from defendant's arrest until his trial, because the State failed to carry its burden of presenting valid reasons for the delay, we reverse the trial court's order denying defendant's motion to dismiss and vacate defendant's judgment.

REVERSED and VACATED.

Judges ARROWOOD and BROOK concur.

STATE v. NUNEZ

[274 N.C. App. 89 (2020)]

STATE OF NORTH CAROLINA
v.
ENRIQUE AMAURIS NUNEZ, DEFENDANT

No. COA19-1169

Filed 20 October 2020

Search and Seizure—driving while impaired—lawfulness of seizure—disabled vehicle—activation of blue lights

In a prosecution for driving while impaired arising from a car accident, where an officer activated her blue lights upon arriving at the scene and finding defendant in the driver's seat of his disabled vehicle (which had two flat tires and a broken mirror), the trial court properly denied defendant's motion to suppress because the officer did not initiate an unlawful seizure by merely activating the blue lights and not doing anything to impede defendant's movement. Rather, the seizure of defendant—which was supported by a reasonable suspicion of criminal activity—did not occur until a second officer approached the vehicle, smelled an odor of alcohol, and began questioning defendant.

Appeal by defendant from judgment entered 10 July 2019 by Judge Craig Croom in Wake County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for the defendant-appellant.

BERGER, Judge.

On January 4, 2017, Enrique Nunez's ("Defendant") motion to suppress was denied by the trial court, and Defendant was subsequently convicted of driving while impaired ("DWI"). Defendant appeals, arguing that the trial court erred when it denied his motion to suppress. We disagree.

Factual and Procedural Background

In the early morning on May 11, 2015, Officer Crawford of the Raleigh Police Department was dispatched to check the status of a single car accident in a Biscuitville parking lot. While en route to the parking

lot, Officer Norton asked Officer Crawford to take the lead on scene because Officer Norton's shift was almost over. Around 1:48 a.m., Officer Crawford arrived at the parking lot. When Officer Crawford arrived, Officer Norton "was some distance from the disabled vehicle but had her police unit there with the blue lights activated." Officer Crawford observed that the vehicle was in the center of a public vehicular area with two flat tires and a missing mirror, and that Defendant was seated "in the driver's seat of the vehicle." Officer Crawford then approached the vehicle and requested Defendant's driver's license and vehicle registration through the already open driver's side window.

Officer Crawford noticed "a very strong odor of alcohol coming from the vehicle." Defendant admitted that he had "five or six beers" earlier that night. Officer Crawford then administered standardized field sobriety tests and two subsequent breath tests. Based on his experience, Officer Crawford determined that Defendant "consumed a sufficient quantity of . . . alcohol . . . to impair his physical and mental faculties." As a result, Officer Crawford arrested Defendant for DWI.

On January 3, 2017, Defendant filed a motion to suppress the evidence obtained by Officer Crawford. At the hearing, Defendant argued that Officer Norton initiated a seizure when she arrived on the scene and activated the blue lights on her patrol vehicle. Specifically, Defendant argued that Officer Norton did not have reasonable suspicion at that time to seize him.

On January 4, 2017, the trial court denied Defendant's motion to suppress. The trial court's order included the following relevant findings of fact:

> 5. Officer Crawford arrived within five minutes of the call to service.
>
> 6. When Officer Crawford arrived, Officer Norton, with the Raleigh Police Department, was already on scene.
>
> 7. Officer Norton did not testify and was not present at this hearing.
>
> 8. Officer Norton was some distance from the disabled vehicle but had her police unit there with the blue lights activated.
>
> . . .
>
> 12. The vehicle was in the middle of the parking lot and not in a parking space.

13. Officer Crawford observed that the vehicle had two flat tires and the mirror on one side was missing.

14. The keys were in the ignition and the Defendant was in the driver's seat.

15. At the time he approached the vehicle, Officer Crawford noticed a strong odor of alcohol emanating from the vehicle.

16. Officer Crawford asked the Defendant whether he had been drinking, and he responded affirmatively.

Based on these findings of fact, the trial court made the following relevant conclusions of law:

4. The parking lot of the Biscuitville is a public vehicular area.

5. The officers were not dispatched due to any alleged criminal activity.

6. They were dispatched for a disabled vehicle, which could be for a lot of things, including issues involving the health of the driver.

7. Officers turn on their blue lights for a number of reasons, including for the safety of the individual that might be inside of a vehicle.

8. The Defendant was not seized by Officer Norton.

9. The nature of the call to service authorized Officer Crawford to approach the vehicle and check on the welfare of the person or persons inside the vehicle.

10. The seizure of the Defendant did not occur until Officer Crawford approached the Defendant's vehicle smelled the odor of alcohol, and began questioning the Defendant.

11. The evidence here is adequate to support a finding that Officer Crawford had reasonable articulable suspicion to seize the Defendant. Therefore, the Defendant's seizure did not violate his rights under the Fourth Amendment to the United States Constitution and Article I, Sections 10, 20 and 23 of the North Carolina Constitution.

On July 10, 2019, a Wake County jury found Defendant guilty of DWI. Defendant appeals, arguing that the trial court erred when it denied his motion to suppress. We disagree.

Standard of Review

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). A defendant's failure to challenge findings of fact renders them binding on appeal. *State v. Styles*, 362 N.C. 412, 417, 665 S.E.2d 438, 441 (2008). "Conclusions of law are reviewed *de novo*." *State v. Gerard*, 249 N.C. App 500, 502, 790 S.E.2d 592, 594 (2016) (citation and quotation marks omitted).

Analysis

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

"Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016) (citation omitted). A seizure occurs when the officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). There must be "a physical application of force or submission to a show of authority." *State v. Cuevas*, 121 N.C. App. 553, 563, 468 S.E.2d 425, 431 (1996) (citation omitted).

"The activation of blue lights on a police vehicle has been included among factors for consideration to determine when a seizure occurs." *State v. Baker*, 208 N.C. App. 376, 386, 702 S.E.2d 825, 832 (2010) (citation omitted). However, the mere activation of an officer's blue lights does not constitute a seizure under the Fourth Amendment. *See State v. Turnage*, 259 N.C. App. 719, 726, 817 S.E.2d 1, 6, *writ denied*, *temporary stay dissolved*, 371 N.C. 786, 821 S.E.2d 438 (2018) ("[T]he

mere activation of the vehicle's blue lights did not constitute a seizure as Defendant did not yield to the show of authority."); *see also State v. Mangum*, 250 N.C. App. 714, 726, 795 S.E.2d 106, 116-17 (2016) (specifying that for a defendant to be seized under the Fourth Amendment he must submit, or yield, to an officer's activation of blue lights or siren).

Here, Officer Norton was dispatched to check the status of a single car accident in a public vehicular area. When Officer Norton arrived and activated her blue lights, Defendant was sitting in the driver's seat of his disabled vehicle, which had two flat tires and a broken side mirror. While the activation of her blue lights is a factor in determining whether a seizure has occurred, there was no action on the part of Officer Norton that caused Defendant's vehicle to stop moving, or otherwise impede Defendant's movement. Rather, Officer Norton may have activated her blue lights to signal to Officer Crawford, or to even signal to Defendant that police assistance was available. *See Turnage*, 259 N.C. App. at 725-26, 817 S.E.2d at 5 ("A vehicle inexplicably stopped in the middle of a public roadway is a circumstance sufficient, by itself, to indicate someone in the vehicle may need assistance, or that mischief is afoot. At the very least, . . . it is not the role of this, or any other court, to indulge in unrealistic second-guessing of a law enforcement officer's judgment call." (*purgandum*)).

Here, Defendant was not seized by the mere activation of Officer Norton's blue lights. Therefore, the trial court did not err when it denied Defendant's motion to suppress.

Conclusion

For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
WILLIAM LAMONTE QUICK

No. COA19-1023

Filed 20 October 2020

Appeal and Error—right to speedy appeal—effective assistance of appellate counsel—record on appeal—sufficiency

Where it took nineteen years to docket defendant's appeal from various criminal convictions because his prior counsel failed to timely prosecute the appeal, the record was insufficient to permit direct appellate review of defendant's arguments that he was deprived of his rights to a speedy appeal and to effective assistance of counsel. Consequently, defendant's appeal was dismissed without prejudice so that he could pursue a motion for appropriate relief in the trial court and develop the facts in an evidentiary hearing.

Appeal by Defendant from Judgments entered 19 April 2000 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

HAMPSON, Judge.

William Lamonte Quick (Defendant) appeals from Judgments entered on 19 April 2000 upon his conviction of Felony Possession of Cocaine, Possession of a Firearm by a Felon, Possession of a Weapon on School Property, and Misdemeanor Resisting a Public Officer, Second Degree Trespass, and Carrying a Concealed Weapon. The sole issue raised by Defendant on direct appeal from these convictions is whether he was deprived of a right to a speedy appeal and effective assistance of appellate counsel during the nineteen years it took for this appeal to be docketed in this Court because his prior appointed appellate counsel did not take action to timely prosecute the appeal. The State has filed a Motion requesting, in part, this Court dismiss Defendant's appeal without prejudice to his right to seek appropriate post-conviction relief

on this issue in the trial court. Because the Record before us is insufficient for us to evaluate Defendant's claims on direct appeal, we allow the State's Motion and dismiss Defendant's appeal without prejudice to his right to seek post-conviction relief.[1]

Factual and Procedural Background

The Record before us tends to show the following:

On 21 January 1999, a Wake County Grand Jury indicted Defendant for Possession with Intent to Sell and Deliver Cocaine, Possession of a Firearm by a Felon, Resisting a Public Officer, Possession of a Firearm on School Property, Trespass, and Carrying a Concealed Firearm. At some point before trial, a Competency Hearing was held regarding Defendant's ability to stand trial. The Record does not contain any transcript of Defendant's Pretrial Competency Hearing.

Defendant's case came to trial in Wake County Superior Court on 18 April 2000. At trial, the State presented the testimony of Raleigh Police Officer Richard Hoffman (Officer Hoffman). Officer Hoffman testified that, on 2 March 1999, he and his partner were patrolling the area around Birch Wood Apartments. The officers saw a group of four men in a courtyard where police had received complaints of drug activity. The officers approached the men to speak with them. Two of the men stopped, but Defendant ran.

Officer Hoffman chased Defendant through private yards and an elementary school's grounds. During the chase, Officer Hoffman testified he saw Defendant remove a jacket and throw it onto the ground. Defendant then tried to hail a taxi cab, but Officer Hoffman was able to catch up and grab Defendant before he could escape in the cab. Shortly after arresting Defendant, Officer Hoffman retrieved the jacket he said he had seen Defendant discard. Officer Hoffman testified that he found a silver .380-caliber handgun, loaded with six rounds, and 3.0 grams of cocaine in the jacket.

After the State and Defendant presented evidence, the jury found Defendant guilty of all charges—with the exception of Possession of Cocaine with Intent to Sell or Deliver on which the jury returned a guilty

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1. The State, as part of its Motion, originally requested this Court also compel Defendant to produce additional transcripts from a prior appeal arising from different charges against Defendant. Defendant produced the additional transcripts in responding to the State's Motion. The State filed a Motion to Withdraw the portion of its Motion to Dismiss asking this Court to order Defendant to produce additional transcripts. We grant the State's Motion to Withdraw this portion of its Motion to Dismiss.

verdict on the lesser included offense of Possession of Cocaine. The trial court sentenced him to consecutive prison terms of 8-10 months for Possession of Cocaine, 20-24 months for Possession of a Firearm by a Felon, and 8-10 months for the consolidated misdemeanor charges. Defendant gave oral Notice of Appeal in open court. The trial court appointed the Appellate Defender as appellate counsel with trial counsel, Mr. Graham, as an alternate.

On 25 April 2000, the Appellate Defender declined appointment and served notice to Mr. Graham that he was responsible for Defendant's appeal. On 9 July 2002, Mr. Graham moved to withdraw as Defendant's appellate counsel and to appoint Mr. Lemuel Hinton in his place. The Motion to Withdraw was allowed the same day.

Years passed with nothing being done to process Defendant's appeal until December 2018 when Defendant contacted Prisoner Legal Services, Mr. Hinton, and the Officer of the Appellate Defender regarding the status of his appeal. On 29 April 2019, Prisoner Legal Services filed a Motion for Reappointment of Legal Counsel. Attached to this Motion was an affidavit from Mr. Hinton in which he stated that he was initially unaware of his appointment in 2002. Mr. Hinton also stated he received copies of the trial transcripts in this case, but could not recall when or how he received them.

Ultimately, Mr. Hinton realized, at some point, he was appointed to represent Defendant on appeal in this matter, but "mistakenly allowed the time to lapse for preparing the appeal." On 21 May 2019, the Wake County Superior Court appointed the Appellate Defender to represent Defendant in this appeal. This Court entered Orders to deem Defendant's appellate filings in this case timely and to clarify that the appeal would proceed under the North Carolina Rules of Appellate Procedure in effect as of 1 January 2019.

Issue

The dispositive issue is whether the Record before us is sufficient for this Court to review Defendant's Speedy Appeal and Ineffective Assistance of Appellate Counsel claims on direct appellate review.

Analysis

We review alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). For speedy appeal claims, any "undue delay in processing an appeal *may* rise to the level of a due process violation." *State v. China*, 150 N.C. App. 469, 473, 564 S.E.2d 64, 68 (2002) (citation and quotation marks omitted).

In determining whether a defendant's constitutional due process rights have been violated by delays in processing the appeal, we consider the following factors: "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy appeal; and (4) any prejudice to defendant." *Id.* (citing *State v. Hammonds*, 141 N.C. App. 152, 158, 541 S.E.2d 166, 172 (2000)). No one factor is dispositive; the factors are related and are considered along with other relevant circumstances. *Id.*

Here, the nineteen-year delay in processing Defendant's appeal is more than "lengthy and sufficient" to warrant consideration of the remaining *China* factors. *Id.* at 474, 564 S.E.2d at 68 (six-year delay in "processing defendant's appeal is lengthy and sufficient to examine the remaining factors"). Also, as in *China*, Defendant contends the reason for the delay in his appeal was the ineffective assistance of his prior-appointed appellate counsel.

By his own admission, Mr. Hinton, Defendant's prior appellate counsel, became aware he was appointed as Defendant's appellate counsel, but he "mistakenly allowed the time to lapse for preparing the appeal." Despite the delivery, at some point, of transcripts of Defendant's trial, no further action was taken by appointed appellate counsel in the appeal for nineteen years. Indeed, the facts surrounding the length of the delay and reason why the appeal was so delayed appear relatively well-established on this Record. It is the remaining two factors—Defendant's assertion of his right to a speedy appeal and the resulting prejudice, if any, from the delay—that, in addition to any other relevant circumstances, require additional evidentiary development.

For instance, in *China*, we observed the defendant's six-year silence in asserting his right to appeal was "deafening" and, although not dispositive, weighed heavily against his due process claims. *Id.* at 474-75, 564 S.E.2d at 68. Here, Defendant did not inquire about his appeal for approximately eighteen years, which absent other facts, would weigh against his current assertion of a right to a speedy appeal. However, on appeal, Defendant argues his "mental illness, developmental disabilities, and neurological disorders" prevented him from asserting his right to a speedy appeal during this time period. The Record before us contains a Pretrial Competency Report outlining conflicting findings as to Defendant's mental illness, developmental disabilities, and neurological disorders. The Record contains no transcript of the Competency Hearing itself. Defendant points to a number of references in the Record to Defendant's mental illness including diagnosis of bipolar disorder, medications, and pretrial suicide attempts.

Defendant was, however, found competent to stand trial and assist in his defense at the time of the original trial. The Record, at this stage, is underdeveloped as to what, if any, impact Defendant's alleged mental illness, developmental disabilities, and/or neurological disorders had during the time his appeal was allowed to languish and on his ability to inquire as to the status of his appeal.

Likewise, Defendant contends he suffered prejudice resulting from the passage of time. For example, Defendant contends even though there are transcripts of the evidence presented at his trial there are no transcripts of jury selection, opening statements, closing arguments, the competency hearing, or the jury instructions. As such, Defendant argues appellate counsel cannot effectively identify, isolate, and brief issues for appeal, and further, that this constitutes the "most serious" form of prejudice.

Defendant's counsel included in the Record a number of emails with court reporters and record-keepers indicating there are likely no "notes, tapes, or discs" from the reporters regarding the unreported portions. Defendant also asserts "some individuals associated with the proceedings are unavailable for purposes of record reconstruction assistance." Defendant points out one of the reporters is deceased, and Defendant contends his trial counsel, Mr. Graham, joined the Attorney General's office and is "aligned with the party-opponent and thus has a conflict which prohibits him from engaging in the reconstruction process."

Again, however, Defendant's arguments would require us, in the first instance, to make factual determinations not only as to the veracity of his claims, but also whether and what prejudice resulted in his ability to reconstruct the Record or to identify potential issues on appeal that were lost because of the failure to reconstruct the Record in its entirety.

Defendant has not filed a Motion for Appropriate Relief in this Court pursuant to N.C. Gen. Stat. § 15A-1418, which might provide an avenue to simply remand the matter to the trial court for an initial determination. Instead, Defendant urges us to resolve these issues on direct appeal. This Court is generally not a fact-finding court, and we are unable to resolve these questions of fact on the Record before us. *See Johnston v. State*, 224 N.C. App. 282, 302, 735 S.E.2d 859, 873 (2012). Rather, this case is analogous to claims of ineffective assistance of counsel made on direct appeal.

For "ineffective assistance of counsel claims brought on direct review," we decide the claims "on the merits when the cold record reveals that no further investigation is required, i.e., claims that may

be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted). When we determine such ancillary procedures are needed, "we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881.

After an evidentiary hearing, "[a] trial court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (citation and quotation marks omitted) (modifications in the original). Consequently, we dismiss Defendant's direct appeal, without prejudice, to permit Defendant to pursue a Motion for Appropriate Relief on the issues of his speedy appeal and related ineffective assistance of counsel claims and to develop the facts in the trial court in an evidentiary hearing.

Conclusion

Accordingly, for the foregoing reasons, we dismiss Defendant's appeal without prejudice to pursue the claims asserted in this appeal through a Motion for Appropriate Relief in the trial court.

DISMISSED.

Judges TYSON and BROOK concur.

STATE OF NORTH CAROLINA
v.
UTARIS MANDRELL REID, DEFENDANT

No. COA19-205

Filed 20 October 2020

1. Criminal Law—post-conviction motions—newly discovered evidence—Beaver factors—not satisfied

The trial court abused its discretion by granting defendant, who had been convicted of first-degree murder more than twenty years earlier, a new trial on the grounds of newly discovered evidence pursuant to N.C.G.S. § 15A-1415(c). Defendant failed to satisfy the factors set forth in *State v. Beaver*, 291 N.C. 137 (1976), where the testimony of the witness who came forward was internally inconsistent and contrary to his sworn affidavit, trial counsel knew that the witness may have had information concerning the victim's death but failed to use available procedures to secure his testimony, and the testimony was inadmissible hearsay and not admissible under Evidence Rule 803(24) because defendant failed to file a proper notice of intent prior to the hearing on the motion for appropriate relief.

2. Criminal Law—post-conviction motions—newly discovered evidence—Beaver factors—due process rights

The trial court erred by concluding that the due process rights of defendant, who had been convicted of first-degree murder more than twenty years earlier, would be violated if he were not allowed to present "newly discovered evidence" at a new trial. The standard for granting a new trial for newly discovered evidence was set forth in *State v. Beaver*, 291 N.C. 137 (1976), and defendant failed to satisfy that standard.

Judge DIETZ concurring by separate opinion.

Appeal by the State from order entered 7 December 2018 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

North Carolina Prisoner Legal Services, Inc., by Lauren E. Miller, for the defendant.

BERGER, Judge.

On July 24, 1997, Utaris Mandrell Reid ("Defendant") was found guilty of first-degree murder and common law robbery. Defendant appealed his conviction and argued that the trial court erred when it denied his motion to suppress his confession to murdering and robbing John Graham. In an unpublished opinion filed on October 19, 1999, this Court upheld Defendant's conviction and determined that the trial court did not err when it denied Defendant's motion to suppress. *State v. Reid*, No. COA98-1392, 135 N.C. App. 385, 528 S.E.2d 75 (N.C. Ct. App. Oct. 19, 1999) (unpublished).

Defendant has since filed a series of post-conviction motions, including this motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415. On December 7, 2018, the trial court granted Defendant's motion for appropriate relief and vacated Defendant's conviction on the grounds of newly discovered evidence pursuant to N.C. Gen. Stat. § 15A-1415(c), and a violation of Defendant's due process rights.

The State appeals, arguing that the trial court (1) erred when it determined that Defendant's confession was a "purported confession;" (2) abused its discretion when it granted Defendant a new trial; and (3) erred when it determined that Defendant's due process rights would be violated if he were not allowed to present the new evidence at a new trial. We agree and reverse the decision of the trial court.

Factual and Procedural Background

On September 30, 1996, the trial court made the following relevant findings of fact related to Defendant's motion to suppress:

> 1. On October 21,1995, Mr. John Graham, a 69 year old black male, was operating a cab for Service Cab Company. At approximately 7:15 p.m. on the above date, Officer Baca of the Sanford Police Department received a call to Humber Street in reference to an assault. He found Mr. Graham lying on his back approximately 20 feet from his vehicle. Mr. Graham had facial injuries that were visible to Officer Baca. Mr. Graham told the officer that he had been assaulted by young black males who had ridden in his cab. Due to Mr. Graham's physical condition, the officers were not able to get very much information from him concerning the identity of the black males who had assaulted him.

2. On December 17, 1995, Mr. Graham died as a result of complications from the injuries he sustained during the assault on October 21, 1995. He was never physically able to assist in identifying his attackers.

3. Detective Jim Eads of the Sanford Police Department was assigned to investigate the October 21, 1995 attack on Mr. Graham. Detective Eads at that time had ten (10) years of experience as a detective with the Sanford Police Department. On December 20, 1995, Detective Eads went to the residence of the defendant's grandparents in order to speak with the defendant. Detective Eads spoke with the defendant's grandfather and told him he needed to speak with the defendant at the police department for 15 to 20 minutes. The defendant then accompanied Detective Eads to the police department.

4. Upon arrival at the police department, Detective Eads and the defendant went to one of the interrogation rooms in the detective division. At approximately 4:19 p.m., Detective Eads advised the defendant of his Miranda Rights using State's Exhibit 1. Detective Eads read each right of the Miranda Warning to the defendant. After reading each right to the defendant, Detective Eads told the defendant to place his initials by the right indicating he understood that right. The defendant initialed each right. Detective Eads then read the Waiver of Rights at the bottom of State's Exhibit 1 to the defendant and asked the defendant to sign at the bottom of the waiver if he understood the waiver and wanted to talk to Detective Eads. The defendant signed the Waiver of Rights.

5. During the rights warning, the defendant and Detective Eads were alone. Detective Eads had no problems communicating with the defendant. The defendant was very attentive during the process. He did not stutter.

6. After the rights advisement and waiver, Detective Eads told the defendant that he was investigating the assault on Mr. Graham. He also told the defendant that Mr. Graham had died. The defendant told Detective Eads "I am not going down for this by myself." The defendant then proceeded to tell Detective Eads about his involvement in the assault on Mr. Graham. This took the defendant about 15

minutes. During this time, Detective Eads did not write down any notes. The defendant did not stutter during this time.

7. After the defendant admitted to Detective Eads that he had been involved in the assault and robbery of Mr. Graham, Detective Eads contacted a detective assigned to juvenile matters, Harold Layton. Detective Eads' asked Detective Layton to come to the police department to assist in making arrangements for placing the defendant in secure custody.

8. After calling Detective Layton, Detective Eads went back to the defendant and spoke with him about putting his statement in writing. The defendant told Detective Eads he could not write very well; however, he agreed to allow Detective Eads to write the statement for him. Detective Eads wrote a statement based on what the defendant had told him. This statement is State's Exhibit 2.

9. After writing the statement, Detective Eads went back over it with the defendant. He placed the statement in front of the defendant and read it to the defendant word for word as it was written. The defendant initialed the beginning and ending of each paragraph as well as two corrections on the second page. Detective Eads asked the defendant to sign the bottom of each page if he agreed that the statement was true. The defendant then signed the bottom of each page of the statement. The statement was signed at 6:25 p.m. on December 20, 1995.

10. After signing the statement, the defendant was allowed to call his grandmother. She came to the police department and was told by the officers what had happened. She was given an opportunity to speak with the defendant. The defendant's mother also came to the police department and was told what happened. She also was given an opportunity to speak with the defendant.

11. The defendant is a black male with a date of birth of July 22, 1981. At the time of this incident, he lived primarily with his grandparents. He was and still is enrolled in the Lee County School System at Bragg Street Academy and received the grades set out on Defendant's Exhibits 1 and 2.

> 12. Prior to this hearing, the defendant was tested and examined by Dr. Stephen Hooper of the Clinical Center for the study of Development and Learning at the University of North Carolina at Chapel Hill. Dr. Hooper is an expert on child neuropsychology. According to Dr. Hooper, the defendant has an I.Q. of 66. The defendant tested as having writing comprehension at the 5.2 grade level and a listening comprehension of the 3.5 grade level. The defendant can read at about the fourth grade level and write at about the third grade level. The defendant also reported to Dr. Hooper that he had used marijuana on December 20, 1995, but did not tell Dr. Hooper how much he had used. Dr. Hooper testified that the Miranda Rights given to the defendant were at a 4.9 grade level. The Waiver of Rights paragraph was at an 8.4 grade level and the confession signed by the defendant was at a 5.6 grade level. However, Dr. Hooper stated these figures were variable depending on how the information was conveyed to the listener. Dr. Hooper also stated that some 33 words on the confession were not understood by him and not factored into the calculations on the grade level of the confession.

Detective Eads testified at trial and read Defendant's confession to the jury. Defendant's signed confession was as follows:

> We were on Goldsboro Avenue the night the cab driver got beat up. It was me, Elliott McCormick, who they call L.L., and Anthony Reid, who they call Pop, and Duriel Shaw, who they call Shaw Dog. Elliott McCormick called the cab company for a ride and had the cab meet us at the new apartments on Goldsboro Avenue that sit at the back fence to Oakwood Avenue apartments.
>
> While the cab was coming, we got to planning how we were going to rob whoever the driver was. Duriel Shaw and Elliott McCormick were planning it out. Duriel was to snatch the money and Elliott was going to punch him. The older man who use to sell ice cream to us was the driver when the cab pulled up. All of us got in the back seat of the cab. Me, Duriel Shaw, Anthony, and Elliott McCormick. We were going to Kendale. Elliott McCormick and Duriel Shaw were going to stay together that night and Anthony Reid and I were going to stay together. Anthony is my double first cousin. Elliott is related to me also. Elliott McCormick is related to me through my father.

We directed the driver to the Kendale area on Humber Street by Hallman Foundry. We had him stop because we were going to rob him at that time. The meter read about $4 and none of us had any money. The driver, who we call Dad because he was so old, always drove real slow which took more time on the meter and increased the price. We had him stop in the roadway at the foundry and were going to rob him in the car. Me and Duriel Shaw tried to do so first in the car. We reached over the front where he sat and I tried to grab under his leg where he kept some money and Duriel Shaw was grabbing in his shirt.

The old cab driver got to grabbing our arms and moving around, so we stopped and we all jumped out of the cab and started returning. We all ran to the back of O'Connell's Supermarket and stopped. And Anthony Reid . . . said, '[expletive deleted] that, we're about ready to go back and rob him.'

We walked back to the cab. The cab driver was still in the car and sitting in the road on Humber Street and talking on his microphone. As we approached him, he jumped out of the cab, started cussing, saying, 'I'm going to kill all you all . . . [expletive deleted],' and still walking towards us. We began beating him and found some wood sticks nearby and used them to hit him with also. The cab driver fell to the ground on the pavement on the roadway. Duriel Shaw, Anthony Reid, Elliott McCormick, and I began going through his pockets. I found $5 in one dollar bills in his left front shirt pocket and I took it. I don't know if the rest of them got any money or not, but they were going through his pockets. We decided also, when we walked back to the cab driver as he sat in the road, to take his car, but we didn't. We just left it in the road. Elliott McCormick, Duriel Shaw, and Anthony Reid, and I all ran away together to Windham's Electronics and over to Crown Cable, and then ran behind Kerr Drugs and split up afterwards. Duriel and Elliott went to Elliott McCormick's house, and me and Anthony went to my house. We did not go back over toward Dalrymple and Humber Street.

I don't recollect anyone taking anything from the car, at least I know I didn't. The next day we all got together on Shawnee Circle at the back fence and talked about it.

> We talked about how we could have killed him and how we could have taken the cab. We all promised not to talk about it. I tried to call Central Carolina Hospital after we beat him, but I didn't know his name. I think he use to go to New Zion Baptist Church with us. I also think he was a friend of one of my mom's friends. My grandmother had even told me she knew his wife. I never said anything to anyone about it until tonight.
>
> I really would like to apologize for what I've done and especially to an old man like him. I was never ever like this until I got to hanging around with these other boys and drinking and smoking marijuana. I usually drank beer and not liquor. I had been drinking beer that night and had drank a 22 ounce IceHouse Beer. The rest of us – the rest had been drinking gin, Canadian Mist, white liquor and beer. We were getting the beer and liquor from an Ann Budes who stays nearby where we were staying – were standing around at the new apartments on Goldsboro Avenue. We all had also been smoking marijuana in blunts by inserting marijuana in the cigar so the cigar would cover the smell.
>
> I'm truly sorry for what I've done and I tried to turn a bad thing around that I have done by being truthful and cooperative concerning this incident. I swear that all I've told Detective J.M. Eads of the Sanford Police Department is the truth, and it was Duriel Shaw, Elliott McCormick, and Anthony Reid and myself who beat the cab driver and that we also used sticks to do this because we intended to rob him and did rob him after we beat him. I have further allowed Detective Eads of the Sanford Police Department to write this statement for me in order that I may accurately reflect what happened that night and, again, how truly sorry I am for what I've done.

On July 24, 1997, a Lee County jury found Defendant guilty of first-degree murder and common law robbery. Defendant appealed, alleging the trial court erred when it denied his motion to suppress his confession.

In an unpublished opinion filed on October 19, 1999, this Court upheld Defendant's conviction and determined that the trial court did not err when it denied Defendant's motion to suppress. In so holding, we considered information in the record that Defendant was a slow learner,

had an overall IQ of 66, read on a third-grade level, and other circumstances surrounding his confession. We noted that

> [w]hile a defendant's subnormal mental capacity is a factor to be considered in determining whether the defendant's waiver of rights is intelligent, knowing and voluntary, such lack of intelligence, standing alone, is insufficient to render a statement involuntary if the circumstances otherwise indicate that the statement is voluntarily and intelligently made. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983). Likewise, a defendant's young age is a factor to be considered, but his youth will not preclude a finding of voluntariness in the absence of mistreatment or coercion by the police. *Id.*
>
> Despite the evidence cited by defendant of his below average intelligence, comprehension, and verbal abilities, there is substantial evidence in the record to support the trial court's determination. Detective Eads testified that he asked defendant whether he understood each right and whether he had any questions. Defendant responded that he understood and that he did not have any questions. Detective Eads further testified that he did not have any difficulty communicating with defendant, and that he did not have to repeat himself to make himself understood by defendant, who was very attentive. He also testified that defendant did not stutter during the interview.
>
> None of the witnesses presented by defendant were present in the interrogation room to observe defendant and to determine whether he actually understood his rights at the time. There is nothing in the record to indicate that Detective Eads or any police officer coerced defendant into giving a statement. To the contrary, Detective Eads' testimony indicates that defendant voluntarily gave the statement to not "go down for this alone."
>
> Because there is ample evidence to support the court's findings of fact, those findings are binding. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). We also find that the court's findings of fact support its conclusions of law and its order denying the motion to suppress.

State v. Reid, No. COA98-1392, at *4-6 (N.C. Ct. App. Oct. 19, 1999) (unpublished).

Defendant subsequently filed post-conviction motions, including this motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415(c). Specific to this motion, Defendant alleged that William McCormick ("McCormick") had provided newly discovered evidence in an affidavit dated June 14, 2011. McCormick's affidavit contained the following assertions:

> 3. In 1995, I was sixteen years old, and I lived with my mother and brother Elliott McCormick at 417 Judd St. in Sanford, NC.
>
> 4. At the time, my mother worked the night shift and was also a minister.
>
> 5. Utaris Reid often visited my home and spent time with my brother and me.
>
> 6. Utaris Reid was younger than me, and he lived about four houses away on Shawnee Circle.
>
> 7. Utaris came to our house often because his mother and her boyfriend were drug-addicts, and he often had to provide for himself.
>
> 8. Utaris would visit with his grandmother who lived out in the country. She cared for Utaris and bought him clothes and necessities.
>
> 9. Utaris was in special education classes in school, and he was slow.
>
> 10. My brother Elliott and I would often use taxi cabs to go to and from our home at night.
>
> 11. I knew cab driver John Graham by the nickname "Pop."
>
> 12. On the night that Mr. Graham was assaulted, I remember staying at home.
>
> 13. My mother, a minister, anointed my head and my brother Elliott's head with oil, and she was moving about the house speaking in tongues. She said that she had a feeling that something bad was going to happen that night, *so she stayed home from work*. She made my brother and I stay home even though we wanted to go out.
>
> 14. At the time, my brother Elliott and I were involved in selling crack cocaine on the street near the Goldsboro apartments.

15. Since we were not allowed to leave the house that night, our friends came to the house to get drugs.

16. Robert Shaw, Norman Cox, and T. Bristow *came to the house, and they were sweating and out of breath. I learned from Shaw that they had left a cab without paying the fare and ran to the house.*

17. *My mother made my friends leave the house that night, and they did.*

18. The next day, I had a conversation with Robert Shaw. *He told me that when he, Norman Cox, and T. Bristow left my house, they got a cab to take them across town.* John Graham, or "Pop," was the cab driver.

19. Shaw told me that he told Pop that they did not have enough money to pay the fare. Pop stopped the cab near the foundry and told the boys to get out. Shaw was in the front passenger seat, and Cox and Bristow were in the back seat. Cox and Bristow got out of the cab. As Shaw was getting out of the cab, Shaw grabbed Pop's money bag. Pop grabbed Shaw's gold necklace, broke it, and pulled it off Shaw. Shaw began to punch and hit Pop, trying to get his necklace back. Cox and Bristow joined Shaw beating, kicking, and stomping Pop. Shaw got his necklace away from Pop and the three boys ran. There was only $5 in the money bag.

20. After Pop died, the police came to my house because they were looking for teenage boys who used cabs with Judd Street destinations.

21. The police picked up my brother Elliott and Utaris Reid and took them to the police station.

22. My brother Elliott told me that he was placed in an individual room. He said that the police were yelling and throwing chairs around in the room trying to get him to confess to murder. They asked him to sign a paper, but Elliot[t] refused to sign.

23. Elliot[t] has since passed away.

24. I was not interviewed by the police or any attorneys involved in Utaris Reid's case.

> 25. After Utaris Reid was convicted and sentenced, I felt bad because I knew that he did not commit the murder.
>
> 26. I went to the Sanford Police Department and spoke to Detective Freeman Worthy. I told Detective Worthy that Utaris Reid did not commit the crime he was convicted of. I told him that Shaw, Cox, and Bristow committed the crime.
>
> 27. In 2005, I saw Detective Worthy at the Piggly Wiggly supermarket. I told him again that they convicted the wrong man, and I told him that Shaw, Cox, and Bristow committed the crime.

(Emphasis added).

At the hearing on the motion for appropriate relief, McCormick testified over the State's objection that Defendant was "slow." McCormick also testified that he and Defendant were friends when they were younger and "smoked weed together."

McCormick testified, contrary to his affidavit, that on the night John Graham was murdered, "[m]y mom worked the graveyard, and this particular night, my mom was working graveyard." According to McCormick, the graveyard shift was from 11:00 p.m. to 7:00 a.m. McCormick and his brother, Elliott, had planned to go across town that night to sell drugs, but their mother made them stay home. According to McCormick, he and Elliott invited Robert Shaw ("Shaw"), Antonio Bristow ("Bristow"), and Norman Cox ("Cox") over to their mother's house. McCormick then testified to the subsequent series of events:

> When they finally got there and the doorbell rang, my mom was like, who is at the door? She said, I told y'all, y'all not-going nowhere tonight. We went to the door. [ ] Shaw, [ ] Bristow, [ ] Cox, and you know, they was – you know, we looked outside. The cab wasn't there, but they was there, and then they was sweating and, you know, out of breath, running from wherever they came from[.]
>
> . . .
>
> [Shaw] told us that they had just jumped out of the cab. They jumped out of the cab because they didn't have no money, so they jumped out of the cab.

According to McCormick, Shaw, Bristow, and Cox were at his mother's house for no more than 10 minutes before his mother ran them off.

When asked if Shaw told him anything else the night Graham was murdered, McCormick replied

> That night? *Not that night. It was already wee hours of the morning. It was already late night anyway*, so, but they, you know, because my mama ran us off, the next day they told me what – they told my brother and I what they had done. They assaulted Mr. Johnny Graham.

(Emphasis added).

McCormick testified that Shaw told him that he, Norman, Bristow and Cox killed Graham before they arrived at the McCormick house. Specifically, according to McCormick, Shaw told him that:

> Well, he told how he called a cab in the middle – well, when he called the cab, he told them where he was coming, you know, to [Judd] Street, you know, which is our address, and said when they got by around the Hallman Foundry, they just told him, they said, Pop, you know, we only got five dollars. He was like, that's all y'all got? And Pop, you had to know him. Pop, he is an old guy. Cab driver. He talked junk, you know. We talked junk to him. You know. And he said – he told, said, Pop, we only got five dollars. He said, look, y'all get y'all book, and he used profane language, told them to get out of his cab, you know, if that's all you got, you know. And [Shaw] was sitting in the front seat. [Shaw] told me once he went to jump out the cab, he grabbed the money bag. And Mr. Pop had a money bag. He grabbed the money bag. Pop still had his seatbelt on. He reached and grabbed [ ] Shaw by the back of the shirt, and when he grabbed the back of his shirt, he grabbed his necklace. And when [ ] Shaw jumped out of the car, he kept his necklace in his hand. So [ ] Shaw wanted to get his necklace back, so [ ] Shaw told me Pop was trying to call in dispatch with the CB thing they had in the car at the time. That's when they commenced to beating on him, trying to get his necklace back. And they beat the man, and they told me they beat him and they stomped him, but at the time, they didn't know they did, you know.
>
> . . .
>
> Once they beat him and stomped him, and [ ] Shaw's necklace was broke, and Mr. Johnny still had it in his own

> hand. They had to end up prying it out of his hand to get the necklace out. You know. He held on tight to it. And they ran to our house as soon as they did. That's why, when they came to the door, they was sweating and out of breath.

Elliott was arrested along with Defendant for Graham's murder and spent 19 months in custody awaiting trial before the charges against him were dismissed. According to McCormick, he did not inform law enforcement about Shaw's purported confession because he lived by a street code, and Elliott told him not to say anything because the police had no evidence.

McCormick was also permitted to testify, over the State's objection, about alleged police interrogation "tactics," and that Defendant did not read his confession before he signed it. There was no evidence provided that McCormick was in the interrogation room when Defendant confessed. However, McCormick did testify that he was in court during Defendant's trial. After Defendant was convicted, but sometime "before 2005," McCormick purportedly told a detective that Defendant did not kill Graham.

On December 7, 2018, the trial court granted Defendant's motion for appropriate relief and vacated Defendant's conviction on the grounds of newly discovered evidence pursuant to N.C. Gen. Stat. § 15A-1415(c), and a violation of Defendant's due process rights. The trial court made the following relevant findings of fact:

> 1. . . . The principal State's evidence against Defendant was a statement taken from Defendant by the lead detective. Defendant was 14 years old and had a combined IQ of 66 when he signed the statement. No eyewitnesses testified against Defendant at trial. . . .
>
> 2. At trial, Defendant challenged the credibility of the written statement and offered an alibi defense. Trial counsel hired an investigator for the specific purpose of interviewing the McCormick brothers, William and Elliott, potential witnesses in the case, but was unable to interview them by the time of Defendant's trial. In 2011, Defendant's MAR investigator located William McCormick, and he was interviewed by the defense for the first time. Mr. McCormick testified at the MAR hearing that another teenager confessed to the assault and robbery the day after it occurred. The teenager was with

two others, who were not Defendant. Trial counsel would have offered this evidence if it was available at the time of Defendant's trial because it would exculpate Defendant and bolster his alibi defense.

. . .

7. Defendant filed a motion to suppress his written statement, and a hearing was held during the August 29, 1996 session of Lee County Criminal Superior Court before the Honorable Wiley F. Bowen. Judge Bowen denied the motion to suppress. On appeal, the denial of the motion to suppress was upheld. For purposes of the MAR, the Defendant's statement has been treated as properly admitted into evidence, with its weight and credibility for the jury.

8. The case was heard for trial at the October 1, 1996 session of Lee County Criminal Superior Court before Judge Bowen. A mistrial was declared because of a hung jury.

9. The case came on for trial again at the July 21, 1997 session of Lee County Criminal Superior Court before the Honorable Henry E. Frye.

10. On July 24, 1997, the jury found the defendant guilty of first degree murder based on the felony murder rule during the commission of a common law robbery.

11. Defendant was sentenced to a mandatory punishment of life imprisonment without parole. The court arrested judgment on the conviction for common law robbery.

. . .

14. The victim in the case, John Graham, worked as a cab driver on the date of offense, October 21, 1995. During his shift, he radioed for help. Other cab drivers and paramedics responded to his location within minutes, around 7:19 p.m.

15. Officers responded to the scene of the assault. The victim's cab was not secured, the police did not collect any physical evidence, and there were no eyewitnesses. There were no fingerprints, blood evidence, or any weapon.

16. The victim was unable to respond to paramedics except for opening his eyes in response to his name. He

suffered an apparent head injury from an assault or fall. His visible injuries were mostly minor puncture wounds, lacerations and abrasions around his left eye. Medical examination revealed a 3 centimeter by 3 centimeter hemorrhage to the right side of the victim's brain which, according to medical testimony at trial, could have been caused by Mr. Graham falling and hitting his head.

17. The victim was interviewed in the emergency room by police. The lead detective, James Eads of the Sanford Police Department, testified that the victim told police that two black males age 16 to 19 years old were responsible for the assault. During cross-examination at the first trial, Detective Eads testified that the victim gave the information to police and he recorded the information in his report. He also testified at the first trial that the victim told police that he had picked up the two black males before and that they had not taken anything from him on the night of the assault.

18. At the second trial, Eads changed his testimony and testified that the victim was unable to communicate verbally with him at all in the emergency room. Eads was cross-examined by Attorney Webb with his testimony from the first trial.

. . .

21. On December 20, 1995, James Eads, the same detective who interviewed the victim, went to Defendant's grandfather's house and picked up Defendant at about 4:15 p.m. to take him to the police station to interview him. The detective told Defendant's grandfather that he would bring him back in 15-20 minutes. Defendant's grandfather was elderly and the detective could not tell whether the grandfather was drinking.

22. Defendant was 14 years old and did not have a parent or guardian present when he was interviewed.

23. The Sanford Police Department had two juvenile detectives on their staff at the time. They would have left the police station at 4:00 p.m. when their shifts ended. Detective Eads did not use a juvenile detective when he interviewed Defendant. Detective Eads shift started at

8:00 a.m., but he waited until after the juvenile detectives left to pick up Defendant and interview him.

24. Juvenile detectives were available for the interview as they were on call twenty-four hours.

25. Detective Eads conducted the interview with Defendant in an interview room that was approximately 8 feet by 10 feet with a table and chairs and no windows.

26. Detective Eads did not record the interview with Defendant. He said that he was not certified in the operation of any tape recording equipment so he could not use it.

27. Detective Eads testified that Defendant talked or "rambled" uninterrupted for thirty minutes without having to be prompted with questions to continue talking.

28. Detective Eads wrote the statement that Defendant signed. The detective acknowledged that some of his own writing was difficult to read and he read the statement back to Defendant.

29. Detective Eads testified that he would have treated Defendant differently if he knew he had trouble comprehending, but he treated him as an ordinary 14-year-old.

30. Attorney Webb hired Dr. Steven Hooper, a child and adolescent neuropsychologist at the Child Development Institute at the University of North Carolina at Chapel Hill, as an expert witness. Dr. Hooper determined that Defendant had a full scale IQ of 66, which was in the first or second percentile for 14-year-olds. Dr. Hooper testified that the test was reliable and Defendant was trying hard.

31. Defendant's overall functioning was at a fourth-grade level. His writing was at a mid-third grade level and Defendant had disproportionately low deficits in visual attention and expressive language.

32. Dr. Hooper did a readability analysis to determine the grade level of the *Miranda* warnings given to Defendant and the waiver of rights form. The *Miranda* warnings were at a fifth grade level and the waiver of rights form was at a mid-eighth grade level.

33. Dr. Hooper conservatively estimated the written statement was at a mid-fifth grade level. There were thirty-three words he could not read so he did not include those. Had they been included, the grade level would likely have been higher.

34. Dr. Hooper opined that it was highly unlikely Defendant understood the *Miranda* rights or the waiver of rights form. He also opined that he did not think Defendant understood the written statement. Defendant's listening comprehension was his lowest area, at a mid-third grade level and his overall reading, decoding, and sight words were a 5.2 grade level.

35. According to the written statement, signed by Defendant, there were four young males involved in the victim's assault: Duriel Shaw, Anthony Reid, Elliott McCormick, and Defendant. This was a significant difference from the information alleged to have been provided by the victim in the emergency room immediately following the assault, in which he was said to have informed police he was attacked by two black males, 16-19 years old. According to the alleged statement of Defendant, the youths were riding in a cab driven by the victim and tried to reach into his shirt pocket and under his leg for money. When the victim resisted, the youths began to run away, but then returned. The victim got out of his car and walked towards the youths, saying that he would "kill you". Some of the youths then hit the victim, using wood sticks they picked up nearby. The victim fell on the pavement, where money was taken from his pocket.

. . .

37. John Love, a co-worker and good friend of the victim, testified at the second trial, but did not testify at the first trial. Love heard the victim call for help over the radio and went to the scene. He testified that he asked the victim who did this and the victim replied with three words or names, L.L., McCormick, and Reid. Love did not remember the order in which the victim said the names. However, Love did not provide this information to [ ] Detective Eads when he met with him shortly after the incident. Love said he did not "put together what he was talking about until

later." Love did not know whether the victim was just mumbling. Love did not claim the victim specified who "Reid" was, whether the Defendant or Anthony Reid.

. . .

48. At the evidentiary hearings, Defendant produced evidence through the testimony of William McCormick ("Mr. McCormick") and Attorney Fred Webb, additional documentary exhibits, and the transcripts of both trials and the hearing on Defendant's motion to suppress. The Court listened to the testimony and observed the demeanor of these witnesses, and finds that each gave credible and truthful testimony on every issue that was material to the findings of fact and conclusions of law which are necessary to reach a ruling on the issues raised in the instant matter. William McCormick was emotional during his testimony. His demeanor gave convincing force to his testimony.

49. Mr. McCormick was located by Defendant's investigator in 2011. He swore to an affidavit that was submitted as an exhibit to the MAR.

. . .

55. On the night that the victim was assaulted, Mr. McCormick and his brother, Elliott, were not allowed to leave their house on Judd Street. William McCormick expected three other juveniles, Robert Shaw, Antonio "T" Bristow, and Norman Cox to come to the McCormick house that night by cab. *Robert Shaw, T Bristow and Norman Cox showed up on the doorstep but there was no cab outside. Defendant was not with them and was never mentioned at any time. Shaw, Bristow and Cox were sweating and out of breath from running. Robert Shaw said they jumped out of the cab because they did not have any money. The evidence indicated Shaw had jumped out of the cab only a short time before this statement. Mr. McCormick's mother made Shaw, Bristow, and Cox leave.*

56. The next day, Robert Shaw told Mr. McCormick that he, Antonio Bristow, and Norman Cox assaulted the victim John Graham. Shaw said that he took the victim's money bag and when he tried to jump out of the cab the victim

grabbed Shaw's necklace, which broke. Shaw explained that they beat the victim to get the necklace back. Shaw did not say that Defendant was involved. Robert Shaw, T Bristow, and Norman Cox were not the juveniles named in the written statement introduced at Defendant's trial. *Shaw told William McCormick that Shaw, Bristow and Cox ran to McCormick's house "as soon as they did" the robbery.* The victim was in fact assaulted near the Hallman Foundry, located no more than a mile from William McCormick's house.

. . .

58. When he was 16 years old, Mr. McCormick sold drugs and lived a different life than when he testified before this Court. When he was a teenager, he did not get along with police and did not talk to the police because he followed a "street code." Before Defendant's trial, Mr. McCormick did not tell police the information that he testified to at the MAR hearing. He explained that the street code meant not to talk to police or help them do their job. Mr. McCormick explained that he no longer followed a street code and he decided to turn his life around after his brother was murdered in 2000.

59. This Court finds Mr. McCormick's testimony to be credible. The court finds that McCormick in fact has no motive to testify for Defendant other than to disclose the true facts known to him.

60. Attorney Webb represented Defendant at both trials and the direct appeal of his case. Attorney Webb had a degree and training in special education and was experienced working with adolescents. Defendant was 14 years old when Attorney Webb was appointed to his case and 16 years old when he was convicted. Attorney Webb recognized that Defendant was slow and had difficulty communicating.

61. Attorney Webb filed a motion to suppress the written statement and retained Dr. Steven Hooper. Following a hearing, the motion to suppress was denied.

62. Attorney Webb challenged the credibility of the police investigation and the written statement and raised an alibi defense at trial.

63. Before trial, Attorney Webb spoke to contacts "in the street" who had provided information that led him to believe Defendant was not involved in the crime. The names of the McCormick brothers, William and Elliott, came up as witnesses who had information that could be helpful to the defense. Attorney Webb moved for and secured funds to retain Investigator Mel Palmer for the specific purpose of locating and interviewing William McCormick. In the motions and orders for investigator funding, Attorney Webb specified that he was trying to locate William McCormick.

64. Investigator Palmer attempted to interview William McCormick, but was unable to locate him. Investigator Palmer made attempts to serve William McCormick with a subpoena but was unable to do so. McCormick's mother interfered with the investigator's efforts to locate William and would not allow him to be interviewed.

65. Attorney Webb was contacted by Defendant's counsel during the post-conviction investigation of Defendant's case. Attorney Webb reviewed the affidavit of William McCormick. Had Attorney Webb been able to locate and interview William McCormick at the time of trial, Attorney Webb would have called him to testify to the information contained in the affidavit.

66. Attorney Webb would have presented William McCormick's testimony because he found that it would have exculpated Defendant and bolstered Defendant's alibi defense.

67. William McCormick's testimony was evidence that went to Defendant's guilt or innocence, since it provided the identity of the actual perpetrators and tended to exonerate Defendant.

(Emphasis added).

The trial court then made the following relevant conclusions of law:

2. Defendant properly raised his newly discovered evidence claim pursuant to N.C. Gen. Stat. § 15A-1415(c).

3. Defendant Reid met his burden of proving the necessary facts by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1420(c)(5).

4. William McCormick's testimony is newly discovered evidence as defined by law. The details of his testimony were unknown to Defendant at the time of trial, and William McCormick was unavailable to Defendant at that time. Defendant could not have discovered or made available the new evidence from McCormick with due diligence. The new evidence has a direct and material bearing upon the Defendant's guilt or innocence. Defendant's motion was filed within a reasonable time of the discovery of the new evidence.

5. *The newly discovered evidence is probably true.*

6. *The newly discovered evidence is competent, material and relevant. It identifies the actual perpetrators of the offense and exculpates the Defendant.*

7. Evidence of William McCormick's personal observations of Robert Shaw, Antonio "T" Bristow and Norman Cox on the night of the offense, including that these three individuals were together, were sweating and out of breath, that neither a cab nor the Defendant were present, are admissible at trial.

8. Testimony from William McCormick regarding statements made by Robert Shaw that he, Bristow and Cox jumped out of a cab and ran because they did not have any money are *admissible as an excited utterance under North Carolina Rule of Evidence 803(2). Shaw was under the stress of a startling or unusual event at the time this statement was made, sufficient to suspend reflective thought, and causing a spontaneous reaction not resulting from fabrication.*

9. After careful scrutiny, the court concludes that the testimony of William McCormick about Robert Shaw's statement regarding the details of Shaw, Bristow and Cox assaulting the victim is admissible evidence under Rule 803(24). *First, the State is on notice that Defendant would offer such evidence at trial. Second, this hearsay evidence is not specifically covered by any other exception in Rule 803. Third, the evidence possesses circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions because it constitutes an admission of criminal conduct by Shaw, is consistent with events*

actually observed by William McCormick the day before, when Shaw and the other youths arrived at McCormick's house out of breath having jumped and run from a cab, and is consistent with known circumstances of the case, including that the victim was assaulted by more than one young male person. Fourth, the evidence is material to the case. Fifth, the evidence is more probative on the issue of whether Shaw, Bristow and Cox, rather than Defendant, were the actual perpetrators of these crimes than any other evidence procurable by reasonable efforts. Defendant cannot reasonably be expected to procure the in-court confession of Shaw that Shaw himself is guilty of robbery and first degree murder. Sixth, admission of the evidence of Shaw's statements will best serve the purposes of the Rules of Evidence and the interests of justice. State v. Smith, 315 N.C. 76 (1985).

10. In addition to those circumstantial guarantees of truthfulness set forth above, Shaw's statements regarding the murder of the victim have the following circumstantial guarantees of truthfulness: (1) Shaw had personal knowledge of the events described; (2) Shaw had a strong motivation to confide the truth to his friend William McCormick and no reason to claim false responsibility for such serious acts which could expose him to criminal liability; and (3) there is no evidence that Shaw ever recanted his statement.

11. The evidence before the court does not support conclusions as to the availability or unavailability of the declarant Shaw for trial. Given the passage of more than twenty years in silence, Shaw's cooperation and availability for trial may well be doubted, but his unavailability cannot be assumed. If Shaw is unavailable, his statements to McCormick would be admissible in any case as statements against penal interest under Rule 804(b). However, taking Shaw's unavailability not to have been established, as the court must do given the Record before it, his statements to McCormick are still admissible under Rule 803(24) for the reasons set forth above.

12. Given the emotional impact and persuasive effect of William McCormick's testimony and the circumstantial indications of the truthfulness of Shaw's statements,

> it would be a manifest injustice to deny Defendant the opportunity to introduce McCormick's evidence regarding the statements of Robert Shaw that it was Shaw, Antonio Bristow and Norman Cox who killed the victim in this case. Admission of Shaw's statements under Rule 803(24) will best serve the interests of justice. It is consistent with the general purposes of the Rules of Evidence.
>
> 13. Defendant used due diligence and proper means to procure the testimony of William McCormick at Defendant's original trial.
>
> 14. The newly discovered evidence is not merely cumulative.
>
> 15. The newly discovered evidence does not tend only to contradict, impeach or discredit a former witness.
>
> 16. The newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. This was an extremely close case, tried once to a hung jury, *finally resulting in a conviction based largely on the purported confession* of the fourteen year old, mentally disabled Defendant. No physical evidence connected Defendant to the case, and alibi evidence was offered. The addition of credible testimony from William McCormick will probably result in a different outcome than that reached in the original trial.
>
> 17. The testimony of William McCormick points directly to the guilt of specific persons and is inconsistent with Defendant's guilt.
>
> 18. In addition, as an independent grounds for decision, denying Defendant the opportunity to present all of the newly discovered evidence to a trier of fact would, under the circumstances of this case, violate Defendant's federal and state constitutional rights to due process of law.

(Emphasis added).

Based upon these findings of fact and conclusions of law, the trial court vacated Defendant's conviction and ordered a new trial.

The State appeals, arguing that the trial court (1) erred when it determined that Defendant's confession was a "purported confession;" (2)

abused its discretion when it granted Defendant a new trial; and (3) erred when it determined that Defendant's due process rights would be violated if he were not allowed to present the new evidence at a new trial. At oral arguments before this Court, Defendant's attorney stated that Defendant was innocent of the crimes charged, but acknowledged that Defendant had not filed an affidavit of innocence in this or any other court.

We reverse the decision of the trial court.

Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted).

"Findings of fact made by the trial court pursuant to hearings on motions for appropriate relief are binding on appeal if they are supported by competent evidence." *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999) (citation and quotation marks omitted). A "trial court's conclusions [of law] are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and quotation marks omitted).

A trial court's findings of fact "may be disturbed only upon a showing of manifest abuse of discretion." *Id.* at 142, 628 S.E.2d at 35 (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (citation and quotations omitted).

Analysis

On appeal, the State argues that the trial court (1) erred when it determined that Defendant's confession was a "purported confession;" (2) abused its discretion when it granted Defendant a new trial; and (3) erred when it determined that Defendant's due process rights would be violated if he were not allowed to present the new evidence at a new trial. We agree.

A defendant may file a motion for appropriate relief at any time following a verdict on

> the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which

> could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c) (2019). The defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2019).

I. Determination that Defendant's Confession was a "Purported Confession"

The State first argues the trial court erred when it determined that Defendant's confession to the murder of Graham was a "purported confession." Specifically, the State argues that the trial court abused its discretion because the trial court was bound by this Court's prior decision regarding the validity of Defendant's confession. However, because we reverse the trial court for the reasons stated below, we decline to address this argument.

II. Newly Discovered Evidence

[1] The State next contends that the trial court abused its discretion when it granted Defendant a new trial. Specifically, the States argues that Defendant failed to prove the purported newly discovered evidence by a preponderance of the evidence. We agree.

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976). It is *the defendant's burden* to "prov[e] by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5).

> [A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear

> case, lest the courts should thereby encourage negligence or minister to the litigious passions of men. The defendant has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial. Under the rule as codified, the defendant has the burden of proving that the new evidence could not with due diligence have been discovered or made available at the time of trial.

State v. Rhodes, 366 N.C. 532, 536-37, 743 S.E.2d 37, 40 (2013) (*purgandum*). We address the pertinent factors below.

A. Probably True

The trial court determined in conclusion of law 5 that the purported "newly discovered evidence was probably true" and that McCormick was a credible witness. While "[t]he trial court is in the best position to judge the credibility of a witness," *State v. Garner*, 136 N.C. App. 1, 14, 523 S.E.2d 689, 698 (1999), McCormick's testimony was internally inconsistent and contrary to his sworn affidavit. Although the trial court found McCormick's testimony credible, it is so contrary to the information contained in his affidavit that we cannot conclude that the information is probably true.

McCormick's sworn affidavit, which was admitted into evidence at the MAR hearing, contradicted his testimony at the hearing. McCormick's affidavit states that Shaw, Cox, and Bristow came to McCormick's house sweating and out of breath because they fled from a cab without paying the fare. Just two paragraphs later, McCormick's affidavit states that Shaw told McCormick they robbed and murdered Graham after they left McCormick's home that night.

At the hearing, McCormick testified that when Shaw, Cox, and Bristow arrived at his home, they were sweating and out of breath from "running from wherever they came from." Shaw, Cox, and Bristow allegedly ran from the murder scene "to [the McCormick's] house as soon as they did [the murder]." In addition, McCormick stated that Shaw told him they had jumped from the cab without paying the fare. But no explanation was provided concerning why Shaw, Cox, and Bristow did not pay Graham when Elliott had agreed to pay the fare.

Moreover, McCormick testified that his mother "was working graveyard [shift]" from 11:00 p.m. until 7:00 a.m., and that he remembered telling her to go to work that night because they were waiting for her to leave to then sell drugs. However, his affidavit indicates that his mother "stayed home from work" that evening.

When asked how long Shaw, Cox, and Bristow stayed at his house that night, McCormick responded, "[m]aybe five, ten minutes. My momma ran them off." McCormick then testified that Shaw did not tell him anything about Graham's murder that night because "[i]t was already the wee hours of the morning." However, finding of fact number 13 states that paramedics responded to the scene of Graham's murder at 7:19 p.m. According to McCormick's testimony, Shaw, Cox, and Bristow fled from Graham's cab to his home. The three were then at McCormick's home for at most ten minutes before his mother ran them off in "the wee hours of the morning." However, if McCormick's mother was working the graveyard shift as he testified, she could not have been home in "the wee hours of the morning" to run Shaw, Cox, and Bristow off. Accordingly, not only is McCormick's testimony probably not true, but it is entirely impossible to reconcile the discrepancies in the information provided by McCormick.

In light of McCormick's conflicting affidavit and inconsistent testimony, Defendant failed to demonstrate by a preponderance of the evidence that the information provided by McCormick is probably true.

B. Evidence in Existence at the Time of Trial and Due Diligence

"Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial." *State v. Nickerson*, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987). "Pursuant to N.C.G.S. § 15A–1415[(c)], newly discovered evidence must be unknown or unavailable to the defendant at the time of trial in order to justify relief." *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993) (citation and quotation marks omitted). Thus, where "the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c)." *Rhodes*, 366 N.C. at 537, 743 S.E.2d at 40.

The trial court found that prior to the original trial, "Attorney Webb spoke to contacts 'in the street' who had provided information that led him to believe Defendant was not involved in the crime." Knowing this, Webb hired Investigator Palmer to speak with McCormick, however, McCormick never spoke with Investigator Palmer. The trial court stated in finding of fact 64 that "Investigator Palmer attempted to interview William McCormick but was unable to locate him." In finding of fact 65, the trial court found that "[h]ad Attorney Webb been able to locate and interview William McCormick at the time of trial, Webb would have called him to testify to the information contained in the affidavit."[1]

1. The trial court based its conclusion that the information from McCormick was newly discovered evidence, in part, on a finding that "the details of [McCormick's] testimony

Webb testified that he had made "contact through some of the people that [he] knew in the street who brought up the names of other guys that they thought had [assaulted Graham] . . . the McCormicks names popped up in those conversations." Despite having this information, Webb failed to utilize available procedures to secure McCormick's statement or testimony. Specifically, Webb did not (1) issue a subpoena, (2) request a material witness order, (3) request a recess, (4) make a motion to continue, (5) alert the trial court to the existence of this information, or (6) otherwise preserve this information in the record at trial. *See State v. Smith*, 130 N.C. App. 71, 77, 502 S.E.2d 390, 394 (1998) (dismissing defendant's argument because the defendant did not avail himself of the methods to procure a witness at trial).

Webb could have secured McCormick's attendance to testify at trial by subpoena. *See* N.C. Gen. Stat. § 15A-801. In addition, Webb failed to file a motion for a material witness order. A material witness order is

> an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.

N.C. Gen. Stat. § 15A-803(a). This method compels a witness to "attend the hearing by subpoena, or if the court considers it necessary, by order for arrest." N.C. Gen. Stat. § 15A-803(g). Therefore, if Webb would have filed a motion for a material witness order, McCormick could have been compelled to attend and testify at Defendant's original trial despite any interference from his mother.

Further, McCormick was actually present at Defendant's trial. Knowing this, Webb failed to speak with McCormick despite knowing that McCormick may have information concerning Graham's death. In addition, Webb failed to alert the trial court to the existence of this information, failed to file a motion to continue, request a recess, or otherwise take steps to procure the information.

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were not known at the time of trial." The trial court's wording is troubling because this is generally true of all testimony – practitioners and judges do not know what a witness's testimony will be until the witness actually testifies. Under the trial court's interpretation of newly discovered evidence, virtually any information not originally introduced at trial could qualify as newly discovered evidence, even though it could have been discovered through other methods or witnesses.

In similar cases, we have rejected a defendant's motion for a new trial on the basis of newly discovered evidence when the defendant had an opportunity at trial to present the evidence through other methods, or the defendant did not use the proper procedures to preserve the evidence.

In *State v. Beaver*, the defendant was convicted of first-degree burglary and sentenced to life imprisonment. *Beaver*, 291 N.C. at 138, 229 S.E.2d at 180. The defendant filed a motion for a new trial on the basis of newly discovered evidence. The defendant argued that he learned during jury deliberations that a witness was located prior to trial, and that this witness would testify that defendant was living in the house which was burglarized. *Id.* at 142, 229 S.E.2d at 182. Our Supreme Court found that the witness' testimony "would only have been cumulative and corroborative[,]" the defendant "had ample opportunity to examine" the detectives who located the witness, and the defendant should have filed an affidavit prior to trial stating that the witness was important and material. *Id.* at 144, 229 S.E.2d at 183.

Furthermore, in *State v. Rhodes*, the defendant was convicted of possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. *Rhodes*, 366 N.C. at 534, 743 S.E.2d at 38. The defendant's father testified at trial but invoked his Fifth Amendment protections when asked whether the contraband belonged to him. *Id.* at 537, 743 S.E.2d at 40. After trial, the defendant's father made an out-of-court statement that the drugs belonged to him. *Id.* at 538, 743 S.E.2d at 40.

Our Supreme Court determined that this information was not newly discovered evidence because it "was not evidence which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time." *Id.* at 538, 743 S.E.2d at 40 (citation and quotation marks omitted). In making this conclusion, our Supreme Court determined that the evidence could have been presented at trial through a different line of questioning or even through the examination of another witness. *Id.* at 538, 743 S.E.2d at 40.

Accordingly, McCormick's testimony is not newly discovered evidence because it was not "unknown or unavailable to the defendant at the time of trial." *Wiggins*, 334 N.C. at 38, 431 S.E.2d at 767.

Closely related is the issue of due diligence. "Due diligence is defined as '[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.' " *State v. Pezzuto*, No. COA02-569, 2003 WL 21037894, at *3 (N.C. Ct. App. May 6, 2003) (quoting Black's Law Dictionary 468 (7th ed.1999)) (unpublished).

> When the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c). *Wiggins*, 334 N.C. at 38, 431 S.E.2d at 767. In *State v. Powell* we found no error in a trial court's conclusion that a defendant failed to exercise due diligence when "the defendant knew of the statement of [the witness] during the trial" but failed to procure her testimony. 321 N.C. at 371, 364 S.E.2d at 336. We also agreed there was no newly discovered evidence when a defendant learned after trial that his blood sample had been destroyed before trial, yet he made no inquiry about the blood sample before or during trial. *State v. Dixon*, 259 N.C. 249, 250-51, 130 S.E.2d 333, 334 (1963) (*per curiam*). In another case we agreed there was no newly discovered evidence when the defendant learned during his trial that two detectives had located his former roommate before the trial began. *Beaver*, 291 N.C. at 144, 229 S.E.2d at 183. We wrote: "Defendant had ample opportunity to examine [the detectives] as to their knowledge of the whereabouts of [his former roommate]. This he failed to do." *Id.* We further wrote: "[I]f [the] defendant considered [the former roommate] an important and material witness, he should have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness. This he did not do." *Id.*

Rhodes, 366 N.C. at 537, 743 S.E.2d at 40.

Conclusion of law 13 states that "Defendant used due diligence and proper means to procure the testimony of William McCormick at Defendant's original trial." For the reasons stated above concerning evidence unknown to Defendant, Defendant failed to exercise due diligence in procuring McCormick's testimony.

C. Material, Competent and Relevant Information

The State further argues that the trial court abused its discretion when it concluded that McCormick's testimony and affidavit was "competent, material and relevant. [Because i]t identifies the actual perpetrators of the offense and exculpates the Defendant." We agree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). "Hearsay

is not admissible except as provided by statute or by the[] rules" of evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2019). McCormick's testimony concerning Shaw's purported statements are inadmissible hearsay. Rule 803 of the North Carolina Rules of Evidence establishes exceptions to the general exclusion of hearsay evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 803 (2019).

The trial court made the following conclusion of law concerning Shaw's statements:

> 9. After careful scrutiny, the court concludes that the testimony of William McCormick about Robert Shaw's statement regarding the details of Shaw, Bristow and Cox assaulting the victim is admissible evidence under Rule 803(24). First, the State is on notice that Defendant would offer such evidence at trial. Second, this hearsay evidence is not specifically covered by any other exception in Rule 803. Third, the evidence possesses circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions because it constitutes an admission of criminal conduct by Shaw, is consistent with events actually observed by William McCormick the day before, when Shaw and the other youths arrived at McCormick's house out of breath having jumped and run from a cab, and is consistent with known circumstances of the case, including that the victim was assaulted by more than one young male person. Fourth, the evidence is material to the case. Fifth, the evidence is more probative on the issue of whether Shaw, Bristow and Cox, rather than Defendant, were the actual perpetrators of these crimes than any other evidence procurable by reasonable efforts. Defendant cannot reasonably be expected to procure the in-court confession of Shaw that Shaw himself is guilty of robber and first degree murder. Sixth, admission of the evidence of Shaw's statements will best serve the purposes of the Rules of Evidence and the interests of justice. *State v. Smith*, 315 N.C. 76 (1985).

Rule 803(24) of the North Carolina Rules of Evidence allows the admission of statements that are

> not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B)

> the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 803(24). However, "Rule 803(24) is disfavored and should be invoked very rarely and only in exceptional circumstances." *Strickland v. Doe*, 156 N.C. App. 292, 299, 577 S.E.2d 124, 130 (2003) (citation and quotation marks omitted).

> Because of the residual nature of the Rule 803(24) hearsay exception and the Commentary's warning that this exception does not contemplate an unfettered exercise of judicial discretion, evidence proffered for admission pursuant to N.C.G.S. § 8C-1, Rule 803(24), must be carefully scrutinized by the trial judge within the framework of the rule's requirements.

State v. Smith, 315 N.C. 76, 91-92, 337 S.E.2d 833, 844 (1985) (*purgandum*).

For evidence to be admissible under Rule 803(24), the trial court must find six factors in the affirmative: (1) proper notice had been given; (2) the hearsay is not specifically covered elsewhere; (3) the statement is trustworthy; (4) the statement is material; (5) the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) the interests of justice will be served by its admission. *Id.* at 92-96, 337 S.E.2d at 844-847. Defendant failed to satisfy the notice requirement, and so we address only that factor in our analysis below.

> When hearsay testimony is sought to be admitted as substantive evidence under Rule 803(24), the proponent must first provide written notice to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. The hearsay statement may not be admitted unless this notice (a) is in writing; and (b) is provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; and (c) contains (1) a statement of the proponent's intention to offer the hearsay testimony, (2) the particulars of the hearsay testimony, and (3) the name and address of the declarant. Thus, a trial judge must make the initial determination that proper notice was duly given and must include that determination in the record; detailed findings of fact are

> not required. Should the trial judge determine that notice was not given, was inadequate, or was untimely provided, his inquiry must cease and the proffered hearsay statement must be denied admission under Rule 803(24).

Id. at 92, 337 S.E.2d at 844 (emphasis added) (quotation marks omitted).

Here, the trial court found that "the State is on notice that Defendant would offer such evidence at trial." However, there is no evidence in the record that Defendant filed a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) prior to hearing the motion for appropriate relief. Thus, Defendant failed to satisfy the first requirement of Rule 803(24), and the trial court abused its discretion when it concluded the written notice requirement had been satisfied. *See id.* at 92, 337 S.E.2d at 844 ("Should the trial judge determine that notice was not given, was inadequate, or was untimely provided, his inquiry must cease and the proffered hearsay statement must be denied admission under Rule 803(24).").

III. Constitutional Violation

[2] The State also argues that the trial court erred when it concluded that Defendant's due process rights would be violated if he were not allowed to present McCormick's testimony at a new trial. We agree.

"The standard of review for alleged violations of constitutional rights is *de novo*. A violation of the defendant's rights under the Constitution of the United States is prejudicial unless we find that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *State v. Guy*, 262 N.C. App. 313, 317, 822 S.E.2d 66, 72 (2018) (*purgandum*).

The Sixth Amendment to the United States Constitution, in pertinent part, states, "[i]n criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment applies to the State of North Carolina by way of the Fourteenth Amendment to the United States Constitution, which states, in part,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Rather than relying on traditional due process principles to determine whether to grant a new trial for newly discovered evidence, this Court has previously applied the seven factors required for a new trial as set forth in *Beaver*. *See State v. Hoots*, 76 N.C. App. 616, 618, 334 S.E.2d 74, 75-76 (1985) ("Defendant contends that due process requires a new trial whenever newly discovered exculpatory evidence in the form of sworn testimony by a confessed perpetrator of the offense is corroborated by independent evidence. This contention is without merit. The standard for granting a new trial is set out in [*Beaver*.]").

Here, the trial court stated in conclusion of law 18, "In addition, as an independent ground for decision, denying Defendant the opportunity to present all of the newly discovered evidence to a trier of fact would, under the circumstances of this case, violate Defendant's federal and state constitutional rights to due process of law."

However, Defendant has failed to satisfy the *Beaver* factors discussed above, and Defendant is not entitled to a new trial. Thus, the trial court erred in concluding that Defendant's constitutional rights would be violated if he did not have the opportunity to present the purported newly discovered evidence.

Conclusion

For the reasons stated herein, we reverse the trial court's order granting a new trial.

REVERSED.

Judge BRYANT concurs.

Judge DIETZ concurs by separate opinion.

DIETZ, Judge, concurring.

This case arrived at our Court on the wrong legal ground for post-conviction relief. When a defendant who already has been convicted of a crime claims that there is evidence of his innocence, his post-conviction options branch into two paths, depending on the availability of that evidence at the time of trial.

If the evidence of innocence *could not* have been discovered in the exercise of due diligence at the time of trial, the defendant can bring a claim under N.C. Gen. Stat. § 15A-1415(c), which addresses newly discovered evidence.

By contrast, if the evidence *could* have been discovered in the exercise of due diligence at the time of trial, but was not, the defendant may pursue a claim for ineffective assistance of counsel under N.C. Gen. Stat. § 15A-1415(b)(3).

This case follows the second path. Reid's trial counsel learned "from the street" that William McCormick had information that implicated other people, but not Reid, in the crime. Reid's counsel even hired an investigator to speak to McCormick. But, according to Reid's counsel, "we couldn't get to him." This was so, Reid's counsel explained, because McCormick's mother did not want him to get involved with the investigation.

As the majority correctly observes, the law provides many options for a defendant in this situation to secure the testimony of the evasive witness. Indeed, McCormick was sitting in the courtroom during Reid's trial, yet Reid's counsel took no steps to obtain his testimony despite knowing that it likely was exculpatory. As a result, the jury never heard the testimony that McCormick ultimately provided years later.

Still, that fact does not make McCormick's testimony, when it finally came to light, newly discovered evidence under our post-conviction jurisprudence. Rather, the failure to secure this testimony at the time of trial implicates Reid's constitutional right to the effective assistance of counsel.

I therefore concur in the majority's judgment but note that this Court's holding does not bar Reid from seeking post-conviction relief on other grounds. The procedural bar on successive motions for appropriate relief should not apply if the basis for one claim did not become apparent until the litigation of another.

STATE OF NORTH CAROLINA
v.
MICHAEL RAY WATERFIELD, DEFENDANT

No. COA19-427

Filed 20 October 2020

1. Hunting and Fishing—fishing—public welfare offenses—strict liability—unattended gill nets and crab pots

The marine fisheries regulations that defendant was charged with violating—rules regarding unattended gill nets and crab pots—were strict liability offenses where the language of the relevant statute criminalizing violations of rules adopted by the Marine Fisheries Commission (N.C.G.S. § 113-135) did not include an intent element, and where these were "public welfare" offenses of the type which our Supreme Court has held to be strict liability offenses. The Court of Appeals was bound by controlling precedent; however, it observed the unfairness that can result from these strict liability offenses, such as here, where defendant had to leave his gill nets due to sickness caused by his throat cancer and was in a car accident on his way home.

2. Criminal Law—jury instructions—strict liability offense—willfulness alleged in indictment

Where the State charged defendant with a strict liability offense but alleged in the indictment that defendant acted willfully, the State was nonetheless not required to prove willfulness, and the trial court properly did not include willfulness as an element of the crime in its jury instructions.

Appeal by Defendant from judgment entered 7 November 2018 by Judge Marvin K. Blount III in Perquimans County Superior Court. Heard in the Court of Appeals 31 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Bircher, for the State.

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

DILLON, Judge.

One of the most fundamental concepts in criminal law is *mens rea*, the guilty mind. Historically, our society punished people for committing a crime for committing certain acts if they had some intent to commit the act.

Over time, this *mens rea* requirement has loosened. We have seen the rise of *strict* liability crimes, crimes that do not have an intent element. One class of crimes where strict liability has flourished is so-called regulatory crimes, meaning criminal offenses that have no common law analogue and are enacted to encourage behavior that advances the public welfare.

This case involves several of these regulatory crimes.

The General Assembly enacted legislation authorizing the Marine Fisheries Commission and its Director to regulate coastal fishing. The legislature also provided that any violation of a Commission rule was a misdemeanor criminal offense. Pursuant to its authority, the Commission enacted rules prohibiting fisherman from leaving gill nets and crab pots unattended for a certain amount of time.

Defendant Michael Waterfield, a fisherman, was convicted of violating these regulations after he left gill nets and crab pots unattended for too long. Defendant argued that he is not criminally liable because he lacked any *mens rea* – or intent – to break the Commission rule. He claims he was sick and had to leave his equipment.

As explained below, Defendant has presented a series of compelling arguments for why the proliferation of these strict liability crimes undermines foundational principles of our State's criminal law jurisprudence. But as an intermediate appellate court, we are bound to follow controlling precedent. Under that precedent, these offenses are strict liability crimes that do not require the State to prove intent. If the law concerning these sorts of strict liability regulatory offenses should be changed, that change must come from our Supreme Court or from our General Assembly.

I. Facts and Procedural History

Defendant is a licensed commercial fisherman. In late 2016, a Marine Patrol officer was on boat patrol and came across an unattended gill net. The officer identified the net as belonging to Defendant because it had his name and boat number on it.

A marine fisheries proclamation in effect at the time required a person operating this type of gill net to remain within 100 yards of the net.

The officer observed the area but did not see anyone in the vicinity of the net.

Somewhere between thirty minutes and one hour later, Defendant approached the officer and asked why the officer was near his net. The officer then gave Defendant a citation for an unattended gill net.

An hour later, the officer found crab pots with markers identifying them as belonging to Defendant. The officer pulled up one of the pots and saw that there were dead and decomposing crabs inside.

Several days later, the officer returned Defendant's crab pots to the water with plastic tags on the pots so that they could not be opened without cutting the tags off. The officer returned to check on the pots seven days later and found that all the tags were still in place, indicating that the crab pots had not been fished.

The officer cited Defendant for two violations of marine fisheries regulations: one for leaving crab pots in the water for more than five consecutive days and another for leaving crab pots containing edible species not fit for human consumption. The officer used a form citation for these offenses, a form that contained language that Defendant was being charged with committing these regulatory violations "unlawfully and willfully."

Defendant was convicted of all charges in district court and appealed to superior court. During his jury trial in superior court, Defendant explained that, as for the unattended gill net, he was struggling with throat cancer and, after setting out his nets, he got sick and had to go home. He further explained that he got into an automobile accident on the way home. As a result of these unfortunate events, Defendant was unable to return and retrieve one of his nets.

As for the crab pots, Defendant testified that he did fish those pots and that he "cut the tags off," despite the officer's testimony to the contrary. On cross-examination, Defendant acknowledged that he had a number of past violations for similar failures to retrieve gills nets or crab pots. He explained that, given the scope of marine fisheries regulations, "[i]f you go out and fish, you gonna get tickets."

Because there were no pattern instructions for these regulatory offenses, the trial court proposed to instruct the jury on the elements of the offenses by tracking the specific language in the applicable regulations or proclamations. The regulations did not include any intent element. Defendant did not object or request any additional instructions.

After closing arguments, the trial court asked Defendant's counsel, "is there a contention that the law is something different than what has been provided to the Court?" Defense counsel responded that he was "just arguing the charging document," which presumably was a reference to the use of the phrase "unlawfully and willfully" in the citation. The trial court then stated, "What I've been provided, I guess, from the law is the elements of the crime do not require willfulness." The trial court then instructed the jury using the language of the applicable provisions and did not instruct the jury that these criminal offenses required proof of any form of criminal intent.

The jury convicted Defendant of the unattended gill net offense and the offense of leaving crab pots in the water for more than five days. The jury acquitted him of the second crab pot violation. The trial court consolidated the two convictions for judgment and sentenced Defendant to 20 days in jail, suspended for one year of supervised probation, and a $200 fine. Defendant appealed.

II. Analysis

A. Strict liability for the charged offenses

[1] Defendant first argues that the trial court committed plain error by failing to instruct the jury that the State must prove his violations were willful. He contends that the offenses with which he was charged must include some form of *mens rea* and cannot be strict liability offenses.

Defendant concedes that these arguments were not preserved by request or objection at trial and thus we review only for plain error. N.C. R. App. P. 10(a)(4); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error should be "applied cautiously and only in the exceptional case" where the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 516-17, 723 S.E.2d at 333.

Whether a particular offense is a strict liability offense is a question of law that this Court reviews *de novo*. *See State v. Watterson*, 198 N.C. App. 500, 503, 679 S.E.2d 897, 899 (2009). As a leading criminal law treatise observes, "[f]or several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or—more rarely—negligence); a person is not guilty of a common law crime

without one of these kinds of fault." 1 Wayne R. LaFave, Substantive Criminal Law § 5.5, *Strict Liability* (3d ed. 2017). "But legislatures, especially in the 20th and 21st centuries, have often undertaken to impose criminal liability for conduct unaccompanied by fault." *Id.*

Our General Assembly is among the state legislatures that began imposing strict liability over the last century-and-a-half. When challenges to these strict liability crimes arrived at our Supreme Court, that Court held that it is "within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961). The determination of whether "criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *Id.*

Our Supreme Court later refined these principles in the context of what are often called "public welfare" crimes. *See Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 13, 220 S.E.2d 536, 541 (1975). In *Watson*, the Court addressed a traffic law prohibiting passing another vehicle at a railway crossing or highway intersection. *Id.* The Court explained that "it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal. This is particularly so when the controlling statute does not require the act to have been done knowingly or willfully." *Id.* at 14, 220 S.E.2d at 541-42 (citations omitted).

The Court focused on several aspects of the traffic law that supported a strict-liability interpretation. First, the Court noted that the General Assembly did not include an express intent element, such as the words "knowingly" or "willfully" often found in criminal statutes. *Id.* at 15, 220 S.E.2d at 542. Second, the Court observed that the law was a "safety statute enacted by the Legislature for the public's common safety and welfare." *Id.* The Court also explained that the offense fell into a category for which the punishment is typically "a small fine." *Id.* Finally, the Court noted that proving "intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon our roads." *Id.* at 14, 220 S.E.2d at 542.

Cases from this Court have applied the *Watson* reasoning to many different "public welfare" offenses, including offenses related to conservation of wildlife. *See, e.g.*, *State v. Ballance*, 218 N.C. App. 202, 217,

720 S.E.2d 856, 867 (2012). Applying that precedent here, if the offenses with which Defendant was charged were contained entirely within our General Statutes, we could readily hold that these are strict liability crimes.

The State charged Defendant with violating a marine fisheries proclamation prohibiting "unattended gill nets with a stretched mesh length of 3 inches through 3 ¾ inches" and a marine fisheries regulation making it "unlawful to leave pots in any coastal fishing waters for more than five consecutive days, when such pots are not being employed in fishing operations, except upon a timely and sufficient showing of hardship." *See* 15A NCAC 3I.0105(b); Proclamation M-23-2016.

These offenses are public welfare laws designed to protect our marine fisheries; they carry minimum punishments, in most cases resulting only in a fine; they are the type of routine, minor offense that could prove impossible to enforce if the State had to gather evidence of intent; and, most importantly, the General Assembly easily could have included an intent element for these offenses but did not do so. All of these factors weigh strongly in favor of strict liability.

But this case is not so simple. Here, our General Assembly did not enact a self-contained criminal law—it enacted legislation *authorizing the Marine Fisheries Commission* to regulate coastal fishing and then provided that violations of Commission regulations could be punished as a low-level misdemeanor. N.C. Gen. Stat. §§ 113-182; 113-135 (2016). The legislature also permitted the Commission to delegate to the Fisheries Director the authority to issue proclamations that are, in effect, Commission regulations. N.C. Gen. Stat. § 113-221.1. As a result of this statutory delegation, the General Assembly could not know what particular conduct would be criminalized by this statute; that depends on what the Marine Fisheries Commission and its director choose to regulate.

Defendant contends that this is the fatal flaw in the State's case. He asserts that there "is nothing in the context of the enabling statutes which suggests it was the 'manifest purpose and design' of the General Assembly" to impose strict liability. After all, the General Assembly did not even know what rules might one day be created under this delegation of authority.

But, to be fair, the so-called enabling statute—the one delegating this regulatory authority to the Commission—is not the key place to look. The operative statute is N.C. Gen. Stat. § 113-135, which criminalizes the conduct at issue: "Any person who violates any provision of this

Subchapter or any rule adopted by the Marine Fisheries Commission or the Wildlife Resources Commission, as appropriate, pursuant to the authority of this Subchapter, is guilty of a misdemeanor . . . ." N.C. Gen. Stat. § 113-135(a).

The General Assembly could have included an intent element in this criminal provision. For example, the legislature could have imposed criminal liability on any person who *willfully* violates the Commission's rules. Or the legislature could have established a default *mens rea*, for example by stating that if a rule does not provide a different level of intent, the defendant must be shown to have acted willfully to establish a violation of the rule.

These examples are not abstract ideas—as the parties point out in their briefing, the General Assembly has contemplated this sort of legislation before. Indeed, one proposed bill was entitled "An act to make changes to future criminal laws related to regulatory offenses . . . that do not specify criminal culpability" and would have created a default *mens rea* of recklessness for regulatory crimes like the ones at issue in this case. *See* H.B. 1010 § 2, 2019 Session (filed 25 April 2019). That the legislature has so many means to include an intent element in these criminal offenses, but still chose not to do so, weighs in favor of concluding these are strict liability offenses.

Moreover, other accompanying statutes support an interpretation that does not include an intent element. For example, the statute authorizing the Fisheries Director to issue proclamations states that "persons who may be affected by proclamations issued by the Fisheries Director are under a duty to keep themselves informed of current proclamations" and it is "no defense in any criminal prosecution for the defendant to show that the defendant in fact received no notice of a particular proclamation." N.C. Gen. Stat. § 113-221.1(c). This statutory language demonstrates that the General Assembly contemplated the proof that would be required in criminal prosecutions of these regulations. Although the legislature chose to address certain issues, such as the obligation to know the law, it chose not to enact an intent element.

Moreover, there is nothing particularly unusual about the General Assembly's decision not to include an intent element for these offenses. These regulatory offenses have no common law analogue; they are designed to cultivate and conserve our State's marine resources. These types of "public welfare" offenses often do not include an intent element. This is because a violation of these offenses "impairs the efficiency of controls deemed essential to the social order as presently constituted."

Morissette v. United States, 342 U.S. 246, 256 (1952). With the rise of the administrative state and corresponding regulatory regimes, courts across our nation began construing these regulatory crimes "which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime." *Id.*

Equally important, violations of the Marine Fisheries Commission regulations and proclamations are minor criminal offenses—low-level misdemeanors that will typically result in a fine and will lead to an active sentence only in exceedingly rare cases for defendants with many prior convictions. N.C. Gen. Stat. § 113-135.

Finally, these offenses fall within the category of regulatory crimes for which an intent element could "make it impossible to enforce such laws in view of the tremendous number of petty offenses." *See Watson*, 289 N.C. at 14, 220 S.E.2d at 542. Requiring the State to launch an investigation into every person who unlawfully leaves a crab pot or gill net unattended and to gather sufficient evidence to prove beyond a reasonable doubt that the violation was willful could render enforcement of these minor offenses impractical for the State. This, too, is a key factor in why our Supreme Court and other courts have interpreted the lack of an express intent element in these regulatory crimes as evidence of an intent to impose strict liability. *Id.*; *see also Morissette*, 342 U.S. at 256.

In sum, we hold that the criminal offenses charged in this case under N.C. Gen. Stat. § 113-135 are strict liability regulatory offenses that do not require the State to prove intent. But we note that our holding is not an endorsement of these strict liability crimes. Defendant's appellate brief lays out in compelling detail why our State's criminal laws historically have required an intent element, and why the ever-expanding morass of regulatory crimes is undermining the fundamental notion that *mens rea* is a necessary component of our State's criminal jurisprudence. But we "lack the authority to change the law on the ground that it might make good policy sense to do so." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 739, 796 S.E.2d 529, 533 (2017).

B. Failure to instruct on willfulness

[2] Defendant next argues that, even if the charged offenses are strict liability crimes, the State was required to prove willfulness in this case because the indictment alleged that Defendant acted willfully. Again, Defendant concedes that he did not raise this argument in the trial court. We therefore review for plain error.

There is logical appeal to Defendant's argument—after all, if the State charges a defendant with willfully violating a regulation, should

the State not be required to prove that charge? But we are again constrained by controlling precedent. What happened in this case has happened before. In *State v. Clowers*, the State charged the defendant with willfully driving while impaired because "the charging officer did not cross out the word 'willfully' on the uniform citation" although, as in this case, "willfulness is not an element of the crime." 217 N.C. App. 520, 529, 720 S.E.2d 430, 437 (2011). The defendant presented a defense based on the State's failure to prove willfulness and requested a jury instruction on willfulness. The trial court denied that request because willfulness was not an essential element of the charged offense.

This Court found no error in *Clowers*, holding that "the inclusion of 'willfully' was beyond the essential elements of the offense" and thus the trial court properly disregarded it as "surplusage." *Id.* at 529-30, 720 S.E.2d at 437. The Court further explained that the trial court *could not* have instructed the jury on willfulness because the trial court's duty is to instruct the jury on the law and "that instruction would not have been supported by law." *Id.*

The facts in *Clowers* are indistinguishable from those in this case. We are therefore constrained to reject this argument. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Accordingly, we find no error in the trial court's instructions to the jury.

III. Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges DIETZ and YOUNG concur.

MARY COOPER FALLS WING, PLAINTIFF
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL., DEFENDANTS

RALPH L. FALLS, III, ET. AL., PLAINTIFF
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL., DEFENDANTS

No. COA19-1007

Filed 20 October 2020

1. Appeal and Error—interlocutory ruling—substantial right—depletion of trust—claim to determine rightful beneficiaries

In a case challenging amendments made to a trust and to determine the trust's rightful beneficiaries, plaintiffs were entitled to immediate review of an interlocutory ruling, in which the trial court allowed defendant's motion to pay costs (ordering the trustee to distribute trust assets to some purported beneficiaries but not others), based on their assertion that they would be deprived of a substantial right absent review because more than two million dollars had already been paid out of the trust and the ownership of the assets was in dispute.

2. Trusts—pending litigation—determination of rightful beneficiaries—trust validity not disputed—duty of trustee to remain neutral—distribution improper

In an issue of first impression, where plaintiffs did not attack the underlying validity of the trust, but disputed the rightful beneficiaries after six amendments were made to the trust, the trial court erred by ordering the trustee to make distributions to some putative beneficiaries but not others for costs in defending the trust, and the matter was remanded for entry of an order allowing a motion to freeze administration of the trust that was filed by one of the plaintiffs. Since the trust itself was not under attack, the trustee breached its duty of neutrality by distributing trust assets, after becoming aware of plaintiffs' claims, to some of the competing beneficiaries for expenses and legal fees incurred in opposing plaintiffs' claims.

Appeal by plaintiffs from order entered 20 May 2019 by Judge Edwin G. Wilson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 September 2020.

Womble Bond Dickinson (US) LLP, by Johnny M. Loper, Elizabeth K. Arias and Jesse A. Schaefer, for plaintiff-appellant Mary Cooper Falls Wing.

Penry Riemann PLLC, by J. Anthony Penry, for plaintiff-appellant Ralph Falls, III.

Mullins Duncan Harrell & Russell PLLC, by Allison Mullins, Alan W. Duncan, and Hillary M. Kies, for defendant-appellee Dianne C. Sellers.

Ellis & Winters LLP, by Leslie C. Packer, Alex J. Hagan and Michelle A. Liguori, for defendant-appellees, Louise Falls Cone, Toby Cone, Gillian Falls Cone, and Katherine Lenox Cone.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Eva G. Frongello, James K. Dorsett, III, and J. Mitchell Armbruster for defendant-appellant Goldman Sachs Trust Company, N.A.

TYSON, Judge.

I. Background

Ralph Lane Falls Jr. ("Decedent") died on 11 May 2015 at the age of seventy-four. Decedent was survived by his wife, Dianne C. Sellers ("Sellers"), and his three adult children from his first marriage, daughter Mary Cooper Falls Wing ("Wing"), son, Ralph Lane Falls III (Falls III), and daughter, Louise Falls Cone ("Cone"). Decedent is also survived by Falls III's three children and by Cone's two children and her husband. Goldman Sachs Trust Company ("Goldman Sachs") is the acting trustee of Decedent's trust ("Trust").

Decedent created a revocable Trust as trustor in August 2011. Decedent signed as both grantor and trustee in the Trust instrument. Wells Fargo Bank, N.A. was designated as the successor trustee. Wing, her brother, Falls III, and two of his children were named and designated as the beneficiaries of 90% of the Trust's assets. The Trust allocated 40% of the *res* upon Decedent's death to Wing, 40% to Falls III, and 5% each to two of Falls III's children. Cone's two children were to receive 5% each, to equal 100% of the *res* ("Original Beneficiaries"). Decedent's other daughter, Louise Cone, her husband, and Sellers were not designated as beneficiaries nor listed to receive any distributions of assets or income from the Trust.

Decedent executed his September 2012 will, prepared by a different attorney from the Trust's drafter, one month prior to scheduled surgery to remove three brain tumors. Decedent's September 2012 will named and appointed Falls III as trustee "of each trust," and Wing as his

successor trustee. Decedent repeatedly acknowledged his desire for his property to be divided equally between his three children, Wing, Falls III, and Cone.

Decedent underwent brain surgery in October 2012. After surgery, he began to suffer a series of serious physical and mental health problems, resulting in recurring hospitalization and rehabilitative care. For the remainder of his life, Decedent relapsed into heavy drinking, experienced depression, manic episodes, and complications with bipolar disorder.

After removal of the brain tumors and beginning in December 2012 until 10 December 2014, Decedent intermittently executed six amendments ("purported amendments") to the 2011 Trust.

The first amendment in December 2012 added Sellers as successor trustee and Falls III as her successor trustee. Falls III's share was reduced to 30%, Wing's share was eliminated to 0%, Cone was named as a beneficiary of 30%, and the four previously named grandchildren's shares were increased to 10% each.

The second amendment in January 2013 left Sellers as the first successor trustee. Successor trustee duties were given to Falls III on behalf of his children, and to Cone and her husband as subsequent successor trustees on behalf of their children. Falls III and Cone were named to receive 30% each, Wing's share remained at 0%, and the four grandchildren's shares remained at 10% each.

The third amendment in January 2014 named Goldman Sachs as successor trustee. Falls III's and Cone's shares were reduced to 20% each, and each of the four grandchildren's shares was increased to 15%.

In February 2014, the Trust was amended again. Goldman Sachs remained successor trustee, and Sellers and Cone were added as successor trustees after Goldman Sachs. Goldman Sachs was given discretionary power to distribute to Cone, her husband and to Sellers. Cone's share increased to 35% with her husband, Cone's two daughters' share increased to 20% each, Sellers was given 25%. Wing, Falls III, and his children are not mentioned in this amendment.

The Trust was again amended in July 2014. This amendment continued Goldman Sachs' discretionary distributions to Sellers and Cone, and Sellers and Cone were given the power to remove Goldman Sachs as trustee.

The sixth and final amendment, entitled the "Fifth Amendment" was executed on 10 December 2014. That same day, Sellers and Decedent

applied for a marriage license and were married. This amendment gave 25% to Sellers, now as Decedent's wife, 35% to Cone and her husband, and 20% each to Cone's two children. An entire section benefits Sellers as a surviving spouse. Cone and her husband are designated to take Sellers' 25%, should Sellers predecease Decedent. Wing, Falls III, and his children are not mentioned in the document.

These amendments did not revoke the Trust nor create a new trust, and each amendment affirmatively restated and reaffirmed all terms and provisions of the Trust, not expressly amended.

Decedent died on 11 May 2015. On 12 June 2015, Goldman Sachs paid distributions from the Trust to Sellers and Cone pursuant to the Trust's Fifth Amendment. In 2016, Wing and Falls III filed claims and challenged the validity of the purported amendments and gave Goldman Sachs notice of their claims. Goldman Sachs continued making distributions, despite being on notice the amendments were challenged and that Sellers and Cone were not named beneficiaries under the original Trust.

Sellers and Cone filed a Joint Motion to Pay Defense Cost ("Motion to Pay") to direct Goldman Sachs to pay the cost of "defending the Trust as amended" on 6 February 2019. Wing filed an amended Motion to Freeze Administration of Revocable Trust until Beneficiaries are Determined or, alternatively, to Pay Defense Costs for ALL Purported Beneficiaries ("Motion to Freeze"). Goldman Sachs did not independently seek instructions on whether to make distributions to any of the purported claimants or seek an interpleader action for the Trust *res*. *See* N.C. Gen. Stat. § 1A-1, Rule 22(a) (2019) (Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims expose or may expose the plaintiff to double or multiple liability . . . . A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim.).

The trial court granted Defendant's Motion to Pay and denied Wing's Motion to Freeze on 20 May 2019. The order does not contain a Rule 54(b) certification that the order is immediately appealable. *See* N.C. R. App. P. 54(b). Plaintiff timely appealed from the superior court's order.

II. Interlocutory Jurisdiction

[1] Wing argues this Court possesses jurisdiction over this interlocutory appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2019).

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to

> appellant if not corrected before appeal from final judgment . . . Essentially a two-part test has developed[:] the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

> Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

On a purported appeal from an interlocutory order without the trial court's Rule 54(b) certification, "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

Wing asserts the trial court's order deprived her of substantial rights in two ways: (1) it depletes the Trust *res* and mandates the immediate payment of a substantial amount of money; and, (2) it risks inconsistent verdicts or outcomes with the ultimate disposition of the wrongful distribution claim and on any potential recovery against Goldman Sachs for funds already distributed.

A. Substantial Right Affected

The first part of the interlocutory test is the right affected must be substantial. Goldman Sachs has distributed more than $2 million dollars from the Trust to Sellers and Cone for expenses and legal fees they incurred in opposing Wing's and Falls III's claims. In 2016, Wing and Falls III filed suit and distributions ceased in November 2017. The record before us is unclear whether Goldman Sachs resumed distributions to Sellers and Cone for their legal fees or otherwise after November 2017. Counsel for Goldman Sachs assert they have not been paid for defending the Trust since November 2017.

This Court has held:

> Remaining claims would jeopardize plaintiff's substantial right not only because it orders plaintiff to pay a not insignificant amount—$48,188.15—The Order appealed affects a substantial right . . . by ordering [Defendant] to make immediate payment of a significant amount of money; therefore this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. 1-277.

Beasley v. Beasley, 259 N.C. App. 735, 742, 816 S.E.2d 866, 872-873, (2018) (alterations, citations, and internal quotations omitted.)

As this Court stated in *Beasley*, Goldman Sachs has paid out far more than an "insignificant amount" in Trust funds for Sellers' and Cone's legal fees. The disbursements for legal fees and expenses already surpass $2 million dollars, more than forty times the amount this Court referenced in *Beasley* as "a not insignificant amount." *Id.*

Secondly, a ruling "purporting to determine who is entitled to money" affects a substantial right. *State ex rel. Comm'r of Insurance v. N. C. Rate Bureau*, 102 N.C. App. 809, 811, 403 S.E.2d 597, 599 (1991). In *Rate Bureau*, the Commissioner of Insurance failed to order the release of funds placed in escrow pending judicial review. "The Commissioner's order only determine[d] that the funds are not to be released now." *Id.* The Commissioner had placed a temporary freeze on the distribution of funds while the proper recipients were determined. As the freeze was temporary, this Court determined no injury had occurred. *Id.*

The opposite result occurred here. Wing's Motion to Freeze, if allowed, would have had the same temporary impact as the Commissioner's freeze in *Rate Bureau*. "The Commissioner's order does not purport to determine who is entitled to the money. For these reasons, we hold that the appeal is interlocutory." *Id.*

Unlike *Rate Bureau*, Goldman Sachs, as purported trustee, held Trust funds whose beneficiaries are in dispute, but nonetheless distributed funds to one group, while the Trust beneficiaries' case is pending. Wing contends she, Falls III, and his children are the proper beneficiaries of the Trust under the operative trust terms set forth in the 2011 Trust Agreement. If Wing and Falls III succeed in their challenges to the amendments to the Trust, the court's ruling on Defendants' Motion to Pay adversely affects their equitable interests in the disbursed and depleted assets of the Trust.

Wing also relies upon this Court's precedents in *Tanner v. Tanner*, 248 N.C. App. 828, 789 S.E.2d 888 (2016) and *Estate of Redden v. Redden*,

179 N.C. App. 113, 632 S.E. 2d 794 (2006). In *Tanner*, the plaintiff-husband moved $300,000 from his business account to his mother's bank account and separated from his wife two months later. *Tanner*, 248 N.C. App. at 829, 789 S.E.2d at 889. The defendant-wife alleged the plaintiff had anticipated the marital separation and the money distributed was marital property, properly included in equitable distribution. *Id.*

This Court applied the two-part test for an immediate appeal of an interlocutory ruling to determine if the mother-appellant's substantial rights were affected by the defendant's claim of substantial money for which appellant had ownership and control. *Id.* at 831, 789 S.E.2d at 890. The mother-appellant asserted her grounds for appellate review, quoting *Redden*: "The order appealed affects a substantial right of [mother-appellant] by ordering her to make immediate payment of a significant amount of money; therefore, this Court has jurisdiction over [mother-appellant's] appeal pursuant to N.C. Gen. Stat. § 1-277." *Tanner*, 248 N.C. App. at 831, 789 S.E.2d at 891 (citation omitted).

In *Redden*, decedent had executed a power of attorney in favor of his wife. He also designated his wife as the payable-on-death beneficiary of funds in a specific bank account. *Redden*, 179 N.C. App. at 114, 632 S.E.2d at 796. The wife testified decedent had instructed her to move $200,000 from the specific account to decedent's work account so she could proceed with office work on decedent's behalf. After the decedent died, his wife moved the remaining money she had transferred to the work account, back to her specific bank account. *Id.* at 115, 632 S.E.2d at 796. The plaintiff sued the wife on behalf of Redden's estate for conversion. The trial court granted partial summary judgment in favor of the plaintiff, and the wife appealed to this Court. *Id.* at 114, 632 S.E.2d at 797.

In both *Tanner* and *Redden*, this Court held a substantial right is affected when a payment is made or required and ownership of the funds is in dispute. *See Tanner*, 248 N.C. App at 831, 789 S.E.2d 890-91. Like *Tanner* and *Redden*, Wing also contests the payment of Trust funds over which there is a dispute to the rightful owners.

Defendants and Goldman Sachs rely upon workers' compensation and other two-party, duty-to-pay cases to argue no substantial right exists to an immediate appeal. This Court has consistently held in interlocutory appeals of workers' compensation and contract disputes "when a party has been required to make payments *pendente lite*, this Court has nonetheless held that no substantial right exists to justify an interlocutory appeal." *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123,

130, 625 S.E.2d 790, 795 (2006). This is not a workers' compensation or a two-party, duty-to-pay case.

Defendants and Goldman Sachs rely on *Miller v. Henderson*, 71 N.C. App. 366, 368, 322 S.E.2d 594, 596 (1984) (allowing plaintiff to bring an interlocutory appeal because plaintiff faced a possibility of inconsistent verdicts and a partial summary judgment for a monetary sum, plaintiff's claim was dismissed as meritless and she was ordered to pay attorney fees). Our Supreme Court permitted the interlocutory appeal in *Miller* using the exact same reasoning Wing asserts in this case. The outcome of *Miller* required the plaintiff to pay attorney's fees because the statute required them to do so after allegations were found to be meritless. *Id.* at 372, 322 S.E.2d at 598. For our interlocutory analysis, *Miller* supports Wing's assertion, but the ultimate conclusion in *Miller* regarding plaintiff's duty to pay is easily distinguished from our facts. *Id.*

Goldman Sachs heavily relies on *Perry*, a workers' compensation case. In *Perry*, plaintiff-employee was injured, and defendant-employer paid the employee for a term, and then unilaterally ceased payment. *Perry*, 176 N.C. App. 123, 625 S.E.2d 790. Defendant was ordered to reinstate workers' compensation benefits to plaintiff, and defendant appealed with a motion to stay the payment order. The motion was denied. Defendant appealed to this Court for an interlocutory appeal asserting a substantial right. *Id.* at 127, 625 S.E.2d at 793. This Court stated: "an order denying a stay is an interlocutory order not subject to immediate appeal." *Id.* at 129, 625 S.E.2d at 794.

The ruling in *Perry* is inapplicable to the order before us. Wing and Falls III are not appealing from a motion to stay, but rather from an order affirmatively ordering payments by a trustee with distributions from a trust to some purported beneficiaries, and not others, when the rightful beneficiaries are disputed. This Court reasoned in *Perry* that workers' compensation cases create unique issues:

> These same circumstances arise in almost every case in which a workers' compensation defendant fails to prevail in connection with [a] request to terminate benefits. To allow a defendant to take an interlocutory appeal from any requirement that it continue to pay benefits pending Commission proceedings would result in precisely the yo-yo procedure, up and down, up and down, which this Court has held works to defeat the very purpose of the Workers' Compensation Act.

Id. at 130, 625 S.E.2d at 794. (alterations in original) (quotation marks omitted).

Finally, this Court noted: "When an employer meets the requirements of N.C. Gen. Stat. § 97-42 (2005), it may receive a credit for overpayments." *Perry*, 176 N.C. App. at 131, 625 S.E.2d at 795 (citation omitted). This available alternative is distinguished here, as Goldman Sachs claims it has no liability from distributing funds. If Wing prevails on her claims of wrongful distribution, no return of funds or credit to offset future payments is guaranteed. *Perry* and *Miller* differ substantially from the facts before us.

Further, in cases involving escrow, like *Rate Bureau*, cases involving constructive trust, like *Tanner*, or cases involving disputed distributions, like *Redden*, this Court has consistently held a substantial right is affected when the dispute is between claims of competing owners of funds to be distributed. Two million dollars was distributed from the Trust to Sellers and Cone, who may be held to be non-beneficiaries in the pending litigation. The order allowing Defendant's Motion to Pay diverts funds from the Trust, which would otherwise be held in the Trust and recoverable by the Wing, Falls III, and two of his children, if they prevail.

B. Deprivation Works Injury

The second part of the test for interlocutory appeals is whether the deprivation immediate appellate review works injury to the appellant. "[W]e may generally state that so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492 (1989).

Issues overlap whenever "the facts relevant to the resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014). The overlapping issues will work injury as inconsistent verdicts could deprive Wing and Falls III of their equitable interest in the Trust.

The wrongful distribution claim, along with all the pending claims, hinge upon undue influence and Decedent's capacity to execute the purported amendments. If Decedent lacked capacity to execute any or all amendments to the Trust, the purported amendments, together or singularly, are void; Sellers and Cone take nothing from the Trust, and Goldman Sachs breached their fiduciary duties to preserve the Trust *res*. The order allowing the Motion to Pay and the pending claims overlap substantially.

The rightful beneficiaries of the Trust are in dispute. Wing's and Falls III's substantial rights are affected by the large sums being distributed from the Trust. Further, the court's order does not clearly define the liability of Goldman Sachs. This creates the possibility of multiple trials on claims involving overlapping issues and could result in inconsistent verdicts. Immediate appeal to and review by this Court is proper, as this interlocutory order affects Plaintiffs' substantial rights. We allow Plaintiffs' interlocutory appeal.

III. Trustee's Duty to the Trust

A. Interpreting Trust Terms

[2] "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." N.C. Gen. Stat. § 36C-1-112 (2019). A caveat proceeding determines whether the writing purporting to be a testamentary will or a codicil thereto is in fact the last will and testament of the decedent. *See In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). If "a caveat is filed the clerk of the superior court shall forthwith issue an order that shall apply during the pendency of the caveat to any personal representative, having the estate in charge, as follows: (1) . . . *[T]here shall be no distributions of assets of the estate to any beneficiary*." N.C. Gen. Stat. § 31-36 (2019) (emphasis supplied).

Our general statutes compel us to interpret wills' and trusts' provisions and dispositions consistently. N.C. Gen. Stat. § 36C-1-112 (2019). N.C. Gen. Stat. § 31-36(a)(1) provides the framework for the case before us. Plaintiff's' challenge of the purported amendments is comparable to a caveat to determine who the rightful beneficiaries should be. The plain text of the statute directs the clerk of the superior court to order the executor or administrator to freeze all distributions until the caveat is resolved.

Wing filed a will caveat in the superior court on 13 November 2017. Wing also challenged the probated will on the basis of Decedent's incapacity and Seller's purported undue influence. Upon filing her caveat, "any personal representative, having the estate in charge . . . *shall [make] no distributions of assets of the estate to any beneficiary*." N.C. Gen. Stat. § 31-36(a)(1) (emphasis supplied).

B. Duty of Neutrality

In August 2011, Decedent created the Trust and thereafter purportedly amended the trust six times in less than two years between 2012

and 2014 after having undergone surgery for multiple brain tumors. Decedent wrote, "This amendment amends and restates in its entirety the trust originally executed by me on August 4, 2011." This phrase is found at the top of each purported amendment, incorporating the Trust as purportedly amended.

Goldman Sachs argues a trustee has a duty to defend the Trust. The first issue is whether a trustee has a duty to defend the purported amendments during pending litigation between purported beneficiaries. Wing and Falls III are not challenging the underlying validity of the Trust. They are challenging the trustor's capacity to execute the amendments thereto and to determine the rightful beneficiaries of their father's Trust.

Aside from the guidance and mandates of N.C. Gen. Stat. §§ 31-36 and 36C-1-112, the trustee's duty of and liability for distribution to disputed beneficiaries during pending litigation is an issue of first impression in North Carolina. Other jurisdictions have considered similar factual scenarios.

In *Terry v. Conlan*, the trustor's children challenged their stepmother regarding the validity of trust amendments. *Terry*, 33 Cal. Rptr. 3d 603 (Cal. Ct. App. 2005). The California Court of Appeals concluded, "The dispute between [Stepmother] and the Children is over the validity of the various trust instruments and amendments . . . The trust remains intact, leaving the parties in their original positions prior to the beginning of litigation." *Id.* at 616. The court in *Terry* held, "[B]ecause the dispute between the parties was related to the benefits of the trust, rather than an attack on the validity of the trust itself, there was no basis for the trustee to have taken other than a neutral position in the contest." *Id.* at 615.

In another case with similar facts to Wing, the decedent and his wife created a trust which named their niece, Whittlesey, as the trustee and primary beneficiary. *Whittlesey v. Aiello*, 128 Cal. Rptr. 2d 742, 743 (Cal. Ct. App. 2002). The wife died, and decedent remarried and amended the trust to make his second wife and her son the primary beneficiaries of the trust. *Id.* Whittlesey challenged the validity of the amendment and opposing attorney's claim he should be paid from the trust. The amendment was determined to be void due to undue influence, and the attorney's fees incurred during litigation were denied *Id.* at 744.

The California Court of Appeals held: "Where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets." *Id.* at 748. The court further ruled, "The essence of

the underlying action was not a challenge to the existence of the trust, it was a dispute over who would control and benefit from it. Whether or not the contest prevailed, the trust would remain intact." *Id.* at 746. The court reasoned the dispute was to determine who was the rightful taker, so the trust would not be affected negatively, and thus the trustee did not have a duty to take either position. *Id.* at. 748.

The court's reasoning is persuasive: "[A]n award of fees to [attorney defending second wife] from the trust would be, in effect, an award from Whittlesey . . . Whittlesey would be required to finance her own trust litigation and that of her opponent, despite the fact she prevailed. There can be no equity in that." *Id.* (internal quotations omitted).

Wing's position is similar to *Whittlesey*. Goldman Sachs asserts attorney's fees are "costs of administration" and a valid expense if incurred by the trustee while defending the Trust. *See Phillips v. Phillips*, 296 N.C. 590, 603, 252 S.E.2d 761, 769 (1979). The Trust does not need defending in the case before us because there is no contest to the validity of the Trust. This dispute is between the rightful beneficiaries, and the Trust is not in peril. Goldman Sachs has breached their duty of neutrality by deciding who the rightful beneficiaries are before pending litigation has resolved that issue.

Many other states have also held a trustee has a duty to remain neutral regarding competing claims between putative beneficiaries. *See In re Duke*, 305 N.J. Super. 408, 440, 702 A.2d 1008, 1023-24 (Ch. Div. 1995) (holding in a dispute between two parties claiming to be beneficiaries, a trustee may not advocate for either side or assume the validity of either side's position."); *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, 95 N.E.3d 1032, 1059 (Ohio Ct. App. 2017) (holding a trustee "breached the duty of impartiality by engaging in advocacy between the beneficiaries"); *In re Connell Living Trust*, 393 P.3d 1090, 1094 (Nev. 2017) (holding a trustee breached fiduciary duties by advocating for a position which benefitted some putative beneficiaries but not others); *Hershatter v. Colonial Trust Co.*, 73 A.2d 97, 101 (Conn. 1950) ("[W]here an attack is being made upon the validity of a trust, the trustee has the duty of participating actively in its defense . . .[but where] he acts . . . merely as a defendant stakeholder, he ordinarily has neither duty nor right to so participate"). We have found no cases arising on similar context and facts, which reach a contrary result.

IV. Conclusion

"A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and

other circumstances of the trust." N.C. Gen. Stat. § 36C-8-804 (2019). A prudent trustee must act impartially towards all purported beneficiaries. N.C. Gen. Stat. § 36C-8-803 (2019). Here, the Trust does not require defending, rather, as purported beneficiaries, Defendants seek to use Trust assets to maintain their positions. The trustee is not required to pay attorney fees or legal costs unless the *res* of the Trust is in peril. *See Whittlesey*, 128 Cal. Rptr. 2d at 743.

Wing's substantial rights are affected by the large sums distributed to competing beneficiaries, which could belong to Wing, Falls III and his children with potentially no way to recover the wrongful payments. The Motion to Pay order creates the possibility of multiple trials on claims involving overlapping issues, which might result in inconsistent verdicts. Immediate appeal of this interlocutory order to this Court is proper.

The beneficiaries of the Trust are in dispute. There is no final determination of who are the rightful beneficiaries. In accordance with the general statutes and precedents, the trial court should have allowed Plaintiff's motion and ordered a freeze on distributions of the Trust assets until resolution of the competing claims.

The trial court erred by not freezing and by ordering distributions from the Trust to some putative beneficiaries but not others during pending litigation. We reverse the Motion to Pay order and remand to the trial court for entry of an order allowing Wing's Motion to Freeze. All remaining claims, rights, and defenses are undisturbed. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE and Judge COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 OCTOBER 2020)

BELNAP v. SHALLCROSS No. 20-266	Johnston (12E23)	Affirmed
KIRBY v. MISSION HOSP., INC. No. 19-525	N.C. Industrial Commission (13-758570)	Affirmed
STATE v. BATTLE No. 19-677	Wilson (17CRS52334)	Vacated
STATE v. BRYANT No. 20-14	Iredell (18CRS50097) (18IFS700124-125)	No error; remanded for resentencing
STATE v. COOPER No. 18-637-2	Beaufort (11CRS50617)	Reversed
STATE v. ELLIS No. 19-820	Davidson (16CRS1704) (16CRS50958) (16CRS50960) (17CRS1950)	No error in part; Dismissed in part.
STATE v. FARRIOR No. 19-1137	Onslow (17CRS53172)	Vacated and Remanded
STATE v. GONZALEZ No. 20-120	Franklin (17CRS50297)	Dismissed
STATE v. MUHAMMAD No. 19-590	Mecklenburg (16CRS231894)	No Error
STATE v. PARKER No. 19-719	Catawba (17CRS932)	No Error
STATE v. PRUITT No. 19-694	Haywood (16CRS50980) (17CRS863)	No Error
STATE v. SUTHERLAND No. 19-637	Wake (16CRS220966-69) (16CRS221104)	No Error
STATE v. WALKER No. 20-35	Vance (17CRS52287) (17CRS52289) (17CRS52386-88) (17CRS705)	DISMISSED IN PART, REVERSED AND REMANDED IN PART.

GREEN v. HOWELL

[274 N.C. App. 158 (2020)]

WILLIE A. GREEN, SR., PLAINTIFF
v.
RICK HOWELL (INDIVIDUALLY), DEFENDANT

No. COA20-204

Filed 3 November 2020

1. Appeal and Error—interlocutory appeal—public official immunity—personal jurisdiction—substantial right

In an interlocutory appeal from the trial court's denial of defendant's motions to dismiss under Civil Procedure Rules 12(b)(1), 12(b)(2), and 12(b)(6) based upon a claim of public official immunity from a libel claim (since defendant worked as the city manager), the Court of Appeals dismissed defendant's appeal from the order denying his Rule 12(b)(1) motion to dismiss because the denial did not affect a substantial right or constitute an adverse ruling to personal jurisdiction. The Court allowed defendant's appeal from the denial of his Rule 12(b)(2) and 12(b)(6) motions to dismiss because the denial of the Rule 12(b)(2) motion based on sovereign immunity constituted an immediately appealable adverse ruling on personal jurisdiction and the denial of the Rule 12(b)(6) motion based on sovereign immunity was immediately appealable since it affected a substantial right.

2. Immunity—public official immunity—city manager—malicious conduct—motion to dismiss

In a libel action, the trial court erred by denying defendant's Civil Procedure Rule 12(b)(2) motion to dismiss based on public official immunity where defendant was acting in his capacity as city manager and plaintiff failed to sufficiently allege facts showing that defendant's acts were malicious or corrupt. The complaint, filed after the city rejected plaintiff's proposal for a public-private partnership to build a sports complex, did not allege any false statements made by defendant. Defendant's expression of his opinions that plaintiff did not have the financial resources to build a sports complex and wanted to build the complex using public funds were statements made under defendant's authority and responsibility to exercise his judgment and discretion in discussions with the city council and were presumed to have been made in good faith where plaintiff failed to allege facts to the contrary.

Appeal by Defendant from order entered 13 January 2020 by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 26 August 2020.

The Freedmen Law Group, by Desmon L. Andrade, for Plaintiff-Appellee.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, for Defendant-Appellant.

COLLINS, Judge.

Defendant Rick Howell appeals from the trial court's order denying his motion to dismiss the complaint filed against him. Defendant contends he is entitled to public official immunity because he was acting as a city manager in the performance of his official duties, and Plaintiff's allegations of malice or corruption are insufficient to bar immunity. We reverse the trial court's order.

I. Background

Willie A. Green, Sr. ("Plaintiff"), commenced this action on 31 October 2019 by filing a complaint against Rick Howell ("Defendant"), in his individual capacity, alleging libel per se and seeking compensatory and punitive damages. Plaintiff alleged the following relevant facts in his complaint:

> 4. [Plaintiff] has served in a leadership capacity in the community for the duration of his residency . . . .
>
> 5. [Plaintiff was] a Nine-year NFL veteran [and] the Chief Executive Officer and President of 5-Star . . . .
>
> 6. [Plaintiff has had] a successful career in the business and corporate sectors . . . [and] obtained his master's degree in Sport[s] Administration . . . .
>
> . . . .
>
> 8. [In] 2016, [Plaintiff] met with the Mayor . . . and . . . [Defendant] (City Manager) to discuss the prospects of a potential Public Private Partnership between 5-Star and the City of Shelby . . . .
>
> 9. [T]he Mayor and Defendant . . . [were] well aware of [Plaintiff's] accomplishments as a professional athlete and as a businessman as both facts were well documented in

local publications and evidenced by his other successful business ventures within the community . . . .

. . . .

12. Over the span of approximately two years and as the result of numerous written and in person communications between [Plaintiff], the Mayor and [Defendant] several proposals were funded by [Plaintiff] . . . .

13. [Plaintiff] hired a sports advisory firm to provide an initial proposal to [Defendant] and the same was completed and delivered on approximately June 4, 2016. This proposal was concluded with an inquiry of whether [Defendant] would like to proceed with discussions on what the city would be able to provide. This inquiry was answered in the affirmative.

14. [Plaintiff] use[d] personal capital and assets of investors [to] expend[] extensive resources, including but not limited to the purchase of 16.68 acres of land as to decrease the strain on city resources in furtherance of a partnership in its most literal interpretation.

15. Subsequently, [Plaintiff] provided a new proposal which included a "location solution" by bringing privately owned land to the table while still operating within the confines of the proposals advanced by [Defendant].

16. On approximately July 6, 2017, this proposal was rejected and new and unfounded basis for said rejection were given to [Plaintiff], leaving him surprised and confused.

17. At this point it became apparent that this process that was promised to be open and in good faith was being handled in an opposite fashion.

18. Still attempting to salvage the once promising partnership and all the historical implications that came therewith [Plaintiff] again in good faith altered his plans and in November of 2017 reopened discussions regarding how to make the sports facility work on the property of Holly Oak Park.

19. On approximately January 24, 2018, [Plaintiff] met with the Mayor and [Defendant] and continued discussions regarding the partnership at Holly Oak Park.

20. Between January 29, 2018, and February 4, 2018, email correspondences confirmed the January 24, 2018, meeting between [Plaintiff], the Mayor and [Defendant] and furthermore evidenced the continued assurances of optimism from [Defendant] who stated in pertinent part[,] "The concept that you presented to the Mayor and I is exciting and we are hopeful that your business is successful in making the sports complex a reality . . . "

21. During this same communication chain, [Defendant] indicated that all proposals would be subject to the scrutiny of City Council in an "open process" and that "City Council will make the final decision."

22. Through the retention of communications from [Defendant] to City Council it is clear that [Plaintiff] was given promises of a thorough and open vetting process while [Defendant] steered the city council's review of [Plaintiff's] proposals with unfounded pessimism, injurious statements and concealment of the detailed analytics provided for the council's review and necessary for an informed and good faith "final decision" as promised.

23. Most damaging, in an April 17, 2018 email correspondence directed to City Council Members [Defendant], **maliciously, with corrupt intent and acting outside and beyond the scope of his official duties**, stated in pertinent part[,] "[]My assessment of the situation is that [Plaintiff] does not have the money or financial backing to build the sports complex on the land he owns adjacent to Holly Oak Park especially given he has a contingency contract to sell the best part of it to an apartment complex. I believe he somehow sees Holly Oak Park as a way to develop that sports complex using public resources. I have serious doubts he will put any significant amount of money toward any improvements.

24. On July 17, 2018 a public records request was sent to the City of Shelby requesting any documents or information relied upon in [Defendant's] April 17, 2018 "assessments". This public records request was responded to by Shelby City Clerk . . . stating, "To my knowledge no such documents exist."

> 25. Additionally, on October 23, 2018 the Mayor fielded a meeting with several concerned and disgruntled leaders of Cleveland County including Plaintiff . . . during which the bad faith negotiations of the City of Shelby became a point of discussion.
>
> 26. During this discussion the Mayor stated to Plaintiff . . . and the others in attendance that he and Defendant . . . "made it clear to Plaintiff that the City would not be able to help fund any part of the project". The Mayor was then presented with an E-mail from Defendant . . . to Plaintiff that completely contradicted the Mayor's representation and left him surprised and unable to explain the contradiction.
>
> 27. This most recent interaction further displays the bad faith nature of the discussions and negotiations conducted by the City of Shelby and led by Defendant . . . .
>
> 28. Despite [Plaintiff's] undeniable qualifications, adequate resources and display of business flexibility and ingenuity [Plaintiff] was denied an open and fair consideration of his business proposals due in large part to the damaging comments made by Defendant . . . .
>
> . . . .
>
> 30. On April 17, 2018 Defendant Ricky Howell, **maliciously. with corrupt intent and acting outside and beyond the scope of his official duties**, communicated via electronic mail several statements that were false.

In lieu of filing an answer, Defendant moved to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1), (2), and (6). Attached to Defendant's motion was the City of Shelby Resolution No. 56-2008 referenced in the complaint; an email Defendant sent on 17 April 2018 to the City Council also referenced in the complaint and upon which the libel claim was based; and an affidavit provided by Defendant, authenticating both. The email sent by Defendant reads as follows:

> Good afternoon. I need direction from Council as to how you want to approach [Plaintiff's] request to appear before Council to present his proposal. I offer the following suggestion.

> I believe it would be unfruitful for Council to invite him to appear and then engage in a painstaking back and forth over details. But if Council wishes to merely listen to his proposal which was previously emailed to you all then I certainly see no harm in that.
>
> [Plaintiff's] latest letter provided to you last night takes a great deal out of context from discussions the Mayor and I had with him early on. He never specifically indicated that it was his desire to essentially take over Holly Oak Park. If he had I know the Mayor and I both would have told him that was a non starter. My assessment of the situation is that [Plaintiff] does not have the money or financial backing to build the sports complex on the land he owns adjacent to Holly Oak Park especially given he has a contingency contract to sell the best part of it for an apartment complex. I believe he somehow sees Holly Oak Park as a way to develop that sports complex using public resources. I have serious doubts he will put any significant amount of money toward any improvements.
>
> A public/private partnership has to be a two way street where there is some direct public benefit derived. In this situation I only see a private benefit. Direction from Council is needed. I would remind you all that discussing this amongst yourselves in groups less than 4 is fine as long as the open meetings law is considered. Otherwise this will need to be discussed at your next regular Council meeting.
>
> I would like to hear your individual thoughts if you wish to call me.

After a hearing, the trial court entered an order on 13 January 2020 denying Defendant's motion to dismiss. Defendant timely filed notice of appeal.

II. Appellate Jurisdiction

[1] We first determine whether Defendant's appeal is properly before us. Where, as here, the trial court's order does not dispose of all claims, it is an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(a) (2019). There is generally no right of immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Immediate appeal may be taken, however, if the order affects a

substantial right or constitutes an adverse ruling as to personal jurisdiction, N.C. Gen. Stat. § 1-277, or if the trial court certified the order for immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b). The record in this case does not indicate that the trial court certified the order pursuant to Rule 54(b).

Defendant moved to dismiss the complaint under Rules 12(b)(1), 12(b)(2), and 12(b)(6) based on his assertion that he is entitled to "absolute immunity" and "public official's immunity." Public official immunity is "a derivative form of sovereign immunity." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996). The trial court denied the motion without specifically stating the ground or grounds upon which it ruled.

We dismiss Defendant's appeal from the trial court's order denying his Rule 12(b)(1) motion based on the defense of public official immunity. Orders denying Rule 12(b)(1) motions to dismiss based on sovereign immunity, and therefore public official immunity, "are not immediately appealable because they neither affect a substantial right nor constitute an adverse ruling as to personal jurisdiction." *Can Am South, LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (2014) (citing *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009)).

We allow Defendant's appeal from the trial court's order denying his Rule 12(b)(2) and 12(b)(6) motions to dismiss based on public official immunity. "As has been held consistently by this Court, denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* (citations omitted). Moreover, we are bound by the longstanding rule that the denial of a 12(b)(6) motion based on the defense of sovereign immunity affects a substantial right and is immediately appealable under section 1-277(a). *See Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010).

III. Standard of Review

"[U]pon a defendant's motion to dismiss for lack of personal jurisdiction [under Rule 12(b)(2)], the plaintiff bears the burden of making out a *prima facie* case that jurisdiction exists." *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010) (citation omitted). "[W]hen a defendant supplements [his] motion with affidavits or other supporting evidence, the unverified allegations of a plaintiff's complaint can no longer be taken as true or controlling[.]" *Id.* (internal quotation marks and citation omitted) (emphasis omitted). If the plaintiff offers

no evidence in response, this Court considers (1) any allegations in the complaint that are not controverted by the defendant's evidence and (2) all facts in the defendant's evidence, which are uncontroverted because of the plaintiff's failure to offer evidence in response. *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 183 (2005) (citation omitted).

> Where . . . the record contains no indication that the parties requested that the trial court make specific findings of fact, and the order appealed from contains no findings, we presume that the trial court made factual findings sufficient to support its ruling, and it is this Court's task to review the record to determine whether it contains evidence that would support the trial court's legal conclusions, and to review the trial court's legal conclusions de novo.

McCullers v. Lewis, 265 N.C. App. 216, 220-21, 828 S.E.2d 524, 531 (2019) (citations omitted).

In this case, Defendant's motion to dismiss, supplemented with supporting evidence and an affidavit, did not controvert Plaintiff's allegations. Plaintiff rested on the unverified allegations in his complaint. As a result, this Court considers the allegations in Plaintiff's complaint and all facts in Defendant's evidence (together, "the Pleadings"). Additionally, because the trial court's three findings of fact do not relate to the scope of Defendant's duties or whether he acted with malice or corruption, we presume the trial court made factual findings sufficient to support its ruling. It is this Court's task to review the Pleadings to determine whether they contain evidence that would support the trial court's legal conclusions, and to review the trial court's legal conclusions de novo. *Id.*

IV. Analysis

[2] Public official immunity precludes a suit against a public official in his individual capacity and protects him from liability as long as the public official "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[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted).

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging

> the validity of public officials' actions to overcome this presumption by competent and substantial evidence.

Strickland v. Hedrick, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (internal quotation marks and citations omitted). To rebut the presumption and hold a public official liable in his individual capacity, a plaintiff's complaint must allege, and the facts alleged must support a conclusion, "that [the official's] act, or failure to act, was corrupt or malicious, or 'that [the official] acted outside of and beyond the scope of his duties.' " *Doe v. Wake Cty.*, 264 N.C. App. 692, 695-96, 826 S.E.2d 815, 819 (2019) (citation omitted).

A. Scope of Duties

A city manager's duties are statutorily defined in N.C. Gen. Stat. § 160A-148, which states in pertinent part that:

> (2.) He shall direct and supervise the administration of all departments, offices, and agencies of the city, subject to the general direction and control of the council, except as otherwise provided by law. (3) He shall attend all meetings of the council and recommend any measures that he deems expedient. . . . (7) He shall make any other reports that the council may require concerning the operations of city departments, offices, and agencies subject to his direction and control.

N.C. Gen. Stat. § 160A-148 (2019).

Plaintiff states in his brief that he "is not objecting to the fact that [Defendant] was in fact acting in his capacity as City Manager of the City of Shelby at the time the tortious behaviors plead [sic] in Appellees [sic] complaint took place[,]" and the Pleadings show that Defendant acted within the scope of his statutory authority and duties. Defendant met with Plaintiff on behalf of Shelby to discuss Defendant's proposals for a sports complex and communicated with the mayor and the City Council regarding the proposals. Defendant sought guidance from the City Council and provided his own recommendation regarding the proposals. Defendant, in his capacity as the city manager, communicated by email to the City Council explicitly seeking its guidance on Plaintiff's most recent proposal to the City Council. The Pleadings demonstrate that Defendant "lawfully exercise[d] the judgment and discretion with which he is invested by virtue of his office[.]" *Smith*, 289 N.C. at 331, 222 S.E.2d at 430.

B. Malice or Corruption

Because the Pleadings show that Plaintiff acted within the scope of his statutory authority and duties, to rebut the presumption of his good faith and exercise of powers in accord with the spirit and purpose of the law, Plaintiff must have sufficiently alleged, and the facts must support a conclusion, that Defendant's acts were malicious or corrupt.

"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." *Mitchell v. Pruden*, 251 N.C. App. 554, 559, 796 S.E.2d 77, 82 (2017) (citation omitted). An act is corrupt when it is done with "a wrongful design to acquire some pecuniary profit or other advantage." *State v. Hair*, 114 N.C. App. 464, 468, 442 S.E.2d 163, 165 (1994) (citation omitted). A conclusory allegation that a public official acted maliciously or corruptly is not sufficient, by itself, to withstand a motion to dismiss. *Doe*, 264 N.C. App. at 695-96, 826 S.E.2d at 819. "The facts alleged in the complaint must support such a conclusion." *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). *See Mitchell*, 251 N.C. App. at 555-56, 560-61, 796 S.E.2d at 79-80, 82-83 (plaintiffs' bare, conclusory allegation that defendant's actions were "only meant to further his personal campaign to maliciously defame [plaintiffs]" was insufficient to support a legal conclusion that defendant acted with malice).

Plaintiff's complaint alleges, in pertinent part, as follows:

> 22. Through the retention of communications from [Defendant] to City Council it is clear that [Plaintiff] was given promises of a thorough and open vetting process while [Defendant] steered the city council's review of [Plaintiff's] proposals with unfounded pessimism, injurious statements and concealment of the detailed analytics provided for the council's review and necessary for an informed and good faith "final decision" as promised.
>
> 23. Most damaging, in an April 17, 2018 email correspondence directed to City Council Members [Defendant], **maliciously, with corrupt intent and acting outside and beyond the scope of his official duties**, stated in pertinent part[,] "[]My assessment of the situation is that [Plaintiff] does not have the money or financial backing to build the sports complex on the land he owns adjacent to Holly Oak Park especially given he has a contingency contract to sell the best part of it to an apartment complex.

> I believe he somehow sees Holly Oak Park as a way to develop that sports complex using public resources. I have serious doubts he will put any significant amount of money toward any improvements.
>
> 24. On July 17, 2018 a public records request was sent to the City of Shelby requesting any documents or information relied upon in [Defendant's] April 17, 2018 "assessments". This public records request was responded to by Shelby City Clerk . . . stating, "To my knowledge no such documents exist."
>
> 25. Additionally, on October 23, 2018 the Mayor fielded a meeting with several concerned and disgruntled leaders of Cleveland County including Plaintiff . . . during which the bad faith negotiations of the City of Shelby became a point of discussion.
>
> 26. During this discussion the Mayor stated to Plaintiff . . . and the others in attendance that he and Defendant . . . "made it clear to Plaintiff that the City would not be able to help fund any part of the project". The Mayor was then presented with an E-mail from Defendant . . . to Plaintiff that completely contradicted the Mayor's representation and left him surprised and unable to explain the contradiction.
>
> 27. This most recent interaction further displays the bad faith nature of the discussions and negotiations conducted by the City of Shelby and led by Defendant . . . .

We note that although the complaint alleges that Defendant acted maliciously, with corrupt intent, "we are not required to treat this allegation of a legal conclusion as true." *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003).

Although Plaintiff alleges Defendant acted in bad faith by his "unfounded pessimism, injurious statements and concealment of the detailed analytics provided for the council's review," Plaintiff alleges no false statements of fact made by Defendant. The fact that Defendant discussed the project with Plaintiff and considered various proposals from him over a two-year period prior to expressing certain concerns to the City Council does not tend to support a conclusion that Defendant acted maliciously or corruptly by recommending measures for expediency and reporting his concerns to the City Council. Moreover, the fact

that Defendant sent an email to the City Council expressing his concerns about Plaintiff's financial ability to complete the project, even though the Shelby City Clerk did not know of any documents or information relied upon by Defendant in making his assessment, does not support a conclusion that Defendant acted maliciously or corruptly. In fact, Defendant's office vests him with the authority and responsibility to exercise judgment and discretion, as discussed above.

The plain text of Defendant's email indicates that Defendant was seeking the City Council's direction and sharing with the City Council his assessment of the situation based on his own judgment. Defendant began with an explicit request for direction on how best to respond to Plaintiff's most recent proposal. Defendant explicitly offered the opinion that "no harm" could come from discussing the proposal with Plaintiff. After reporting discrepancies between his understanding of the negotiations and Plaintiff's newest proposal, Defendant again explicitly requested "[d]irection from Council." Defendant recommended that the City Council be mindful of the applicable open meeting laws and reiterated his desire to receive input from the City Council. These details of Defendant's email contradict Plaintiff's assertions that Defendant intentionally engaged in a process that lacked transparency. Rather, Defendant's email illustrates his intent to adhere to the City Council's wishes, comply with applicable laws regarding transparency of communications regarding City Council business, and fulfill his statutory obligations.

Plaintiff's complaint has not sufficiently alleged facts that would support a conclusion that Defendant acted in a manner that was "contrary to his duty and which he intend[ed] to be prejudicial or injurious to another[,]" *Mitchell*, 251 N.C. App. at 559, 796 S.E.2d at 82, or acted with "a wrongful design to acquire some pecuniary profit or other advantage," *Hair*, 114 N.C. App. at 468, 442 S.E.2d at 165. Because we presume that Defendant discharged his duties in good faith and exercised his power in accordance with the spirit and purpose of the law, and Plaintiff has not alleged facts to the contrary, the complaint failed to support a legal conclusion that Defendant acted with malice or corruption.

V. Conclusion

Plaintiff has failed to allege facts necessary to support a conclusion that Defendant acted outside the scope of his duties or acted in a matter that was malicious or corrupt. Thus, Plaintiff has failed to allege sufficient facts to overcome the heavy burden of rebutting the presumption that Defendant discharged his duties as a public official in good faith, *see Strickland*, 194 N.C. App. at 10, 669 S.E.2d at 68, and public official

immunity bars Plaintiff's action against Defendant. Accordingly, Plaintiff has failed to make out a *prima facie* case that jurisdiction exists, and the trial court erred by denying Defendant's Rule 12(b)(2) motion to dismiss. Because the trial court erred by denying Defendant's Rule 12(b)(2) motion to dismiss, we need not address whether the trial court erred by denying Defendant's Rule 12(b)(6) motion to dismiss.

We reverse the trial court's order.

REVERSED.

Judges INMAN and BERGER concur.

KAVITHA N. KRISHNAN OTD, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA20-107

Filed 3 November 2020

Administrative Law—state employee grievance proceeding—deadline to commence contested case—more specific statute controls

An administrative law judge erred by dismissing a state employee's contested case as untimely under N.C.G.S. § 150B-23(f), which states that the time to file a contested case begins when "notice is given," which occurs once an agency places its final decision in the mail. Although section 150B-23(f) is a general statute that applies to all contested case proceedings, the more specific statute in the North Carolina Human Resources Act—N.C.G.S. § 126-34.02(a), which governs employee grievance and disciplinary actions—governed this case, and petitioner complied with the statute by filing the case within thirty days "of receipt" of the final agency decision.

Appeal by petitioner from order entered 12 December 2019 by Administrative Law Judge J. Randolph Ward in the Office of Administrative Hearings. Heard in the Court of Appeals 25 August 2020.

Dysart Willis Houchin & Hubbard, by Meredith Woods Hubbard, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for respondent-appellee.

DIETZ, Judge.

In this state employee grievance proceeding, the administrative law judge, on the judge's own initiative without notice to the parties, dismissed the case on the ground that it was not timely initiated. The ALJ reasoned that, under the general timing rules for contested cases in N.C. Gen. Stat. § 150B-23(f), the time to commence the case began to run when the agency placed its final decision in the mail.

Both parties argue on appeal that the ALJ's ruling is erroneous. We agree. This contested case is governed by a more specific provision in the North Carolina Human Resources Act, N.C. Gen. Stat. § 126-34.02, which states that the time to commence a contested case runs from the employee's "receipt of" the final agency decision. Applying the ordinary meaning of the word "receipt," the time to commence this contested case began to run when the decision was delivered, not when the agency placed it in the mail. We therefore reverse the ALJ's order and remand this case for further proceedings.

Facts and Procedural History

Kavitha Krishnan worked at a development center operated by the North Carolina Department of Health and Human Services. In 2019, Krishnan's employer placed her on leave while it pursued an investigation for "unacceptable personal conduct and/or unsatisfactory job performance resulting from an allegation of violation of informed consent regulations." Krishnan resigned while this investigation was ongoing. The day after she resigned, Krishnan submitted a *pro se* employment complaint alleging unlawful retaliation and workplace harassment.

On 17 May 2019, Krishnan received a letter from DHHS sent by certified United States mail. The letter stated that Krishnan's grievance had been dismissed and the matter administratively closed. The letter also provided information about further review through a contested case proceeding.

On 17 June 2019, Krishnan filed a petition for a contested case hearing. The administrative law judge assigned to the case later entered an order dismissing the case on the ground that the petition commencing the proceeding was untimely. The ALJ raised this issue on the judge's own initiative without providing the parties with an opportunity to

address the timeliness of the petition. Krishnan appealed the ALJ's order to this Court.

Analysis

Krishnan argues that the ALJ erroneously dismissed this contested case on the ground that the petition was not timely filed. The Department of Health and Human Services concedes that the ALJ erred. We agree.

In the order of dismissal, the ALJ determined that "[i]n the course of considering the merits of the parties' arguments . . . it has become apparent that the Petitioner failed to timely file her Petition for a contested case hearing in this matter." The ALJ noted that "Petitioner was given notice of the Respondent's final agency decision and of her right to appeal to the Office of Administrative Hearings by certified letter dated May 14, 2019" which was "placed in an official depository of the United States Postal Service" the following day. The ALJ also noted that Krishnan's petition "was filed on June 17, 2019." The ALJ then determined that, because the petition "must be filed within 30 days of receipt of the final agency decision" under the applicable statute, the petition was untimely.

That determination is erroneous. It appears that the ALJ relied on a provision in N.C. Gen. Stat. § 150B-23 stating that the time to file a petition for a contested case "shall commence when notice is given . . . by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency." N.C. Gen. Stat. § 150B-23(f). Relying on this provision, the ALJ appears to have concluded that notice was given when the agency placed the decision in the mail on 15 May 2019 and thus the 30-day deadline to file began to run at that time.

The flaw in this reasoning is that N.C. Gen. Stat. § 150B-23(f) is a general statute that establishes default rules for contested case proceedings under the Administrative Procedure Act. This case is subject to those general statutes, but also to a more specific statute in the North Carolina Human Resources Act stating that a "contested case must be filed within 30 days of receipt of the final agency decision." N.C. Gen. Stat. § 126-34.02(a).

The words "notice" and "receipt" in these statutes mean different things. "When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019). Here, however, the word "notice" has a special statutory definition. In

ordinary usage, one would not have notice of something unless one actually knows about it. But under Section 150B-23(f), a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it. N.C. Gen. Stat. § 150B-23(f).

By contrast, the word "receipt" in Section 126-34.02 is undefined and thus is given its ordinary meaning. The word "receipt" means the "act of receiving something given or handed to one; the fact of being received." *Receipt*, *Oxford English Dictionary* (2nd ed. 1989). So, in ordinary English usage, one is not in "receipt" of a letter when it is mailed; receipt occurs when the letter is delivered.

As a result of the differing meanings of the words "notice" and "receipt," there is a conflict between the time deadlines created by these two statutes. The more general statute, N.C. Gen. Stat. § 150B-23(f), which applies to all contested case proceedings, starts the time to commence a contested case on 15 May 2019, when the agency placed its final decision in the mail. But the more specific statute, N.C. Gen. Stat. § 126-34.02(a), which governs the time deadlines in cases involving employee grievance and disciplinary actions, starts the time on 17 May 2019, when that decision was delivered by certified mail.

"Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Applying that principle here, the statute dealing directly and specifically with employee grievances controls over the broader statute addressing all forms of administrative proceedings. We therefore agree with the parties that the time deadline in this case did not begin to run when DHHS placed its final agency decision in the mail. Instead, it began to run upon Krishnan's "receipt of" the decision—that is, when that certified mailing was delivered to Krishnan. Accordingly, Krishnan's petition was timely and the ALJ erred by dismissing the contested case on the ground that the petition was untimely.

Conclusion

We reverse the administrative law judge's order and remand for further proceedings.

REVERSED AND REMANDED.

Judges STROUD and ZACHARY concur.

MITCHELL v. BOSWELL

[274 N.C. App. 174 (2020)]

MASON MITCHELL D/B/A MASON MITCHELL MOTORSPORTS, AND MASON MITCHELL MOTORSPORTS, INC., PLAINTIFFS
v.
SCOTT BOSWELL, DEFENDANT

No. COA19-1077

Filed 3 November 2020

Statute of Frauds—mediated settlement agreement—parties' signatures required—"parties" defined

Where the parties to a lawsuit participated remotely in a mediated settlement conference in which their attorneys signed a settlement agreement on their behalf, and where plaintiff eventually signed the agreement but defendant refused to do so, an order granting plaintiff's motion to enforce the agreement was reversed because the agreement failed to satisfy the applicable statute of frauds (N.C.G.S. § 7A-38.1(*l*)), which requires a mediated settlement agreement to be "signed by the parties against whom enforcement is sought." The language of section 7A-38.1(*l*) was unambiguous, and the plain meaning of the word "parties" did not include the parties' attorneys or other agents.

Appeal by Plaintiffs from Order entered 9 September 2019 by Judge Jesse B. Caldwell, III in Iredell County Superior Court. Heard in the Court of Appeals 14 April 2020.

Hartsell & Williams, P.A., by Andrew T. Cornelius, Austin "Dutch" Entwistle, III, and E. Garrison White, for plaintiffs-appellees.

Stam Law Firm, PLLC, by R. Daniel Gibson, for defendant-appellant.

MURPHY, Judge.

Motions to enforce settlement agreements are treated like motions for summary judgment and should be granted only when there are no genuine issues of material fact and the movant is entitled to relief as a matter of law. The statute of frauds may preclude such relief as a matter of law. Where a statute's terms are unambiguous, we consider their plain meaning. Here, the applicable statute of frauds by its plain terms requires the parties, not their attorneys, to sign a mediated settlement agreement. The failure of the parties to sign the mediated settlement

agreement renders it unenforceable as a matter of law. The motion to enforce the mediated settlement agreement should have been denied. We reverse.

BACKGROUND

Defendant, Scott Boswell ("Boswell"), and Plaintiffs, Mason Mitchell ("Mitchell") and Mason Mitchell Motorsports, Inc., were ordered by the Superior Court to participate in a mediated settlement conference, which took place on 29 April 2019. At the mediated settlement conference, the parties created a memorandum that seemingly described the terms under which the parties would settle the case ("memorandum of settlement"). Both parties were out of state at the time of the mediation, so the mediation was conducted with the attorneys and mediator present while the parties were available by telephone. The parties did not sign the memorandum of settlement themselves; however, the attorneys purportedly signed on the parties' behalf. The memorandum of settlement is shown in relevant part below:

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STATE OF NORTH CAROLINA

IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17CVS1631

MASON MITCHELL d/b/a MASON MITCHELL MOTORSPORTS & MASON MITCHELL MOTORSPORTS, Inc.)
Plaintiff
vs.
SCOTT BOSWELL
Defendant.

Memorandum

Both parties mutually and voluntarily to dismiss all claims with prejudice under the above mentioned case number pursuant the following terms:

1. For Scott Boswell to pay the full amount of $45,000.00 in certified funds to Hartsell & Williams Trust account within 30 days of execution of the settlement agreement which will be drafted by attorneys Andrew Cornelius and Marisa Thompson within 30 days of this dated memorandum.

2. For MMM to allow for Scott Boswell and/or agent to pick up his race car and two race seats within 45 days of the execution of the settlement agreement.

This is only a memorandum and a settlement agreement with more details will be drafted.

This 29 day of April, 2019

Retired Judge Preston Cornelius

Andrew Cornelius o/b/o MMM

Marisa Thompson o/b/o Scott Boswell

Following the creation of the memorandum of settlement, Boswell's attorney drafted a proposed settlement agreement pursuant to the terms of the memorandum of settlement and sent it to Mitchell's attorney. This document was eventually signed by Mitchell; however, Boswell did not sign the settlement agreement. In a letter via email, Mitchell demanded Boswell execute the settlement agreement as Mitchell contended the parties had agreed to do in the memorandum of settlement. When this did not occur, Mitchell filed a motion to enforce the memorandum of settlement.

After the filing of this motion, competing affidavits from the mediator and Boswell were filed. The affidavit from the mediator stated in relevant part:

> Both parties were present via telephone conference because both parties reside out of state. . . . [T]he mediation resulted in a settlement that resolved all issues memorialized by a memorandum of settlement signed by myself, [and the parties' attorneys on behalf of their clients]. . . . That I was present when [Boswell] authorized [his counsel] to sign the memorandum of judgment on his behalf due to his lack of physical presence.

Boswell's affidavit stated in relevant part:

> I did not review any settlement documentation requiring my signature or my attorney's signature as part of the 29 April 2019 mediation. . . . I did not sign or authorize anyone to sign on my behalf any settlement documentation as part of the 29 April 2019 mediation. . . . I was not aware of any settlement documentation signed as part of the 29 April 2019 mediation until 4 June 2019. On 4 June 2019, I reviewed a letter from [Mitchell's] counsel to [my attorney] dated 3 June 2019 which attached a document that [my attorney] purportedly signed on my behalf. . . . [My attorney at the time] did not and does not have my authorization to sign the document attached to the 3 June 2019 letter.

At the hearing on this motion, Boswell contended the motion to enforce the memorandum of settlement should be denied, in part due to the failure to satisfy the statute of frauds.[1] The trial court granted Mitchell's motion to enforce the memorandum of settlement and found the "Memorandum of Settlement is a binding contract between the parties which contains the material terms of that agreement, and that counsel for the parties had the authority at mediation to execute the

1. Although no transcript was filed in the Record, during oral argument Mitchell conceded this argument was presented below. *See State v. Williams*, 247 N.C. App. 239, 244 n.3, 784 S.E.2d 232, 235 n.3 (2016) (citing *State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001)). Thus, this argument is preserved for our review. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Memorandum of Settlement on behalf of the parties." Boswell timely appeals the trial court's order enforcing the memorandum of settlement.

ANALYSIS

A motion to enforce a memorandum of settlement is treated as a motion for summary judgment. *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

> On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

Summey v. Barker, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Our General Assembly determines which contracts must be in writing and by whom they must be signed in order to be enforceable.

Whether Mitchell was entitled to enforcement of the memorandum of settlement as a matter of law turns on whether Boswell's failure to sign the memorandum of settlement made it unenforceable against him under the statute of frauds.[2] The controlling statute of frauds for settlement agreements resulting from mediated settlement conferences is N.C.G.S. § 7A-38.1(l). N.C.G.S. § 7A-38.1(l) provides:

> No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought.

N.C.G.S. § 7A-38.1(l) (2019). The order that required the parties to complete a mediated settlement conference was based on N.C.G.S. § 7A-38.1, as it explicitly cited this statute. *See* N.C.G.S. § 7A-38.1(a) (2019) ("this

2. Boswell argues genuine issues of material fact existed due to conflicting affidavits and ambiguous language regarding the parties' intent in the memorandum of settlement, and argues the memorandum of settlement is an agreement to agree, not a settlement agreement, that is unenforceable as a matter of law. We do not address these arguments and express no opinion as to them because the statute of frauds issue is determinative of this appeal. *See Rogerson v. Fitzpatrick*, 170 N.C. App. 387, 392, 612 S.E.2d 390, 393 (2005).

section is enacted to require parties to [S]uperior [C]ourt civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section"). Thus, N.C.G.S. § 7A-38.1(l) is controlling here. Furthermore, the memorandum of settlement is such a settlement agreement subject to N.C.G.S. § 7A-38.1(l). By its terms, the memorandum of settlement is an agreement[3] "to dismiss all claims with prejudice," resolving the case, which the trial court enforced against Boswell.

Mitchell contends N.C.G.S. § 7A-38.1(l) should be read to "allow[] for authorized persons to enter into settlement agreements on behalf of a non-attending party at [a mediated settlement conference]." Mitchell relies on Mediated Settlement Conference Rule 4(A)(2)(a), which at the time permitted a party to participate without physical attendance, in conjunction with the lack of "a procedure for how a non-attending party . . . is to sign the agreement which has been reduced to writing in the event that a settlement is reached." *See* Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, 367 N.C. 1020 (2014).

We disagree. As Mitchell acknowledges, the meaning of N.C.G.S. § 7A-38.1(l) is an issue of statutory interpretation. In addressing these questions, our Supreme Court has stated:

> Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. The principal goal of statutory construction is to accomplish the legislative intent. The best indicia of that intent are the language of the statute, the spirit of the act and what the act seeks to accomplish. The process of construing a statutory provision must begin with an examination of the relevant statutory language. It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. In other words, if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.

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3. We note that we are assuming, without deciding, the memorandum of settlement is an agreement. As alluded to, Boswell contends it was not an agreement; however, it makes no difference to the outcome here. If the memorandum of settlement was not an agreement, then it was not enforceable against Boswell. If the memorandum of settlement was an agreement, then the statute of frauds prevents it from being enforceable against Boswell.

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (internal quotations marks, alterations, and citations omitted). "An unambiguous word has a 'definite and well known sense in the law.' " *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 148-149 (2017) (quoting *C.T.H. Corp. v. Maxwell*, 212 N.C. 803, 810, 195 S.E. 36, 40 (1938)). "[L]anguage in a statute is unambiguous when it 'express[es] a single, definite and sensible meaning[.]' " *Id.* at 19, 803 S.E.2d at 149 (quoting *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967)). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) (quoting *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000)).

Here, the language at issue is "signed by *the parties* against whom enforcement is sought." N.C.G.S. § 7A-38.1(l) (emphasis added). There is no definition of "party" within the statute. Black's Law Dictionary defines a "party" as:

> 1. Someone who takes part in a transaction <a party to the contract>. . . .
>
> 2. One by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment; LITIGANT <a party to the lawsuit>. • For purposes of res judicata, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit either personally, or, if not fully competent, through someone appointed to protect the person's interests. In law, all nonparties are known as "strangers" to the lawsuit.

Party, Black's Law Dictionary (11th ed. 2019). In the full definition, there is no reference to "party" including an attorney. Thus, according to its "definite and well known sense in the law," "party" does not include an attorney. *Fid. Bank*, 370 N.C. at 19, 803 S.E.2d at 148-149. "Furthermore, this Court cannot 'delete words used or insert words not used' in a statute." *State ex rel. Util. Comm'n v. N.C. Sustainable Energy Ass'n*, 254 N.C. App. 761, 764, 803 S.E.2d 430, 433 (2017) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014)). If we were to read "the parties" in N.C.G.S. § 7A-38.1(l) to include the parties' attorneys, then we would be inserting language into the statute in contravention of this principle.

The language in N.C.G.S. § 7A-38.1(l) requires the people "who take[] part in a transaction," or the "[o]ne by or against whom a lawsuit is brought" to sign any settlement agreement reached as the result of a mediated settlement conference in order for it to be enforced against them under N.C.G.S. § 7A-38.1. *See Party*, Black's Law Dictionary (11th ed. 2019). Here, Boswell was the party against whom enforcement was sought, not his attorney. The failure of Boswell to sign the memorandum of settlement renders it unenforceable against him as a matter of law.[4] N.C.G.S. § 7A-38.1(l) (2019). As a result, the trial court erred in granting the motion to enforce the memorandum of settlement.[5]

Even assuming, *arguendo*, N.C.G.S. § 7A-38.1(l) was ambiguous, requiring statutory interpretation, we would still come to the same result—that N.C.G.S. § 7A-38.1(l) does not permit authorized agents to sign on behalf of a party. In adopting the language of N.C.G.S. § 7A-38.1(l), the General Assembly unambiguously omitted the authority to sign by authorized agent as it has included in other statute of frauds contexts. *See* N.C.G.S. § 22-1 (2019) ("signed by the party charged therewith or some other person thereunto by him lawfully authorized"); N.C.G.S. § 22-2 (2019) ("signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized"); N.C.G.S. § 25-2-201(1) (2019) ("signed by the party against whom enforcement is sought or by his authorized agent or broker"). "[I]t is always presumed that the [General Assembly] acted with full knowledge of prior and existing law." *See Dickson*, 366 N.C. at 341, 737 S.E.2d at 369, (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977)). We presume the General Assembly was fully aware of the inclusion of authorized agents in other statutes of frauds, and the absence of authorized agents in this statute therefore reflects the General Assembly's decision to specifically require the parties' signatures to satisfy N.C.G.S. § 7A-38.1(l). This interpretation is also supported by the separate treatment of parties and attorneys in other subsections of N.C.G.S. § 7A-38.1. *See* N.C.G.S. §§ 7A-38.1(b)(1) (2019) ("the parties to a civil action and their representatives"); 7A-38.1(f) ("The parties to a

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4. We recognize the increased use of virtual and telephonic attendance at settlement conferences. Without deciding the issue today, we observe the current availability of the provisions of the Uniform Electronic Transactions Act. N.C.G.S. § 66-311 *et seq*.

5. We have held "[t]he statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made." *House v. Stokes*, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675 (1984). Such a holding does not apply here, where Boswell has not admitted entering into the memorandum of settlement below or on appeal, and instead contends he did not enter into the contract.

[S]uperior [C]ourt civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority"). The references to non-parties with authority to sign and bind a party, both within N.C.G.S. § 7A-38.1 and outside of it, demonstrate the intentional decision on the part of the General Assembly to require the signature of the *parties* themselves to satisfy the statute of frauds. *Id.* at 342, 737 S.E.2d at 370 ("This definition suggests that the General Assembly's use of the word "provision" was meant to refer only to other statutory clauses and not to common law doctrines such as the attorney-client privilege and work-product doctrine. . . . This interpretation is bolstered by the fact that the General Assembly repeatedly has demonstrated that it knows how to be explicit when it intends to repeal or amend the common law.").

CONCLUSION

The trial court erroneously granted Mitchell's motion to enforce the memorandum of settlement when the memorandum of settlement did not satisfy the statute of frauds promulgated by our General Assembly in N.C.G.S. § 7A-38.1(l). Mitchell was not entitled to enforcement of the settlement agreement as a matter of law and we reverse the trial court's order to the contrary.

REVERSED.

Chief Judge McGEE and Judge BROOK concur.

NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, DALE FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY), STEVEN C. TOOLE, DIRECTOR OF RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY), NORTH CAROLINA RETIREMENT SYSTEM COMMISSION BOARD OF TRUSTEES (IN OFFICIAL CAPACITY ONLY), PETITIONERS

v.

LAURA M. RIDDICK, RESPONDENT

LAURA M. RIDDICK, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, DALE FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY), STEVEN C. TOOLE, DIRECTOR OF RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY), NORTH CAROLINA RETIREMENT SYSTEM COMMISSION BOARD OF TRUSTEES (IN OFFICIAL CAPACITY ONLY), RESPONDENTS

No. COA20-224

Filed 3 November 2020

1. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A

Where a county register of deeds was convicted of embezzling more than $600,000 of public funds in a separate criminal proceeding, the trial court properly concluded that the forfeiture provisions of N.C.G.S. § 128-38.4A—which mandates that any member of the Local Governmental Employees' Retirement System (LGERS) who commits a felony that is directly related to the member's office while in service must forfeit retirement benefits in LGERS—applied to her. Her argument that the forfeiture provisions did not apply because the sentencing judge in the separate criminal proceeding did not find an aggravating factor under N.C.G.S. § 15A-1340.16(d)(9) was contrary to the plain language of the statute.

2. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—N.C.G.S. § 161-50.4(c)

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her embezzlement convictions, her argument that the forfeiture was invalid under N.C.G.S. § 161-50.4(c)—which enumerates specific felonies to justify a forfeiture—was rejected because that provision did not invalidate or repeal N.C.G.S. § 128-38.4A.

3. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—not unconstitutional impairment of contract

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, her argument that denial of those benefits constituted an unconstitutional impairment of contract in violation of the state and federal constitutions was rejected. She failed to maintain her obligation under the contract for retirement benefits when she embezzled public funds, and the forfeiture of her benefits was reasonable and necessary to hold her responsible for her crimes.

4. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—not unconstitutional retroactive taking

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the forfeiture did not constitute an unconstitutional retroactive taking of her contractual rights in her retirement benefits without just compensation. The forfeiture statute was properly applied as of its effective date, rather than the dates of the register's first and second offenses of embezzlement (which were before the statute's effective date).

5. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—not cruel and unusual punishment

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the register failed to show that the forfeiture constituted cruel and unusual punishment. The punishment was authorized by statute, and the register cited no cases in support of her argument.

6. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—unused sick leave

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, all of the register's creditable service

that she converted from unused sick leave upon her retirement was subject to forfeiture, and the trial court erred by concluding that she forfeited only the unused sick leave accrued after the effective date of the forfeiture statute.

7. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—vested service for unelected position

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the Court of Appeals rejected the argument that the register should forfeit all accrued service that she transferred from the Teachers' and State Employees' Retirement System (TSERS) to the Local Governmental Employees' Retirement System (LGERS). The register's vested service accrued in TSERS was for an unelected position prior to her criminal acts, which was not subject to forfeiture, pursuant to N.C.G.S. § 128.26(w).

8. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—Registers of Deeds' Supplemental Pension Fund

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the register remained eligible to retire from the Registers of Deeds' Supplemental Pension Fund (RDSPF) because she still had the minimum of twenty years of creditable service required for retirement from the Local Governmental Employees' Retirement System (LGERS), allowing her to retire from RDSPF (with her requisite years of service as a register of deeds).

Appeal by North Carolina Department of State Treasurer, Retirement Systems Division, Dale Folwell, State Treasurer; Thomas G. Causey, Director of the Retirement Systems Division; and the North Carolina Retirement System Commission Board of Trustees (collectively, "the Retirement System parties") and Laura M. Riddick ("Riddick") from order entered 27 September 2019 by Judge C. Winston Gilchrist in Wake County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy, for the Retirement System parties.

Robert F. Orr and Gammon, Howard & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for Laura M. Riddick.

TYSON, Judge.

I. Background

Riddick was employed by the North Carolina Department of Natural and Cultural Resources from 1990 until 1996. Riddick was elected the Register of Deeds of Wake County and served from 1 December 1996 until she resigned on 31 March 2017. Riddick filed for retirement benefits on 1 April 2017.

Riddick embezzled public funds in an amount exceeding $600,000 while serving as Register of Deeds beginning in 2010 through 2016. Riddick entered guilty pleas to six (6) counts of felonious Embezzlement by a Public Official in Excess of $100,000, in violation of N.C. Gen. Stat. § 14-92 (2019). Riddick was sentenced to an active term in prison of 60 to 84 months. Riddick was also ordered to pay restitution in the amount of $926,615, which was paid in full after sentencing. These underlying criminal convictions and ordered restitution are not before us on this appeal.

The Retirement Systems Division oversees the relevant retirement systems: Teachers' and State Employees' Retirement System ("TSERS"), the Local Governmental Employees' Retirement System ("LGERS"), and the Registers of Deeds' Supplemental Pension Fund ("RDSPF").

A. TSERS

TSERS is a defined benefit pension plan. State employee members make contributions to the plan by deduction of six percent (6%) of their paycheck over the course of their careers. The State also makes a contribution. In order to retire with benefits of TSERS, the member must be either: (1) at least sixty years old with five years of vested membership, or (2) have completed thirty years of creditable service. *See* N.C. Gen. Stat. § 135-5(a) (2019).

A TSERS member's full retirement benefit is calculated as 0.0182, multiplied by a member's average compensation over the highest average salary for four consecutive years, multiplied by the number of years of creditable service. N.C. Gen. Stat. § 135-5(b19)(2) (2019). A reduced benefit is calculated by taking the above formula then multiplying a reduction factor from N.C. Gen. Stat. § 135-5(b19)(2) b, c (2019).

B. LGERS

Similar to the requirements above, local governmental employees, who are employed by entities that participate in LGERS, become members of LGERS. As with TSERS, employees have six percent (6%) withheld from their pay during each pay period. Under LGERS, an employee is eligible to retire upon: (1) being at least sixty years old with five vested years of creditable service; or, (2) have completed thirty years of creditable service. N.C. Gen. Stat. § 128-27(a1) (2019). An employee in LGERS is also eligible for early retirement at a reduced benefit, if they are at least fifty years old and accrued at least twenty years of creditable service. *Id.*

Full retirement benefits are calculated as .0185, multiplied by the employee's average compensation over four consecutive years which create the highest average, multiplied by the number of years of creditable service. *See* N.C. Gen. Stat. § 128-27(b21)(2)a. If an eligible employee takes an early retirement, a reduced benefit is calculated under the same formula as above. *See id.*

C. RDSPF

Any register of deeds, who retires from LGERS or an equivalent locally sponsored plan with at least ten years of eligible service as a register of deeds, is entitled to receive a monthly pension from RDSPF. N.C. Gen. Stat. § 161-50.5 provides the pension amount is to be calculated by one share for each full year of eligible service multiplied by the total number of years of eligible service. N.C. Gen. Stat. § 161-50.5 (2019). Each share is calculated by determining the total number of years of eligible service for all eligible retired registers of deeds on December 21 of each calendar year. *Id.* Payment cannot exceed the maximum retirement allowance. *Id.*

D. Riddick's Retirement

N.C. Gen. Stat. § 128-34(b) allows an employee to transfer benefits accrued in TSERS into an LGERS account. This transfers the accumulated contributing interest and service credits to LGERS and terminates the employee's eligibility and participation in TSERS.

In February 2017, Riddick completed a form to transfer accrued membership service from her TSERS account into her LGERS account. By completing this transfer, Riddick acknowledged she would "lose all pending and accrued rights to any benefits" from her prior membership in TSERS. When Riddick filed for retirement benefits on 1 April 2017, she was over fifty years old and had accrued at least twenty years of

creditable employment service in LGERS. Her age and years accrued qualified her for a reduced retirement benefit from LGERS. Riddick was also eligible for payments from RDSPF, because she also had accrued at least ten years of service as a register of deeds.

When Riddick retired, her 618 days of unused sick leave were converted to 2.5833 years of additional credited service. *See* N.C. Gen. § 128-26(E) (2019). As of 1 April 2017, Riddick had 20.3333 years of creditable service in LGERS, 6.1667 years transferred from TSERS, and the 2.5833 years of credited sick leave to total 29.0833 years of creditable employment service in LGERS.

N.C. Gen. Stat. § 128-38.4A(a) mandates a member of LGERS, who is convicted of a felony, must forfeit retirement benefits from LGERS, if the offense is committed while the "member is in service" and the felonious act is "directly related to the member's office or employment." N.C. Gen. Stat. § 128-38.4A(a) (2019).

The Retirement System parties determined both statutory conditions in N.C. Gen. Stat. § 128-38.4A(a) were met and reduced Riddick's creditable service to 16 years. The Retirement System parties concluded Riddick forfeited 4.333 years of membership in LGERS earned between 1 December 2012 and her resignation on 31 March 2017, all 2.5833 years of converted credited sick leave accrued at retirement, and 6.667 years of vested service transferred from TSERS to LGERS.

With only 16 years remaining after forfeiture, Riddick was ineligible to retire from LGERS prior to age 60 at a reduced benefit. Under the statute, Riddick lacked the minimum age to receive benefits or twenty years of accrued creditable service necessary for early retirement. Because Riddick was ineligible for immediate retirement from LGERS, she was also ineligible to receive immediate benefits from RDSPF.

The Retirement System parties ceased benefit payments on 25 September 2018 and assessed Riddick $126,290.28 due for overpayment of retirement funds from her retirement on 1 April 2017 until 25 September 2018. The return of Riddick's contributions, after deducting for taxes, resulted in a refund of $47,724.77, which was credited against the assessed overpayment, reducing the amount Riddick owed to $78,565.51.

Riddick filed a petition for a contested case hearing. The temporary ALJ concluded Riddick forfeited only 4.333 years of membership service in LGERS and 1.25 years of accrued service for unused sick leave, as of 1 December 2012, reducing her creditable service from 29.0833

years to 23.5 years. As Riddick retained over twenty years of creditable service, the ALJ ordered the Retirement System parties to recalculate Riddick's early retirement. The ALJ further concluded Riddick was entitled to payments from RDSPF from the date of her retirement until the date of the Division's final agency decision on 25 September 2018.

Both parties petitioned for judicial review of the ALJ's decision. The trial court applied the proper standard of review and affirmed the decision of the ALJ. Both parties timely appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 150B-52 (2019).

III. Issues

Riddick argues the trial court erred by: (1) concluding the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A applies to her without the sentencing judge in the underlying felonies finding the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(9); (2) concluding she had forfeited her rights to receive RDSPF benefits after notification by the Retirement System parties on 25 September 2018; (3) violated her rights under the Constitution of the United States and the North Carolina Constitution by applying the forfeiture statute retroactively, and by taking her property without just compensation; (4) violated her rights under the Constitution of the United States and the North Carolina Constitution by instituting a cruel and unusual punishment; and, (5) reducing her converted sick leave to accrued service after 1 December 2012.

The Retirement System parties argue the trial court erred by: (1) crediting instead of forfeiting any accruals after 1 December 2012; (2) not forfeiting all of Riddick's unused sick leave converted to credited service in her LGERS account; and, (3) concluding Riddick was entitled to benefits from the RDSPF.

IV. Standards of Review

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole record test." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 99, 798 S.E.2d 127, 132 (2017) (citation and quotation marks omitted).

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

"Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "When the trial court applies the whole record test, however, it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation and quotation marks omitted).

"[T]he whole record test is not a tool of judicial intrusion; instead, it provides a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 19, 802 S.E.2d 115, 128 (2017).

Like the jury in a jury trial, the ALJ is the sole judge of the credibility of the witnesses and the weight to be given to the evidence as the finder of fact. *Id.* at 20, 802 S.E.2d at 129. The challenger carries the burden to show prejudicial and reversible error on appeal.

V. N.C. Gen. Stat. § 15A-1340.16(d)(9)

[1] Riddick argues the trial court erred by concluding the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A (2019) applies to her without the sentencing judge in the underlying felonies finding the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(9) (2019).

N.C. Gen. Stat. § 128-38.4A provides:

> (a) Except as provided in G.S. 128-26(x), the Board of Trustees *shall not pay* any retirement benefits or allowances, except for a return of member contributions plus interest, *to any member who is convicted of any felony* under federal law or the laws of this State *if all* of the following apply:

> (1) The offense is committed while the member is in service.
>
> (2) The conduct resulting in the member's conviction is directly related to the member's office or employment.
>
> (b) Subdivision (2) or subsection (a) of this statute *shall apply to felony convictions where the court finds under G.S. 15A-1340.16(d)(9)*.

N.C. Gen. Stat. § 128-38.4A (emphasis supplied). N.C. Gen. Stat. § 15A-1340.16(d)(9) provides as an aggravating factor for crimes: "The defendant held public elected or appointed office or public employment at the time of the offense and the offense directly related to the conduct of the office or employment." N.C. Gen. Stat. § 15A-1340.16(d)(9).

N.C. Gen. Stat. § 128-26(x) provides:

> If a member who is in service and has not vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. If *a member who is in service and has vested* in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for *acts committed after* December 1, 2012.

N.C. Gen. Stat. § 128-26(x) (2019) (emphasis supplied).

A. Rules of Statutory Construction

When reviewing the parties' arguments, we apply the plain meanings of N.C. Gen. Stat. § 128-38.4A. We are guided by several well-established principles of statutory construction.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citations omitted). "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).

"Statutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be

reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks, citations, and ellipses omitted).

"[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

B. Analysis

Riddick pleaded guilty to six (6) counts of felonious embezzlement by public employee of over $100,000 each, all of which occurred while she was employed and served as the elected Wake County Register of Deeds. By pleading guilty, Riddick admitted committing six violations of N.C. Gen. Stat. § 14-92 ("If any . . . register of deeds . . . shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony.").

N.C. Gen. Stat. § 128-38.4A(a) mandates "the Board of Trustees *shall not pay*" if "[t]he offense is committed while the member is in service" and "the conduct resulting in the member's *conviction is directly related to the member's office*." (emphasis supplied). This statute is not ambiguous. Riddick argues N.C. Gen. Stat. § 128-38.4A(a)(2) does not apply when the N.C. Gen. Stat. § 15A-1340.16(d)(9) aggravating factor was not found. Her assertion is contrary to the plain language of the statute.

N.C. Gen. Stat. § 128-38.4A(b) applies when the aggravating factor is found "*or* other applicable state or Federal procedure that the member's conduct is directly related to the member's office or employment." N.C. Gen. Stat. § 128-38.4A(b) (emphasis supplied). The General Assembly has since repealed subsection (b). *See* 2020 N.C. Sess. Laws 48, § 4.3(b).

Riddick pleaded guilty to six violations of N.C. Gen. Stat. § 14-92. The plain language of that statute provides if a: "register of deeds . . . shall embezzle . . . [she] shall be guilty of a felony." By pleading guilty to six violations of N.C. Gen. Stat. § 14-92, Riddick expressly admitted she had embezzled public funds entrusted to her by virtue of her office and while serving as the Wake County Register of Deeds.

The statute provides a disjunctive "or" and enables it to be invoked through "state or Federal procedure", which is provided for by the express elements of N.C. Gen. Stat. § 14-92. There are scenarios where an aggravating factor is not found by the jury or a judge or is omitted in a plea bargain. *See* N.C. Gen. Stat. § 15A-1340.16(a1) (2019). Riddick's argument is overruled. As the ALJ found and the trial court properly concluded, a valid forfeiture of future accruals occurred as of 1 December 2012, we need not address Riddick's forfeiture arguments under N.C. Gen. Stat. § 128-38.4A.

VI. Denial of RDSPF Benefits

[2] Riddick argues the forfeiture was invalid under N.C. Gen. Stat. § 161-50.4 (c) (2019). As held above, a valid forfeiture as of 1 December 2012 occurred under N.C. Gen. Stat. § 128-38.4A. The General Assembly outlined specific mechanisms for forfeiture. By enacting N.C. Gen. Stat. § 161-50.4 (c), which enumerated specific felonies to justify a forfeiture, the General Assembly did not invalidate or repeal the mechanism under N.C. Gen. Stat. § 128-38.4A for forfeiture. This argument is dismissed.

VII. Impairment of Contract

[3] Riddick further argues the denial of benefits constitutes an unconstitutional impairment of contract in violation of the Constitution of the United States and the North Carolina Constitution.

An appellate court "presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt." *N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016).

The Contract Clause in the Constitution of the United States provides, inter alia: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U. S. Const. art I, § 10. In *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977), the Supreme Court of the United States articulated a three-part test to determine whether a state has impaired a contractual obligation.

North Carolina adopted the three-part test from *U.S. Trust Co.* in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). Our Supreme Court held "[t]he *U.S. Trust Co.* test requires a court to ascertain (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141, 500 S.E.2d at 60.

The Supreme Court of the United States and the Supreme Court of North Carolina have both "recognized a presumption that a state statute is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *N.C. Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 (citing *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 82 L. Ed. 57, 62 (1937)). Our Supreme Court held: "Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals." *Id.* at 786, 786 S.E.2d at 262-63. *See Lake v. State Health Plan for Teachers & State Emps.*, 264 N.C. App. 174, 181, 825 S.E.2d 645, 651 (2019). The party asserting the creation of a contract bears the burden of overcoming this presumption against the formation of a contract. *Id.*

The Retirement System parties assert the RDSPF is governed by N.C. Gen. Stat. § 161-50.1(c) (2019). This statute provides "The provisions of this Article shall be subject to future legislative change or revision, and *no person is deemed to have acquired any vested right to a pension payment provided by this Article.*" N.C. Gen. Stat. § 161-50.1(c) (emphasis supplied).

Riddick argues she has a vested contractual right to RDSPF benefits and payments, citing *Bailey*. In *Bailey*, our Supreme Court examined a constitutional challenge to a statute that removed the tax-exempt status of retirement benefits for state employees, holding the RDSPF was one of "at least thirteen different public employee retirement systems . . . operating for the purpose of providing public servants with retirement benefits." *Bailey*, 348 N.C at 136, 500 S.E.2d at 57.

Our Supreme Court further held:

> Each of these systems contains certain preconditions to the receipt of benefits. The primary one is the requirement that employees work a predetermined amount of time in public service before they are eligible for retirement benefits. After employment for the set number of years, an employee is deemed to have "vested" in the retirement system. Thereafter, the employee generally is guaranteed a percentage payment at retirement based upon years of service.

Id. at 138, 500 S.E.2d at 58.

"[T]he relationship between the Retirement Systems and state employees who have vested in those systems is contractual in nature."

Id. at 140, 500 S.E.2d at 60. The Supreme Court of North Carolina in *Bailey* struck down the statute and held there was an unconstitutional impairment of contract to those employees who had vested when it was passed by the legislature. *Id.* at 153, 500 S.E.2d at 67. Riddick asserts *Bailey* determines a contractual relationship exists and N.C. Gen. Stat. § 128-38.4A interferes with this contractual right for her.

N.C. Gen. Stat. § 128-38.4A serves an important governmental purpose in holding elected officials responsible and accountable for their illegal actions. This forfeiture provides additional deterrence beyond that offered by the criminal statutes. This remedy is "reasonable and necessary to serve an important government purpose." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citation omitted). A government or public employee being paid a taxpayer-funded salary must not benefit from their position to embezzle public taxpayer funds. In exchange for these benefits, the elected official also maintains obligations under the contract for retirement benefits. *See McCraw v. Llewellyn*, 256 N.C. 213, 216, 123 S.E.2d 575, 578 (1962) ("One of the essential elements of every contract is mutuality of agreement" (citation omitted)).

To remain eligible for retirement benefits, Riddick mutually agreed and bore a duty to faithfully execute the duties of her office and to receive, hold, and account for all public funds entrusted to her, which she admittedly violated by pleading guilty to six (6) counts of embezzlement of over $100,000 each. N.C. Gen. Stat. § 128-38.4A does not unconstitutionally impair contracts under the Federal or State Constitutions. Riddick's argument is overruled.

VIII. Retroactive Taking

[4] Riddick argues the forfeiture violates her rights under Article I, Section 10 of the Constitution of the United States and Article I, Section 19 of the North Carolina Constitution by retroactively taking her property without just compensation.

The relationship between the State and Riddick is contractual in nature. "The privilege of contracting is both a liberty and a property right . . . . 'Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property.' " *Morris v. Holshouser*, 220 N.C. 293, 295-96, 17 S.E.2d 115, 117 (1941) (citations omitted).

Our Supreme Court stated: "The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980).

In *Gardner*, our Supreme Court examined whether "a statute may be applied retroactively to alter the effect of a final judgment which had previously established the proper venue for an action" and held the legislation altered the status of a prior ruling. *Id.* at 716, 268 S.E.2d at 469. "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, must be deemed retrospective[.]" *Id.* at 718, 268 S.E.2d at 471 (citation omitted).

In *Bailey*, our Supreme Court found the change in taxation status was a "derogation of plaintiffs' rights established through the retirement benefits contracts and thus constitutes a taking of their private property." *Bailey*, 348 N.C. at 155, 500 S.E.2d at 69.

Riddick acquired contractual rights in LGERS when she vested in 2001. N.C. Gen. Stat. § 128-38.4A is effective as of 1 December 2012. The Retirement System parties expressly cannot forfeit accredited and accrued service time prior to the enactment of the act, which would run afoul of our General Statutes, *Bailey*, and *Gardner*. The Retirement System parties and the trial court correctly concluded Riddick forfeited accrued time after 1 December 2012 when the statute became effective.

This forfeiture differs from the retroactive application of both *Bailey* and *Gardner*. In *Bailey*, retirees lost benefits they had earned for future payments. *Bailey*, 348 N.C. at 155, 500 S.E.2d at 69. In *Gardner*, a prior legal ruling was overturned due to the statutory change. *Gardner*, 300 N.C. at 717, 268 S.E.2d at 470.

Riddick stopped accruing time the date the statute became effective, not on the dates of her first and second offenses of embezzlement. Both of these crimes occurred prior to the effective date of the statute. She did not lose her accrued vested right to receive future payments prior to that date. Riddick was placed in the same position as if she had retired on the effective date of the statute. She received the benefit of accruing service time, even while admittedly embezzling funds, until the effective date of the statute ceased that accrual effective 1 December 2012. The statute only addresses prospective acts. Riddick's argument is overruled.

IX. Cruel and Unusual Punishment

[5] Riddick argues her loss of accrued service constitutes cruel and unusual punishment in violation of the North Carolina Constitution. N.C. Const. art. I, § 27. "When the punishment imposed is within the limit fixed by law it cannot be excessive." *State v. Blake*, 157 N.C. 608,

611, 72 S.E. 1080, 1082 (1911). The forfeiture is authorized by statute and subject to the 1 December 2012 effective date.

Beyond citing the state constitutional provision and a definition from a treatise, Riddick does not cite any case, nor can this Court find any case, holding as cruel and unusual punishment a statute forbidding further and prospective accrual of state retirement benefits, upon an employee's related criminal conduct while holding public office or employment. Plaintiff has failed to show the forfeiture of pension benefits under the statutory mechanism provided by the General Assembly is cruel and unusual punishment.

Riddick has not argued the forfeiture provisions violates the excessive fines clauses of the Constitution of the United States and the North Carolina Constitution. By failing to assert any authority to support her arguments, Riddick has waived any argument this statute violates the excessive fines clauses in either constitution. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, of in support of which no reason or argument is stated, will be taken as abandoned."). Riddick's argument is dismissed.

X. Forfeiture of Unused Sick Leave after 1 December 2012

[6] Riddick argues her creditable service attributed to unused sick leave should not have been forfeited under N.C. Gen. Stat. § 128-38.4A. As established above, the forfeiture under N.C. Gen. Stat. § 128-38.4A as of its effective date was lawful. All sick leave she purportedly accrued after 1 December 2012 was subject to forfeiture due to her admitted criminal acts. Riddick's argument is overruled.

The Retirement System parties argue Riddick forfeited all her unused sick leave because an employee had no vested right to convert sick leave to accrued service until the actual date of retirement. N.C. Gen. Stat. § 128-26(x) provides:

> If a member who is in service and has not vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. *If a member who is in service and has vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member is not entitled to any creditable service that accrued after December 1, 2012.*

N.C. Gen. Stat. § 128-26(x) (emphasis supplied).

N.C. Gen. Stat. § 128-26(e) provides:

> Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by the member since he or she last became a member, and also if the member has a prior service certificate which is in full force and effect, the amount of the service certified on the prior service certificate; and if the member has sick leave standing to the member's credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof, but not less than one hour; *sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for disability retirement or for a vested deferred allowance.* Creditable service for unused sick leave shall be allowed only for sick leave accrued monthly during employment under a duly adopted sick leave policy and for which the member may be able to take credits and be paid for sick leave without restriction. However, in no instance shall unused sick leave *be credited to a member's account at retirement* if the member's last day of actual service is more than 365 days prior to the effective date of the member's retirement. *Days of sick leave standing to a member's credit at retirement* shall be determined by dividing the member's total hours of sick leave at retirement by the hours per month such leave was awarded under the employer's duly adopted sick leave policy as the policy applied to the member when the leave was accrued.

N.C. Gen. Stat. 128-26(e) (2019) (emphasis supplied).

The plain language of N.C. Gen. Stat. § 128-26(x) states the "member is not entitled to any creditable service that accrued after December 1, 2012." N.C. Gen. Stat. § 128-26(x). The unused sick leave is only allowed to be converted to creditable service time into the member's account at retirement. N.C. Gen. Stat. § 128-26(e). Riddick was only able to convert her unused sick leave into creditable service time upon her retirement effective 1 April 2017. Her retirement occurred after the effective forfeiture date of 1 December 2012 in N.C. Gen. Stat. § 128-38.4A.

Riddick forfeited all 2.5833 years of creditable service converted from unused sick leave, not just the 1.25 years of creditable service forfeited after 1 December 2012 as concluded by the ALJ and affirmed by the superior court. The superior court's ruling on this issue is reversed

and this cause is remanded to that court for further remand with instructions to recalculate Riddick's accrued service without including any credit for unused sick leave consistent with the statute and this opinion.

XI. 2017 Transfer of Membership from TSERS to LGERS

[7] The Retirement System parties assert Riddick should forfeit all accrued service transferred from TSERS to LGERS. They argue the transfer of creditable service accrued in the retirement system after the effective date of N.C. Gen. Stat. § 128-38.4A, 1 December 2012, and is subject to forfeiture.

By transferring her accrued and vested benefits from TSERS to LGERS Riddick attested: "I understand that upon completion of the transfer, I lose all pending and accrued rights to any benefits from my membership in the Retirement System from which I am transferring accumulated contributions and service credits."

N.C. Gen. Stat. § 128-26(w) provides:

> If a member who is an elected government official and has not vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 128-38.4 for acts committed after July 1, 2007, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. If a member who is an elected government official and has vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 128-38.4 for acts committed after July 1, 2007, then that member is not entitled to any creditable service that accrued after July 1, 2007. *No member shall forfeit any benefit or creditable service earned from a position not as an elected government official.*

N.C. Gen. Stat. § 128-26(w) (2019).

Riddick worked for the North Carolina Department of Natural and Cultural Resources from 1990 until 1996, six and one-half years in an unelected position. This employment and length of service vested and earned her creditable time in TSERS, which she was allowed to transfer to LGERS. N.C. Gen. Stat. § 128-26(w) is controlling, Riddick cannot forfeit vested service she had already accrued as an unelected state official prior to her criminal acts. By the express language of the transfer, Riddick lost her right to further participate in TSERS, but not her prior accrued and vested service while in an unelected position. The

Retirement System parties' argument on forfeiture of her vested service in TSERS is overruled.

XII. Retirement from RDSPF

[8] The Retirement System parties argue Riddick was ineligible to retire from RDSPF because of lack of and the improper calculation of service time. Because we affirm the judgment of the superior court to credit her vested service in TSERS to LGERS, Riddick was eligible to retire from RDSPF as of 1 December 2012. The ALJ and superior court properly concluded Riddick forfeited 4.3333 years of LGERS creditable service, but remained eligible to retire from LGERS. Because of her eligibility to retire from LGERS, she was also eligible to retire from RDSPF. The Retirement System parties argument is overruled.

XIII. Conclusion

We affirm the superior court's conclusions: (1) the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A applies to Riddick; (2) Riddick did not forfeit her rights to receive benefits from RDSPF prior to 1 December 2012 after notification by the Retirement System parties; (3) N.C. Gen. Stat. § 128-38.4A does not violate her rights under the Constitution of the United States and the North Carolina Constitution by retroactively applying the forfeiture statute and taking her property without just compensation; (4) the application of the forfeiture statute post 1 December 2012 is not cruel and unusual punishment; and, (5) disallowing retirement credit for her unused sick leave post 1 December 2012. These parts of the superior court's order remain undisturbed and are affirmed.

The superior court erred by concluding Riddick forfeited only 1.25 years of creditable service accruing after 1 December 2012 for her unused sick leave. Riddick forfeited all 2.5833 years she attempted to convert to creditable service upon retirement from unused sick leave. This cause is remanded to the superior court with instructions to enter an order forfeiting all 2.5833 years of credited service from unused sick leave and for further remand with instructions to recalculate Riddick's accrued service and benefits as is consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and COLLINS concur.

POUNDS v. PORTFOLIO RECOVERY ASSOCS., LLC

[274 N.C. App. 201 (2020)]

IRIS POUNDS, CARLTON MILLER, VILAYUAN SAYAPHET-TYLER, AND RHONDA HALL, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
PORTFOLIO RECOVERY ASSOCIATES, LLC, DEFENDANT

No. COA19-925

Filed 3 November 2020

1. Arbitration and Mediation—motion to compel arbitration—assignment of right to arbitrate—purchaser of credit card debts

In a class action against defendant-business, which obtained default judgments against the named plaintiffs after purchasing their credit card debts through bills of sale, the trial court properly denied defendant's motion to compel arbitration because no valid arbitration agreement existed between the parties where the original creditors did not assign defendant the right to arbitrate. The state laws governing plaintiffs' credit card agreements (Utah and South Dakota) required an express intent to specifically assign arbitration rights, which the bills of sale failed to demonstrate by only assigning plaintiffs' "accounts" and "receivables" and by not including language assigning "all" of the creditors' rights to defendant.

2. Uniform Commercial Code—assignment of credit card debt—Section 9-404—right to compel arbitration—not included

Where defendant-business purchased plaintiffs' credit card debts through bills of sale that did not expressly assign the original creditors' arbitration rights (under the credit card agreements) to defendant, Section 9-404 of the Uniform Commercial Code (U.C.C.)—providing that an assignee's rights are subject to all terms of the agreement between an account debtor and assignor—did not grant defendant a statutory right to arbitrate plaintiffs' consumer protection claims against it. Even if Section 9-404 applied to this case, the U.C.C. allows parties to vary its terms by agreement, and the bills of sale contractually limited the scope of the assignments to include only plaintiffs' accounts and receivables.

Appeal by Defendant from Order entered 21 March 2019 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 14 April 2020.

North Carolina Justice Center, by Jason A. Pikler, Carlene McNulty, and Emily P. Turner, J. Jerome Hartzell, Collum &

Perry, PLCC, by Travis E. Collum, Lapas Law Offices, PLLC, by Adrian M. Lapas, for plaintiffs-appellees.

Ellis & Winters LLP, by Jonathan A. Berkelhammer, Joseph D. Hammond, Michelle A. Liguori, and Carson Lane, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Portfolio Recovery Associates, LLC, (PRA) appeals from an Order denying PRA's Motion to Compel Arbitration (Order) entered on 21 March 2019. The Record reflects the following relevant facts:

PRA is in the business of purchasing delinquent consumer debt, and since 1 October 2009, PRA has filed over 1,000 lawsuits seeking enforcements of those debts in North Carolina courts.[1] Specific to this case, PRA purchased the debts of Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall (collectively, Plaintiffs) pursuant to a credit sale. PRA then filed individual lawsuits in various North Carolina courts against each Plaintiff and obtained default judgments in each of those actions against each Plaintiff on the debts.

On 21 November 2016, Plaintiffs[2] initiated this case by filing a "Class Action Complaint" (Complaint) against PRA alleging the default judgments obtained by PRA in North Carolina courts against both the named Plaintiffs and the proposed plaintiff class violated North Carolina's Consumer Economic Protection Act. Plaintiffs sought class action certification for the proposed class of "all persons against whom PRA obtained a default judgment entered by a North Carolina court in a case filed on or after October 1, 2009." Plaintiffs alleged the default judgments PRA obtained violated the Consumer Economic Protection Act, in part located at N.C. Gen. Stat. § 58-70-155, because PRA did not comply with certain statutorily enumerated prerequisites to obtain default judgments. Plaintiffs sought vacatur of the default judgments, statutory penalties pursuant to N.C. Gen. Stat. § 58-70-130(b), and recovery of amounts paid to PRA after entry of the default judgments. Plaintiffs

1. Facts alleged by Plaintiffs and admitted by PRA.

2. Pia Townes was originally a named party in this action; however, the judgment against Townes was since vacated by the Mecklenburg County District Court on 8 June 2016.

contemporaneously filed a Motion for Preliminary Injunction seeking to bar PRA from "enforcing or collecting on the default judgments . . . pending a final judgment by [the court] as to whether PRA's default judgments are void."

On 9 December 2016, PRA removed the case to the United States District Court for the Middle District of North Carolina on the basis of diversity jurisdiction under the Class Action Fairness Act of 2005. Plaintiffs moved for remand, arguing the federal district court lacked jurisdiction under the *Rooker-Feldman* doctrine, which limits the jurisdiction of federal courts to review valid state court judgments. On 28 March 2018, the federal district court entered a written Order concluding it lacked jurisdiction over Plaintiffs Pounds, Miller, Sayaphet-Tyler, and Hall, and thereby granted, in part, Plaintiffs' Motion to Remand. The federal district court remanded the case to Durham County Superior Court.[3]

On 31 May 2018, PRA responded to Plaintiffs' Complaint with its "Notice of Election to Arbitrate, Answer, and Counterclaims." On 29 June 2018, PRA filed an amended pleading captioned "Notice of Election to Arbitrate, Amended Answer, and Counterclaims." On or about 28 September 2018, the case was designated as an "exceptional case" pursuant to Rule 2.1 of North Carolina's General Rules of Practice and assigned to Superior Court Judge Michael O'Foghludha.

On 22 October 2018, Plaintiffs filed a Motion for Judgment on the Pleadings. On 11 January 2019, PRA moved to compel arbitration pursuant to the Federal Arbitration Act (FAA). In its supporting brief, PRA argued each of the arbitration agreements at issue was enforceable against the respective Plaintiff, and therefore the trial court should dismiss Plaintiffs' claims and, instead, compel arbitration. In opposition, Plaintiffs asserted PRA failed to meet its burden of demonstrating the existence of a valid, binding arbitration agreement as between Plaintiffs and PRA.

On 21 March 2019, the trial court entered its Order denying PRA's Motion to Compel Arbitration. In relevant part, the Order provided:

> 49. [T]he Court therefore finds that each Plaintiff entered into a credit card agreement with Synchrony that requires arbitration of disputes with Synchrony/GE, and that

3. Because Plaintiff Townes's default judgment had been vacated, the federal district court determined it had jurisdiction over her claim.

[Plaintiff] Sayaphet-Tyler also entered into a credit card agreement with Citibank that requires arbitration of disputes with Citibank.

. . . .

54. . . . The Court concludes based on the findings of the Court and the evidence presented that a valid contract or option to arbitrate was entered into between [P]laintiffs and the original creditors, at least as such relates to disputes between the [P]laintiffs and the original creditors.

55. Likewise, in this case, a second "necessarily antecedent statutory inquiry" is whether PRA has been assigned the rights created in the purported arbitration agreements and any delegation clauses contained therein. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (noting that the Court must always complete a "necessarily antecedent statutory inquiry").

. . . .

59. The Court further concludes that PRA, as a nonsignatory to the credit card agreement, has not proven it was assigned the right to arbitrate the current dispute in this case.

60. The question of whether PRA was assigned the right to enforce these agreements is governed by the choice of law provisions in each agreement. Accordingly, in assessing whether PRA can enforce the arbitration agreements, the Court applies Utah law to all the GE Bank agreements and South Dakota law to the Citibank agreement.

. . . .

65. This Court will interpret the Bills of Sale—as the available portion of the agreements between the original creditors and PRA—to determine if the parties manifested an intent to transfer the right to compel arbitration to PRA.

66. . . . The Bills of Sale state an intent to transfer to PRA either "the Receivables as set forth in the Notification Files (as defined in the [purchase] Agreement)" (for the GE Bank bills of sale) or "the Accounts described in Exhibit 1 and the final electronic file" for the Citibank bill of sale. Neither term is defined in the agreements.

. . . .

69. In the case of these [P]laintiffs, only the Hall credit agreement with GE and the Sayaphet-Tyler credit agreement with Citibank specifically grant assignees of the agreement the right to enforce the arbitration clause of the agreement. The Court concludes as a matter of law that the Pounds, Miller, and Sayaphet-Tyler GE agreements do not grant assignees of those agreements the right to enforce arbitration, as the mere sale and transfer of the receivable (the debt) to PRA did not transfer the right to arbitrate.

70. As to the Hall GE agreement, that agreement did specifically give the right to enforce the arbitration clause to assignees of the account. However, the Bill of Sale to PRA only sold and transferred the debt (the receivable) to PRA, not all of the rights and obligations of the original agreement. The Court concludes as a matter of law that the mere sale and transfer of the Hall receivable (the debt) did not transfer the right to arbitrate.

71. Although the language of the Sayaphet-Tyler Citibank Bill of Sale is broader than the Bills of Sale of the GE accounts, (the account is transferred, not merely the receivable), the Bill of Sale does not clearly indicate an intent to transfer the right to arbitrate any dispute, or indeed all of the rights and obligations of the original agreement. The Court concludes that the transfer of the account does not necessarily transfer the right to arbitrate. If Citibank and PRA had intended to transfer all of the rights and obligations of the original agreement, those parties could have taken care to so indicate in the agreement. The fact that they did not means th[at] PRA has not met its burden of showing that the plaintiffs in this case must arbitrate the current dispute(s).

. . . .

74. Given its conclusions in the foregoing paragraphs, and in consideration of the applicable state and federal law, the Court concludes that PRA is not a party entitled to enforce any arbitration agreement regarding any current Plaintiff in this case.

PRA timely filed Notice of Appeal from the trial court's Order on 2 April 2019.

Issue

The issue before this Court on appeal is whether the trial court erred in denying PRA's Motion to Compel Arbitration. This issue turns on the question of whether there was a valid arbitration agreement between Plaintiffs and PRA, which, in turn, hinges on whether PRA was assigned the right to arbitrate pursuant to the Bills of Sale.

Analysis

I. Appellate Jurisdiction and Standard of Review

Although "an appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order[,]" *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted), it is "well established that an order denying a motion to compel arbitration is immediately appealable." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012).

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> . . . .
>
> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

N.C. Gen. Stat. § 1-569.7(a)(2) (2019).

This Court has elaborated "the trial court must perform a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514 (citations and quotation marks omitted). "[T]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633-34, 610 S.E.2d 293, 296 (2005) (citations and quotation marks omitted). We review the trial court's conclusions of law de novo. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55,

826 S.E.2d 567, 571 (2019) (citing *Creed v. Smith*, 222 N.C. App. 330, 333, 732 S.E.2d 162, 164 (2012)).

II. Arbitration Agreement Between the Parties

[1] Here, the parties do not dispute the trial court's determination there was a valid arbitration agreement between Plaintiffs and the original creditors as established in each Plaintiff's credit card agreement. At issue is the trial court's conclusion there was not a valid arbitration agreement between Plaintiffs and PRA on the basis PRA was not assigned arbitration rights when it purchased Plaintiffs' debts through the Bills of Sale. PRA contends the trial court's conclusion erred as a matter of law for several reasons. In broad strokes, PRA argues the trial court "misapplied basic contract law," "singled out arbitration rights for special, discriminatory treatment and resolved its doubts against the transfer of arbitration rights—both in violation of the FAA." PRA specifically contends it was entitled to arbitration under the express language in Plaintiff Hall's GE Bank Credit Card Agreement and Plaintiff Sayaphet-Tyler's Citibank Credit Card Agreement, and, further, the assignment of Plaintiffs' Accounts and Receivables, as effectuated by the Bills of Sale, necessarily or implicitly included the assignment of the right to arbitrate.

The United States Supreme Court has instructed "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530, 202 L. Ed. 2d 480, 487 (2019) (citation omitted). "[A] litigant who was not a party to the relevant arbitration agreement may invoke [Section] 3 [of the FAA] if the *relevant state contract law* allows him to enforce the agreement." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632, 173 L. Ed. 2d 832, 841 (2009) (emphasis added). Therefore, as an initial matter and contrary to PRA's assertion, the trial court did not "misapply basic contract law" when it examined the relevant state contract law to instruct its analysis as to whether Plaintiffs and PRA had binding arbitration agreements. Thus, we must examine, as did the trial court, the "relevant state contract law" to determine if PRA is entitled to enforce the arbitration agreements contained in Plaintiffs' original credit card agreements against Plaintiffs. *See id.*

The parties agree with the trial court the relevant state contract law is the law of Utah for the GE Bank Agreements and South Dakota for the Citibank Agreement. Both Utah and South Dakota require proof of a valid arbitration agreement between parties before compelling arbitration. *Bybee v. Abdulla*, 2008 UT 35, ¶ 26, 189 P.3d 40, 47 (2008); *Mastellar*

v. Champion Home Builders Co., 2006 SD 90, ¶ 11, 723 N.W.2d 561, 564 (2006). Moreover, the party seeking to compel arbitration bears the burden of proving there is a valid arbitration agreement between the parties. *E.g.*, *McCoy v. Blue Cross and Blue Shield of Utah*, 2001 UT 31, ¶ 11, 20 P.3d 901, 904 (2001).

As such, whether a valid arbitration agreement exists under the applicable state law turns on whether PRA was assigned the right to arbitrate.

> Generally, the elements of an effective assignment include a sufficient description of the subject matter to render it capable of identification, and delivery of the subject matter, with the intent to make an immediate and complete transfer of all right, title, and interest in and to the subject matter to the assignee.

Gables v. Castlewood-Sterling, 2018 UT 04, ¶ 38, 417 P.3d 95, 107 (2018) (citations and quotation marks omitted). Likewise:

> It is the substance of the assignment rather than the form that is evaluated. Regardless of how it is made, an assignment must contain clear evidence of the intent to transfer rights, must describe the subject matter of the assignment, and must be noticed to the obligor.

Northstream Investments, Inc. v. 1804 Country Store Co., 2005 SD 61, ¶ 15, 697 N.W.2d 762, 766 (2005).

For purposes of this appeal, PRA became an assignee when it purchased Plaintiffs' debts; thus, here, the Bills of Sale are the operative assignment agreements. The GE Bills of Sale, which cover four of five the assignments at issue in the present case, provide:

> Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, the *Receivables* as set forth in the Notification Files (as defined in the Agreement), delivered by Seller to Buyer . . . and as a further described in the Agreement.

(emphasis added). The Citibank Bill of Sale states: "Bank does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to Buyer, and to Buyer's successors and assigns, the *Accounts* described in Exhibit 1 and the final electronic file." (emphasis added). Although the language of the GE Bills of Sale indicates the Receivables are "as

set forth in the Notification Files (as defined in the Agreement)" and the Citibank Bill of Sale reflects the Accounts are "described in Exhibit 1 and the final electronic file" no such documents or files describing Plaintiffs' Accounts and Receivables are included in the Record.

Therefore, the pivotal question for this Court is *what* rights were assigned to PRA when it purchased Plaintiffs' Accounts and Receivables pursuant to the Bills of Sale. The trial court concluded, examining the relevant laws of Utah and South Dakota, the language of the Bills of Sale, and both parties' supporting arguments and briefs, the right to arbitrate Plaintiffs' claims was not included in the assignment of Plaintiffs' Receivables and Accounts. PRA contends the trial court's conclusion was error, arguing "numerous courts have held that an assign may enforce an arbitration agreement that is expressly enforceable by assigns, without requiring evidence that the assignors' arbitration rights transferred." In particular, PRA argues it was *expressly* assigned the right to arbitrate by Plaintiff Hall's GE Bank Agreement and Plaintiff Sayaphet-Tyler's Citibank Agreement and, further, that PRA was assigned the right to arbitrate all Plaintiffs' claims because the Bills of Sale assigned PRA all of the rights granted to the original creditors.

PRA first singles out Plaintiff Hall's GE Bank Agreement and Plaintiff Sayaphet-Tyler's Citibank Agreement and contends they were enforceable by PRA because the language of the two agreements themselves stated they were expressly enforceable by assigns. This is consistent with the trial court's Order, which found "only the Hall credit agreement with GE and the Sayaphet-Tyler credit agreement with Citibank specifically grant assignees of the agreement the right to enforce the arbitration clause of the agreement." However, PRA's argument the trial court's analysis should have concluded there is misplaced. Just because the original credit card agreements expressly contemplated that a future assignee may be assigned the right to compel arbitration does not relieve the future assignee from having to prove there was, in fact, an assignment of that right. Accordingly, as the trial court also recognized, the analysis for Plaintiff Sayaphet-Tyler's GE Bank Agreement and Plaintiff Hall's Citibank Agreement is the same as for the additional Plaintiffs; we turn to the language of the Bills of Sale themselves to determine what rights the original creditors assigned to PRA. PRA contends even if the Bills of Sale did not expressly assign the right to arbitration, the original creditors' right to arbitration was implicitly or necessarily assigned as part of the assignment of Plaintiffs' Accounts and Receivables.

Utah and South Dakota law both require express intent to assign identified rights or subject matter. Indeed, the Supreme Court of Utah

explained, "the elements of an effective assignment include[,]" *inter alia*, "a sufficient description of the subject matter to render it capable of identification" and "the intent to make an immediate and complete transfer of all right, title, and interest in and to the subject matter to the assignee." *Gables*, 2018 UT 04 at ¶ 38, 417 P.3d at 107 (citation and quotation marks omitted). Similarly, the South Dakota Supreme Court reiterated "an assignment must contain clear evidence of the intent to transfer rights [and] must describe the subject matter of the assignment[.]" *Northstream Investments, Inc.*, 2005 SD 61 at ¶ 15, 697 N.W.2d at 766.

A number of courts around the country—including some applying Utah and South Dakota law—have considered whether an assignment of debt necessarily or implicitly carries with it an assignment of the right to compel arbitration. Instructive is the United States District Court for the Northern District of Alabama's decision in *Lester v. Portfolio Recovery Assocs., LLC*, No. 1:18-CV-0267-VEH, 2018 WL 3374107 (N.D. Ala. 2018). The plaintiff in *Lester* defaulted on credit card debt originally owned by GE Bank (later Synchrony), who subsequently sold the debt to PRA. *Id.* at *2. The plaintiff's cardholder agreement included an arbitration provision and identified the FAA and Utah law as the relevant state law. *Id.* The *Lester* court considered an almost-identical question to the case at hand. In determining if PRA could compel arbitration on the plaintiff's claims, the *Lester* court examined the bill of sale,[4] which stated:

> Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, *the Receivables* as set forth in the Notification Files (as defined in the Agreement), delivered by Seller to Buyer on [date], and as further described in the Agreement.

Id. The *Lester* court determined, applying the relevant Utah law, the defendant had not demonstrated the right to compel arbitration was included in the purchase of the plaintiff's debt as effectuated through the bill of sale and thus the original creditor "only transferred to PRA the right to collect Lester's receivable." *Id.* at *7.

PRA cites, *inter alia*, *Brooks v. N.A.R., Inc.*, No. 3:18-cv-362, 2019 WL 2210766 (N.D. Ohio 2019), for the proposition "numerous courts

4. This language is identical to the language of the GE Bills of Sale at issue in the case *sub judice*, save for the language relating to the date of the specific transaction.

have held that an assign may enforce an arbitration agreement that is expressly enforceable by assigns without requiring evidence that the assignors' arbitration rights transferred." Notably in *Brooks*, however, the federal district court determined "[a]long with the account itself, Crest *also assigned N.A.R. all of its rights*." *Id.* at *1. (emphasis added). The *Brooks* court, therefore, consistent with the trial court in the case *sub judice*, looked at the document effectuating the assignment to see what rights were assigned to the defendant. Although the assignment in *Brooks* did not expressly identify assignment of the specific right to arbitration, the assignment included the plaintiff's account and "all of [the original creditors] rights." *Id.* Thus, the assignment at issue in *Brooks* was more inclusive than the assignments in the present case that do not include such similar, additional catch-all language.

We are persuaded by the federal district court's reasoning in *Lester*. As detailed, Utah and South Dakota look for both the identification of and the intent to transfer rights to an assignee. *See Gables*, 2018 UT 04 at ¶ 38, 417 P.3d at 107; *Northstream Investments, Inc.*, 2005 SD 61 at ¶ 15, 697 N.W.2d at 766. Here, PRA purchased Plaintiffs' debts pursuant to the Bills of Sale, which specifically and solely identify the assignment of Plaintiffs' Accounts and Receivables. The Bills of Sale in this case contrast with the language of other bills of sale or purchase agreements where the documents effectuating the assignments expressly assign *all of the rights* of the original creditors to the assignee. *See Brooks*, No. 3:18-cv-362, 2019 WL 2210766, at *1 ("Along with the account itself, [original creditor] also assigned [the defendant] *all of its rights*." (emphasis added)); *James v. Portfolio Recovery Assocs., LLC*, No. 14-cv-03889-RMW, 2015 WL 720195, at *5 (N.D. Cal. 2015) ("[U]nder the express terms of the agreement, the assignment of the agreement to PRA affords PRA 'the same rights' as [original creditor] had under the agreement."); *Mark v. Portfolio Recovery Assocs., LLC*, No. 14-cv-5844, 2015 WL 1910527, at *3 (N.D. Ill. 2015) (where the "Bill of Sale and Assignment of Assets unambiguously assigns 'all of [its] right, title and interest in and to' the accounts purchased by PRA[,]" the federal district court concluded "[t]he plain and ordinary meaning of 'all of [its] right, title, and interest in and to' provides for an assignment of all of [original creditor's] rights under the Cardmember Agreement, including the arbitration provision"). Thus, we conclude the language contained in Plaintiffs' Bills of Sale does not identify the assignment of the right to arbitration nor does it demonstrate an intent of the parties to assign PRA "all of the rights" of the original creditors. Without more, the right to arbitrate against Plaintiffs was not implicitly assigned along with Plaintiffs' Accounts or Receivables.

[2] PRA also argues Section 9-404(a) of the Uniform Commercial Code, which has been adopted in both Utah and South Dakota, applies and compels the conclusion PRA was entitled to arbitration. Section 9-404, in part, provides:

> (a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
>
> (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
>
> (2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

S.D. Codified Laws § 57A-9-404(a) (2019); Utah Code Ann. § 70A-9a-404(1) (2019). PRA contends it was transferred the right to compel arbitration under this statutory provision because its own rights under the assignment from the original creditors, under the UCC, are made subject to the same terms of the Plaintiffs' original credit card agreements.

Although the applicability of Section 9-404 under either Utah or South Dakota law to the present case is not extensively briefed before us, as an initial matter, the applicability of Section 9-404 to the present case is at least questionable. Indeed, Subsection (c) of Section 9-404 as adopted by both states provides: "This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes." S.D. Codified Laws § 57A-9-404(c); Utah Code Ann. § 70A-9a-404(3).

Moreover, it appears PRA's argument on this point is contrary to the purpose of Section 9-404. The purpose of Section 9-404(a) is to define and limit the defenses and claims that may be asserted against an assignee by an account debtor, including by preserving any claims or defenses an account debtor may assert under the terms of the original agreement against an assignee. *See*, *e.g.*, S.D. Codified Laws § 57A-9-404 cmt. 3. Nowhere in this Section does it mandate the terms of every assignment—no matter the express terms of the actual assignment—from the original debtor to an assignee.

Indeed, even assuming PRA's reading of this Section is correct and Section 9-404(a) is designed to be a broad grant of rights under an assignment to the assignee and is applicable to agreements like the one in this case, the UCC also recognizes parties have the right to vary its terms by agreement. *See* Utah Code § 70A-1a-302(1) ("Except as otherwise provided . . . the effect of provisions of this title may be varied by agreement"); S.D. Codified Laws § 57A-1-302(a) (same); *see also Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado*, 771 F.3d 980, 992 (7th Cir. 2014) ("The provisions of the UCC on which [the plaintiff] relies cover contractual language assigning 'the contract' or 'all my rights under the contract.' If an assignment includes such language, the UCC tells us that the transfer is subject to 'all terms of the agreement.' " (citing 810 ILCS 5/9-404(a))).

However, as Plaintiffs argue and we have discussed *supra*, the very terms of the Bills of Sale at issue in the present case contractually limit the scope of the assignments—they assign PRA *only* Plaintiffs' Accounts and Receivables. As such, application of Section 9-404 does not alter our analysis. Therefore, consistent with both Utah and South Dakota law, the key inquiry remains unchanged: Whether the right to arbitrate was included in the assignment of Plaintiffs' Accounts and Receivables as effectuated by the Bills of Sale. The trial court properly concluded under the laws of South Dakota and Utah and based on the terms of the Bills of Sale themselves, the right to arbitrate was not transferred by implication or by necessity along with the Accounts and Receivables.

Consequently, we conclude, as did the trial court, without any showing of the additional intent by the original creditors to assign to PRA, at the very least, "all of the rights and obligations" of the original agreements, the right to arbitrate was not assigned in the sale and assignment of the Plaintiffs' Accounts and Receivables as set forth in the Bills of Sale. The trial court correctly concluded PRA has not met its burden of showing a valid arbitration agreement between each Plaintiff and PRA and did not err when it denied PRA's Motion to Compel Arbitration.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order is affirmed.

AFFIRMED.

Judges STROUD and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTINA ANN BOWMAN

No. COA20-237

Filed 3 November 2020

1. Constitutional Law—effective assistance of counsel—concession to lesser-included offense—Harbison inquiry—informed consent

In a trial for first-degree burglary, even if defense counsel's closing argument impliedly admitted defendant's guilt of the lesser-included offense of misdemeanor breaking or entering, that concession did not constitute per se ineffective assistance of counsel where the record showed the trial court conducted a *Harbison* inquiry, during which defendant gave consent to counsel's strategy of "admitting to everything but intent" for the burglary.

2. Criminal Law—prosecutor's closing argument—impugning defense expert's credibility—improper—not reversible

In defendant's trial for first-degree burglary, the prosecutor's statements during closing that the defense expert in forensic psychology had been paid by the defense "to give good stuff" and "to say good things for the defense" were clearly improper since they suggested that the expert was paid to make up an excuse for defendant's behavior, but did not constitute reversible error given the significant evidence of defendant's intent to commit burglary.

3. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

A civil judgment for attorney fees entered after defendant was convicted of first-degree burglary was vacated and the matter remanded to the trial court. Defendant was deprived of a meaningful opportunity to be heard before the judgment was entered because even though she stated she had no objection after being informed that a judgment would be entered and what her appointed counsel's hourly fee was, she was not yet aware of the number of hours her counsel planned to submit or the total amount she would owe when she gave her agreement.

Appeal by Defendant from judgment entered 24 September 2019 by Judge Richard Kent Harrell in Carteret County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah N. Cibik, for the State-Appellee.

Richard J. Costanza for Defendant-Appellant.

COLLINS, Judge.

Defendant Christina Ann Bowman appeals from judgment entered upon a jury verdict of guilty of first-degree burglary. Defendant argues that (1) she was denied effective assistance of counsel because her trial counsel conceded her guilt to the lesser-included offense of misdemeanor breaking or entering without her consent, (2) the trial court erred by failing to intervene ex mero motu to address the prosecutor's attack on the credibility of Defendant's expert witness during closing argument, and (3) the trial court erred by denying her the opportunity to be heard prior to the entry of a civil judgment for attorneys' fees. We discern no error in defense counsel's remarks and no reversible error in the trial court's failure to intervene ex mero motu to address the prosecution's improper remarks. We vacate the civil judgment for attorneys' fees and remand the matter to allow Defendant to waive further proceedings or to request an opportunity to be heard.

I. Procedural History

On 11 March 2019, Defendant was indicted on one count of first-degree burglary. Defendant was tried before a jury in Carteret County Superior Court from 23 to 24 September 2019. The jury found Defendant guilty of first-degree burglary and the trial court sentenced Defendant to an active term of 59 to 83 months' imprisonment on 24 September 2019. The trial court then entered a civil judgment against Defendant for attorneys' fees and other expenses on 25 September 2019. On 26 September 2019, Defendant gave written notice of appeal from her conviction for first-degree burglary.

II. Factual Background

The evidence at trial tended to show the following: In December 2018, Ginger and Milton Boyd resided in Morehead City with their two children. The home was situated at the back of a two-acre lot and is accessible by a dirt road. It was surrounded by homes owned by other members of the Boyd family.

At approximately 5:30 to 6:00 a.m. on 10 December 2018, Ginger Boyd saw a flash from a flashlight inside her bathroom. When she went to investigate, she encountered Defendant standing in the living room.

Defendant initially claimed that she was an emergency medical services responder there to assist a dead person on the couch. Defendant had never been in the Boyd home and was not invited. At that point, Mrs. Boyd grabbed Defendant's arms, pushed her against the wall, and screamed for her husband, Milton Boyd. Mrs. Boyd believed that Defendant was under the influence of an impairing substance.

Milton Boyd had never seen Defendant before. When he came into the living room in response to Mrs. Boyd's call, he saw that she had restrained Defendant to prevent her from leaving. Mr. Boyd proceeded to take hold of Defendant. Defendant pointed to Mrs. Boyd's purse, claimed it was hers, and said she wanted to leave. Mr. Boyd believed that Defendant was coherent and was not intoxicated with alcohol, but could not say whether she was under the influence of any drugs.

The Boyds' minor son, who was sleeping on the couch, woke up to his mother yelling at Defendant and indicated that Defendant was making up stories.

The Boyds' daughter, Jessica, was awakened by the screaming, and when she came downstairs, she recognized Defendant because they had been roommates eight years prior. Defendant began to insist that she was there to assist different members of the Boyd family. Jessica called 911. She also believed Defendant was under the influence.

While waiting for officers to respond, Mrs. Boyd called her brother-in-law to restrain Defendant while she and her husband got dressed. During that time Defendant struggled to leave and claimed that the Boyds were hurting her arm. Defendant alternately explained that someone had chased her or someone had asked her to come to the house.

Carteret County Sheriff's Deputies Christopher Kuzynski and Jordan Byrd responded to the 911 call. When they arrived, the two arrested Defendant. When Byrd asked Defendant why she was in the Boyd home, she initially responded that she was attacked by two others who chased her, shot at her, and jumped her. Upon further questioning, Defendant told Byrd that she had gone inside the Boyd home to check on an injured person.

Kuzynski believed that Defendant appeared "a little lethargic" and thought she was under the influence of a substance other than alcohol. Byrd recognized Defendant from a previous arrest for breaking or entering. After that arrest, she was involuntarily committed because she had told police that voices in her head led her to enter the home. In contrast to the previous arrest, Byrd believed that Defendant was more coherent

on the night of 10 December, though she still claimed that voices were guiding her.

After the deputies arrived and took Defendant into custody, they returned to the Boyd home to collect Defendant's belongings. Defendant's wallet was found in Mrs. Boyd's purse alongside loan documents, wireless headphones, and other items belonging to the Boyds which had been stored in vehicles outside the Boyd home. The purse had been moved from the hook where Mrs. Boyd kept it to the kitchen table.

At trial, Defendant called Dr. Amy James as an expert in forensic psychology. She testified that she interviewed Defendant and reviewed court records, police records, involuntary commitment records, and medical records. Based upon this examination, Dr. James diagnosed Defendant with post-traumatic stress disorder, severe alcohol use disorder, severe amphetamine use disorder, and a personality disorder. She testified that Defendant admitted to using methamphetamine daily; use of the drug can result in a methamphetamine-associated psychosis which presents with delusions, paranoia, and hallucinations; and Defendant's symptoms were congruent with this condition.

The jury found Defendant guilty of first-degree burglary. The trial court entered judgment upon the jury's verdict, sentencing Defendant to 59 to 83 months' imprisonment, and entered a civil judgment against Defendant for attorneys' fees and other expenses. Defendant gave written notice of appeal from the judgment entered upon her conviction for first-degree burglary.

III. Appellate Jurisdiction

Defendant's written notice of appeal was sufficient to confer jurisdiction on this Court to review the criminal judgment. *See* N.C. Gen. Stat. § 7A-27(b)(1); N.C. R. App. P. 4(a)(2). However, Defendant's written notice of appeal was limited to the criminal judgment, and is therefore insufficient to confer jurisdiction on this Court to review the civil judgment for attorneys' fees. *See* N.C. R. App. P. 3(a). This issue is subject to dismissal.

Contemporaneously with his opening brief, Defendant filed a petition for writ of certiorari, acknowledging the deficiency in his notice of appeal and asking this Court issue a writ of certiorari to review the civil judgment for attorneys' fees. We exercise our discretion under N.C. R. App. P. 21(a) and issue a writ of certiorari to review the issues pertaining to the civil judgment for attorneys' fees. *E.g.*, *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018) (issuing a writ of certiorari to

review a civil judgment for attorneys' fees where the defendant's arguments were meritorious).

IV. Discussion

A. Ineffective Assistance of Counsel

[1] Defendant first argues that her trial counsel implicitly conceded that she was guilty of misdemeanor breaking or entering, denying her right to effective assistance of counsel. We review whether a defendant was denied effective assistance of counsel de novo. *State v. Foreman*, 842 S.E.2d 184, 187 (N.C. Ct. App. 2020).

A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defense counsel's admission of the defendant's guilt of a charged offense to the jury without the defendant's consent, however, is per se ineffective assistance of counsel. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985).

"Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur." *State v. McAllister*, No. 221A19, 2020 WL 5742615, at *13 (N.C. Sept. 25, 2020). *Harbison* error also occurs where "defense counsel impliedly concedes his client's guilt without prior authorization." *Id.* at *12.

"Our Supreme Court has 'previously declined to set out what constitutes an acceptable consent by a defendant in this context.' " *State v. Perry*, 254 N.C. App. 202, 212, 802 S.E.2d 566, 574 (2017) (quoting *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991)). "[A]n on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt," but our courts have "declined to define such a colloquy as the sole measurement of consent or to set forth strict criteria for an acceptable colloquy." *State v. Thompson*, 359 N.C. 77, 120, 604 S.E.2d 850, 879 (2004). A defendant may consent to his counsel's concession of guilt at trial without the same formalities that apply to a defendant's guilty plea. *See State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776 (2010) (distinguishing statutory requirements for a defendant's entry of a guilty plea). "For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that

defendant knew his counsel were going to make such a concession." *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004); *see also State v. Thomas*, 327 N.C. 630, 631, 397 S.E.2d 79, 80 (1990) (remanding case to superior court for an evidentiary hearing to determine whether defendant knowingly consented to trial counsel's concessions of defendant's guilt to the jury).

Defendant was indicted for first-degree burglary under N.C. Gen. Stat. § 14-51. "Misdemeanor breaking or entering is a lesser-included offense of first-degree burglary." *State v. Mangum*, 158 N.C. App. 187, 196, 580 S.E.2d 750, 756 (2003). Conviction for misdemeanor breaking or entering therefore "requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985); *see also* N.C. Gen. Stat. § 14-54(b) (2019) ("Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor."). The trial court accordingly instructed the jury that if it did not find Defendant guilty of first-degree burglary, it must consider whether she was guilty of misdemeanor breaking or entering.

In his opening statement, counsel reminded the jury that it was the State's burden to prove that Defendant "had the specific intent to commit a larceny or a felony when she entered the Boyds' home on that morning." Counsel contended that "[t]he evidence shows that she was confused about why she was there[,]" and asked the jury "whether a person in a normal mental state would use [the explanation provided by Defendant] for their presence."[1]

In closing, defense counsel argued that the State failed to show Defendant had the requisite intent to support a first-degree burglary conviction. Counsel conceded on multiple occasions that Defendant had entered the Boyd home and reminded the jury of the State's burden to prove Defendant's intent "when she entered the Boyds' home that morning." He argued that "she was confused about why she was there[,]" and contended the evidence showed that Defendant's actions were "not the actions of a coherent burglar . . . ." Counsel asked the jury, "Can you really determine beyond a reasonable doubt that [Defendant] entered the Boyds' home to steal?" In concluding, counsel asked the jury to find Defendant "not guilty of first-degree burglary."

Even presuming, without deciding, that counsel impliedly admitted Defendant's guilt to misdemeanor breaking or entering, he did so with

1. The trial court ruled that this and several other remarks in counsel's opening statement were impermissibly argumentative, but did not instruct the jury to disregard the remarks.

Defendant's consent. Prior to defense counsel's opening statement, the trial court asked whether there were "[a]ny *Harbison* issues that we need to deal with?" Defense counsel responded that "we'll be admitting to everything but intent." At that point, the trial court addressed Defendant directly:

> THE COURT: . . . Ms. Bowman, you've heard [counsel] indicate that the issue that they intend to make is intent; that they'll be admitting the other elements of the offense. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Do you agree with that?
>
> DEFENDANT: Yes, sir.

It is clear that "defendant knew [her] counsel [was] going to make such a concession." *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540. The trial court's colloquy with Defendant demonstrated that Defendant knew her counsel planned to admit to all the elements of first-degree burglary except intent, understood, and agreed with this strategy.

Our Supreme Court held that a similar colloquy established that the defendant had consented to his counsel's concessions. *See Thompson*, 359 N.C. at 118, 604 S.E.2d at 878-79. In *Thompson*, defense counsel informed the trial court on the record and in the defendant's presence that he intended to "acknowledg[e] responsibility in these cases." *Id.* The trial court then directly addressed the defendant and confirmed that he agreed with the strategy of making the admissions. *Id.* at 118-19; 604 S.E.2d at 878-79. Here, as in *Thompson*, Defendant acknowledged that she understood and agreed to counsel's strategy on the record. Defendant has therefore failed to demonstrate per se ineffective assistance of counsel under *Harbison*.[2]

B. Prosecution's Closing Remarks

[2] Defendant also argues that the trial court erred by failing to intervene ex mero motu when the prosecutor attacked the credibility of Defendant's forensic psychology expert during her closing argument.

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2. Ordinarily, when we do not find per se ineffective assistance of counsel under *Harbison*, "the issue concerning ineffective assistance of counsel should be examined pursuant to the normal ineffectiveness standard set forth in *Strickland v. Washington* . . . ." *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991). We do not reach this analysis, however, because Defendant argued only that her counsel's conduct amounted to per se ineffective assistance.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). But "when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where we find "both an improper argument and prejudice will this Court conclude that the error merits appropriate relief." *Id.*

In a criminal trial, counsel's remarks are improper if he "become[s] abusive, inject[s] his personal experiences, express[es] his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make[s] arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. § 15A-1230 (2019). "Within these statutory confines, we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *Huey*, 370 N.C. at 180, 804 S.E.2d at 469 (quotation marks omitted).

Our courts have frequently addressed the propriety of arguments attacking the credibility of expert witnesses. "[I]t is proper for an attorney to point out potential bias resulting from payment a witness received or would receive for his services," but "it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay." *Id.* at 183, 804 S.E.2d at 471-72; *accord State v. Rogers*, 355 N.C. 420, 462-63, 562 S.E.2d 859, 885 (2002). Counsel must not go so far as "to insinuate that the witness would perjure himself or herself for pay." *Rogers*, 355 N.C. at 463, 562 S.E.2d at 885.

"For an appellate court to order a new trial, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (quotation marks and citations omitted). "In determining whether a prosecutor's statements reached this level of gross impropriety, we consider the statements 'in context and in light of the overall factual circumstances to which they refer.' " *Id.* (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995)). Where the context shows "overwhelming evidence against a defendant,

we have not found statements that are improper to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470.

At trial, Dr. James testified for the defense as an expert in forensic psychology. On cross examination, Dr. James acknowledged that she was paid for her time by the State, on behalf of Defendant. Dr. James indicated that she is paid flat rates for time traveling, time spent in court, and time actually testifying. With these facts in evidence, the prosecutor was permitted "to point out potential bias resulting from payment a witness received or would receive for his services." *Id.* at 183, 804 S.E.2d at 471.

In her closing argument, the prosecutor addressed the issue of intent and attacked the credibility of Dr. James's testimony. The prosecutor said that "psychosis is quite convenient as an excuse" for Defendant' actions. She argued that Defendant "had Dr. James come and testify . . . with the end in mind"; that she was "paid by the defense, for the defense, to give good stuff for the defense"; and that "[y]ou get what you put out. What you put in, you get out." After questioning the utility of Dr. James's diagnoses of Defendant, the prosecutor remarked to the jury, "So I ask you to take that for what it is. At the end of the day, hired by the defense, for the defense, to say good things for the defense . . . ." Defendant failed to object to any of these remarks.

These remarks were improper because they went beyond permissibly arguing that an expert witness was potentially biased. *Id.* The prosecution impermissibly suggested to the jury that Defendant's psychological expert was paid to fabricate an excuse for Defendant's conduct and acts, regardless of the truth. By arguing that psychosis was an "excuse," Dr. James testified with an end in mind, Dr. James was paid "to give good stuff for the defense," and Dr. James was hired "to say good things for the defense," the prosecutor inappropriately suggested that Dr. James "should not be believed because [s]he would give untruthful or inaccurate testimony in exchange for pay." *Id.* at 183, 804 S.E.2d 472.

The prosecution's remarks impugning the defense expert's credibility in this case are substantively equivalent to those the Court held improper in *Huey*. There, the prosecution stated that (1) the defendant was the psychiatric expert's "client," (2) the expert "works for the defendant" and was "not an impartial mental-health expert," (3) the expert "has a specific purpose, and he's paid for it," (4) the expert was a "$6,000 excuse man," and (5) the expert had done "exactly what he was paid to do." *Id.* at 178, 804 S.E.2d at 468. As discussed above, the prosecution's remarks in this case had the same tenor, and were therefore improper.

Still, while the remarks were clearly improper, in the absence of any objection thereto by Defendant, they were not so grossly improper as to impede the defendant's right to a fair trial. *Id.* at 179, 804 S.E.2d at 469. Similar remarks have been held not to amount to prejudicial, and therefore reversible, error. *See*, *e.g.*, *State v. Campbell*, 359 N.C. 644, 677, 617 S.E.2d 1, 22 (2005) (prosecutor's characterization of the defense expert as a "witness that the defendant could buy" was not grossly improper); *Rogers*, 355 N.C. at 460-61, 562 S.E.2d at 884-85 (prosecutor's remarks that "it's a crying shame when education is corrupted for filthy lucre, it's a crying shame when people who've got the education abuse it" and "saying [something] doesn't make it so cause you can pay somebody to say anything" were not so grossly improper as to require the trial court to intervene ex mero motu); *State v. Murillo*, 349 N.C. 573, 604-05, 509 S.E.2d 752, 770-71 (1998) (prosecutor's remarks that "[i]t is a sad state of our legal system, that when you need someone to say something, you can find them. You can pay them enough and they'll say it," even if improper, were not prejudicial).

Moreover, we cannot conclude that the prosecution's remarks were so prejudicial as to merit a new trial considering the substantial amount of evidence tending to show that Defendant had the requisite intent for first-degree burglary. Numerous witnesses for the State testified that Defendant had entered the Boyd home on the night in question. The home was located on a secluded private property, which would have required Defendant to travel down a curved dirt road. Defendant had taken items belonging to the Boyds from cars on the Boyd property and put them inside Ginger Boyd's purse, along with Defendant's own wallet. When Mrs. Boyd found Defendant in the house, Defendant was in the living room and had a flashlight. The jury also heard Rule 404(b) evidence about Defendant's previous break in, which the court instructed the jury was "solely for the purpose of showing the identity of the person who committed the crime charged in this case, . . . that the defendant had the intent, . . . or that there existed in the mind of the defendant a plan, scheme, system, or design . . . ." Because the record reveals significant evidence on the question of Defendant's intent, the prosecutor's improper remarks concerning Defendant's expert were not sufficiently prejudicial to require reversal. *See Huey*, 370 N.C. at 181, 804 S.E.2d at 470.

C. Civil Judgment on Attorneys' Fees

[3] Finally, Defendant challenges the trial court's entry of a civil judgment on attorneys' fees outside of her presence.

In certain circumstances, a trial court may enter a judgment requiring an indigent defendant to pay for a portion of the cost of legal services provided by appointed counsel. *See* N.C. Gen. Stat. § 7A-455 (2019).

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Friend, 257 N.C. App. at 523, 809 S.E.2d at 907.

The trial court informed Defendant that it intended to impose a civil judgment for attorneys' fees, that appointed counsel's fee would be $75 per hour, and that it would enter the civil judgment against her once counsel had submitted an affidavit setting forth his time in the case. When asked, Defendant stated that she had no objection to entry of the civil judgment. But because Defendant did not know either the number of hours her appointed counsel planned to submit or the consequent amount she would owe, Defendant was deprived of a meaningful opportunity to be heard before the judgment was entered.

In light of these facts, the State has informed the Court in its brief that it "does not oppose Defendant's request that this matter be remanded to the trial court exclusively on the issue of the civil judgment for attorney's fees." We agree that vacating the civil judgment and remanding to the trial court for a waiver by Defendant or a hearing on the issue of attorneys' fees is the appropriate remedy. *See State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005) (vacating and remanding a civil judgment for attorneys' fees where there was "no indication in the record that defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed").

V. Conclusion

Even presuming that trial counsel conceded Defendant's guilt to a charged offense, we find no *Harbison* error because counsel acted with Defendant's consent. Though the prosecutor's remarks attacking the credibility of Defendant's expert witness were improper, they were

not so grossly improper as to impede Defendant's right to a fair trial. We vacate the civil judgment for attorneys' fees and remand to the trial court to allow Defendant to either waive further proceedings or be given an opportunity to be heard on the matter.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
CAROLYN VONDESSA DOSS, DEFENDANT, AND ACCREDITED SURETY AND CASUAL, SURETY/BAIL AGENT/APPELLANT

No. COA20-43

Filed 3 November 2020

Penalties, Fines, and Forfeitures—bond forfeiture—motion to set aside—imposition of sanctions

In a proceeding to set aside a bond forfeiture where the trial court granted the bail agent's motion to set aside but also ordered him to pay a monetary sanction for failure to attach sufficient documentation to the motion and prohibited him from becoming surety on future bonds until payment was made, the order imposing sanctions was reversed. The trial court abused its discretion in ordering sanctions because, by the plain language of N.C.G.S. § 15A-544.5(d)(8), the court could only impose sanctions if the motion to set aside had been denied. Additionally, the school board failed to follow statutory requirements to make a proper motion for sanctions, the sanction prohibiting the bail agent from becoming a surety on future bonds exceeded the scope of the trial court's statutory authority, and the court failed to make findings concerning why the motion—which had attached to it a printout of an official electronic court record—contained insufficient documentation.

Appeal by surety-bail agent-appellant from order entered 25 October 2019 by Judge William B. Sutton in Jones County District Court. Heard in the Court of Appeals 26 August 2020.

Greene, Wilson & Crow, P.A., by Kelly L. Greene and Thomas R. Wilson, for appellant Accredited Surety and Casual.

Tharrington Smith LLP, by Rod Malone and Stephen G. Rawson, for appellee Jones County Board of Education.

Campbell Shatley, PLLC, by Christopher Z. Campbell, Kristopher L. Caudle, and John F. Henning, Jr., for North Carolina School Boards Association.

Allison B. Schafer for North Carolina School Boards Association.

BERGER, Judge.

On October 25, 2019, the trial court entered an order which granted Reginal Beasley's ("Bail Agent") and Accredited Surety and Casual's motion to set aside forfeiture. However, the trial court also ordered Bail Agent to pay sanctions in the amount of $500.00 because Bail Agent failed to attach sufficient documentation with its motion pursuant to N.C. Gen. Stat. § 15A-544.5. In addition, the trial court prohibited Bail Agent from becoming surety on any future bonds in Jones County until the judgment was satisfied. Bail Agent appeals, arguing that the trial court abused its discretion when it granted Jones County Board of Education's (the "Board") motion for sanctions. We agree, and reverse the trial court's order for sanctions.

Factual and Procedural Background

On July 14, 2018, Carolyn Vondessa Doss ("Defendant") was arrested for driving while impaired, placed in jail, and given a secured bond of $4,000.00. That same day, Accredited Surety and Casual, through its agent Bail Agent, posted bond in the amount of $4,000.00, and Defendant was released. On November 2, 2018, Defendant failed to appear, and an order for her arrest was issued. On November 10, 2018, the trial court issued and mailed a bond forfeiture notice to Accredited Surety and Casual, Bail Agent, and Defendant.

On March 29, 2019, Bail Agent filed a motion to set aside forfeiture using form AOC-CR-213. As grounds for relief, Bail Agent checked boxes 2 – "All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State taking a dismissal with leave as evidenced by the attached copy of the official court record" – and 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 as evidenced by a copy of an official court record, including

an electronic record."[1] An Automated Criminal/Infractions System ("ACIS") printout showing that Defendant had been assigned a new court date was attached to the motion.

On April 12, 2019, the Board filed its objection to the motion, and noticed hearing for May 10, 2019. The left margin contained the following typed language: "Surety shall take notice that the Board of Education reserves the right to seek, as a sanction, reimbursement of all attorney fees and expenses incurred in objecting to this motion if Surety provides additional documentation after the date of this objection."

Prior to the hearing on the Board's objection to the motion to set aside, Bail Agent provided the Board's counsel with additional documentation that demonstrated the order for arrest had been served. The record does not contain a written motion for sanctions or notice of hearing on the issue of sanctions from the Board.

On October 25, 2019, the Board's objection to Bail Agent's motion was heard. At the hearing, the Board's counsel conceded that the additional documentation was sufficient to set aside forfeiture, and the trial court granted Bail Agent's motion to set aside. The trial court also ordered sanctions against Bail Agent in the amount of $500.00 for failure to attach sufficient documentation to the motion to set aside. Further, the trial court prohibited Bail Agent from becoming "surety on any bail bond in Jones County until" Bail Agent satisfied the judgment.

Bail Agent appeals, arguing that the trial court abused its discretion in assessing sanctions. We agree.

Standard of Review

A trial court's ruling on imposition of sanctions will not be disturbed absent an abuse of discretion. *State v. Cortez*, 229 N.C. App. 247, 267, 747 S.E.2d 346, 360 (2013). "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." *State v. Cummings*, 361 N.C. 438, 463, 648 S.E.2d 788, 803 (2007) (citation and quotation marks omitted).

1. Bail Agent claims that box 2 was checked accidentally, and Bail Agent attempted to cure this mistake by initialing above box 2.

Analysis

"The goal of the bonding system is the production of the defendant, not increased revenues for the county school fund." *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979).

"A statute that is clear on its face must be enforced as written." *State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757 (2000). "As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Reaves-Smith*, 271 N.C. App. 337, 343, 844 S.E.2d 19, 24 (2020) (citation and quotation marks omitted).

> It is a well-established rule of statutory construction that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature . . . did not intend any provision to be mere surplusage.

State v. Conley, 374 N.C. 209, 215, 839 S.E.2d 805, 809 (2020) (citation and quotation marks omitted).

N.C. Gen. Stat. § 15A-544.5(d)(8) states that

> If at the hearing [on the motion to set aside] the court determines . . . that the documentation required to be attached . . . was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. A motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing. If the court concludes that a sanction should be ordered, in addition to ordering the denial of the motion to set aside, sanctions shall be imposed as follows: (i) twenty-five percent (25%) of the bond amount for failure to sign the motion; (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation; and (iii) not less than one hundred percent (100%) of the bond amount for the filing of fraudulent documentation. Sanctions awarded under this subdivision shall be docketed by the clerk of superior court as a

> civil judgment as provided in G.S. 1-234. The clerk of superior court shall remit the clear proceeds of the sanction to the county finance officer as provided in G.S. 115C-452. This subdivision shall not limit the criminal prosecution of any individual involved in the creation or filing of any fraudulent documentation.

N.C. Gen. Stat. § 15A-544.5(d)(8) (2019).

Section 15A-544.5(d)(8) addresses grounds for sanctions, a procedure for seeking sanctions, permissible sanctions, and satisfaction of any judgment relating to sanctions. By the plain language of the statute, sanctions may only be allowed if a motion to set aside is not signed, or the required documentation was not attached at the time of filing the motion to set aside.

In addition, Section 15A-544.5(d)(8) specifically states that "*If at the hearing the court determines that the motion to set aside* was not signed or that the documentation required to be attached pursuant to subdivision (1) . . ., the court may order monetary sanctions[.]" N.C. Gen. Stat. § 15A-544.5(d)(8) (emphasis added). Further, the statute only permits sanctions to be imposed if the motion to set aside is denied. *See* N.C. Gen. Stat. § 15A-544.5(d)(8) ("[I]f the court concludes that a sanction should be ordered, *in addition to ordering the denial of the motion to set aside*, *sanctions shall be imposed*" based on the amount of the bond (emphasis added)).

Read in its entirety, the plain language of Section 15A-544.5(d)(8) requires the trial court to first hold a hearing and make a determination regarding the underlying motion to set aside. "The trial court's authority to order sanctions against the surety who filed a motion to set aside is triggered [only after] the trial court" makes this initial determination. *State v. Lemus*, COA19-582, 2020 WL 1026548, at *4 (N.C. Ct. App. 2020) (unpublished). A trial court may only impose sanctions under Section 15A-544.5(d)(8) when the motion to set aside is denied, and by the plain language of this section, the trial court cannot order both that the forfeiture be set aside and that sanctions be imposed. Thus, the trial court abused its discretion when it granted the motion to set aside and imposed sanctions against Bail Agent.

Further, the Board failed to make a proper motion for sanctions. Pursuant to N.C. Gen. Stat. § 15A-544.5(d)(8), "[a] motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing." N.C. Gen. Stat.

§ 15A-544.5(d)(8). There is nothing in the record that indicates that the Board filed or served Bail Agent with a motion for sanctions and notice of the hearing 10 days prior to the hearing. Rather, the notation in the margin of the Board's objection to the motion to set aside merely reserved the right to file a motion for sanctions if Bail Agent provided supplemental documentation. No such motion is set forth in the record, and the Board's oral motion for sanctions is insufficient pursuant to the plain language of N.C. Gen. Stat. § 15A-544.5(d)(8).

Moreover, the sanction imposed by the trial court that prohibited Bail Agent from becoming surety on any future bonds in Jones County until the judgment was satisfied exceeded the scope of the trial court's authority. It is uncontroverted that a court cannot exercise authority not specifically prescribed in the bond forfeiture statutes. *See State v. Knight*, 255 N.C. App. 802, 806, 805 S.E.2d 751, 754 (2017) (emphasizing that the trial court's authority over bond forfeiture must be exercised in accordance with the relevant statutory provisions).

Allowable sanctions for failure to attach sufficient documentation to a motion to set aside are prescribed by N.C. Gen. Stat. § 15A-544.5(d)(8). Specifically, that section states that "sanctions shall be imposed as follows: . . . (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation." N.C. Gen. Stat. § 15A-544.5(d)(8); *see also Cortez*, 229 N.C. App. at 269, 747 S.E.2d at 361 ("[I]f a surety fails to attach the required documentation to a motion to set aside . . . a court is now authorized and required by the General Assembly under subdivision (d)(8) to impose a sanction equal to fifty percent of the bond's amount if the court decides to impose monetary sanctions against a surety for such a failure."). Prohibiting Bail Agent from writing bonds until the judgment for sanctions was satisfied went beyond the trial court's authority as set forth in Section 15A-544.5, and therefore, the trial court abused its discretion.

In addition, the trial court assessed sanctions because the motion to set aside "contained insufficient documentation." Relying on *State v. Isaacs*, 261 N.C. App. 696, 821 S.E.2d 300 (2018), the trial court determined that "the Board is entitled, at the Court's discretion, to be reimbursed for attorney fees and expenses as a sanction to remedy any prejudice caused by the Surety's failure to attach sufficient evidence to its" motion to set aside the forfeiture.

An ACIS printout is a copy of an official court record. *See State v. Waycaster*, 375 N.C. 232, 243, 846 S.E.2d 688, 695 (2020) ("[T]he ACIS

database serves as a court record—albeit an electronic one.").[2] Here, Bail Agent attached an electronic copy of a court record which satisfies N.C. Gen. Stat. § 15A-544.5(b)(4) to his motion to set aside. The trial court failed to make findings of fact concerning why the motion to set aside contained insufficient documentation when an official court record was attached. Thus, the trial court abused its discretion when it sanctioned Bail Agent for failure to attach sufficient documentation to the motion to set aside.

Conclusion

For the reasons provided herein, the trial court abused its discretion when it sanctioned Bail Agent, and we reverse.

REVERSED.

Judges ARROWOOD and COLLINS concur.

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2. ACIS is "maintained by the North Carolina Administrative Office of the Courts [and] provides the superior and district courts in North Carolina with accurate and timely criminal and infraction case information." *ACIS Citizen's Guide*, North Carolina Administrative Office of the Courts 5 (2017), https://www.nccourts.gov/assets/documents/publications/ACIS_Inquiry_RG.pdf?n5DVrlE3ODObw13mPuMpNs0uEecpTaBN. The system is used by courts to "create indexes, calendars and docket cases, notify individuals of case status and exceptions, and control the reporting of dispositions and final judgments for criminal cases." *ACIS Criminal Inquiry Module User Manual*, North Carolina Administrative Office of the Courts 8 (2010), https://www.nccourts.gov/assets/documents/publications/Criminal-Inquiry-Manual.pdf?fu6MNou7dLhkSYKnJ99hVDL4h2IjbzLh.

The primary users of the ACIS criminal module, are clerks of court, district attorneys, and magistrates. *Id.* at 6. The system is designed to "provide[] a complete history of all case related activity, and ultimately, disposition data." *Id.* at 8.

STATE v. McGAHA

[274 N.C. App. 232 (2020)]

STATE OF NORTH CAROLINA
v.
KAYLA SUE McGAHA

No. COA19-1108

Filed 3 November 2020

1. Appeal and Error—preservation of issues—driving while impaired—pretrial motion to suppress—failure to object at trial—failure to argue plain error

In a driving while impaired case, defendant failed to preserve for appellate review her argument that the trial court erroneously denied her pretrial motion to suppress for lack of reasonable suspicion for the stop where she did not object to the court's ruling, did not object to the evidence at trial, and failed to argue plain error on appeal. Therefore, the argument was dismissed.

2. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of the evidence

In a driving while impaired case, there was sufficient evidence to support a conclusion that defendant was under the influence of an impairing substance, and the trial court properly denied her motion to dismiss for insufficient evidence where the trooper testified that defendant's driving was erratic, she stumbled and staggered as she got out of the car, he smelled a moderate odor of alcohol on her breath, she spoke in slurred and mumbled speech, and she refused to submit to an intoxilyzer test.

3. Sentencing—driving while impaired—grossly aggravating factor—prior conviction within seven years—notice to defendant—waiver

Although the record on appeal in a driving while impaired case did not include evidence that the State gave notice of its intent to prove the grossly aggravating factor of a prior driving while impaired conviction within seven years of the date of the offense, as required by N.C.G.S. § 20-179(a1)(1), the trial court did not err by finding the grossly aggravating factor and imposing a Level Two sentence. Defendant waived her statutory right to notice where she testified to the prior conviction at trial, her counsel stipulated that she had the prior DWI, and she failed to object to the lack of notice at the sentencing hearing.

Appeal by Defendant from judgment entered 29 March 2019 by Judge Alan Thornburg in Henderson County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Jarrett W. McGowan, for the State-Appellee.

Charlotte Gail Blake for Defendant-Appellant.

COLLINS, Judge.

Kayla Sue McGaha ("Defendant") appeals from judgment entered upon the trial court's finding her guilty of impaired driving. Defendant argues that the trial court erred by denying her motion to suppress evidence, denying her motion to dismiss for insufficient evidence, and finding one grossly aggravating factor and accordingly imposing a Level Two sentence. We discern no error.

I. Procedural History

Defendant was arrested on 17 February 2017 and charged with driving while subject to an impairing substance and operating a motor vehicle with an open alcohol container. On 31 May 2018, Defendant pled guilty in district court to driving while impaired. The district court determined the State had proven beyond a reasonable doubt the grossly aggravating factor that Defendant "has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense." The district court imposed a Level Two sentence. Defendant noticed appeal to the superior court.

On 2 November 2018, Defendant filed a motion to suppress evidence in superior court. On 28 March 2019, Defendant pled not guilty to driving while impaired, waived her right to a jury trial, and requested a bench trial. Following a colloquy with Defendant, the superior court found Defendant's waiver to be made freely, voluntarily, and understandingly, and permitted the matter to be heard by the bench. The State voluntarily dismissed the open container charge. After hearing testimony and arguments on the suppression motion, the superior court denied the motion in open court and entered a corresponding written order on 5 April 2019.

At the close of the trial on 29 March 2019, the superior court found Defendant guilty of driving while impaired and found the grossly aggravating factor of a prior impaired driving conviction within seven years of the date of the offense. The superior court imposed a Level Two sentence of 12 months in prison, suspended the sentence, and placed

Defendant on 24 months' supervised probation. The superior court also ordered Defendant to abstain from consuming alcohol for 90 days, complete 240 hours of community service, and pay court costs. Defendant timely filed notice of appeal to this Court.

II. Factual Background

The State's evidence tended to show the following: At around 10:50 p.m. on 17 February 2017, State Trooper Tony Osteen of the North Carolina Highway Patrol was on preventative patrol travelling in an unmarked patrol car in the left-hand, eastbound lane of Upward Road, a four-lane road that connects U.S. Highway 176 to Interstate 26 to Howard Gap Road in Henderson County. Upward Road contains a grass median between the two lanes going in opposite directions, as well as turn lanes for accessing roads to the left, which start and stop between the grass median.

Osteen noticed a car approaching from behind, whose driver failed to dim the car's bright lights when the car was directly behind Osteen. After pulling over to the left into one of the turn lanes to let the driver pass, Osteen got back on Upward Road behind the car and followed it. Osteen noticed that the car was "weaving inside of its lane" and "going into . . . the right eastbound lane," and that it "crossed a dotted fog line," so he continued to follow it toward the intersection at Interstate 26. Just before reaching the intersection, the car got over into the leftmost of two turn lanes connecting to Interstate 26, then "jerked the wheel back and got into the lane that [the driver] had just left from and went straight through the intersection." When asked, "How would you characterize her driving?" Osteen responded, "It was definitely something that caught my eyes, somebody that could be impaired, driving erratic, weaving, unable to drive in a straight line." When they reached the next set of turn lanes, Osteen activated his lights and pulled the car over.

When Osteen approached the car to talk with the driver, whom he later identified as Defendant, he noticed an odor of alcohol coming from inside the car and asked Defendant to step out. When Defendant stepped out of the car, she staggered and smelled of alcohol. While Osteen conversed with Defendant to find out who she was, to obtain her driver's license, and to discuss why he stopped her, Osteen observed that she spoke in "slurred and mumbled speech" and had "a moderate odor of alcohol coming from her breath." When Osteen gave Defendant an Alco-Sensor test, Defendant's first blow into the device produced an error because it contained "too much moisture and was full of spit." Trooper Danny Odom, whom Osteen had called to assist, arrived at the scene and gave Defendant two Alco-Sensor tests using his portable

testing device, which both produced positive results. Osteen arrested Defendant and took her to the police station, where she refused to take an intoxilyzer test.

Osteen testified that it was his opinion that Defendant "had consumed a sufficient amount of impairing substance, which was alcohol, as to appreciably impair her mental and physical faculties." Osteen based his opinion on his observations of Defendant stumbling and staggering when she got out of the car, the moderate odor of alcohol on her breath, her mumbled and slurred speech, and her erratic driving.

III. Discussion

A. Motion to Suppress Evidence

[1] Defendant first argues that the trial court erred by denying her motion to suppress evidence. The State argues that Defendant failed to properly preserve the denial of the suppression motion for appellate review. Defendant's argument has not been preserved and thus is not properly before us.

"The law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, 241 N.C. App. 121, 124, 772 S.E.2d 115, 119 (2015) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)). Where a defendant fails to object when such evidence is offered at trial, appellate review is limited to plain error. *State v. Muhammad*, 186 N.C. App. 355, 364, 651 S.E.2d 569, 576 (2007); N.C. R. App. P. 10(a)(4). Plain error review is only available "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

In this case, Defendant filed a motion to suppress evidence seized as a result of the stop, arguing that the officer lacked reasonable suspicion to stop her. After the trial court denied Defendant's motion but before the beginning of the trial, the State asked the trial court, "[S]ince you've already heard the evidence up to the stop[,] [w]ould it be acceptable to apply that to the trial portion here?" Defense counsel stated he "would have no issue just proceeding from here," and the trial court announced it would "incorporate that testimony into the trial testimony and consider that for purposes of the trial." Defendant did not object to the trial court's ruling and made no objections at trial. Thus, Defendant did not properly preserve the denial of her motion to suppress for review on appeal. *See Hargett*, 241 N.C. App. at 124, 772 S.E.2d at 119. Further,

because Defendant does not argue plain error on appeal, we do not review the denial of the motion for plain error. *See* N.C. R. App. P. 10(a)(4). Defendant's argument is dismissed.

B. Motion to Dismiss for Insufficient Evidence

[2] Defendant next argues that the trial court erred by denying her motion to dismiss based on insufficient evidence of the offense of driving while impaired.

This Court reviews a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Denial of a motion to dismiss in a criminal trial is proper if there is substantial evidence of the essential elements of the offense and that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455 (citation omitted); *see State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (appellate court must resolve any contradictions in the State's favor).

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1(a)(1) (2019). "The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002) (citations omitted). Additionally, a defendant's refusal to submit to an intoxilyzer test is admissible as substantive evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(f) (2019).

Here, Osteen testified that he initially saw Defendant's car "weaving inside of its lane" and "going into . . . the right eastbound lane," and that it "crossed a dotted fog line," so he continued to follow it toward the intersection at Interstate 26. Just before reaching the intersection, Defendant's car got over into the leftmost of two turn lanes connecting to Interstate 26, then "jerked the wheel back and got into the lane that [the driver] had just left from and went straight through the intersection." Osteen thought that the driver of the car could be impaired due to the driver's "erratic" driving, weaving, and being "unable to drive in a straight line."

After Osteen pulled Defendant over and approached her car, he detected an odor of alcohol coming from inside the car. When Defendant stepped out of the car, she staggered and smelled of alcohol. While Osteen conversed with Defendant, he observed that she spoke in "slurred and mumbled speech" and had "a moderate odor of alcohol coming from her breath."

Osteen testified, "It is my opinion [Defendant] had consumed a sufficient amount of impairing substance, which was alcohol, as to appreciably impair her mental and physical faculties." Osteen further testified, "I based that on observing her stumbling, her staggering a little bit when she got out of the vehicle, moderate odor of alcohol on her breath, her mumbled and slurred speech, along with erratic driving." Because Osteen's opinion that Defendant was impaired was not based solely on the odor of alcohol, it was sufficient evidence of impairment. *See Mark*, 154 N.C. App. at 346, 571 S.E.2d at 871. Osteen also testified that Defendant refused to submit to an intoxilyzer test at the police station, which was admissible evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(f).

Defendant argues that there is conflicting testimony about why she refused to take the intoxilyzer test at the police station, asserting that she has a heart condition that caused her to be unable to blow any more after they arrived at the police station. However, in viewing the evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, *see Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455, we resolve any contradiction in the State's favor, *see Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

Viewed in the light most favorable to the State, the evidence was sufficient to support the conclusion that Defendant was "under the influence of an impairing substance" at the time of her arrest. N.C. Gen. Stat. § 20-138.1(a)(1). The trial court properly denied Defendant's motion to dismiss.

C. Grossly Aggravating Factor

[3] Defendant finally argues that the trial court erred by finding the grossly aggravating factor of a prior driving while impaired conviction within seven years of the date of the offense, where the State failed to notify Defendant of its intent to prove the aggravating factor for sentencing purposes.

We first address the State's motion made pursuant to North Carolina Rule of Appellate Procedure 9(b)(5)(a) to supplement the record, or

alternatively pursuant to Rule 9(b)(5)(b) to remand to the trial court to allow the trial court to correct the record, with a Notice of Grossly Aggravating and Aggravating Factors (DWI) form the State alleges was served on Defendant's attorney on 17 September 2018.

North Carolina Rule of Appellate Procedure 9(b)(5)(a) allows an appellee, in certain circumstances, to "supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9." N.C. R. App. P. 9(b)(5)(a). In addition to an enumerated list of items, Rule 9 provides that the record shall contain "copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(3)(i). Rule 9(b)(5)(b) states in pertinent part: "On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal."

In this case, the State admits in its motion that the Notice of Grossly Aggravating and Aggravating Factors (DWI) form "was neither filed nor presented to the trial court." Accordingly, the form could not have been included in the record pursuant to Rule 9 and could not supplement the record on appeal pursuant to Rule 9(b)(5)(a). Additionally, as the proffered form was not part of the trial court's record in this case, it cannot be added to the record on appeal pursuant to Rule 9(b)(5)(b). We therefore deny the State's motion and do not consider the proffered form.

"Alleged statutory errors are questions of law and, as such, are reviewed *de novo*. Under *de novo* review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court." *State v. Hughes*, 265 N.C. App. 80, 81-82, 827 S.E.2d 318, 320 (2019) (citations omitted).

Pursuant to N.C. Gen. Stat. § 20-179(a1)(1), "[i]f the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent." N.C. Gen. Stat. § 20-179(a1)(1) (2019). Under subsection (c) of this section, a prior conviction for an offense involving impaired driving is a grossly aggravating factor if "[t]he conviction occurred within seven years before the date of the offense for which the defendant is being sentenced." *Id.* at § 20-179(c)(1)(a). A defendant's right to notice of the State's intent to prove a prior conviction is a statutory right, not a constitutional one. *State v. Williams*, 248 N.C. App. 112, 116-17, 786 S.E.2d 419, 423-24 (2016). *See Blakely v. Washington*, 542 U.S. 296, 301 (2004) ("Other than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Thus, "[a] defendant's Sixth Amendment right to 'reasonable notice' is not violated 'where the State provides no prior notice that it seeks an enhanced sentence based on the fact of prior conviction.' " *Williams*, 248 N.C. App. at 117, 786 S.E.2d at 423-24 (citation omitted). The statutorily required notice of a prior conviction under N.C. Gen. Stat. § 20-179(a1)(1) can be waived.[1] *See*, *e.g.*, *Hughes*, 265 N.C. App. at 81, 84, 827 S.E.2d at 321-22 (where the State failed to provide defendant notice of its intent to use aggravating factors under N.C. Gen. Stat. § 20-179(a1)(1), "and the record d[id] not indicate that [d]efendant waived his right to receive such notice," the trial court committed prejudicial error by applying the aggravating factors).

Here, Defendant admitted to her 2012 driving while impaired conviction when questioned on cross-examination during the trial on the merits. At sentencing, the State offered, "[Defendant] has had one prior conviction of DWI in the last seven years making her a Level II for sentencing, we believe." Defense counsel stipulated that "Defendant did have the prior DWI," but asked the court to "take into consideration everything that you heard today and everything that you heard from [Defendant] with her condition and everything like that in terms of sentencing." The court then announced, "The Court finds that grossly aggravating factor No. 1A, that the defendant has been convicted of a prior offense involving impaired driving, which conviction occurred within seven years before the date of this offense. Therefore, the defendant is a Level II for punishment with one grossly aggravating factor present." Defendant did not object.

Defendant admitted to her prior conviction, her counsel stipulated to Defendant's prior conviction, and at no time during sentencing did Defendant object to the consideration of her prior conviction as an aggravating factor in determining her punishment level for sentencing. Defendant's admission and her counsel's stipulation, coupled with Defendant's failure to object to lack of notice at the sentencing hearing, operated as a waiver of her statutory right to notice.

Defendant relies upon *Hughes*, *State v. Geisslercrain*, 233 N.C. App. 186, 756 S.E.2d 92 (2014), and *State v. Reeves*, 218 N.C. App. 570, 721

1. Unlike N.C. Gen. Stat. § 15A-1340.16, our felony sentencing statute that contains an analogous notice provision, N.C. Gen. Stat. § 20-179 does not require admissions to the existence of an aggravating factor to be consistent with N.C. Gen. Stat. § 15A-1022.1, which requires the trial court to address the defendant personally regarding an admission.

S.E.2d 317 (2012), to support her argument that Defendant's sentence should be vacated and remanded for lack of notice. However, unlike in the present case, the facts in those cases do not indicate that defendants waived notice by admitting the aggravating factor and failing to object based on a lack of notice of the State's intent to use the factor. The defendant in *Hughes* specifically objected to the lack of notice, and this Court stated that the record before it "does not indicate that Defendant waived his right to receive such notice." 265 N.C. App. at 81, 84, 827 S.E.2d at 320, 322.

The trial court did not err by finding the grossly aggravating factor of a prior driving while impaired conviction within seven years of the date of the offense and imposing a Level Two sentence. Defendant's argument is overruled.

IV. Conclusion

The trial court did not err by denying Defendant's motion to dismiss for insufficient evidence. The trial court did not err in sentencing Defendant by finding a grossly aggravating factor based on a prior driving while impaired conviction because Defendant waived notice.

NO ERROR.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
LORRIE LASHANN RAY

No. COA20-132

Filed 3 November 2020

1. Appeal and Error—preservation of issues—failure to object—sentencing—claim that sentence invalid as a matter of law

Where defendant was convicted of insurance fraud and obtaining property by false pretenses and did not object to her sentence at trial, her arguments that the trial court erred by imposing sentences on both offenses based on the same misrepresentation and improperly delegated authority to her probation officer by failing to set a completion deadline for the active term of her split sentence were reviewable on appeal. Because defendant alleged the trial court

erred by imposing a sentence that was invalid as a matter of law, her arguments were preserved for appellate review despite her failure to object on that basis at sentencing.

2. Sentencing—insurance fraud—obtaining property by false pretenses—arising from same misrepresentation

Where defendant was convicted of both insurance fraud and obtaining property by false pretenses based on the same misrepresentation to the insurance company, the trial court did not err in sentencing defendant on both offenses because the language, subject, and history of the statutes involved showed a legislative intent to impose multiple punishments. Each offense required an element not required by the other, each offense addressed a violation of a separate and distinct social norm, and the Court of Appeals had sustained sentencing for convictions of both insurance fraud and obtaining property by false pretenses in numerous cases over the years, and if that had not been the intent of the legislature, it could have addressed the matter.

3. Sentencing—probation—split sentence—failure to set completion deadline for active sentence

Where defendant was convicted of insurance fraud and obtaining property by false pretenses and the trial court sentenced her to serve 24 months of supervised probation with a condition that she serve a 60-day active sentence in two 30-day terms as scheduled by her probation officer, the trial court did not err or unlawfully delegate its authority to the probation officer by failing to set a completion deadline for the active sentence. The trial court properly determined the time and intervals within the period of probation (the two thirty-day periods) as allowed by N.C.G.S. § 15A-1351(a), and the completion date was set by statute—the end of the probationary period or no more than two years from the date of defendant's conviction.

Appeal by Defendant from judgment entered 28 August 2019 by Judge Gale M. Adams in Harnett County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant-Appellant.

COLLINS, Judge.

Defendant Lorrie Lashann Ray appeals from judgment entered upon guilty verdicts for insurance fraud and obtaining property by false pretenses. Defendant argues that the trial court erred by (1) imposing a sentence based on both offenses and (2) improperly delegating authority to Defendant's probation officer by failing to set a completion deadline for the active term of the sentence as a condition of special probation. We discern no error.

I. Procedural History

Defendant was indicted on charges of insurance fraud, obtaining property by false pretenses, and attempting to obtain property by false pretenses. At trial, the State voluntarily dismissed the attempt charge. The jury found Defendant guilty of insurance fraud and obtaining property by false pretenses. The trial court consolidated the convictions for judgment and sentenced Defendant to 10 to 21 months of imprisonment, suspended for 24 months of supervised probation. As a condition of probation, the trial court ordered Defendant to serve a 60-day active term.

Defendant gave notice of appeal in open court.

II. Factual Background

The State's evidence tended to show the following: Defendant's home in Dunn, North Carolina, was damaged in the fall of 2016 by Hurricane Matthew. Defendant filed a claim on 24 October 2016 with her home insurance company, Universal Property and Casualty Insurance Company ("Insurer"). Defendant claimed her roof, windows, doors, porch, and electronics were damaged; there were leaks throughout the home due to the roof damage; she was living in her barn; and she lost all of the food in her refrigerator due to spoilage. An insurance adjustor inspected the home on 2 November and completed a report the next day, which included photographs and stated that Hurricane Matthew caused wind damage to the exterior and interior of the home estimated at $1,578.99, that the house was habitable, and that living expenses would not be expected. The insurance adjustor issued a final report on 21 November showing the gross claim of $1,578.99 less the deductible, resulting in an amount payable to Defendant of $452.99. The Insurer issued a check for $452.99 to Defendant.

Defendant contacted the Insurer on 6 December by phone, disputing the amount awarded on her claim and requesting that the Insurer perform another home inspection. The next day, Defendant submitted

to the Insurer an inventory of food loss totaling $1,350. On 21 December, Defendant submitted estimates for roof repairs for $6,240, window repairs for $1,520, and a door repair for $427. Defendant also submitted (1) a handwritten lease agreement signed by Defendant and her stepfather, Robert McEachin, stating that Defendant would pay $100 per day to McEachin to stay in his home; and (2) handwritten documents purporting to be 76 paid daily receipts beginning 11 October 2016 for $100 each, signed by McEachin and stating that Defendant was living in his home. Twice in January 2017, Defendant contacted the Insurer claiming reimbursement for living expenses in the amount of $8,300. Defendant faxed the handwritten lease agreement and receipts totaling $8,300, explained that she was paying cash to McEachin, and gave the Insurer McEachin's phone number. On 1 February, Defendant called the Insurer explaining that she was going to be evicted from where she was staying and would need to spend $150 per night on a hotel.

After reviewing Defendant's claims, the Insurer made three additional payments to Defendant: $5,608.01 for additional home repairs; $500 for spoiled food; and $2,000 for living expenses, based on 20 days under the lease agreement that Defendant provided to the Insurer.

Defendant called McEachin and told him that the Insurer was going to call him to ask him a few questions, and that "all [he] had to do was just tell them yes." McEachin received a phone call from the Insurer but did not answer or return it. A representative of the Insurer visited McEachin at his home; showed him the receipts that Defendant had submitted; asked him if he had signed them, to which he replied "no"; and had him sign his name on a piece of paper. McEachin told the insurance representative that he did not have a lease agreement with Defendant and that Defendant had not stayed with him between October 2016 and January 2017. McEachin testified at trial that he did not write or sign the purported receipts and that Defendant did not stay in his house.

III. Discussion

[1] Defendant argues that the trial court erred by sentencing her for both obtaining property by false pretenses and insurance fraud for the same alleged misrepresentation. Defendant also argues that the trial court improperly delegated its authority to Defendant's probation officer by failing to set a completion deadline for the active term of Defendant's split sentence.

We reject the State's argument that these issues are not properly preserved for appellate review. When a defendant alleges that a trial court erred by imposing a sentence that is invalid as a matter of law,

the defendant's argument is preserved for appellate review, even if the defendant failed to object on this basis at sentencing. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2019); *State v. Meadows*, 371 N.C. 742, 747, 821 S.E.2d 402, 406 (2018) ("Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court, subdivision (18) is not one of them."); *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) ("[N.C. Gen. Stat. § 15A-1446(d)(18)] does not conflict with any specific provision in our appellate rules and operates as a 'rule or law' under [North Carolina Rule of Appellate Procedure] 10(a)(1), which permits review of this issue").[1]

A. Sentencing Based on Both Convictions

[2] Defendant contends that the trial court erred by sentencing her based on both the conviction for obtaining property by false pretenses and the conviction for insurance fraud, arising from the same alleged misrepresentation. Defendant argues that the "General Assembly did not intend to doubly punish defendants for making a single misrepresentation merely because the victim happened to be an insurance company."

"Whether . . . multiple punishments may be imposed when a defendant, in a single trial, is convicted of multiple offenses when some are fully, factually embraced within others is to be determined on the basis of legislative intent." *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986). Where the legislature "clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes." *State v. Pipkins*, 337 N.C. 431, 433-34, 446 S.E.2d 360, 362 (1994) (citations omitted). "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, 347, 809 S.E.2d 391, 393 (2018) (citations omitted).

"The traditional means of determining the intent of the legislature where the concern is . . . one of multiple punishments for two convictions

1. Embedded within the discussion in Defendant's appellate brief of her challenge to sentencing is a separate argument that legislative intent bars two *convictions* in this case. Defendant failed to preserve this argument for appellate review by failing to object to the jury instruction on both charges at trial. *See* N.C. R. App. P. 10(a)(1). Further, we decline to grant Defendant's request that we invoke Rule 2 in order to review this argument. *See* N.C. R. App. P. 2. Declining review of this argument does not result in manifest injustice in this case because we would uphold both convictions for similar reasons we uphold the trial court's sentence, as discussed below.

in the same trial include the examination of the subject, language, and history of the statutes." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712.

With regard to *language*, "[t]he legislative intent of the statutes defining the offenses in question can be extrapolated from the provisions of each statute." *State v. Banks*, 367 N.C. 652, 657, 766 S.E.2d 334, 338 (2014) (citations omitted). "When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction." *Id.* (citations omitted).

The elements of insurance fraud are: "(1) a defendant presents a statement for a claim under an insurance policy; (2) that statement contained false or misleading information; (3) the defendant knows the statement is false or misleading; and, (4) the defendant acted with the intent to defraud." *State v. Koke*, 264 N.C. App. 101, 107, 824 S.E.2d 887, 892 (2019) (citing N.C. Gen. Stat. § 58-2-161(b)) (other citation omitted). The elements of obtaining property by false pretenses are: "(1) A false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person." *State v. Saunders*, 126 N.C. App. 524, 528, 485 S.E.2d 853, 855-56 (1997) (brackets and citation omitted). *See* N.C. Gen. Stat. § 14-100(a) (2019).

While both offenses require a misrepresentation intended to deceive, they each require an element not required by the other. Insurance fraud requires proving that the defendant presented a statement in support of a claim for payment under an insurance policy; obtaining property by false pretenses requires proving that the defendant's misrepresentation did in fact deceive. Based on the separate and distinct elements that must be proven, the legislature clearly expressed its intent to proscribe and punish a misrepresentation intended to deceive under both statutes. *See Banks*, 367 N.C. at 659, 766 S.E.2d at 339 (Given the separate and distinct elements of second-degree rape and statutory rape, "it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act" (citations omitted)).

With regard to the *subject* of the two crimes, "it is clear that the conduct of the defendant is violative of two separate and distinct social norms." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. Where obtaining property by false pretenses is generally likely to harm a single victim, a broader class of victims is harmed by insurance fraud. Fraud perpetrated

on insurers through the submission of false claims increases insurers' cost of doing business—beyond simply the financial loss of having paid an insured a finite amount on a fraudulent claim—because it requires insurers to investigate fraudulent claims and establish ongoing processes for avoiding future fraudulent claims. These costs must be passed on to consumers of insurance through increased premiums. Hence, there are policy concerns unique to insurance fraud that the legislature seeks to achieve by criminalizing this activity.

Finally, regarding the *history* of the treatment of the two crimes for sentencing purposes, this Court has sustained sentencing for convictions of obtaining property by false pretenses and insurance fraud arising from the same misrepresentation. *See*, *e.g.*, *Koke*, 264 N.C. App. at 105, 824 S.E.2d at 890; *State v. Locklear*, 259 N.C. App. 374, 816 S.E.2d 197 (2018); *State v. Pittman*, 219 N.C. App. 512, 725 S.E.2d 25 (2012). "Had conviction and punishment of both crimes in a single trial not been intended by our legislature, it could have addressed the matter during the course of these many years." *Gardner*, 315 N.C. at 462-63, 340 S.E.2d at 713.

Accordingly, because our legislature has expressed its intent to proscribe and punish the same misrepresentation under both insurance fraud and obtaining property by false pretenses, the trial court did not err by consolidating both Class H felony convictions for judgment and sentencing Defendant in the high presumptive range for one Class H felony.

B. Active Term of Sentence

[3] Defendant argues that the trial court improperly delegated its authority to Defendant's probation officer by failing to set a completion deadline for the active term of Defendant's split sentence. Defendant contends that this delegation of authority is not permitted by N.C. Gen. Stat. § 15A-1351(a).

Although "[a] challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard," *State v. Chadwick*, 843 S.E.2d 263, 264 (N.C. Ct. App. 2020) (citation omitted), "[a]n alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*," *State v. Wainwright*, 240 N.C. App. 77, 79, 770 S.E.2d 99, 102 (2015) (citation omitted).

Under North Carolina's criminal statutes, a trial court may sentence a defendant to special probation as a form of intermediate punishment, under certain circumstances. N.C. Gen. Stat. § 15A-1351(a) (2019). When doing so,

> the court may suspend the term of imprisonment and place the defendant on probation . . . and in addition require that the defendant submit to a period or periods of imprisonment . . . at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. . . . [T]he total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction.

Id.

Thus, under the statute, a period or periods of imprisonment must be "within the period of probation," and no portion of this imprisonment "may be required beyond two years of conviction." *Id.* Accordingly, the statute itself sets the outer limit, or completion deadline, of an active term as a condition of special probation as the end of the period of probation or two years after the date of conviction, whichever comes first.

In this case, the trial court sentenced Defendant to 10 to 21 months of imprisonment, and suspended that sentence for 24 months of supervised probation. As a condition of probation, the trial court ordered Defendant to serve a 60-day active term. On the Judgment Suspending Sentence form (AOC-CR-603D), under Intermediate Punishments, the trial court selected Special Probation and checked box A, ordering an active term of 60 days to be served in the custody of the Sheriff of Harnett County. The trial court also checked box H, labeled "Other," and inserted the following: "TO SERVE 30 DAYS AT ONE TIME AND 30 DAYS AT ANOTHER TIME AS SCHEDULED BY PROBATION."

The trial court appropriately determined the "intervals within the period of probation" as two thirty-day periods, and the completion date is set by statute as 27 August 2021—which, in this case, is both the end of the two-year probationary period and two years from the date of conviction.

IV. Conclusion

We conclude that the trial court did not err by imposing a sentence based on convictions for both obtaining property by false pretenses and insurance fraud based on the same misrepresentation, and the trial

court did not err by failing to set a completion deadline for the active term of Defendant's sentence as a condition of special probation.

NO ERROR.

Judges BRYANT and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 NOVEMBER 2020)

IN RE L.J.B. No. 19-1130	Rockingham (19JA41)	Vacated and Remanded
JUSTICE v. DEACON JONES AUTO. OF CLINTON, LLC No. 20-76	Wayne (19CVD1183)	Dismissed
LARUE v. LARUE No. 20-277	Henderson (15CVD590)	Affirmed
REECE v. HOLT No. 19-986	Mecklenburg (18CVD23070) (19CVD9282)	Affirmed
RICHARDSON v. N.C. STATE BUREAU OF INVESTIGATION No. 18-765	Office of Admin. Hearings (17OSP4570)	Vacated and Remanded
SPECTOR v. PORTFOLIO RECOVERY ASSOCS., LLC No. 20-13	Mecklenburg (18CVS18068)	Affirmed
STATE v. ALSTON No. 19-346	Orange (15CRS53533) (18CRS43)	No Error
STATE v. BARBER No. 20-234	Guilford (16CRS91317)	No error with respect to trial; dismissed without prejudice as to claim of ineffective assistance of counsel.
STATE v. BORUM No. 19-1022	Mecklenburg (16CRS236159-60)	No Error at Trial; Remanded for resentencing.
STATE v. BROOM No. 19-888	Mecklenburg (18CRS215623) (18CRS215626)	No Error
STATE v. BUENO No. 19-1144	Stanly (19CRS50047-48)	No Error
STATE v. BUTLER No. 19-939	Cabarrus (14CRS54781)	No Error

STATE v. CROMARTIE No. 20-96	New Hanover (17CRS54688) (19CRS1347)	No Error in Part; Dismissed in Part
STATE v. DANCY No. 20-70	Wake (16CRS204952) (16CRS204953)	No Error
STATE v. DEL CASTILLO CAICEDO No. 19-643	Wake (17CRS719934)	Affirmed
STATE v. DOTSON No. 19-1003	Haywood (17CRS000809) (17CRS052010) (17CRS052011) (17CRS052012) (17CRS052013)	No Error
STATE v. JOHNSON No. 20-116	Forsyth (16CRS2150-51) (16CRS50570-71)	Vacated and remanded in part.
STATE v. LECKNER No. 19-1109	Haywood (17CRS963)	No Error
STATE v. MATHIS No. 19-1062	Iredell (18CRS2215) (18CRS51629)	No Error in Part; Dismissed without Prejudice in Part
STATE v. McPETERS No. 19-687	Mitchell (17CRS187) (17CRS50365)	No Error
STATE v. PRICE No. 20-98	Durham (15CRS59081) (17CRS50989)	Vacated and Remanded
STATE v. SMITH No. 20-226	Scotland (16CRS51589)	NO PLAIN ERROR.
STATE v. WHISNANT No. 20-66	Catawba (16CRS52677)	No Error in Part; Reversed in Part
STATE v. WHITE No. 20-189	Forsyth (14CRS54011-12) (14CRS54014)	No Error
SUN v. McDONALD No. 19-1068	Robeson (17CVS2156)	Dismissed

DUNBAR v. ACME S.

[274 N.C. App. 251 (2020)]

DERRICK DUNBAR, PLAINTIFF
v.
ACME SOUTHERN, EMPLOYER, HARTFORD UNDERWRITERS INSURANCE COMPANY (THE HARTFORD), CARRIER, DEFENDANTS

No. COA19-1153

Filed 17 November 2020

1. Workers' Compensation—last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—notice of final payment

The Industrial Commission did not err by concluding that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation because two years had passed since the employer's last medical payment (which occurred because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change). Contrary to plaintiff's argument, section 97-18(h), which requires insurers to send notice when they have made their final payment, was unrelated to section 97-25.1 and inapplicable to plaintiff's case.

2. Workers' Compensation—last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—equitable estoppel

Where two years had passed since the employer's last medical payment (because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change) and the Industrial Commission concluded that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation, the Court of Appeals rejected plaintiff's argument that the employer and insurer (defendants) should have been equitably estopped from asserting N.C.G.S. § 97-25.1 as a defense. There was no evidence that the insurer acted in bad faith to induce plaintiff into a false sense of security.

3. Workers' Compensation—last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—due process

Where two years had passed since the employer's last medical payment (because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change) and the Industrial Commission concluded that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation, the Court of Appeals rejected plaintiff's

argument that the Workers' Compensation Act unconstitutionally deprived him of his property right to medical compensation. Plaintiff was entitled to medical compensation only as set forth in the Act, and plaintiff lost his right to compensation pursuant to N.C.G.S. § 97-25.1 when two years had passed since the employer's last payment.

Appeal by Plaintiff from Opinion and Award entered 3 September 2019 by Commissioner Charlton L. Allen for the North Carolina Industrial Commission. Heard in the Court of Appeals 23 September 2020.

Seth M. Bernanke for the Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Michael F. Hedgepeth, for Defendants-Appellees.

DILLON, Judge.

Derrick Dunbar ("Plaintiff") was injured in 1998 and received medical compensation from his employer's insurer for over a decade. Plaintiff appeals from an order entered last year by the North Carolina Industrial Commission (the "Commission") in which the Commission concluded that Plaintiff was no longer entitled to medical compensation for that injury. The Commission based its determination on the fact that no claim had been made to the insurer for medical compensation for over two years. For the reasoning explained below, we affirm.

I. Factual and Procedural Background

In 1998, Plaintiff was injured in a workplace accident. He entered into a settlement agreement with his employer, Defendants Acme Southern, Inc., and the employer's insurer, Hartford Underwriters Insurance Company ("Hartford") as to Plaintiff's *indemnity* compensation. However, the parties did not reach a settlement agreement as to Plaintiff's *medical* compensation.

While Plaintiff's claim for medical compensation remained pending, Plaintiff's medical providers billed Hartford for Plaintiff's medical treatment related to his injuries, and Hartford paid the submitted bills.

However, sometime around 2013, Plaintiff's medical providers began billing Medicare for reimbursement rather than billing Hartford. Neither Plaintiff nor Hartford knew of this change in billing by the medical providers, so Plaintiff was unaware that Hartford was no longer paying for his medical treatment, and Hartford was unaware that Plaintiff

continued to receive medical treatment. Hartford made no payments for Plaintiff's treatment after October 2013.

In 2017, Plaintiff was referred to a medical provider for pain management. He sought authorization from Defendants for this treatment, which was denied. Therefore, on 15 February 2018, more than four years after Hartford last paid any medical compensation for Plaintiff's 1998 injuries, Plaintiff filed a request with the Commission for a hearing to determine whether he was entitled to further medical compensation from Defendants.

After a hearing on the matter, a deputy commissioner concluded that Plaintiff was not entitled to continued medical compensation because he had not submitted a request for more than two years since Hartford's last payment. Plaintiff appealed to the Full Commission, which affirmed the deputy commissioner's ruling. Plaintiff timely appeals. After careful review, we affirm.

II. Analysis

Plaintiff makes several arguments on appeal, which we address in turn.

A. Notice Requirement

[1] Plaintiff's main argument is that his claim should not be barred by the fact that Hartford did not make any payments for his medical compensation for a two-year period.

The issue presented by Plaintiff is one of statutory construction, which, as a question of law, we review *de novo*. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E.2d 692, 696 (1979) (recognizing that "the construction of a statute is ultimately a question of law for the courts"). Specifically, Plaintiff's argument concerns the interplay of two statutes – Section 97-25.1 and Section 97-18(h) – both which are part of our Workers' Compensation Act (the "Act").

The Commission denied Plaintiff's claim based on N.C. Gen. Stat. Section 97-25.1, which provides that "[t]he right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless" the employee's right to further compensation is preserved in one of two ways, neither of which apply in the present case. N.C. Gen. Stat. § 97-25.1 (2018).[1]

1. Specifically, Section 97-25.1 provides that an employee's right to further medical compensation may be preserved, notwithstanding any payments being made in a two year period if, within the two year period, either (1) "the employee files with the Commission

In the present case, Hartford last made a payment for Plaintiff's medical compensation in October 2013, after it received its last bill from Plaintiff's medical provider.[2] The parties stipulate that Plaintiff was not aware that Hartford was no longer being billed after October 2013 for his care.

Plaintiff argues, though, that Section 97-25.1 should be read *in pari materia* with Section 97-18(h), which requires an insurer that provides coverage to an injured employee to promptly notify the employee and the Commission when it has made its "final" payment. This Section further provides that the failure by the insurer to provide this required notice will result in a $25.00 penalty, to be paid to the Commission. Specifically, Section 97-18(h) provides that

> Within 16 days after final payment of compensation has been made, the employer or insurer shall send to the Commission and the employee a notice . . . stating that such final payment has been made . . . . If the employer or insurer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer or insurer a civil penalty in the amount of twenty-five dollars ($25.00). . . .

N.C. Gen. Stat. § 97-18(h).

Specifically, Plaintiff argues that Hartford should not be deemed to have made its "last" payment under Section 97-25.1, thus starting the two-year clock, unless and until Hartford provided notice to Plaintiff that it had made its "final" payment under Section 97-18(h). We disagree.

Our Supreme Court has provided five guides for courts when construing the Act, imploring that the Act should be construed liberally, but that a court should not engage in "judicial legislation" by enlarging coverage beyond the plain meaning of the terms used by our General Assembly:

> First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not

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an application for additional medical compensation which is thereafter approved by the Commission" or (2) "the Commission on its own motion orders additional medical compensation." N.C. Gen. Stat. § 97-25.1.

2. There is no indication that any payment was made towards Plaintiff's indemnity compensation claim after 2013, as Plaintiff's claim for indemnity compensation was settled in 2003.

> be denied upon mere technicalities or strained and narrow interpretations of its provisions.
>
> Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation."
>
> Third, *it is not reasonable* to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced.
>
> Fourth, in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole — its language, purposes and spirit.
>
> Fifth, and finally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance.

Deese v. Southeastern Law and Tree Expert Co., 306 N.C. 275, 277-78, 293 S.E.2d 140, 142-43 (1982) (emphasis added) (citations and quotation marks omitted).

Applying *Deese*, we conclude that the notice requirement in Section 97-18(h) regarding a "final payment" is unrelated to the two-year provision in Section 97-25.1 regarding a "last payment."

The plain language of Section 97-25.1 bars compensation beyond the two-year period following the last payment of either medical or indemnity compensation, and contains no language suggesting that any "notice" is a condition to the accrual of the limitation period. Our appellate courts have always construed the term "last payment" as the date of the last actual payment made by the insurer (or employer). *See Busque v. Mid-America Apartment Cmtys.*, 209 N.C. App. 696, 707, 707 S.E.2d 692, 700 (2011) (determining that the "last payment" was the most recent payment that was issued to the injured party); *Harrison v. Gemma Power Sys., LLC*, No. COA13-1358, 2014 WL 2993853, at *4

(N.C. Ct. App. July 1, 2014) (unpublished) (defining "last payment" as the "the most recent payment of medical or indemnity benefits that has actually been paid"). Section 97-18(h) does not refer to the "last" payment, but rather the "final" payment.

Further, Section 97-18(h) plainly states the appropriate sanction for failing to provide a required notice of a "final" payment is a nominal civil fine. Had the General Assembly intended that providing notice under Section 97-18(h) was a condition to bar future claims under Section 97-25.1, that body would have said so: "the legislature would [not] leave [this] important matter . . . open to inference or speculation[.]" *Deese*, 306 N.C. at 278, 293 S.E.2d at 143. We are further persuaded by the holding of our Court in *Hunter v. Perquimans County Board of Education* that the failure to provide notice when required by Section 97-18(h) has no impact on the operation of the limitations period for termination of indemnity compensation under Section 97-47. 139 N.C. App. 352, 357, 533 S.E.2d 562, 566 (2000) (stating that "the Form 28B notice required by N.C. Gen. Stat. § 97-18(h) is actually a reminder and not a notification. Neither our General Assembly nor our case law has interpreted an employer's failure to file such notice as providing an employee with a right to remedy." (citation omitted)).

In any event, Section 97-18(h) does not apply in this case. There is no way Hartford could have known within 16 days of providing coverage in October 2013 that this payment would be the last payment Plaintiff would have sought.

B. Estoppel

[2] Plaintiff argues that even if his claim for further compensation is barred by Section 97-25.1, Defendants should be equitably estopped from asserting this Section as a defense in this case. On the facts of this case, we disagree.

Plaintiff points to no evidence that Hartford was aware that Plaintiff was continuing to incur medical expenses after October 2013. There is no indication that Hartford acted in bad faith or acted in any way to induce Plaintiff into a false sense of security regarding its willingness to continue providing medical compensation. Therefore, we hold that Plaintiff's estoppel argument fails.

While our courts have recognized that equitable doctrines are available in workers' compensation cases, we express no view as to whether estoppel would ever apply with respect to Section 97-25.1. *See Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 665, 75 S.E.2d 777, 781 (1953); *Daugherty*

v. Cherry Hospital, 195 N.C. App. 97, 102, 670 S.E.2d 915, 919 (2009). It could be argued that estoppel should apply where an insurer was continuing to be billed but was not making payments, though acting in a way to suggest that they would make said payments. But such is not the case here. Our holding is limited to situations where the two-year gap was caused by the fact that the insurer was not being billed.

C. Due Process

[3] Plaintiff contends that if the Act does not require that Defendants provide Plaintiff with notice, the Act then violates our North Carolina Constitution by unfairly taking away Plaintiff's property right to medical compensation.

Notice is a due process consideration, required under the Fourteenth Amendment to the United States Constitution and article 1, Section 19 of the state constitution. *City of Randleman v. Hinshaw*, 267 N.C. 136, 139-40, 147 S.E.2d 902, 904-05 (1966). "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. "Procedural due process protection ensures that when government action deprives a person of life, liberty, or property . . . that action is implemented in a fair manner." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quotation marks omitted) (citing *U.S. v. Salerno*, 481 U.S. 739, 746 (1987); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). With procedural due process questions, this Court must first "determine whether there exists a liberty or property interest which has been interfered with by the State . . ." *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972)).

Here, the Act does not deprive Plaintiff of an existing liberty or property interest or of a "vested right." Plaintiff is only entitled to medical compensation as far as the Act defines the scope of that compensation. Section 97-25.1 states that a plaintiff is no longer entitled to compensation after two years have passed since the employer's last payment. Once that period expires, the property interest terminates.

The statute itself also provides Plaintiff with notice of termination of the right to medical compensation because "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). For these reasons, the Act does not violate Plaintiff's due process rights.[3]

3. Based on our holding, we need not address Defendants' argument concerning the Commission's failure to find that Plaintiff knew of Defendants' termination of payments.

IV. Conclusion

We conclude that the Commission did not err in determining that Plaintiff was not entitled to further medical compensation where more than two years elapsed since Defendants last made a compensation payment, notwithstanding that Defendants never provided notice that its last payment would be the "final" payment. We further conclude that neither Plaintiff's vested rights nor constitutional rights were violated by the Commission's order.

AFFIRMED.

Judges INMAN and YOUNG concur.

HOME REALTY CO. & INSURANCE AGENCY, INC.,
A NORTH CAROLINA CORPORATION, PLAINTIFF
v.
RED FOX COUNTRY CLUB OWNERS ASSOCIATION, INC., A NORTH CAROLINA NONPROFIT CORPORATION; ET AL., DEFENDANTS

No. COA20-125

Filed 17 November 2020

1. Civil Procedure—motion for judgment on the pleadings—conversion to motion for summary judgment—no matters outside pleadings

In a quiet title action, the trial court did not err by declining to treat plaintiff's motion for judgment on the pleadings as a motion for summary judgment pursuant to Civil Procedure Rule 12(c). Although defendants presented affidavits and exhibits with their legal briefs, which constituted "matters outside the pleadings," the order granting plaintiff's motion stated that the court only considered the pleadings, arguments made by counsel, and the applicable law; therefore, plaintiff's motion for judgment on the pleadings never converted into one for summary judgment.

2. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust

In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property in 1986 that benefitted defendants (a country club owners'

association and forty homeowners who ratified the restrictions), plaintiff was entitled to judgment as a matter of law that the restrictions were extinguished by a foreclosure sale in 1990 of a senior deed of trust recorded in 1984, and therefore the trial court properly granted plaintiff's motion for judgment on the pleadings. Contrary to defendants' argument, the 1986 restrictions did not reattach to the property when plaintiff bought it at a second foreclosure sale on another deed of trust, which was recorded after the restrictions were recorded.

3. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—failure to plead affirmative defense

In plaintiff's action seeking to quiet title property with a golf course, where the trial court granted plaintiff's motion for judgment on the pleadings after finding that certain land restrictions encumbering the property and benefitting defendants (a country club owners' association and forty homeowners who ratified the restrictions) had been extinguished by a foreclosure sale of a senior deed of trust, defendants could not argue on appeal that the foreclosure proceedings were void as to them because they were not given notice of the proceedings pursuant to N.C.G.S. § 45-21.16. This argument constituted an affirmative defense, which defendants waived by failing to raise it in their pleadings, as required under Civil Procedure Rule 8(c).

4. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—effect on ratifying homeowners

In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property in 1986 benefitting forty homeowners who ratified the restrictions (defendants), the trial court correctly found that the restrictions were extinguished by a foreclosure sale in 1990 of a senior deed of trust recorded in 1984, and therefore defendants were no longer entitled to any rights in the property arising from those restrictions.

5. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—equitable exception

In plaintiff's action seeking to quiet title property with a golf course, where the trial court granted plaintiff's motion for judgment on the pleadings after finding that certain land restrictions encumbering the property and benefitting defendants (a country club

owners' association and forty homeowners who ratified the restrictions) had been extinguished by a foreclosure sale of a senior deed of trust, the equitable exception to the rule of extinguishment by foreclosure set forth in *Dixieland Realty Co. v. Wysor*, 272 N.C. 172 (1967), was inapplicable to the facts of this case. The exception only applies in cases where a trustor purchases his or her own secured property at a senior mortgage sale following foreclosure.

6. Estoppel—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—equitable estoppel—quasi-estoppel

In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property that benefitted defendants (a country club owners' association and forty homeowners who ratified the restrictions), plaintiff was not estopped under principles of equitable or quasi-estoppel from arguing that the restrictions were extinguished by a foreclosure sale of a senior deed of trust. Although the restrictions gave plaintiff a right of first refusal to purchase residential lots in the subdivision that included plaintiff's property, plaintiff did not assert that the restrictions were still legally effective when it signed waivers of its right to purchase some of those lots; therefore, plaintiff was not taking a position in the lawsuit that was inconsistent with an earlier position.

7. Easements—by estoppel—in a golf course—representations in marketing materials—no legally cognizable claim

In plaintiff's action seeking to quiet title property with a golf course, which was part of a subdivision including residential lots and a country club, the trial court properly dismissed a claim by defendants (a country club owners' association and forty homeowners) seeking a declaratory judgment that the property could only be used as a golf course, because North Carolina law does not recognize the creation of an easement by estoppel based on representations in marketing materials, and therefore plaintiff did not grant defendants an easement by estoppel when it sold lots in the subdivision based on marketing materials depicting unrecorded plats with a golf course and describing the lots as part of a golf course community.

8. Easements—by plat—in a golf course—subdivision plats—inadequate description of property boundaries

In plaintiff's action seeking to quiet title property with a golf course, which was part of a subdivision including residential lots and a country club, the trial court properly concluded that defendants (a

country club owners' association and forty homeowners) were not entitled to an easement-by-plat restricting the use of the property to a golf course because the subdivision plats did not adequately describe the golf course's outer boundaries and, therefore, did not create such an easement.

Appeal by Defendants from order entered 2 December 2019 by Judge Robert C. Ervin in Polk County Superior Court. Heard in the Court of Appeals 11 August 2020.

Offit Kurman, P.A., by Robert B. McNeill, for Plaintiff-Appellee.

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., for Defendants-Appellants.

COLLINS, Judge.

Red Fox Country Club Owners Association and homeowners in the Red Fox Community in Polk County (collectively "Defendants") appeal from an order entering judgment on the pleadings in favor of Home Realty Co. & Insurance Agency, Inc. ("Plaintiff"), the owner of property generally known as the Red Fox Country Club Golf Course ("the Property"). Defendants argue that the trial court erred by granting judgment on the pleadings in favor of Plaintiff and by dismissing Defendants' counterclaims with prejudice. We affirm the order.

I. Procedural History

Plaintiff filed a complaint on 8 February 2018 in Polk County Superior Court seeking to quiet title to the Property and requesting a declaratory judgment that restrictions recorded in 1986 had been extinguished by a foreclosure in 1990, and were no longer in force to encumber or restrict the Property. Plaintiff filed an amended complaint in April. Defendants filed an answer, defenses, and counterclaims in June. Plaintiff filed a motion to dismiss, answer, and affirmative defenses in August. Defendants filed an amended answer, defenses, and counterclaims in March 2019. Plaintiff filed a motion to dismiss, reply to counterclaims, and affirmative defenses in May.

In July 2019, Plaintiff filed a motion for judgment on the pleadings, followed by a memorandum of law supporting the motion, with exhibits. In September, Defendants filed a memorandum of law opposing the motion, with affidavits and exhibits. Plaintiff filed a reply brief in

October. After conducting a hearing on the motion on 8 November 2019, the trial court entered an order on 2 December 2019 granting Plaintiff's motion for judgment on the pleadings and dismissing Defendants' counterclaims with prejudice. Defendants timely filed notice of appeal.

II. Factual Background

In 1966, Charles Dooley and Robert Ernst conveyed 582.29 acres of property, which included 231.20 acres upon which Red Fox Country Club Golf Course was operating, to Tryon Development Company ("Tryon"). Ten days later, Tryon recorded restrictive covenants in the Polk County Register of Deeds,[1] governing a subdivision called Red Fox Run ("1966 Restrictions"). Tryon also recorded plats depicting sections A, B, C, D, E, and H of the subdivision. The 1966 Restrictions did not purport to apply to the remaining acreage that included the golf course.

After 37 lots had been sold, Tryon severed 231.20 acres—the Property that contained the golf course—from the original 582.29-acre tract and conveyed it, as well as another tract, to Red Fox Properties, Inc., by two deeds recorded on 14 July 1971.

Red Fox Properties, Inc., conveyed both tracts to Capstone Development Company ("Capstone") by two deeds recorded on 4 October 1983. The deed to the tract that did not include the golf course explicitly excluded the 70 lots that had been sold by that time.

Capstone executed and recorded on 27 June 1984 a deed of trust that encumbered the Property[2] in the amount of $2,600,000 to William Miller, as trustee for Adrian Hooper ("Hooper deed of trust"). In February 1986, Capstone transferred the Property to Red Fox, Ltd.

On 23 December 1986, Red Fox, Ltd., recorded Amended & Restated Restrictions for Red Fox Country Club and Provisions for Red Fox Country Club Owners Association ("1986 Restrictions"). The 1986 Restrictions pertained to the Property acquired from Capstone and the properties of 40 homeowners who ratified the 1986 Restrictions. The 1986 Restrictions created a Red Fox Country Club Owners Association ("the Association") and stated in part that the "Recreational Amenities shall be conveyed to the Association as Common Properties upon the

1. All recordings referred to herein were filed in this office.

2. While this deed of trust and the subsequent encumbrances and conveyances referred to herein also applied to the tract of property that did not contain the golf course, we refer hereinafter to the Property only, as the other tract is not relevant in this case.

sale of ninety (90%) percent of the Participating Membership in Red Fox Country Club but not later than January 1, 1996."

At 11:00 on 30 December 1986, Red Fox, Ltd., recorded a deed conveying the Property it had acquired from Capstone to Red Fox Limited Partnership. At 11:10 on 30 December 1986, Red Fox Limited Partnership recorded a deed of trust encumbering the Property as collateral for a note in the amount of $3,000,000 to North Carolina Federal Savings & Loan Association ("NCFS&L deed of trust"). At 11:15 on 30 December 1986, the trustee for the 27 June 1984 Hooper deed of trust recorded a subordination agreement, wherein the trustee subordinated the lien created by the Hooper deed of trust to the lien created by the NCFS&L deed of trust.

On 20 February 1990, the substitute trustee for the Hooper deed of trust commenced foreclosure proceedings and served notice on Red Fox Limited Partnership, Capstone, and the District Director for the Internal Revenue Service. Adrian Hooper purchased the Property at the foreclosure sale and assigned the bid to RF Acquisition Co., Inc. ("RF Acquisition"), an entity of which he was President. On 19 June 1990, the substitute trustee conveyed the Property via trustee's deed to RF Acquisition. The substitute trustee filed a Final Report and Account of the sale, which the clerk of superior court audited and approved.

On 2 March 1992, the substitute trustee for the NCFS&L deed of trust commenced foreclosure proceedings. After conducting the sale of the Property, the substitute trustee filed a Final Report of Sale, which the clerk of superior court audited and approved. The substitute trustee conveyed the Property on 14 May 1992 to Resolution Trust Corporation, Receiver for NCFS&L. The deed was recorded on 15 June 1992. The substitute trustee filed a Final Report of Sale, which the clerk of superior court audited and approved. Resolution Trust Corporation conveyed the Property to Plaintiff by a deed recorded on 5 August 1992.

III. Discussion

Defendants argue that the trial court erred by: (1) failing to treat Plaintiff's motion for judgment on the pleadings as one for summary judgment because the trial court considered matters outside the pleadings; (2) entering judgment on the pleadings in favor of Plaintiff, because the foreclosure by power of sale on the Hooper deed of trust was not properly conducted; (3) holding as a matter of law that the 1986 Restrictions were extinguished as to the 40 property owners who had ratified them; and (4) dismissing with prejudice Defendants' counterclaims.

A. Matters Outside the Pleadings

[1] Defendants argue that the trial court erred by failing to treat Plaintiff's motion for judgment on the pleadings as a motion for summary judgment. Defendants contend that when the trial court considered the arguments of counsel, it necessarily considered affidavits and exhibits attached to the parties' respective memoranda of law and brief, which constituted matters outside the pleadings.

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.* §§ 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, 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*, 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004) (motion for judgment on the pleadings was 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 a 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, the trial court stated in its order granting Plaintiff's motion for judgment on the pleadings:

> The Court considered the pleadings, the arguments of counsel, and applicable law, and determined that Plaintiff's Motion for Judgment on the Pleadings should be granted.

As in *Davis* and *Privette*, the order indicates that the trial court considered the pleadings, the arguments of counsel, and applicable law. Notably, it does not state that the trial court considered Defendants' affidavits or exhibits that 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, the arguments of counsel, and the applicable law. Accordingly, although the affidavits and exhibits were *presented* to the trial court, they were *excluded* by the trial court, and the motion was therefore not converted into one for summary judgment. *See McBurney*, 616 F.3d at 410.

B. Judgment on the Pleadings

[2] Defendants argue that the trial court erred by entering judgment on the pleadings in favor of Plaintiff because the trial court failed to

consider genuine issues of fact in dispute, and Plaintiff is not entitled to judgment as a matter of law. Defendants specifically assert that the foreclosure proceedings on the Hooper deed of trust were defective as a matter of law.

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 issues of fact exist 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).

"[I]nstruments registered in the office of the register of deeds shall have priority based on the order of registration . . . ." N.C. Gen. Stat. § 47-20 (2019). Generally, "[t]itle acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights." *St. Louis Union Tr. Co. v. Foster*, 211 N.C. 331, 344, 190 S.E. 522, 530 (1937) (quoting 3 *Jones on Mortgages* 623 (8th ed.)). "Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument." *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967) (citation omitted). *See also Dunn v. Oettinger Bros.*, 148 N.C. 276, 282, 61 S.E. 679, 681 (1908) ("A sale under a mortgage or deed of trust . . . cuts out and extinguishes all liens, encumbrances[,]

and junior mortgages executed subsequent to the mortgage containing the power." (internal quotation marks and citation omitted)).

In this case, the Hooper deed of trust that encumbered the Property in the amount of $2,600,000 was recorded on 27 June 1984. In February 1986, Capstone transferred the Property to Red Fox, Ltd. On 23 December 1986, Red Fox, Ltd., recorded the 1986 Restrictions. Accordingly, title acquired by RF Acquisition to the Property upon the foreclosure on the Hooper deed of trust related back to 27 June 1984 and extinguished the 1986 Restrictions.

Defendants seem to argue in their reply brief that, because Plaintiff purchased the Property at a second foreclosure sale on the NCFS&L deed of trust, which was recorded after the 1986 Restrictions, that this sequence of events should cause us to disregard the extinguishment of the 1986 Restrictions by the prior Hooper foreclosure. Defendants cite no authority to support this argument, and our own research reveals no authority supporting a theory that, after the 1986 Restrictions were extinguished as to the Property by the Hooper foreclosure, the benefits and burdens created by the 1986 Restrictions were resurrected with respect to the Property and reattached to the Property when it was later conveyed at the foreclosure sale on the NCFS&L deed of trust.

While the record shows the trustee for the 27 June 1984 Hooper deed of trust recorded a subordination agreement at 11:15 on 30 December 1986, which subordinated the Hooper deed of trust lien to the lien created by the NCFS&L deed of trust, that instrument did not waive the priority of the 27 June 1984 Hooper deed of trust over the Amended & Restated Restrictions subsequently recorded by Red Fox, Ltd., on 23 December 1986. N.C. Gen. Stat. § 47-20 ("Instruments registered in the office of the register of deeds shall have priority based on the order of registration . . . .").

1. Notice

[3] Defendants argue that the foreclosure proceedings on the Hooper deed of trust did not extinguish the 1986 Restrictions because the proceedings were defective as a matter of law. Defendants specifically argue that the proceedings were void as to them because they were not given notice of the proceedings pursuant to N.C. Gen. Stat. § 45-21.16(b).

At the time of the foreclosure proceedings instituted on 20 February 1990, the relevant portion of N.C. Gen. Stat. § 45-21.16(b) required notice of the hearing be given to

> [e]very record owner of the real estate whose interest is of record in the county where the real property is located at the time of giving notice. The term "record owner" means any person owning a present or future interest of record in the real property which interest would be affected by the foreclosure proceeding . . . .

N.C. Gen. Stat. § 45-21.16(b)(3) (1991).

Defendants contend that they were record owners entitled to notice because they had a future interest in the Property by virtue of the terms of the 1986 Restrictions. Specifically, Defendants assert that by the terms of the 1986 Restrictions, (a) the Association, of which each property owner was a member, was created; and (b) Red Fox, Ltd., as the owner of the Property, committed to convey "Recreational Amenities . . . to the Association as Common Properties upon the sale of ninety (90%) percent of the Participating Membership in Red Fox Country Club but not later than January 1, 1996." This commitment to convey the Property, Defendants argue, created a future interest in real property in the Association and its members. Defendants contend that it was Plaintiff's burden to "prove that the foreclosure sale met the requirements of law then in effect in order to apply any principles of law that arise out of the foreclosure," and that "[i]t was not necessary for Defendants to plead in their Answer the 'lack of notice.'"

While Plaintiff argues in response that Defendants were not record owners entitled to notice under the statute, Plaintiff contends that Defendants are barred from relying on this unpled affirmative defense to defeat Plaintiff's motion for judgment on the pleadings. We agree with Plaintiff.

"In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." N.C. Gen. Stat. § 1A-1, Rule 8(c) (2019). "Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." *Id.* "Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof." *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998) (citation omitted).

While our state courts have not directly addressed whether the failure to serve notice under N.C. Gen. Stat. § 45-21.16 is an affirmative defense, a United States District Court in North Carolina analyzed

a factually similar case under North Carolina law and concluded that "it is clear that the defense set forth in [N.C. Gen. Stat.] § 45-21.16 constitutes an affirmative defense within the meaning of [Federal] Rule 8(c)"[3] and must be affirmatively pled. *See Resolution Tr. Corp. v. Sw. Dev. Co.*, 807 F. Supp. 375, 378 (E.D.N.C. 1992), *amended*, 837 F. Supp. 122 (E.D.N.C. 1992), *aff'd in part, rev'd in part sub nom. Resolution Tr. Corp. v. Cunningham*, 14 F.3d 596 (4th Cir. 1993).

Our state courts have treated the failure to serve notice under N.C. Gen. Stat. § 45-21.16 as an affirmative defense in various contexts. *See, e.g.*, *Barclays Am./Mortg. Corp. v. Beca Enters.*, 116 N.C. App. 100, 101, 104, 446 S.E.2d 883, 885, 887 (1994) (affirming summary judgment in favor of defendant in a foreclosure action wherein defendant "filed answer asserting . . . the affirmative defense of plaintiff's failure to serve him with Notice of Hearing in the foreclosure proceeding as required by N.C. [Gen. Stat.] § 45-21.16 (1991)," and plaintiff "was unable to surmount the affirmative defense"); *Branch Banking & Tr. Co. v. Keesee*, 237 N.C. App. 99, 766 S.E.2d 699 (Table), 2014 WL 5334744 at *6 (2014) (unpublished) (affirming the trial court's order striking defendant's affirmative defense of inadequate notice under § 45-21.16 where the clerk concluded in the orders allowing the foreclosure sales that "[p]roper notice of hearing was given to all of those parties entitled to such notice under [N.C. Gen. Stat.] § 45-21.16" and authorized the substitute trustee to "exercise the power of sale," and defendants neither raised these issues at the foreclosure proceedings nor appealed the clerk's orders).

Furthermore, our Court has considered a statutory bar to recovery as an affirmative defense. *See Roberts v. Heffner*, 51 N.C. App. 646, 648, 277 S.E.2d 446, 448 (1981) (statutory bar to recovery for failure to obtain general contractor's license required under N.C. Gen. Stat. § 87-1 is an affirmative defense). In *Roberts*, our Court defined an affirmative defense as "[a] defense which introduces new matter in an attempt to avoid [a claim], regardless of the truth or falsity of the allegations in the [claim.]" *Id.* at 649, 277 S.E.2d at 448.

Measured against this standard, it is apparent that Defendants have employed N.C. Gen. Stat. § 45-21.16 as an affirmative defense by injecting an entirely new issue into the case for the purpose of defeating Plaintiff's claim for declaratory judgment. Accordingly, Defendants' use

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3. Like N.C. Gen. Stat. § 1A-1, Rule 8(c), Rule 8(c) of the Federal Rules of Civil Procedure requires a party to plead affirmatively "any avoidance or affirmative defense." Fed. R. Civ. P. 8(c).

of N.C. Gen. Stat. § 45-21.16 falls within the purview of North Carolina Rule of Civil Procedure 8(c) and must be affirmatively pled.

Plaintiff alleged in its amended complaint:

> 13. The Hooper Deed of Trust was properly foreclosed via a Polk County special proceeding with File No. 90-SP-9. A Final Report was filed on June 19, 1990, and a Trustee's Deed from James Gary Roe, Substitute Trustee, to RF Acquisition Co., Inc., a Pennsylvania corporation, was recorded on June 19, 1990 in Deed Book 206, Page 1356. (These actions are collectively referred to as "the Hooper Foreclosure").

In their amended answer, Defendants responded:

> 13. Answering the allegations contained in Paragraph 13 of the Complaint, it is admitted that the Hooper deed of trust was foreclosed via a Special Proceeding in Polk County, North Carolina under docket number 90-SP-9 and that there was a Report of Sale filed on June 19, 1990, and a Trustee's deed from James Gary Roe, Substitute Trustee to RF Acquisition Company, a Pennsylvania corporation, recorded on June 19, 1990 in Book 206 page 1365; but except as admitted the allegations contained in Paragraph 13 of the Complaint are denied.

Defendants' admission in their answer that "the Hooper deed of trust was foreclosed via a Special Proceeding" coupled with the denial of all allegations "except as admitted" in that paragraph was not "a short and plain statement . . . sufficiently particular to give the court and the parties notice" that Defendants intended to prove that they were not given notice of the underlying foreclosure proceeding. *See* N.C. Gen. Stat. § 1A-1, Rule 8(c). Defendants thus failed to affirmatively plead the defense of lack of notice under § 45-21.16.

"Although the failure to plead an affirmative defense ordinarily results in its waiver, the parties may still try the issue by express or implied consent." *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989); *see also* N.C. Gen. Stat. § 1A-1, Rule 15(b) (2019) ("When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

In this case, Defendants raised the defense of lack of notice for the first time in their memorandum of law opposing Plaintiff's motion for

judgment on the pleadings, filed 10 September 2019—approximately 15 months after their answer and 6 months after their amended answer. In its reply brief, Plaintiff stated,

> In their memorandum, Defendants assert for the first time that in the Hooper Foreclosure the statutory notice requirements of [sic] were not met. In their Answer, Defendants did not plead any defect in the manner in which the Hooper Deed of Trust was foreclosed. Because the claim was not raised in the pleadings, such a claim should not be considered as part of a Motion for Judgment on the Pleadings.

The trial court heard Plaintiff's motion for judgment on the pleadings on 8 November 2019. As Plaintiff specifically objected to the issue of notice being considered as part of the motion for judgment on the pleadings, the issue of notice was not heard by the trial court by the express or implied consent of the parties. As such, the issue of notice shall not be treated in all respects as if it had been raised in the pleadings, *see* N.C. Gen. Stat. § 1A-1, Rule 15(b), and Defendants waived this defense by failing to plead it in their answer, *see Robinson*, 348 N.C. at 566, 500 S.E.2d at 717 ("Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof.").

2. Effect of foreclosure on ratifying property owners

[4] Defendants next argue that the trial court erred by holding as a matter of law that the 1986 Restrictions were extinguished as to the 40 property owners who ratified them.[4] Defendants urge that the 1986 Restrictions imposed servitudes upon the Property that are enforceable by the ratifying owners and subsequent purchasers of their properties because the Restrictions run with the land.

"The purpose of foreclosure is to allow the mortgagee to realize on the security as it existed at the time the mortgage was executed. Consequently, . . . junior easements on the servient estate are terminated by out-of-court foreclosure under a power of sale found in a senior mortgage or deed of trust . . . ." Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land* § 10:41 (2020). As our Supreme Court explained,

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4. The trial court held that the 1986 Restrictions "were extinguished as to the property . . . consisting of approximately 231.20 acres, more or less, formerly being known generally as the Red Fox Country Club Golf Course . . . by the foreclosure of . . . the 'Hooper Deed of Trust.' "

> If subsequent judgment creditors or litigants over the equity of redemption could "tie up" a first mortgage and effect its terms, it would seriously impair a legal contract. It may be "hard measure" to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously hamper business.

Leak v. Armfield, 187 N.C. 625, 628, 122 S.E. 393, 394 (1924).

As explained above, the 1986 Restrictions were extinguished by the foreclosure of the Hooper deed of trust. Thus, as a matter of law, the 1986 Restrictions no longer have force and effect on the Property. *See St. Louis Union Tr.*, 211 N.C. at 344, 190 S.E. at 530 ("Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights."). Because the Property is no longer burdened by the 1986 Restrictions, the 40 ratifying property owners are not entitled to any rights in the Property arising from the 1986 Restrictions. *See Dixieland Realty*, 272 N.C. at 175, 158 S.E.2d at 10 (encumbrances that trustor imposed on property after execution and recording of deed of trust are extinguished by sale under foreclosure of senior instrument); *Dunn*, 148 N.C. at 282, 61 S.E. at 681 (sale under deed of trust extinguishes all encumbrances executed after deed of trust).

3. Equitable exception to extinguishment by foreclosure

[5] Defendants also argue that this Court should follow our Supreme Court's opinion in *Dixieland Realty*, and make an equitable exception in this case to the general rule that all encumbrances imposed by the trustor on the property after the execution and recording of the senior deed of trust are extinguished by sale under foreclosure of the senior instrument. In *Dixieland Realty*, the Supreme Court affirmed the settled rule of extinguishment by foreclosure. 272 N.C. at 175, 158 S.E.2d at 10. However, the Court formulated a narrow exception to the rule by holding that the foreclosure of the senior deed of trust did not extinguish the lien of the junior deed of trust, because the trustor who intended to convey the land described therein—the land the grantee expected to acquire as security for his debt—purchased the property at the senior mortgage sale following foreclosure. *Id.* at 180, 158 S.E.2d at 13-14. *See also* Restatement (Third) of Property (Mortgages) § 7.1 (1997) (It is "[o]nly in the rare instance where the mortgagor is the foreclosure purchaser do fairness and policy considerations dictate a

departure from" the principle that foreclosure extinguishes junior liens and encumbrances). The instant case does not involve a trustor who purchased his own secured property at a senior mortgage sale following foreclosure. The "rare instance" utilized in *Dixieland Realty* is distinguishable and not applicable to the facts of this case. *See id.*

4. Estoppel

[6] Defendants argue that Plaintiff should be equitably estopped from asserting that the 1986 Restrictions were extinguished by the Hooper foreclosure.[5]

North Carolina courts have long recognized the doctrine of equitable estoppel, which applies

> "when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."
>
> In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. In applying the doctrine, a court must consider the conduct of both parties to determine whether each has "conformed to strict standards of equity with regard to the matter at issue."

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (quotation marks and citations omitted). "There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007).

> This Court has also recognized that branch of equitable estoppel known as "quasi-estoppel" or "estoppel by benefit." Under a quasi-estoppel theory, a party who accepts a

5. Although Defendants refer to this estoppel argument as a counterclaim in their appellate brief, in their amended answer they pled estoppel as their sixth and seventh defenses. Generally, equitable estoppel is an affirmative defense, *see Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 628, 808 S.E.2d 576, 579 (2017), and we will address it as a defense. Defendants make no argument on appeal regarding their defenses of easement by implied dedication and appurtenant easement by prior use. Thus, we deem these arguments abandoned. N.C. R. App. P. 28(a).

> transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument. The key distinction between quasi-estoppel and equitable estoppel is that the former may operate without detrimental reliance on the part of the party invoking the estoppel. In comparison to equitable estoppel, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation.
>
> . . . .
>
> "[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions."

Whitacre, 358 N.C. at 18-19, 591 S.E.2d at 881-82 (citations omitted).

The 1986 Restrictions gave the owner of the Property a right of first refusal to purchase a residential lot being resold to a third party. Between 5 August 1992 and 29 November 2017, Plaintiff signed 115 Waiver of Right to Purchase instruments, at the request of the sellers of the lots. Defendants argue, "If it had been the belief of [Plaintiff] that the 1986 Restrictions were extinguished by the foreclosure of the Hooper deed of trust, the Waivers would not have been necessary."

As Defendants concede in their brief, both the 1966 Restrictions and the 1986 Restrictions gave the owner of the Property a right of first refusal to purchase residential lots being resold to third parties. The waivers Plaintiff signed stated (1) that the two declarations of restrictions granting the owner of the Property a right of first refusal had been recorded, and (2) that the parties selling the lots "requested [Plaintiff] to approve said transfer[s] for the purpose of complying with and evincing compliance with" both declarations of restrictions.

The waivers were signed at the sellers' requests and merely clarified that Plaintiff had no right to repurchase the lots. The waivers did not state that the 1986 Restrictions were still in effect and did not purport to convey any interest in the Property to Defendants. Even if one could infer from this conduct that Plaintiff understood the 1986 Restrictions to still be in effect, by executing the waivers upon request, Plaintiff made no representation as to the legal effectiveness of the 1986 Restrictions.

Accordingly, by arguing before the trial court that the 1986 Restrictions were extinguished by foreclosure, Plaintiff was not denying

the truth of any earlier representations or taking a position inconsistent with an earlier position. Thus, neither the principle of equitable estoppel nor the principle of quasi-estoppel should be applied under these facts to preclude Plaintiff from asserting that the foreclosure extinguished the 1986 Restrictions.

Defendants make no argument that the 1986 Restrictions created an express easement by restricting the use of the land to a golf course. Moreover, section 42 of the 1986 Restrictions expressly disclaims any affirmative obligation by the owner of the Property. "Absent a specific restriction within the Declaration, the law presumes the free and unrestricted use of land." *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 391, 802 S.E.2d 908, 913 (2017) (citation omitted).

In summary, Plaintiff was entitled to judgment as a matter of law that the 1986 Restrictions were extinguished by foreclosure of the earlier recorded Hooper deed of trust. Thus, the trial court did not err by granting judgment on the pleadings in favor of Plaintiff.

C. Defendants' Counterclaims

Defendants argue generally that the trial court erred by dismissing Defendants' counterclaims with prejudice, as there are genuine issues of material fact and Plaintiff is not entitled to judgment as a matter of law. Defendants assert that the trial court erred by dismissing their counterclaim seeking a declaratory judgment that the Property can only be used as a golf course. Defendants base this argument upon their contention that Plaintiff should be "equitably estopped from denying the easements created" by Plaintiff's representations, including its use of unrecorded plats, when selling properties in Red Fox Run. Defendants' argument is properly characterized as easement by estoppel.[6]

In its motion for judgment on the pleadings, Plaintiff moved to dismiss Defendants' counterclaim for declaratory judgment for failure to state a claim upon which relief may be granted. The standard of review of an order granting a motion to dismiss for failure to state a claim is "whether the [counterclaim] states a claim for which relief can be granted under some legal theory when the [counterclaim] is liberally construed and all the allegations included therein are taken as true." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d

6. Defendants do not argue on appeal that the trial court erred by dismissing their counterclaims for unjust enrichment, constructive trust, and appointment of receiver. We deem these arguments abandoned. N.C. R. App. P. 28(a).

374, 377 (2014). Dismissal is proper when the counterclaim on its face reveals that no law supports the claim. *Id.* "We conduct a de novo review of the pleadings to determine their legal sufficiency." *Id.*

1. Easements, generally

"An easement is a right to make some use of land owned by another . . . ." *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citations omitted). "An appurtenant easement is an easement created for the purpose of benefiting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992) (citation omitted). "In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (citation omitted).

2. Easement by estoppel

[7] Defendants argue that they are entitled to easements created when Plaintiff sold properties based on (1) representations made in printed marketing materials displayed in the sales office—including unrecorded plats depicting a golf course and brochures describing a golf course community; and (2) oral representations made to prospective buyers in the sales office, in which Plaintiff indicated that the lots for sale were in a golf course community. Also, Defendants argue that the mere existence of an operational golf course and golf amenities at the time prospective buyers purchased their lots affirmed these representations. Defendants contend that they detrimentally relied on these representations and that Plaintiff should be "equitably estopped from denying the existence of the easements thus created" "by the sale of the property off the plats." We disagree.

The argument that courts should apply equitable estoppel principles to create an easement based on representations in a developer's marketing materials was rejected by this Court in *Crooked Creek*. *See* 254 N.C. App. at 394, 802 S.E.2d at 915. This Court explained:

> While Crooked Creek subdivision may have been contemplated and marketed as a golf course community to induce Plaintiffs to purchase lots in the subdivision, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land, based upon statements in marketing materials. Courts have recognized marketing materials as further demonstrating

> the expressed intent of the developer, but only where a recorded instrument exists to demonstrate the intent to encumber and restrict the land.

Id. (citations omitted).

In this case, taking as true Defendants' allegations that Plaintiff represented to prospective purchasers that the Property would always be used as a golf course, Defendants fail to state a claim upon which relief may be granted, because there is no cognizable legal claim in North Carolina that an easement by estoppel restricting land has been created based on marketing materials, unrecorded plats, or plats not referenced by deed. *See id.* The trial court did not err by dismissing Defendants' counterclaim seeking declaratory judgment on this basis.

3. Easement-by-plat

[8] Construing Defendants' brief generously, Defendants argue that they are entitled to an easement-by-plat. We disagree.

An easement may be created by plat, based on the following settled principle:

> when the owner of land, located within or without a city or town, has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, alleys, and parks, and all of them, to the use of the purchasers, and those claiming under them, and of the public.

Gaither v. Albemarle Hosp., Inc., 235 N.C. 431, 443, 70 S.E.2d 680, 690 (1952).

> Th[is] general rule is based on principles of equitable estoppel, because purchasers who buy lots with reference to a plat are induced to rely on the implied representation that the "streets and alleys, courts and parks" shown thereon will be kept open for their benefit. Consequently, the grantor of the lots is "equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

Harry v. Crescent Res., Inc., 136 N.C. App. 71, 77, 523 S.E.2d 118, 122 (1999) (quoting *Gaither*, 235 N.C. at 444, 70 S.E.2d at 690). "For an easement implied-by-plat to be recognized, the plat must show the developer

clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners." *Crooked Creek*, 254 N.C. App. at 392, 802 S.E.2d at 914 (citing *Crescent Res.*, 136 N.C. App. at 77, 523 S.E.2d at 122 ("depiction of remnant parcels on the plat was insufficient to show a clear intent by the developer to grant an easement setting them aside as open space")).

"[A] map or plat, referred to in a deed, becomes a part of the deed, as if it were written therein. A recorded plat becomes part of the description and is subject to the same kind of construction as to errors." *Stines v. Willyng, Inc.*, 81 N.C. App. 98, 101, 344 S.E.2d 546, 548 (1986) (quotation marks, ellipsis, and citations omitted). "[A] description which omits one or more of the boundaries, and leaves the quantity of land undetermined, is insufficient." *Id.* (brackets and citations omitted) (plat insufficient to create easement when "[n]othing on the plat or referred to therein would enable a title attorney to determine the precise boundaries of the area burdened with the park easement").

In *Crooked Creek*, this Court considered whether recorded subdivision plats created an easement implied-by-plat in a golf course. Plats recorded in 1992, 1993, and 1994 showed residential lots, but none depicted a golf course. 254 N.C. App. at 385, 392, 802 S.E.2d at 910, 914. A survey plat, completed to reflect undeveloped portions of the property to be sold to a third party, was recorded in 1995. *Id.* at 386, 802 S.E.2d at 910. "[T]he survey plat reflect[ed] five un-subdivided tracts of land labeled as 'A, B, C, D and F,' some previously subdivided lots, and the dotted line location of the golf course greens and fairways. Metes and bounds descriptions [we]re shown *only* for the five un-subdivided tracts." *Id.* at 392, 802 S.E.2d at 914. Plaintiffs' deeds did not reference the survey plat. *Id.* at 393, 802 S.E.2d at 914. The plats did not create an easement implied-by-plat for two reasons. First, none of plaintiffs' deeds referenced a plat recorded by the developer that depicted a golf course. *Id.* Second, even if plaintiffs' deeds had referenced the survey plat, the survey plat depicting a dotted outline of a golf course did not bind the land for golf use for the benefit of plaintiffs or create any easement or common use right to the property. *Id.* Accordingly, the recorded plats did not impose an easement-by-plat, requiring the golf course property to be perpetually used only for golf. *Id.*

In this case, Defendants alleged, in relevant part: (a) the original developer recorded subdivision plats for Red Fox Run Sections A, B, C, D, and E, which showed lots by number and identified contiguous holes on the golf course; (b) property was conveyed to third parties by deeds

to each of the lots in Sections A, B, C, D, and E, which referenced the relevant recorded plat; and (c) common areas and open spaces described in the 1986 Restrictions are not identified on the plats.

The recorded subdivision plats for Red Fox Run Sections A, B, C, D, and E depict portions of the development. The residential lot lines are depicted with solid lines and have metes and bounds descriptions. While golf course holes are depicted adjacent to some of the residential lots, as was shown in *Crooked Creek*, the plats do not include metes and bounds descriptions of the outer boundaries of the golf course or the Property. Indeed, similar to the plats in *Crooked Creek*, the outer boundaries of the Property, and thus, the golf course, are either not marked at all or are depicted with dotted lines. The description, as illustrated by the plats, is insufficient to create a golf course easement, as it "omits one or more of the boundaries, and leaves the quantity of land undetermined." *Stines*, 81 N.C. App. at 101, 344 S.E.2d at 548. Because "[n]othing on the plat or referred to therein would enable a title attorney to determine the precise boundaries of the area burdened with the [golf course] easement," the plat is not capable of describing or reducing an easement in the golf course to a certainty. *Id.* Accordingly, the trial court did not err by concluding that the subdivision plats did not create easements restricting use of the Property to a golf course.

IV. Conclusion

The trial court did not err by ruling on the motion for judgment on the pleadings in favor of Plaintiff, because (1) the trial court was not required to treat the motion as one for summary judgment; and (2) Plaintiff was entitled to judgment as a matter of law that the 1986 Restrictions were extinguished by foreclosure of the Hooper deed of trust. The trial court did not err by dismissing with prejudice Defendants' counterclaim seeking declaratory judgment that Defendants have an enforceable right to require the Property to be used as a golf course. The order of the trial court is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

IN RE B.W.

[274 N.C. App. 280 (2020)]

IN THE MATTER OF B.W., T.W., L.W.

No. COA19-1000

Filed 17 November 2020

1. Child Abuse, Dependency, and Neglect—adjudication of abuse—lack of notice—allegations in petition limited to neglect

Where an abuse and neglect petition filed by a department of social services contained factual allegations of abuse regarding only one of three siblings, but neglect as to all three, the trial court's adjudication of one of the children as abused was vacated because the petition only alleged neglect with regard to that child.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—allegations of sexual assault—hearsay evidence—inadmissible—no other competent evidence

The trial court's adjudication order determining three children to be abused and neglected, based on allegations that their mother's friend sexually assaulted one of them, was reversed where the court improperly admitted hearsay evidence in the form of the children's recorded statements. The trial court's conclusion that the children were unavailable to testify, made as a prerequisite to allowing the recordings under the residual hearsay exception in Evidence Rule 804(b)(5), was unsupported where it was based on findings from a pre-trial hearing at which the trial court made an oral ruling that was never reduced to a written order. With regard to the residual hearsay exception in Evidence Rule 803(24), which does not require a finding of unavailability, the court's findings that the recorded statements were more probative than any other evidence were also based on the pre-trial ruling which was never reduced to writing. The erroneously admitted statements were prejudicial, since no other competent evidence supported the court's conclusions regarding abuse and neglect.

Appeal by respondent from order entered 13 June 2019 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 3 November 2020.

Richard Penley for petitioner-appellee Onslow County Department of Social Services.

David A. Perez for respondent-appellant mother.

Guardian Ad Litem Division, N.C. Administrative Office of the Courts, by Michelle FormyDuval Lynch, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals an order adjudicating her children, "Brian," and "Lydia," as abused and neglected juveniles and her child, "Timothy," as a neglected juvenile. The parties have stipulated to pseudonyms for the minor children pursuant to N.C. R. App. P. 42(b). We vacate in part, reverse in part, and remand.

I. Background

The Onslow County Department of Social Services ("DSS") received a report on 30 April 2018 that Respondent-mother and her family were living in a shed with multiple cats, with cat feces and roaches present inside the shed. Respondent-mother agreed to a safety plan and to clean her home.

DSS received a report of sexual abuse of Brian on 25 May 2018. During the course of the investigation, Brian told social workers his mother's friend, Justin, had inappropriately touched his groin area, had anally raped him, and engaged in fellatio with him. Brian used the term "crotch" to describe his penis and bottom to describe his "anus." Brian told social workers he had informed his mother of the actions and stated she did not believe him.

Social workers interviewed Respondent-mother regarding Brian's allegations. Respondent-mother indicated Brian had accessed pornography on his electronic devices, and the details he described could be based upon materials he had observed on his phone. Respondent-mother acknowledged Justin had stayed over nights in the shed with the family and that on occasion he spent the night in the bed with the boys and herself. She denied Brian had ever told her of Justin's actions.

Timothy and Lydia were also interviewed by social workers. Both reported the poor sanitation of the shed and acknowledged Justin spent time in the home and occasionally spent the night in the shed with the family.

Clinical social worker, Sara Ellis, interviewed both Brian and Lydia on 30 May 2018 at the Children's Advocacy Center ("CAC") in Jacksonville. At the time of the interview, Brian was eleven and a half years old and Lydia was seven and a half years old. Ellis videotaped the interview while other social workers watched and listened via

live stream in another room. Brian repeated that Justin had raped him and sexually assaulted him and used the same terminology during his 25 May 2018 interview with DSS. Lydia asserted Justin had inappropriately touched her on two occasions, one of which occurred while they were sleeping on the bed with Respondent-mother.

DSS filed its petition alleging Brian was abused and that all three children were neglected on 31 May 2018. The children were removed from Respondent-mother's care on that same date. Petitions were served on the putative fathers of the children. The putative fathers did not participate in the adjudication and disposition hearing. Their cases are not before us.

Orders were entered continuing the juveniles in nonsecure custody with DSS for approximately five months. During this time, Respondent-mother entered into a case plan with DSS. Respondent-mother made progress and completed parenting classes, a psychological evaluation and began outpatient therapy. Respondent-mother and the children engaged in bi-weekly appropriate visitation. Respondent-mother obtained a suitable and clean three-bedroom home with the assistance of her parents.

Following removal from their home, the children were placed into foster care. Brian was placed in a therapeutic foster home and Timothy and Lydia were placed together in a foster home. All three children received mental health services from a licensed professional counselor, Elbert Owens.

DSS filed a "Notification and Motion to Introduce Hearsay" on 7 September 2018. DSS sought to introduce hearsay statements of Brian and Lydia at the adjudication hearing pursuant to N.C. Gen. Stat. § 8C-1, Rules 803(24) and 804(b)(5). Copies of the DVDs and statements produced from the children's interviews at the CAC had been provided to Respondent-mother's counsel on 14 June 2018 and 27 July 2018.

DSS' motion was heard at a pre-adjudication trial hearing, combined with the hearing on the need for continued nonsecure custody. The trial court orally ruled the children would be unavailable to testify at the adjudication hearing, but failed to reduce the order to writing.

On 12 December 2018, Respondent-mother's counsel subpoenaed the children to testify at adjudication. The trial court orally granted DSS' and the guardian *ad litem's* ("GAL") motion to quash these subpoenas prior to the adjudication hearing.

The adjudication hearing was held on 14 and 15 January 2019. Sara Ellis, who had interviewed Brian and Lydia, testified regarding the protocols used to conduct interviews at the CAC, as well as her training. Respondent-mother objected on hearsay grounds to Ellis' hearsay testimony and the admission of the video of Brian's statement. After *voir dire* by counsel as well as questions from the bench, the trial court allowed the CAC video interview of Brian to be admitted into evidence. After similar objections and *voir dire* of Ellis, the CAC video interview of Lydia was also admitted into evidence.

The almost two-and-a-half-hour video of Brian's CAC interview was played for the courtroom. Brian described the rapes as occurring on the bed in the shed and on a bunkbed in a travel trailer near the shed where the family accesses running water. Brian gave details of being forced onto his chest, being tied up and Justin putting his "crotch" in Brian's "bottom" and it "really hurt."

Brian described Justin putting his mouth on his "crotch." Brian defined "crotch" as where he urinated. Brian provided details of what he was wearing, of what he saw, felt, and tasted. Brian stutters and when he described Justin's attacks his stuttering increased. The video interview of Lydia was also played in the courtroom. Lydia told Ellis that Justin had touched her private area on several occasions.

DSS called Justin, the alleged perpetrator of the sexual abuse of Brian and Lydia, as a witness. Justin denied molesting or sexually assaulting any of Respondent-mother's children. Justin acknowledged occasionally staying overnight in Respondent-mother's shed and spending time with her children. He admitted sleeping in a bed with Respondent-mother and one of the children. He indicated Respondent-mother would sleep in between himself and the child. Justin was interviewed by DSS and an Onslow County sheriff's detective. No criminal indictments were issued against him for any of the allegations.

DSS called Respondent-mother as a witness. She denied that Brian had told her about being sexually assaulted by Justin. She hesitated on whether she believed Brian's and Lydia's allegations. Respondent-mother testified that her brain condition impacts her memory. The children's former social worker, Noemi Rivera, testified to the conditions of the shed and Brian's reaction when she was at his home. Over Respondent-mother's hearsay objection, the trial court allowed Rivera to testify to statements Brian made in front of her on 25 May 2018 about Justin as an excited utterance.

The children's grandmother, Respondent-mother's mother, testified on her daughter's behalf. She showed photographs of Respondent-mother's new home and its clean condition. She testified she had never observed any inappropriate contact between Justin and her grandchildren. She stated there was a "strong possibility" that Brian could have been assaulted. She also testified Lydia swam in her swimming pool with Justin in 2016.

The court adjudicated Brian and Lydia as abused and all three children to be neglected juveniles and continued the case for a hearing on disposition. The disposition hearing was held 12 February 2019. The court ordered placement authority to remain with DSS and that the children could be placed with their great-aunt in Texas. The court's written order was filed 13 June 2019 and Respondent-mother timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2019).

III. Issues

Respondent-mother argues the trial court erroneously adjudicated Lydia to be an abused juvenile. She also asserts the trial court erred in admitting hearsay statements of Brian and Lydia.

IV. No Allegation of Abuse

[1] DSS failed to allege any factual allegations of abuse regarding Lydia. Notwithstanding the lack of allegations, the trial court found Lydia to be an abused juvenile. "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). A respondent must be put on notice as to the allegations against her. *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

The petition here only put Respondent-mother on notice as to allegations of neglect regarding Lydia. DSS and the GAL concede that the trial court erred by concluding Lydia was an abused juvenile. The portion of the trial court's order finding Lydia is an abused juvenile is vacated.

V. Residual Hearsay Exceptions

[2] Respondent-mother asserts the trial court's finding the children were unavailable to appear and testify under Rule 804(b)(5) incorporates purported findings of fact from an unwritten determination from

the 8 November 2018 hearing. Respondent-mother further contends no competent record evidence supports the necessity to admit the juveniles' hearsay statements under Rule 803(24). She argues competent evidence does not exist to support the trial court's adjudication of her children as neglected or abused. DSS filed a motion to supplement the record on appeal and for this Court to order the court stenographer to transcribe the pre-trial hearing. That motion was denied.

A. Standard of Review

"The admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, and may be disturbed on appeal only where an abuse of such discretion is clearly shown. The appellant must show that [he or she] was prejudiced and a different result would have likely ensued had the error not occurred." *In re W.H.*, 261 N.C. App. 24, 27, 819 S.E.2d 617, 620 (2018) (alteration in original) (internal quotation marks and citation omitted).

B. Analysis

DSS sought introduction of the hearsay statements and video under both residual hearsay exceptions, Rules 803(24) (declarant's availability immaterial) and 804(b)(5) (declarant unavailable). Hearsay may be admissible under these residual exceptions where the statement is:

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rules 803(24), 804(b)(5) (2019). The statute requires the trial court to make findings of fact of (A), (B) and (C) stated above and for the proponent to provide the mandated prior notice to the adverse party. *Id.*

Our Supreme Court has interpreted both residual exceptions to require the trial court to conduct a six-part inquiry and determine whether: (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and, (6) the interest of justice will be best served by admission. *State v. Smith*, 315 N.C. 76, 92-96, 337 S.E.2d 833, 844-46 (1985) (holding the trial court must engage in this six-part inquiry in determining whether to admit proffered hearsay evidence under Rule 803(24)); *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 741 (1986) (holding the trial court must proceed with the same six-part inquiry prescribed by *State v. Smith* in determining whether hearsay testimony may be admitted under Rule 804(b)(5)).

Respondent-mother's assertions on appeal challenge the purported incorporated findings based upon Owens' testimony and the children's unavailability. She contends any finding in the Adjudication Order supported by Owens' testimony on 18 November 2018 is erroneous and unsupported by competent evidence.

1. *Rule 804(b)(5)*

It is undisputed the trial court must make findings of fact and conclusions of law on the record when determining the admissibility of a hearsay statement. *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 853 (2003) (citations omitted).

Our Supreme Court has held:

> admitting evidence under the catchall hearsay exception . . . is error when the trial court fails to make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its discretion in making its ruling. If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception.

State v. Sargeant, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011) (citation omitted).

In relevant part, the trial court found:

> n. . . . At a hearing on the need for continued nonsecure custody and adjudication pre-trial conducted on November

> 8th, 2018, the Judge heard evidence in the form of testimony of the juvenile's therapist, Elbert Owens. That hearing pertained to Rule 804 (b)(5), whether the juveniles would be declared unavailable for testimony, as [Respondent-mother's counsel] indicated that he would subpoena on behalf of the respondent mother the juveniles for testimony at the adjudication of this matter. On that date the Court made specific findings of fact as to why the juveniles were unavailable to testify at the adjudication of this matter. The Court adopts each findings of fact as noted in that Order from the November 8th, 2018 court date and incorporates them into this finding, for purposes of this adjudication order pursuant to Rule 804(b)(5) as follows.

The only written recording of the 8 November 2018 hearing is the form nonsecure custody order, which fails to include any required findings about determining the juveniles to be "unavailable." DSS and the GAL argue that findings regarding unavailability from the 8 November 2018 hearing are not invalid and were memorialized later in the court's Adjudication Order.

"The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 214, 580 S.E.2d 732, 737 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2019).

Here, while the parties may have been aware of the court's announcement of its decision that the children would be unavailable, precedent requires that the trial court enter sufficient findings of fact to support its conclusion of unavailability. *State v. Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693 (2001); *State v. Clonts*, 254 N.C. App. 95, 115, 802 S.E.2d 531, 545, *aff'd*, 371 N.C. 191, 813 S.E.2d 796 (2018).

"The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case." *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740. In *Triplett*, the declarant was deceased. Our Supreme Court held the trial court's determination of unavailability was properly "supported by a finding that the declarant [was] dead, which finding in turn [was] supported by evidence of death." *Id.*

The court's order indicates it relied upon the testimony of Owens to find the juveniles were unavailable. The order references Owens'

testimony in its determination that it "would be detrimental to the health and safety of the juveniles if the juveniles were compelled to testify regarding allegations of acts of sexual abuse perpetrated on them, by Justin [], and allowed to be perpetrated on them by the respondent mother." At the adjudication hearing, counsel for DSS simply states that at the 8 November 2018 hearing, Owens testified and the court ruled "the children would be unavailable to testify."

Owens' specific testimony is not set forth in the Adjudication Order. DSS argues the record on appeal submitted by Respondent-mother includes a file stamped letter from Owens. Owens' letter states "providing . . . testimony would likely re-traumatize the children." However, this letter is not a substitute for sworn testimony nor does it contain the findings required by our Supreme Court. It is impossible for this Court to determine whether the trial court's findings in its adjudication are supported by clear and convincing evidence.

The trial court's finding of fact that testifying would be detrimental to the health and safety of the juveniles is not supported by competent evidence and cannot support its conclusion that the juveniles were unavailable to testify in person at the adjudication hearing as to the sexual abuse they suffered. *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740. In the absence of any physical evidence of abuse and a denial of any of the alleged acts by Justin, and Respondent-mother, the prejudice to Respondent-mother is readily apparent. Respondent-mother is unable to present a defense to test the credibility of these statements and to ferret out or challenge the statements, any improper conduct, coaching, or other basis for these allegations.

2. *Rule 803(24)*

DSS' motion to introduce the hearsay statements asserted the statements were admissible under both Rules 803(24) and 804(b)(5). The only distinction between the rules is the finding of unavailability required for Rule 804(b)(5). *Triplett*, 316 N.C. at 8, 340 S.E.2d at 741.

Before allowing the residual hearsay at the adjudication, the trial court must "determine whether (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission." *In re W.H.*, 261 N.C. App. at 27, 819 S.E.2d at 620 (citing *Smith*, 315 N.C. at 92-96, 337 S.E.2d at 844-46).

In the present case, the trial court made purported findings regarding the hearsay within the CAC video interview of Brian. The trial court made nearly identical findings with respect to Lydia's statements in the CAC video.

Respondent-mother challenges the trial court's decision the statement is more probative than any other evidence which the proponent can procure through reasonable efforts.

> The availability of a witness to testify at trial is a crucial consideration under either residual hearsay exception. Although the availability of a witness is deemed immaterial for purposes of Rule 803(24), that factor enters into the analysis of admissibility under subsection (B) of that Rule which requires that the proffered statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." If the witness is available to testify at trial, the "necessity" of admitting his or her statements through the testimony of a "hearsay" witness very often is greatly diminished if not obviated altogether.

State v. Fearing, 315 N.C. 167, 171–72, 337 S.E.2d 551, 554 (1985) (citation omitted).

In the district court transcript, the parties referenced *In re M.A.E.*, 242 N.C. App. 312, __ S.E.2d __ (2015). In that case, the respondents challenged the trial court's conclusion that a female child sexual assault victim's statements were "more probative on the point for which they are offered than any other evidence which [DSS] can procure through reasonable efforts[.]" *Id.* at 318, __ S.E.2d at __. The respondents argued "the trial court failed to properly consider [the child's] availability to testify in person at the adjudicatory hearing." *Id.*

In *M.A.E.*, the trial court found it would be detrimental to the welfare of the juvenile to be compelled to come to court. *Id.* at 319, __ S.E.2d at __. The court found the child would "suffer from anxiety," "the courtroom setting itself would likely be overwhelming . . . even in a closed-circuit situation," and causing the child to testify "could hamper" her progress in therapy. *Id.*, __ S.E.2d at __. There the trial court found "the proffered hearsay statements . . . were more probative on the point for which they [were] offered than any other evidence the proponent [could] procure through reasonable efforts due to the age, risk and bias of [the child]." *Id.*

Our Court reviewed the record and transcript and held the trial court's findings were consistent with the testimony of the child's therapist. *Id.* This Court recognized the therapist had testified that she was concerned the child would not be truthful "because she 'may feel guilt and maybe feel like she is getting someone in trouble and that she doesn't want anyone to be in trouble.' " *Id.*

Here, in relevant part, trial court found:

> iv. The statements of the juveniles to include the video taped recordings is more probative on the issue of sexual abuse than any other evidence which DSS could procure through reasonable efforts.
>
> This Court previously had a hearing on the availability of the testimony of the juveniles to provide testimony. This Court found as fact that it would be detrimental to the health and safety of the juveniles if the juveniles were compelled to testify regarding allegations of acts of sexual abuse ·perpetrated on them by Justin [] and allowed to be perpetrated on them by the respondent mother. This was based upon the testimony of the juveniles' therapist, Elbert Owens, as provided on November 8th , 2019 (sic).

Here, the trial court found it would be detrimental to the juveniles' health and safety for them to testify based upon unwritten findings of fact from a nonexistent order. This same unsupported finding cannot support any finding that the hearsay statements of the juveniles in their recorded interviews at the CAC were more probative than any other evidence DSS could have obtained. This Court cannot evaluate whether the court's findings are consistent with the testimony of the children's therapist.

The best evidence DSS could procure of the children's allegations of abuse are from the children themselves. Respondent-mother had subpoenaed her children for adjudication, but these subpoenas were quashed by the trial court prior to trial. The trial court erred by adopting purported findings from the 8 November 2018 hearing. The recorded statements were inadmissible as an exception to the hearsay rule solely under Rule 803(24).

Where the court's findings and conclusions are not supported by other evidence, the admission of incompetent evidence is prejudicial. *See In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (holding the admission of incompetent evidence is not prejudicial where there is

other competent evidence to support the district court's findings), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Respondent-mother was prevented from preparing and asserting a defense and has demonstrated prejudice exists. Without the inadmissible hearsay, no clear and convincing evidence supports the court's findings of abuse and neglect. The allegations against Respondent-mother based upon her allowed sexual assaults of Brian have no other evidentiary support.

VI. Conclusion

The trial court improperly concluded Lydia was an abused juvenile where no such allegation was asserted by DSS. That portion of the court's order is vacated.

The trial court's finding of fact that testifying would be detrimental to the health and safety of the juveniles is unsupported and is insufficient to support its conclusion that the juveniles were unavailable to testify in person at the adjudication hearing based upon the sexual abuse they allegedly suffered.

The CAC video was improperly admitted under both residual hearsay exceptions. Without the CAC video, no other evidence supports the trial court's determination that Brian was abused or that Brian, Timothy, or Lydia were neglected. The trial court's order is reversed and remanded. *It is so ordered.*

VACATED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and HAMPSON concur.

IN RE L.G.

[274 N.C. App. 292 (2020)]

IN THE MATTER OF L.G.

No. COA19-1129

Filed 17 November 2020

1. Child Abuse, Dependency, and Neglect—motion to continue—absence of parent—no abuse of discretion

The trial court did not abuse its discretion by denying the motion to continue made by respondent-mother's counsel at the permanency planning hearing for the daughter. Counsel gave no reason, other than the mother's absence, showing why a continuance would help identify the appropriate permanent plan for the daughter; further, counsel advocated for the mother's interests effectively despite her absence, and she could not demonstrate prejudice.

2. Child Abuse, Dependency, and Neglect—permanency planning—not placed with parent—required findings

The trial court erred by establishing a guardianship for respondent-mother's daughter with her grandparents without making any findings regarding whether it was possible for the daughter to be placed with a parent within the next six months, as required by N.C.G.S. § 7B-906.1(e)(1). Where the trial court's other findings could support such a determination, the matter was remanded for consideration of the issue and, if appropriate, inclusion of the appropriate additional findings.

3. Child Abuse, Dependency, and Neglect—permanency planning—waiver of further hearings—termination of jurisdiction

The trial court erred by waiving further permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) where respondent-mother's child had not been residing in her current placement for at least one year. The trial court further erred by failing to retain jurisdiction over the matter where the order acknowledged the parties' right to file a motion in the cause for review and established reunification as the secondary plan.

Appeal by Respondent-Mother from orders entered 9 September 2019 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 3 November 2020.

John C. Adams for petitioner-appellee Buncombe County Department of Health and Human Services.

Jackson M. Pitts for guardian ad litem-appellee.

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

MURPHY, Judge.

Respondent-Mother, Sam,[1] challenges the trial court's denial of her motion to continue when she was not present and unable to testify on her own behalf at a permanency planning and review hearing. Sam appeals from the trial court's orders awarding guardianship pursuant to a primary permanency plan to the paternal grandparents of the minor child, Wanda, and dissolving the trial court's jurisdiction of this matter.

In a permanency planning and review hearing regarding an abused and neglected child's placement, a trial court does not abuse its discretion when it denies to continue the hearing when the mother is not present and there was no request by the mother's counsel for time to allow counsel to contact the mother. Where a trial court orders a juvenile's placement to be with a person other than a parent, the trial court meets the statutory requirements when it makes written findings regarding whether it is possible for the juvenile to be placed with a parent within the next six months, and if not, why placement is not in the juvenile's best interest. A trial court abuses its discretion when these findings are not included in a permanency planning hearing order. Finally, when a trial court dissolves jurisdiction in a matter, it must make a finding the juvenile has resided in the placement for a period of at least one year.

BACKGROUND

Wanda was born in March 2015 and is the only child of Sam and Respondent-Father, Peter, who are married. During the course of these proceedings, Sam and Peter have both struggled with substance abuse.

On 19 August 2017, Peter placed Wanda in his car at approximately 1:30 a.m., intending to drive to the store. He instead re-entered their residence and passed out due to his ingestion of Xanax, a benzodiazepine for which he did not have a prescription. Two-year-old Wanda remained alone in the car and strapped in her car seat until she was found the next morning at 7:00 a.m. On 12 October 2017, Buncombe County Department of Health and Human Services ("DHHS") filed a juvenile petition alleging

1. We use pseudonyms for all relevant persons throughout this opinion to protect the juvenile's identity and for ease of reading.

Wanda was abused and neglected. In addition to describing Sam and Peter's substance abuse and its effects on Wanda, the petition alleged Sam was facing eviction and lacked safe and stable housing.

At a hearing on 13 December 2017, Sam and Peter stipulated to the petition's material allegations and to the stipulated allegations supporting the conclusion Wanda was an abused and neglected juvenile. The trial court entered an order on 9 February 2018 adjudicating Wanda to be abused and neglected and maintaining her in a temporary safety placement.[2] The trial court ordered Sam and Peter to participate in parenting education courses and to "continue to engage in substance abuse treatment to obtain an abstinence based recovery," submitting to random drug screens, completing detox and inpatient treatment, and complying with all recommendations of their treatment providers. Sam was granted weekly supervised visitation with Wanda.

The trial court held an initial permanency planning hearing on 28 February 2018 and established a primary permanent plan for Wanda of preventing an out-of-home placement with a secondary permanent plan of reunification. The trial court maintained these permanent plans through four subsequent permanency hearings ending on 6 February 2019, keeping Wanda in a temporary safety placement as Sam and Peter worked toward attaining sobriety. Between 3 and 16 August 2018, Wanda was transitioned out of her maternal grandmother's home into a temporary safety placement with her paternal grandmother.

Beginning in September 2018, Sam was granted unsupervised visits with Wanda, eventually progressing to sixteen hours per week of unsupervised visitation. Following a sixth permanency planning review hearing on 1 May 2019, the trial court changed the primary permanent plan to reunification and established a secondary plan of guardianship. The trial court authorized Sam and Peter to have unsupervised overnight visitations with Wanda in their home at the discretion of the Child and Family Team. All unsupervised visits were then suspended by DHHS in June 2019, following Sam's use of alcohol while caring for Wanda.

The trial court held the next permanency planning hearing on 30 July 2019 and entered the resulting *Subsequent Permanency Planning and Review Order* ("permanency planning order") on 9 September 2019.

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2. Although the decretal portion of the trial court's order purports to place Wanda in DHHS custody, the remainder of the order and the court's subsequent orders reveal this to be a scrivener's error. Prior to placing Wanda in guardianship with her paternal grandparents in September 2019, the trial court left Wanda in Sam and Peter's custody subject to a "temporary safety placement."

Based on the parties' evidence and the recommendations of DHHS and the guardian ad litem ("GAL"), the trial court changed Wanda's primary permanent plan to guardianship and her secondary plan to reunification. The trial court appointed the paternal grandmother and her husband as Wanda's guardians. The trial court also awarded Sam and Peter two hours of weekly supervised visitation but authorized the guardians to deny visitation if either Sam or Peter appeared to be intoxicated. Simultaneous to its entry of the permanency planning order on 9 September 2019, the trial court entered a *Guardianship Order* confirming Wanda's placement in the legal guardianship of her paternal grandparents. Sam filed timely notice of appeal from the *Subsequent Permanency Planning and Review Order* and *Guardianship Order* on 19 and 20 September 2019.

ANALYSIS

A. Denial of Continuance

[1] Sam first argues the trial court abused its discretion by denying her oral motion to continue the 30 July 2019 permanency planning hearing based on her absence from the proceeding. We disagree.

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review."[3] *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)). To prevail on appeal, Sam must demonstrate "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 C.J.C.*, 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020) (quoting *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019)). She must also show she "suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91 (quoting *Walls*, 342 N.C. at 24-25, 463 S.E.2d at 748). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (citation omitted).

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3. Sam's counsel did not assert a continuance was necessary to protect a constitutional right. *See In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91 (noting if "the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable"); *In re C.M.P.*, 254 N.C. App. 647, 653, 803 S.E.2d 853, 857 (2017) ("[R]espondent's motion to continue was not based on a constitutional right, and we review the trial court's denial of the motion for abuse of discretion.").

The transcript of the 30 July 2019 permanency planning hearing shows Sam's counsel made an oral motion to continue due to Sam's absence. Noting Sam had consistently attended all court proceedings, Sam's counsel advised the trial court as follows:

> Recently, [Sam] has had some issues, and she emailed me yesterday letting me know that she had checked into Pardee [Hospital]. She intends to go from there into a rehab facility. But given the [DHHS and GAL] reports that are in front of the [c]ourt and the requests and recommendations, I am asking the [c]ourt to continue this matter. [4]
>
> My client has received copies of the report[s], but given how we received them, she just got them . . . and has not been able to communicate back to me any – anything about her comments on them or regarding the recommendations. But given that the [c]ourt is being asked today to close, I would ask that the matter be held op[en] or continued over so my client can participate today since I won't be able to represent what she would desire, based on the reports.

DHHS, Peter, the GAL, and the paternal grandmother objected to a continuance. DHHS reported it had not received confirmation of Sam's enrollment in inpatient substance abuse treatment. Reminding the trial court Wanda had been "out of home for [twenty-one[5]] months," the GAL confirmed "we would be asking for guardianship to be granted to these paternal grandparents" even if Sam was present for the hearing. The paternal grandmother argued Sam "had the opportunity to admit herself into a treatment program" when her relapse first came to light in mid-June 2019 and yet waited until the eve of the hearing to do so.

In denying Sam's motion, the trial court observed the case had been "before the Court now for [twenty-three] months," and pointed to the amount of information contained in the court file and in the reports submitted by DHHS and the GAL. The trial court proceeded to hear testimony from the family's START social worker and Wanda's paternal grandparents. Sam's counsel actively participated in the hearing, cross-examining the social worker and the paternal grandmother.

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4. In their reports filed on 24 July 2019 and admitted into evidence without objection, DHHS and the GAL recommended changing Wanda's primary permanent plan to guardianship and appointing her paternal grandmother as guardian.

5. The Record shows Wanda entered a temporary emergency placement with maternal grandmother in September 2017, more than twenty-three months before the 30 July 2019 hearing.

Sam has failed to carry her burden to show the trial court abused its discretion when it denied her motion to continue. The purpose of a permanency planning hearing is to identify the "best permanent plans to achieve a safe, permanent home for the juvenile" consistent with the juvenile's best interest. N.C.G.S. § 7B-906.1(g), (i) (2019); *see also* N.C.G.S. § 7B-906.2(a) (2019). Sam's counsel made no proffer, other than Sam's absence, tending to suggest a continuance would further the cause of identifying the appropriate permanent plan for Wanda. *See In re A.L.S.*, 374 N.C. at 518, 843 S.E.2d at 92 (noting "counsel offered only a vague description of the [absent witness's] expected testimony and did not tender an affidavit or other offer of proof to demonstrate its significance"). Although Sam's counsel stated she had not received her client's "comments" about the reports filed by DHHS and the GAL, there was no suggestion Sam intended to dispute any of the information contained in the reports or the court file.

Moreover, the mere fact Sam was not present for the hearing is not *per se* prejudicial. *See In re C.M.P.*, 254 N.C. App. 647, 653, 803 S.E.2d 853, 857 (2017); *see also In re Murphy*, 105 N.C. App. 651, 658, 414 S.E.2d 396, 400 ("When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal."), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Sam's counsel advocated for Sam's interests in an effective manner. *See Murphy*, 105 N.C. App. at 658, 414 S.E.2d at 400 (holding the respondent "failed to produce any evidence of prejudice" resulting from his absence from hearing to terminate his parental rights).

Sam argues her "testimony was necessary to clarify her physical and mental and emotional state, which was in turn necessary" for the trial court to determine whether Wanda could be permanently returned to Sam's care "within a reasonable period of time" under N.C.G.S. § 7B-906.1(d)(3), or whether it was possible to place Wanda with Sam within the next six months as contemplated by N.C.G.S. § 7B-906.1(e)(1). However, when making the oral motion, Sam's counsel did not indicate Sam intended to testify; nor did counsel offer a forecast of Sam's potential testimony. *See Murphy*, 105 N.C. App. at 655, 414 S.E.2d at 399 ("During the hearing, respondent's attorney did not argue that his client would be able to testify concerning any defense to termination, nor did he indicate how his client would be prejudiced by not being present."). Sam's counsel's representation that Sam had just entered an inpatient substance abuse treatment facility appeared to foreclose the prospect

of Wanda's reunification with her mother in the near future.[6] "[Sam] thus fails to demonstrate any prejudice arising from the trial court's denial of her motion to continue." *In re A.L.S.*, 374 N.C. at 518, 843 S.E.2d at 92.

Sam also cites our holding in *In re D.W.*, 202 N.C. App. 624, 693 S.E.2d 357 (2010) to support her argument. In *In re D.W.*, we held the trial court abused its discretion by denying the respondent's motion to continue a termination of parental rights hearing based on the respondent's absence. *Id.* at 629, 693 S.E.2d at 360. *In re D.W.* noted a confluence of factors justifying the continuance, none of which were present here:

> First, [r]espondent notes that it was unclear whether she received notice of the hearing. . . . Furthermore, the [R]ecord indicates that the trial court was on notice that [r]espondent suffered from diminished capacity, possibly making her absence involuntary. . . . Also, it was apparent from the transcript that external time constraints negatively affected the nature of the proceeding in such a manner as might have been avoided through the issuance of a continuance. Lastly, we are troubled by the trial court's failure to ascertain the nature of the proceeding prior to issuing a ruling on a motion to continue . . . .

Id. at 628, 693 S.E.2d at 360. *In re D.W.* is inapposite and the trial court did not abuse its discretion in denying Sam's motion to continue. *Id.*

B. Lack of Findings under N.C.G.S. § 7B-906.1(e)(1)

[2] Sam argues the trial court erred by establishing a guardianship for Wanda without "consider[ing] and mak[ing] written findings regarding '[w]hether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests[,]' " as required by N.C.G.S. § 7B-906.1(e)(1). We agree.

Where the trial court does not place the juvenile with a parent following a permanency planning hearing, N.C.G.S. § 7B-906.1(e)(1) requires the trial court to enter findings of fact regarding, *inter alia*, "[w]hether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests." N.C.G.S. § 7B-906.1(e)(1) (2019). "The trial court's findings must explain 'why [Wanda] could not be returned home immediately or within

6. Sam's counsel later acknowledged Sam was "struggling" and averred she had entered inpatient substance abuse treatment "as of yesterday" with "a plan going forward to go to ADATC from there, and then her intention is to go to Abba House."

the next six months, and why it is not in [her] best interests to return home.' " *In re J.H.*, 244 N.C. App. 255, 273, 780 S.E.2d 228, 241 (2015) (quoting *In re I.K.*, 227 N.C. App. 264, 275, 742 S.E.2d 588, 595-96 (2013)).

As a general matter, "[o]ur review of a permanency planning order entered pursuant to N.C.[G.S.] § 7B-906.1 is 'limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.' " *In re J.S.*, 250 N.C. App. 370, 372, 792 S.E.2d 861, 863 (2016) (quoting *In re J.H.*, 244 N.C. App. at 268, 780 S.E.2d at 238). The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re L.T.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122, 125 (2007) (internal quotation marks omitted). We have characterized a trial court determination of a juvenile's best interest as a conclusion of law which must be supported by its findings of fact. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 676 (1997); *see also In re Chasse*, 116 N.C. App. 52, 62, 446 S.E.2d 855, 861 (1994) ("When making a disposition or reviewing one, a trial court must enter an order with findings sufficient to show that it considered the best interest of the child.").

The permanency planning order here makes no mention of the possibility of Wanda's placement with either parent within the next six months. However, the trial court's contemporaneously-entered *Guardianship Order* includes the following finding:

> 12. [Wanda] has been placed with her paternal grandparents, since August of 2018, and it is in [Wanda's] best interest that she be placed in the legal guardianship of them, as they are committed to caring for [Wanda] and being her legal guardian[s], and as it is unlikely [Sam and Peter] will be able to care for [Wanda] within the next six months.

The permanency planning order includes the following findings of fact supporting the trial court's assessment:

> 27. On [13 June 2019], the Department became aware that [Sam] had relapsed on alcohol and had been drinking in the home the night before, while [Wanda] was there and being cared for by [Peter]. It was reported that [Sam and Peter], with [Wanda], arrived at the home of paternal grandmother to put the child to bed, on [12 June 2019], and that [Sam] was under the influence of alcohol. A decision was made to return to only supervised time between [Wanda] and both [Sam and Peter], until further notice.

28. On [20 June 2019], an emergency meeting was called to talk about the new concerns and make a plan moving forward. . . . The team agreed that [Sam] would need to take action regarding her relapse and recent use, in order to move back towards unsupervised time with [Wanda]. [Sam] acknowledged her use of alcohol, and apologized for her behavior and choices. It was decided that [DHHS] would hold a similar meeting with [Peter] at a later time.

29. On [28 June 2019], the social worker stopped by the apartment of [Sam and Peter] as the social worker had not had further contact with [Peter]. He reported that on this date, [Sam] would no longer be allowed to live in the apartment. He reported that she may have a place to live temporarily in Henderson County. [Peter] reported that he believes that his marriage is over, and that he has had concerns for some time that [Sam] has been drinking alcohol. . . .

. . .

31. [Sam] completed an updated Comprehensive Clinical Assessment to identify any new or additional treatment needs at Women's Recovery Center. It was recommended that she continue her MAT services and also attend weekly individual therapy. [Sam] started her individual therapy sessions on [8 July 2019] . . . .

. . .

33. On or about [12 July 2019], [Sam] moved into Biltmore Housing, in a Half Way/Sober Living home. She moved out about [14 July 2019], due to not feeling like the home was a good fit.

. . .

35. On [19 July 2019], the social worker learned from paternal grandmother that [Sam] did not make her visitation with [Wanda] on [18 July 2019]. It was reported that on [18 July 2019], [Sam] contacted the paternal grandmother and [Sam] may have been intoxicated, was in a bad emotional state, and was alone in her car. The social worker followed up with [Sam] the next day who reported that she quit her new job, and was waiting to coordinate an admission into detox and inpatient rehab through the Behavioral Health Urgent Care or Crossroads.

36. [Sam and Peter] were required to complete 8 random drug screens with [DHHS]. [Peter] missed three screens, had 1 negative for illicits but was with abnormal creatine and non-prescribed Gabapentin, had 1 negative but was with abnormal creatine, had two that were negative for illicits but were with non-prescribed Gabapenti[n], and had 1 (oral) which was positive for Fentanyl, Norfentanyl, Cocaine, and Cocaine Metabolite.

. . .

38. [Sam] missed 1 screen, had three that were negative/normal, had 2 (1 oral and 1 urine) [that] were positive for Fentanyl, and had two that were positive for alcohol and/or cocaine.

39. Several screens were positive for prescribed Gabapentin. [Sam] does admit alcohol use. She has reported no use of Fentanyl, and no knowledge of coming into contact with this substance that could lead to a positive test.

. . .

41. [Wanda's] GAL concludes that [Wanda] is a bright young girl living in a safe and secure environment with her paternal grandparents.

. . .

45. [Sam] has had numerous positive screens and missed screens since June of 2019. [Peter] has had numerous positive screens and failed screens since June of 2019. [Sam] has visited regularly, up until about two weeks ago. [The social worker] has not spoken to [Sam] since last week, and has received no confirmation that [Sam] is in treatment. [Peter] continues to be involved with Crossroads and with a START program, but he continues to test positive. . . .

46. [Peter] is in favor of the submitted recommendations.

. . .

48. The paternal grandparents reside in a two bedroom apartment in Buncombe County, in which [Wanda] has her own bedroom. They have no impairments and/or health concerns that would impede their care for [Wanda]. Their monthly income is approximately 20,000 dollar[s] . . ., and

> as such, their income exceeds their liabilities. [Wanda] will have been in their home for one year, as of [3 August 2019]. . . . [Sam] has missed 3 consecutive visits and has called the paternal grandmother, severely intoxicated. [Sam] has presented for visits, impaired, with [Wanda]. . . . .
>
> . . .
>
> 51. Pursuant to N.C.G.S. § 7B-903(a)(2)(c), the paternal grandparents . . . are aware of the legal responsibilities of accepting legal guardianship of [Wanda] and they are willing and able to provide proper care and supervision of [Wanda] in a safe environment.
>
> 52. Pursuant to N.C.G.S. § 7B-906(b), [Wanda] is placed with the paternal grandparents, . . . and this placement is stable, and the continuation of the placement is in [her] best interest.
>
> 53. It is in the best interest of [Wanda] that [s]he be placed in the legal guardianship of the paternal grandparents . . . at this time.

Sam does not challenge any of these findings of fact so they are presumed to be supported by competent evidence and binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

We hold while the trial court included findings of fact in the permanency planning order that could support a potential conclusion it was not possible for Wanda to be placed with Sam or Peter within six months, it failed to make that conclusion of law in the permanency planning order. We remand this matter for the trial court's consideration of this issue and if the trial court so concludes, to include specific language regarding the possibility of Wanda being placed with a parent within six months in the permanency planning order.[7]

C. Waiver of Further Hearings

[3] Lastly, Sam argues the trial court erred by waiving further permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) and by "dissolv[ing]" its jurisdiction and releasing DHHS, the GAL, and counsel from further responsibility in the case effective 3 August 2019. DHHS and the GAL concede these errors and recognize the need to remand this cause to the trial court for correction thereof.

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7. In its brief, the GAL maintains this matter "should be remanded to correct the trial court's error in failing to include specific language that it is not possible for [Wanda] to

N.C.G.S. § 7B-906.1(n) authorizes the trial court to waive periodic permanency planning hearings if the trial court finds by clear and convincing evidence each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to [N.C.]G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C.G.S. § 7B–906.1(n)(1-5) (2019).

Here, the trial court found Wanda would have resided in her current placement for one year as of 3 August 2019, four days after the 30 July 2019 hearing date. The trial court purported to waive further hearings and terminate its jurisdiction as of the anniversary date, decreeing as follows:

> 12. That [Wanda] will have been in the home of the paternal grandparents for one year, beginning on [3 August 2019]; and, that on that date, jurisdiction of this Court over such person shall dissolve.
>
> 13. That this cause shall need not be brought back on for review in [the] normal course unless requested by any party hereto.

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be placed with a parent within six months. However, the GAL-Appellee contends that the findings of fact already contained in the subject permanency planning order are sufficient to support a conclusion that it is not possible for [Wanda] to be placed with [Sam] within six months." While we agree with the GAL it could support such a conclusion, on remand the trial court is free to enter a conclusion of law it finds appropriate and we do not dictate such a conclusion is mandated by the findings of fact.

> 14. That, on [3 August 2019], this cause shall be removed by the [c]lerk of [c]ourt from the juvenile docket, and [DHHS], and all court-appointed representatives shall be released from further responsibility in this cause.

We agree with the parties that the trial court erred in this regard. The trial court had no authority to waive further hearings in this matter because Wanda had not been residing in her current placement for at least one year at the time of the permanency planning hearing. *See In re J.H.*, 244 N.C. App. at 278, 780 S.E.2d at 244; *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015). Furthermore, the trial court's purported decision to terminate or "dissolve" its own jurisdiction effective 3 August 2019 is inconsistent with its findings elsewhere in the order acknowledging the parties' right to file a motion in the cause for review. The permanency planning order contains the following findings of fact, conclusions of law, and decrees:

> 61. Pursuant to N.C.G.S. § 7B-905.1(d), any party may file a motion for review to address the current visitation plan.
>
> . . .
>
> 15. That, pursuant to N.C.G.S. § 7B-905.1(d), any party may file a motion for review to address the current visitation plan.
>
> . . .
>
> 17. That pursuant to § 7B-201, [Wanda] will have been in the home of the paternal grandparents for one year, beginning on [3 August 2019]; therefore, jurisdiction of this [c]ourt over such person will dissolve on that date. This cause need not be brought back on for review in [the] normal course unless requested by any party hereto, and upon the attainment of such date, this cause may be removed by the [c]lerk of [c]ourt from the juvenile docket, and [DHHS], and all court-appointed representatives should be released from further responsibility in this cause.
>
> . . .
>
> 12. That [Wanda] will have been in the home of the paternal grandparents for one year, beginning on [3 August 2019]; and, that on that date, jurisdiction of this [c]ourt over such person shall dissolve.

> 13. That this cause shall need not be brought back on for review in [the] normal course unless requested by any party hereto.

See generally N.C.G.S. § 7B-201(b) (2019) ("When the [juvenile] court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case . . . ."). The trial court's decision is also at odds with its finding and conclusion that "[t]he conditions that caused [DHHS] to become involved in this matter have not yet been addressed, and ceasing [S]tate involvement would be contrary to the health and safety of [Wanda] at this time[,]" as well as its oral statement at the conclusion of the hearing that "[t]his [c]ourt does retain jurisdiction."[8]

Finally, because the trial court's order established reunification as the secondary permanent plan, "[Sam] continued to have the right to have [DHHS] provide reasonable efforts toward reunifying [Wanda] with her, and the right to have the court evaluate those efforts." *In re C.S.L.B.*, 254 N.C. App. 395, 398, 829 S.E.2d 492, 494 (2017). Accordingly, we remand this matter to the trial court to correct the failure to satisfy the requirement set forth in N.C.G.S. § 7B-906.1(n)(1) and the failure of the trial court to retain jurisdiction and for DHHS to continue reunification efforts in this matter.

CONCLUSION

We affirm the trial court's denial of Sam's motion to continue. We remand to the trial court to address its error in failing to conclude and, if appropriate, include specific language in the *Subsequent Permanency Planning and Review Order* that it is not possible for Wanda to be placed with a parent within six months. Further, we remand to the trial court to correct the failure to satisfy the requirement set forth in N.C.G.S. § 7B-906.1(n)(1) and the failure to retain jurisdiction of this matter, and for DHHS to continue further efforts of reunification.

REMANDED.

Judges TYSON and HAMPSON concur.

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8. We note the trial court did not convert the proceeding into a child custody action under N.C.G.S. Chapter 50 pursuant to N.C.G.S. § 7B-911.

NYAMEDZE QUAICOE, BY AND THROUGH HIS GUARDIAN AD LITEM, SALLY A. LAWING, FAFANYO ASISEH AND OBED QUAICOE, PLAINTIFFS

v.

THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION D/B/A MOSES CONE HEALTH SYSTEM, D/B/A WOMEN'S HOSPITAL; JODY BOVARD STUCKERT M.D., PIEDMONT HEALTHCARE FOR WOMEN, P.A., D/B/A GREENSBORO OB/GYN ASSOCIATES, DEFENDANTS

No. COA20-233

Filed 17 November 2020

Public Officers and Employees—State Health Plan—liens—subject matter jurisdiction—courts

The trial court properly dismissed plaintiffs' motion to reduce the North Carolina State Health Plan's (SHP's) lien on proceeds from a medical malpractice settlement for lack of subject matter jurisdiction (pursuant to Civil Procedure Rule 12(b)(1)) because the SHP is a creature of statute, and neither the state constitution nor the General Statutes confer jurisdiction upon the courts to reduce SHP liens.

Appeal by Plaintiffs from an Order entered 27 September 2019 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 8 September 2020.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, and Nichols Zauzig Sandler, PC, by Charles J. Zauzig, III, and Melissa G. Ray, pro hac vice, attorneys for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara Mary Van Pala, for State Health Plan.

HAMPSON, Judge.

Factual and Procedural Background

Nyamedze Quaicoe (Minor Plaintiff), by and through his Guardian *ad Litem*, Sally A. Lawing, and his parents, Fafanyo Asiseh and Obed Quaicoe, (collectively, Plaintiffs) appeal from an Order entered 27 September 2019 denying Plaintiffs' Motion[1] requesting the

1. Plaintiffs' Motion is captioned "Motion to Reduce Medicaid Lien"; however, Plaintiffs' Motion requested the trial court reduce both the Medicaid lien and the SHP lien.

trial court reduce a North Carolina State Health Plan (SHP) lien on monetary proceeds from a minor settlement. The Record before us shows the following:

In April 2017, Plaintiffs filed a Complaint alleging medical malpractice against the Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System d/b/a Women's Hospital, Jody Bovard Stuckert M.D., Piedmont Healthcare for Women, P.A. d/b/a Greensboro OB/GYN Associates (collectively, Defendants) for serious and permanent injuries Minor Plaintiff sustained during birth. At the time of the incident giving rise to Plaintiffs' medical malpractice claim, Plaintiffs had health insurance coverage through the SHP along with Medicaid. The medical malpractice action was later settled by consent of both parties, approved by the trial court, and placed under seal on 20 May 2019. A trust was created for the disbursement of settlement proceeds for the Minor Plaintiff.

During the course of settlement negotiations, on 25 March 2019, Plaintiffs filed their Motion seeking to have the trial court reduce the monetary amount of liens imposed on the settlement by both SHP and Medicaid. Plaintiffs subsequently secured a voluntary reduction in the Medicaid lien. SHP, however, objected to any reduction of its lien against the settlement proceeds and moved to dismiss Plaintiffs' Motion for lack of subject-matter jurisdiction and for failing to state a claim for which relief can be granted under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. SHP also filed a Notice of Limited Appearance with the trial court, explaining its status as a nonparty but asserting it would appear to argue its Motion to Dismiss.[2]

On 27 September 2019, the trial court entered a written Order denying Plaintiffs' Motion to Reduce State Health Plan Lien (Order). In denying Plaintiffs' Motion, the trial court emphasized "there is no case law or statutory authority for an equitable reduction or waiver of the Plan's lien under N.C. [Gen. Stat.] §135-48.37." Accordingly, the trial court concluded: "This court lacks jurisdiction to reduce or modify the Plan's lien and denies Plaintiffs' Motion. Plaintiffs have failed to state a claim upon which relief may be granted." Plaintiffs filed Notice of Appeal on 22 October 2019.

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2. The State Health Plan initially moved to intervene in Plaintiffs' case; however, its Motion to Intervene was subsequently withdrawn.

Issue

The sole issue before this Court on appeal is whether the trial court erred in denying Plaintiffs' Motion for lack of subject-matter jurisdiction.

Analysis

I. Subject-Matter Jurisdiction

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[ ]" and "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). "A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal." *Banks v. Hunter*, 251 N.C. App. 528, 531, 796 S.E.2d 361, 365 (2017) (citations omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

The North Carolina State Health Plan is codified at N.C. Gen. Stat. §§ 135-48.1 *et seq.*, and was created by the General Assembly "exclusively for the benefit of eligible employees, eligible retired employees, and certain of their eligible dependents, which will pay benefits in accordance with the terms of this Article." N.C. Gen. Stat. § 135-48.2(a) (2019). The General Assembly delegated administration and operation of the SHP to the State Treasurer, *id.* § 135-48.30, and broadly directed "[t]he Plan shall administer one or more group health plans that are comprehensive in coverage." *Id.* § 135-48.2(a).

Section 135-48.37, titled "Liability of third person; right of subrogation; right of first recovery," provides:

> The Plan shall have the right of subrogation upon all of the Plan member's right to recover from a liable third party for payment made under the Plan, for all medical expenses, including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury caused by a liable third party. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise. Notwithstanding any other provision of law to the contrary, the recovery limitation set forth in G.S. 28A-18-2 shall not apply to the Plan's right of subrogation of Plan members.

N.C. Gen. Stat. § 135-48.37(a). Subsection (d) limits, "[i]n no event shall the Plan's lien exceed fifty percent (50%) of the total damages recovered by the Plan member, exclusive of the Plan member's reasonable costs of collection as determined by the Plan in the Plan's sole discretion." *Id.* § 135-48.37(d). A separate section—Section 135-48.24—describes the administrative review process for claims brought under the SHP. *Id.* § 135-48.24.

In part, Plaintiffs requested the trial court "hold a hearing pursuant to N.C. [Gen. Stat.] § 108A-57 and determine the appropriate amount of the lien." In denying Plaintiffs' Motion, the trial court correctly noted Section 108A-57 addresses Medicaid liens and only provides recourse for the trial court to reconsider the amount of a Medicaid lien, *see* N.C. Gen. Stat. § 108A-57(a2) (2019), and, instead, Section 135-48.37 governs liens imposed under the SHP. N.C. Gen. Stat. § 135-48.37. SHP moved the trial court to dismiss Plaintiffs' Motion under N.C.R. Civ. Pro. 12(b)(1) for lack of subject-matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2019). On appeal, Plaintiffs contend the trial court had jurisdiction over Plaintiffs' Motion based on the court's general role in protecting the rights of minors and its inherent judicial power.

The State Health Plan, however, is a creature of statute, created by the General Assembly and administered by the State Treasurer pursuant to Sections 135-48.1 *et seq*. In enacting Section 135-48.37, the General Assembly expressly provided "[t]he Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by . . . settlement[.]" N.C. Gen. Stat. § 135-48.37(a). The SHP is not always entitled to recover a lien in full; the General Assembly limited liens imposed by the SHP under Section 135-48.37 so as not to exceed "fifty percent (50%) of the total damages recovered by the Plan member . . . ." *Id.* § 135-48.37(d); *see State Health Plan for Teachers & State Emps. v. Barnett*, 227 N.C. App. 114, 116, 744 S.E.2d 473, 474 (2013) ("[T]he State Health Plan is authorized to recover up to one-half of the total damages, less attorney's fees, recovered by a Plan member from a third party.").

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris*, 84 N.C. App. at 667, 353 S.E.2d at 675. Here, Plaintiffs have not pointed to any constitutional provision or general statute conferring jurisdiction on the courts of this State to reduce the monetary amount of SHP liens imposed upon a settlement pursuant to N.C. Gen. Stat. § 135-48.37. Instead, Plaintiffs cite a string of cases from our Supreme Court and argue this Court has equitable jurisdiction because of North Carolina courts' strong interest in protecting the rights of minors. However, this Court has clarified: "the

equity powers of neither the trial court nor this Court extend into areas which are expressly governed by statute." *Orange County ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 822, 501 S.E.2d 109, 112 (1998); *c.f. Dare Cnty. v. N.C. Dep't of Ins.*, 207 N.C. App. 600, 611, 701 S.E.2d 368, 376 (2010) ("[T]he extent to which the trial court had subject matter jurisdiction over Petitioners' request for judicial review of the consent order depends upon whether the General Assembly has enacted any statutory provisions authorizing Petitioners to seek and obtain judicial review of the consent order.").

Here, there is no dispute SHP's lien is expressly governed by Section 135-48.37. What Plaintiffs sought from the trial court, and what it now asks of this Court, is to reduce the amount of the SHP lien based on principles of equity. However, Section 135-48.37 does not confer jurisdiction to review the amount of the SHP lien. Although we are sensitive to the facts underlying this case, we are constrained by the language of Section 135-48.37. *Orange County ex rel. Byrd*, 129 N.C. App. at 822, 501 S.E.2d at 112 ("[W]e are not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning." (citing *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977))). Plaintiffs' proper recourse is with the General Assembly as "the judiciary should avoid ingrafting upon a law something that has been omitted which it believes ought to have been embraced." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (alterations, citations, and quotation marks omitted). Therefore, we conclude the trial court was correct in determining it lacked subject-matter jurisdiction over Plaintiffs' Motion.

Plaintiffs also argue the trial court misapplied North Carolina's Administrative Procedure Act and erred in concluding Plaintiffs failed to state a claim upon which relief may be granted under N.C.R. Civ. P. 12(b)(6), which determination Plaintiffs contend should be reviewed for abuse of discretion arguing it was based on a misapprehension of the law. However, because we conclude the trial court was correct in determining it did not have subject-matter jurisdiction over Plaintiffs' Motion, we do not reach Plaintiffs' subsequent arguments.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

SHORT v. CIRCUS TRIX HOLDINGS, LLC

[274 N.C. App. 311 (2020)]

CHARLES J. SHORT, PLAINTIFF
v.
CIRCUS TRIX HOLDINGS, LLC; SKY ZONE LLC; SKY ZONE FRANCHISE GROUP, LLC; SKYZONE ASHEVILLE, LLC D/B/A SKYZONE TRAMPOLINE PARK; AND JOHN DOES 1-3, DEFENDANTS

No. COA20-285

Filed 17 November 2020

Agency—waiver of liability—arbitration agreement—wife signed for husband—factual dispute regarding agency relationship—remanded for additional findings

In plaintiff's action to recover damages for injuries that he sustained at a trampoline park, the trial court's order denying defendant's motion to compel arbitration was vacated and the matter remanded for additional findings resolving factual disputes on the issue of agency. Although the trial court concluded there was no valid arbitration agreement because plaintiff had not read or signed the park's liability waiver (which contained an arbitration clause), the court's order did not address whether plaintiff's wife was acting on his authority, whether actual or apparent, when she signed the liability waiver for both of them and their three children, thereby creating an agency relationship and binding plaintiff to the arbitration agreement.

Appeal by Defendants from an Order entered 13 September 2019 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2020.

Davis Law Group, P.A., by Brian F. Davis, for plaintiff-appellee.

Cranfill Sumner & Hartzog, LLP, by John W. Ong, Meredith F. Hamilton, and Steven A. Bader, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

Circus Trix Holdings, LLC, Sky Zone, LLC, Sky Zone Franchise Group, LLC, and Sky Zone Asheville, LLC d/b/a Sky Zone Trampoline Park (collectively, Defendants) appeal from the trial court's 13 September 2019 Order denying Defendants' Motion to Compel Arbitration where the trial court ruled there was no valid agreement to arbitrate between the parties. The Record before us tends to show the following:

On 4 April 2019, Charles J. Short (Plaintiff) filed a First Amended Complaint[1] (Complaint) asserting Defendants violated North Carolina's Device Safety Act and were negligent in connection with injuries Plaintiff sustained while visiting Defendants' trampoline park in Asheville, North Carolina. Plaintiff alleged on or about 27 January 2018, Plaintiff and his wife decided to celebrate their daughter's birthday at Sky Zone Asheville trampoline park. On or about that same date, Plaintiff's wife visited Sky Zone Asheville's website to book the party. As part of the online booking process, Plaintiff's wife filled out and signed liability waivers for Plaintiff and the couple's three children. Plaintiff further alleged, at no time prior to the incident in question, did Plaintiff know about his wife's signing a waiver, nor did he authorize her to do so. The Complaint further alleged, upon arrival at Sky Zone Asheville, Plaintiff and his group were "checked in" by a manager, then the group removed and stowed their shoes.

Plaintiff asserted he then began to "look around the facility to see what other activities were offered" before making his way to the "free climb" wall. Plaintiff claimed he asked the attendant for direction on "what to do" and the attendant responded "just climb the wall and jump into the foam pit. Keep your feet apart when you jump." Plaintiff then climbed the wall and, before jumping off, asked the attendant: "And I can just jump off?" The attendant responded, "jump away from the wall, land feet first. Go ahead and jump." Plaintiff claimed he did as the attendant instructed, and when he entered the pit and his feet impacted the floor, he fractured both his right and left tibias.

On 16 July 2019, Defendants filed their Motions to Dismiss and Answer to Plaintiff's First Amended Complaint (Answer). In their Answer, Defendants alleged "Plaintiff signed a Participant Agreement, Release and Assumption of Risk with Sky Zone . . . contain[ing] an arbitration provision which is specifically highlighted by requesting that the signor place an 'X' acknowledging that he/she read the clause." Defendants also argued the trial court lacked subject-matter jurisdiction based on the signed agreement containing the arbitration clause. Defendants admitted all customers are required to read and sign a "Participation Agreement, Release and Assumption of Risk" (Agreement) online or at the facility prior to being allowed to use Sky Zone Asheville's facilities and equipment. Defendants also admitted an Agreement "was signed by or for Plaintiff[.]" Defendants further raised a number of affirmative defenses including: Release and Waiver; Arbitration, as set forth in the Agreement; and Contractual Limitations.

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1. Plaintiff filed an earlier Complaint on 25 January 2019 alleging Defendants' negligence and "wanton conduct" caused Plaintiff's injuries.

Also on 16 July 2019, Defendants filed a Motion to Compel Arbitration and Stay Proceedings (Arbitration Motion). Defendants attached an Affidavit of Sky Zone (Defendants' Affidavit)—completed by Sky Zone Asheville General Manager Travis Wilson Fowler—and a copy of the Agreement purportedly signed by Plaintiff. Defendants alleged Plaintiff "electronically signed the agreement for himself" and "entered into the Agreement in consideration of Plaintiff being allowed to use the Sky Zone Asheville facilities and equipment . . . ." The Agreement's arbitration clause states:

> I understand that by agreeing to arbitrate any dispute . . . I am waiving my right, and the right(s) of the minor child(ren) above, to maintain a lawsuit against [Defendants] . . . for any and all claims covered by this Agreement. By agreeing to arbitrate, I understand that I will NOT have the right to have my claim determined by a jury . . . .

In Defendants' Affidavit, Travis Fowler stated he became the general manager in January 2018 and was the general manager at the time Plaintiff was injured. Fowler then explained Sky Zone Asheville's policies and procedures regarding Participation Agreements and customers using Sky Zone Asheville's facilities. Fowler stated all participants must sign an Agreement before entering and using the facilities. In addition, "all participants had to check in and be provided with a temporary sticker" in order to confirm they "had signed and acknowledged the Agreement." According to Fowler, temporary stickers were not "provided to those individuals who had not executed the Agreement, either online or in person."

Fowler stated Sky Zone Asheville's "online system for the execution of the Agreement" recorded information about the participant and this information "was then used when the participant arrived in order to confirm their execution of the agreement." Fowler also asserted, on the day of Plaintiff's injury, Plaintiff would have been asked if [he] had completed the Agreement online." Those who had not completed the agreement online would have been directed to a "Waiver Station Kiosk" where they would complete the Agreement and receive a receipt. A participant would then take this receipt to the check-in counter where the participant would buy a ticket and receive a temporary sticker. Participants who advise they completed the Agreement online are directed to the check-in counter where a Sky Zone Asheville employee checks the online system to confirm completed Agreements before participants buy a ticket and receive a sticker. Moreover, Fowler stated in January 2018, there were Guest Responsibility signs placed throughout the facility

advising participants they were required to execute the Agreement and of other warnings.

On 28 August 2019, Plaintiff filed a Response to Defendants' Motion to Compel Arbitration and Stay Proceedings (Response). In this Response, Plaintiff asserted he did not sign the Agreement; Plaintiff's wife signed the Agreement for him without Plaintiff's "permission or authorization;" at no time "before, during, or after his arrival at Sky Zone Asheville did Plaintiff expressly or impliedly enter into any agreements with Sky Zone Asheville;" and there "was never a mutual agreement, or meeting of the minds, between the parties." Plaintiff submitted affidavits from himself and his wife with this Response.

In his affidavit, Plaintiff asserted he went to Sky Zone Asheville on 27 January 2018, to celebrate, as part of a group totaling approximately twenty-six people, his daughter's birthday. According to Plaintiff, as the group entered Sky Zone Asheville, "a male employee approached [the group] and inquired if we had signed up and purchased tickets online." Plaintiff's wife, and some of the other adults, replied they had signed up online and the employee took them to a counter to "complete the check-in process." Another employee approached Plaintiff, some of the remaining adults, and the fourteen children and led them to an area where the group could remove and stow their socks and shoes. Then, Plaintiff's wife approached from the check-in counter and handed Plaintiff socks for use in the facility. Plaintiff's affidavit then recounted the events alleged in the Complaint leading up to and including his injury.

The remainder of Plaintiff's affidavit states "at no time prior to the incident in this case," did any Sky Zone Asheville employee ask Plaintiff if he had signed an online agreement or waiver or direct Plaintiff to a "Waiver Station Kiosk." Plaintiff further asserted at no time prior to the incident did he notice the "Waiver Station Kiosk" or "anything inside Sky Zone Asheville . . . that alerted [Plaintiff] to the need and/or requirement for signing any agreement and/or waiver." Plaintiff asserted he did not know, nor did he "have reason to know," his wife had completed an online agreement waiving any of his legal rights, and he did not authorize his wife, expressly or impliedly, to do so. Moreover, according to Plaintiff, his wife did not seek his permission to sign any agreement or waiver.

For her part, Plaintiff's wife, Deanna Short, stated in her affidavit she "went online to Sky Zone's website and filled out the required paperwork" for Plaintiff and their children. Plaintiff's wife stated she did not ask Plaintiff's permission to do so, nor did she tell or notify Plaintiff she had signed the Agreement for Plaintiff. According to Plaintiff's wife,

when the group entered Sky Zone Asheville, an employee "approached us and inquired if we had signed up and purchased tickets on-line." Plaintiff's wife said she had, as did some of the other adults, and the employee took her to the check-in counter. Plaintiff's wife asserted the employee asked her if she had completed the paperwork online and she said she had, but did not recall "being given any tickets and/or any temporary stickers by the Sky Zone employee . . . ." Plaintiff's wife further asserted the employee did not ask if Plaintiff had signed the Agreement, nor did the employee ask her to "go get [Plaintiff] . . . so that he could confirm that he had electronically signed the agreement and/or waiver[.]" Plaintiff's wife then recounted handing Plaintiff socks for the group and being alerted to Plaintiff's injury.

The trial court heard Defendants' Motion at a 3 September 2019 hearing. Almost immediately after the hearing began, the trial court stated, "what it boils down to, correct me if I'm wrong, it boils down to whether or not Mr. Short signed the arbitration." The trial court continued: "If [Plaintiff] signed it, okay, he's subject to arbitration. If he didn't sign it, he's not subject to arbitration." The trial court then asked if Defendants had any evidence showing Plaintiff, in fact, signed the Agreement and counsel replied they did not. However, Defendants' counsel stated the affidavits showed Plaintiff's wife did sign the Agreement for Plaintiff as—Defendants claimed—his agent. Defendants' counsel asserted Plaintiff "knew, according to his affidavit, that [Plaintiff's wife] responded in the affirmative that she had signed up and purchased tickets online. He was also aware that she went to complete the check-in process while he was there." Counsel further stated Plaintiff was only allowed entry after Plaintiff's wife completed the check-in process and that there were signs posted alerting participants "must have completed and signed the agreement." Defendants' counsel continued to reiterate Plaintiff's wife completed the check-in process, with Plaintiff's knowledge, and Plaintiffs wife told Sky Zone Asheville employees she had "completed the paperwork online[.]"

Plaintiff's counsel responded saying, based on the affidavits, Plaintiff did not enter into any agreement with Defendants and that Plaintiff hearing his wife "sign[ed] up and [bought] tickets online" was not sufficient to alert Plaintiff she had signed the Agreement for him. Counsel further asserted: "at no time did [Plaintiff], either through implication or an express agreement or apparent agency situation, . . . ever say you have my permission to sign an agreement for me." Both Plaintiff's and Defendants' counsel continued to argue whether the affidavits showed there was an agreement, whether Plaintiff was aware of

the requirement to sign a waiver or agreement, and whether Plaintiff's wife acted as his agent—to include signing the Agreement.

At the close of oral arguments, the trial court denied Defendants' Motion. Defendants' counsel asked the court to include "factual findings in the denial;" the trial court agreed, and Plaintiff's counsel stated he would draft the Order and findings. The trial court told Plaintiff's counsel to "do findings of fact as to what transpired with everything."

On 13 September 2019, the trial court issued an Order denying Defendants' Motions to Dismiss and Compel Arbitration. The Order contained Findings of Fact including: Plaintiff's wife completed the online check-in process and paperwork on Sky Zones Asheville's website; Plaintiff's wife "checked" the clause in the Agreement titled "Arbitration of Disputes;" Plaintiff's wife typed Plaintiff's name into the end of the Agreement form; and Plaintiff did not know his wife completed the Agreement form by entering Plaintiff's name and information. The trial court accepted the sequence of events beginning with Plaintiff and his family arriving at Sky Zone Asheville and ending with the completion of the check-in process as stated in Plaintiff's and his wife's affidavits. The trial court also found Plaintiff did not see the signs alerting participants of the need to sign waivers as referenced in Defendants' affidavit.

Based on the affidavits and oral arguments, the trial court concluded there was "no mutual agreement and no meeting of the minds between Plaintiff . . . and Defendants[,]" necessary for a valid agreement to arbitrate under North Carolina law. The trial court further concluded: "Because Plaintiff . . . had not read the Agreement, Sky Zone's attempt to bind him to the arbitration clause is not sufficient to prove the necessary mutual agreement between the parties." Accordingly, the trial court held the Agreement's arbitration clause was "unenforceable against" Plaintiff.

On 11 October 2019, Defendants timely filed a written Notice of Appeal from the trial court's 13 September Order denying Defendants' Motion to Compel Arbitration.

Issue

The dispositive issue on appeal is whether the trial court's Findings of Fact adequately resolve the factual disputes between the parties as to the existence of a valid arbitration clause to support its denial of Defendants' Motion to Compel Arbitration.

Analysis

Defendants' appeal of the trial court's Order is interlocutory. "Generally, there is no right of immediate appeal from interlocutory

orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). "[T]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289-90, 681 S.E.2d 512, 514 (2009) (citation and quotation marks omitted). Accordingly, Defendants' appeal is properly before us.

"When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). When reviewing the denial of a motion to compel arbitration, findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. *Bookman v. Britthaven, Inc.*, 233 N.C. App. 454, 457, 756 S.E.2d 890, 893 (2014). "Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Id.* (citation and quotation marks omitted). Moreover, when deciding pretrial motions, "[i]f the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005).

In this case, the parties dispute the existence of a valid arbitration agreement. Plaintiff contends he never signed the Agreement himself and he did not know his wife signed the Agreement, nor did he authorize her to do so. At the hearing, Defendants argued Plaintiff's wife signed the Agreement as Plaintiff's agent and Defendant Sky Zone Asheville relied on that authority. Defendants' counsel admitted there was not evidence Plaintiff signed the Agreement himself, but there was evidence Plaintiff was aware his wife signed Plaintiff up online. Defendants' counsel also argued there was evidence Plaintiff was, or should have been, aware the sign up and check-in process included waivers as there were signs posted in the facility alerting customers of this requirement. Plaintiff's affidavit asserts he did not recall seeing such signs.

Based on these arguments and the affidavits in the Record, the trial court found: (1) Plaintiff's wife signed the Agreement for him, without

Plaintiff's knowledge; (2) Plaintiff did not sign the Agreement; and (3) Plaintiff was not aware of the need to sign the Agreement. The trial court then concluded as a matter of law: (1) because Plaintiff did not sign the Agreement, there was no "mutual agreement and no meeting of the minds" between Plaintiff and Defendants; (2) because Plaintiff had not read the Agreement, there was no mutual agreement to which Defendants could bind Plaintiff; and therefore (3) the Agreement's arbitration clause was unenforceable against Plaintiff.

However, "[t]he law of contracts governs the issue of whether an agreement to arbitrate exists." *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005). An agent may contractually bind a principal to a third party if the third party can establish an agency relationship between the principal and agent. *Bookman*, 233 N.C. App. at 457-58, 756 S.E.2d at 893-94. "An agent's authority to bind [a] principal . . . can be shown only by proof that the principal authorized the acts to be done or that, after they were done, [the principal] ratified them." *Id.* "Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent [the agent] possesses[,]" and the principal's liability "must be determined by what authority the third person in the exercise of reasonable care was justified in believing" the principal conferred to the agent. *Id.* at 458, 756 S.E.2d at 894.

At the motion hearing, Defendants argued, generally, such an agency relationship existed between Plaintiff and his wife, and Defendants relied on Plaintiff's manifestations holding his wife out as his agent. For its part, the trial court made no findings of fact as to whether an agency relationship existed between Plaintiff and his wife on any of the above agency theories. The trial court's findings only addressed the uncontested fact Plaintiff did not sign the Agreement. The trial court did not address the central factual disputes as to whether an agency relationship between Plaintiff and his wife existed such that Plaintiff's wife could bind him to the Agreement. The trial court accepted the affidavits as true without weighing the parties' incompatible narratives on what those affidavits proved as to agency.

On appeal, Plaintiff argues no such agency relationship existed and we should presume the trial court found there was no agency relationship. Defendants argue Plaintiff's wife had actual and/or apparent authority to bind Plaintiff to the Agreement, or in the alternative, the trial court made no such findings which we can review. The Record—through affidavits and oral arguments—reflects a number of factual disputes regarding agency. Because the trial court did not decide the

key factual issue of agency, we cannot, in turn, decide the issue as a matter of law. *See Parker v. Town of Erwin*, 243 N.C. App. 84, 99, 776 S.E.2d 710, 722 (2015) ("the trial judge had the responsibility of acting as a fact-finder . . . and was responsible for determining the weight and sufficiency of the evidence" (citations and quotation marks omitted)). Accordingly, we vacate the trial court's Order and remand to the trial court for appropriate findings of fact to resolve the parties' factual disputes regarding agency and to support its conclusion as to whether the parties mutually agreed to arbitration. *See Bookman*, 233 N.C. App. at 461, 756 S.E.2d at 896 (reversing and remanding a trial court's denial of a motion to compel arbitration because the trial court made no findings of fact concerning apparent authority).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter to the trial court for additional proceedings on the question of agency.

VACATED AND REMANDED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
NOWLIN POWELL CROOKS

No. COA20-146

Filed 17 November 2020

1. Criminal Law—jury instructions—possession of a firearm by a felon—defense of justification

In a possession of a firearm by a felon case where, in the light most favorable to defendant, the evidence showed defendant grabbed the firearm from an intoxicated man in a trailer after the man fired the gun into a wall near him, defendant then left the trailer to find someone sober to take the gun, and defendant did not dispose of the gun—but could have—once he left the trailer and continued to possess the gun in the presence of others, the trial court properly denied defendant's request for a jury instruction on the defense of justification. Any impending threat of death or serious bodily injury ended when defendant left the trailer with the gun and

he was required to relinquish possession of the firearm once the threat was gone.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

In a case involving possession of a firearm by a felon where defendant's counsel had not calculated his hours worked at the time of sentencing and the trial judge told defendant that once counsel calculated the hours the court would sign what it felt to be a reasonable fee, the court's later entry of a civil judgment for $2,220 without informing defendant of the specific amount deprived defendant of a sufficient opportunity to address the court on the entry of judgment for that amount. Therefore, the civil judgment was vacated and remanded for further proceedings.

Appeal by defendant from judgments entered 19 September 2019 and 20 September 2019 by Judge Kevin M. Bridges in Catawba County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Stephen G. Driggers for defendant.

DIETZ, Judge.

Defendant Nowlin Crooks appeals his conviction for possession of a firearm by a felon, arguing that he was entitled to a jury instruction on the defense of justification. He also challenges the civil judgment entered against him for the attorneys' fees of his court-appointed counsel.

As explained below, the trial court properly declined to instruct on justification because undisputed trial evidence showed that Crooks continued to possess the firearm well after any potential threat had ended despite many options for relinquishing possession. We therefore find no error in the trial court's criminal judgment.

The State concedes error with respect to the civil judgment for attorneys' fees because Crooks was not provided sufficient opportunity to be heard. We agree and therefore vacate that judgment and remand for further proceedings.

Facts and Procedural History

This case involves two versions of events so deeply inconsistent that telling both accounts is impractical. Because this appeal concerns

the sufficiency of evidence supporting a jury instruction on justification, we recount the version of events described by Defendant Nowlin Crooks, which is the more favorable version for his argument, and ignore the accounts of the State's witnesses, who offered a dramatically different version of events. *State v. Mercer*, 373 N.C. 459, 464, 838 S.E.2d 359, 363 (2020).

In August 2017, Crooks was walking to the store when he passed by David Harrison's home in a trailer park. Harrison was on his porch and invited Crooks inside for a drink. Crooks and Harrison began drinking bourbon. The two men had seven or eight shots of bourbon.

While the two men were drinking, Harrison suddenly stood up while only a few feet from Crooks, pulled a pistol out of his pocket, pointed it toward the wall near Crooks, and fired a shot at the wall. Before pulling out the gun, Harrison had not threatened Crooks in any way. Harrison also did not appear angry or upset. As soon as Harrison fired the shot at the wall, Crooks stood up, grabbed the pistol from Harrison, and left the trailer.

Crooks then went looking for a woman named Karen Tucker, who was dating his father. Crooks believed that Tucker likely would be sober and safely could take the gun from him. Crooks went to a nearby trailer and knocked on the door. Karen Tucker's daughter Lacey answered the door, but Crooks did not give the gun to Lacey because Crooks worried that she was high on drugs. Lacey's sister Echo also was present in the trailer. Echo told Crooks that Karen was nearby in Crooks's father's trailer. Crooks testified that he did not try to go to his father's trailer after learning that Karen was there because the "sheriffs got over there." Instead, Crooks waited with the gun in his possession, in the presence of Lacey and Echo, until Karen arrived. Crooks then gave Karen the gun.

Law enforcement who responded to the trailer park found a number of intoxicated people outside the trailers, including Harrison and Crooks. Harrison claimed that Crooks stole the gun from his living room while Harrison was in the bathroom. Karen Tucker's daughter Lacey told officers that Crooks pounded on the door to her trailer and, when she opened it, Crooks pointed the gun at her and went into the kitchen of the trailer with her while holding the gun to her head.

Crooks told the officers he took the gun from Harrison after Harrison held it close to him and fired a shot at the ceiling. None of the other witnesses heard any gun shots. Officers searched the inside of Harrison's trailer and did not find any bullet holes but did find a shell casing sitting on a coffee table.

The State later charged Crooks with a number of offenses, including possession of a firearm by a felon. At trial, Crooks requested a jury instruction on the defense of justification. The trial court denied the request. The jury found Crooks guilty of possession of a firearm by a felon. The trial court sentenced Crooks to 25 to 39 months in prison and also entered a civil judgment of $2,220 against Crooks for the attorneys' fees of his court-appointed counsel. Crooks filed a timely *pro se* notice of appeal that had a number of procedural defects. Crooks never served the notice of appeal on the State.

Crooks later petitioned for a writ of certiorari to remedy the defects with his notice of appeal. The State does not oppose the petition. In our discretion, we allow the petition and issue a writ of certiorari to address the merits of this appeal. *See* N.C. R. App. P. 21.

Analysis

I. Jury instruction on defense of justification

[1] Crooks first argues that the trial court erred by denying his request for a jury instruction on the defense of justification. Ordinarily, when a defendant requests specific jury instructions, the trial court "must give the instructions requested, at least in substance, if they are proper and supported by the evidence." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015). On appeal, we review de novo whether the evidence supported the requested instruction. *Id.* at 393, 768 S.E.2d at 621.

The doctrine of justification is available as a defense to the charge of possession of a firearm by a felon. *State v. Mercer*, 373 N.C. 459, 463, 838 S.E.2d 359, 362 (2020). The justification defense is appropriate when, taken in the light most favorable to the defendant, there is evidence of each of the following factors:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464, 838 S.E.2d at 363.

Here, the evidence at trial was insufficient to establish the first factor of the *Mercer* test. Even assuming that Harrison's drunken act of firing

his pistol into the wall or ceiling of his house represented an "impending threat of death or serious bodily injury" to Crooks, that threat was gone once Crooks left Harrison's trailer with the gun. But after that point, undisputed evidence showed that Crooks continued to possess the gun. He admitted at trial that he could have disposed of the gun in various ways, such as throwing it on a roof or hiding it somewhere until police arrived. More importantly, Crooks testified that, once he took the gun to the Tuckers' home and learned that Karen Tucker was not there, he continued to possess the gun and remain inside that home with Tucker's two daughters, even after they informed Crooks that their mother Karen was at a nearby trailer with Crooks's father.

When asked why he stayed instead of going to his father's trailer at that point, Crooks explained that it was because "the sheriffs got over there" and that he had no other explanation:

> Q: Okay. But you stayed at Karen's place until she arrived?
>
> A: Yes. . . .
>
> Q: Why didn't you leave and go to your dad's place?
>
> A: The sheriffs got over there.
>
> Q: How did you know that?
>
> A: Because Echo called them. That's the other sister.
>
> Q: Why didn't you leave to go give her the gun?
>
> A: I just didn't.

In light of this evidence, Crooks failed to show that his possession of the gun was justified because he was in imminent danger. The danger had ended. But Crooks chose to keep possession of the gun in the presence of other people. The law does not permit Crooks that choice; once the threat (assuming one actually existed) was gone, Crooks was required to relinquish possession of the firearm. *See State v. Craig*, 167 N.C. App. 793, 796–97, 606 S.E.2d 387, 389 (2005). Thus, the trial evidence did not support the first factor of the *Mercer* test and the trial court properly declined to provide a jury instruction on justification.

II. Attorneys' fees

[2] Crooks next argues that the trial court improperly imposed attorneys' fees without providing notice and an opportunity to be heard. The State concedes error and we agree.

Before imposing a judgment for the attorneys' fees of a defendant's court-appointed counsel, "the trial court must afford the defendant notice and an opportunity to be heard." *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018). To afford the necessary opportunity to be heard, "trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. "Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

Here, Crooks's counsel had not calculated the number of hours worked on the case at the time of sentencing. The trial court explained to Crooks at sentencing that "your attorney will calculate the time that he has expended in representing you. He will submit the total of his hours to me. I will sign what I feel to be a reasonable fee." The court later entered a civil judgment for $2,220 in attorneys' fees without first informing Crooks of that amount and providing Crooks the opportunity to address the entry of a civil judgment for that amount.

We agree with the parties that, under *Friend*, Crooks was not provided sufficient opportunity to be heard before entry of this civil judgment. We therefore vacate the civil judgment and remand for further proceedings on that issue in the trial court.

Conclusion

We find no error in the trial court's criminal judgment. We vacate the civil judgment for attorneys' fees and remand that matter for further proceedings.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JAMALL MONTE GLENN

No. COA20-65

Filed 17 November 2020

1. Robbery—with a dangerous weapon—other related offenses—identity of perpetrator—sufficiency of evidence

In a prosecution for robbery with a dangerous weapon and other related offenses, the trial court properly denied defendant's motion to dismiss where there was sufficient evidence showing defendant was the perpetrator of each offense, including the robbery victim's multiple descriptions of the robber and of his car—each one of which matched defendant and his car—and the victim's in-court identification of defendant as the robber. Although the victim identified someone other than defendant in a photo lineup, and defendant reported that his car was stolen from him at gunpoint on the night of the robbery, these contradictions in the evidence were for the jury to resolve.

2. Conspiracy—criminal—robbery with a dangerous weapon—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit robbery with a dangerous weapon where the evidence permitted a reasonable inference by the jury that defendant conspired with two other people to commit the robbery. Specifically, one of the victims described three individuals threatening him and his wife at gunpoint, defendant shooting him before taking his phone and wallet, and the three individuals fleeing together in defendant's car; additionally, law enforcement apprehended one of the individuals inside the car after it crashed, found the gun along with the stolen items inside the car, and secured surveillance footage of defendant and his girlfriend fleeing from the crash site.

3. Evidence—relevance—impeachment—witness's civil suit against third party—interest in outcome of defendant's trial

In a prosecution for robbery with a dangerous weapon and other related offenses, the trial court properly sustained the State's objection on relevance grounds when defendant, on cross-examination, asked the victim about a civil lawsuit he filed against the owner of the parking lot where the armed robbery took place (alleging inadequate security), where defendant was identified in the lawsuit as

the robber. Because it was unnecessary to prove that defendant was the robber in order to prevail against the parking lot owner in the civil suit, the pendency of that suit did not prove the victim's interest in the outcome of defendant's trial, and therefore was inadmissible to impeach the victim.

4. Identification of Defendants—in-court—due process rights—witness credibility

In a prosecution for robbery with a dangerous weapon and other related offenses, there was no plain error where the trial court did not intervene ex mero motu to exclude the robbery victim's in-court identification of defendant as the perpetrator of the offenses. The identification did not violate defendant's due process rights where nothing indicated that it had been tainted by an "impermissibly suggestive" pre-trial identification procedure. Furthermore, defendant had ample opportunity to test the reliability of the in-court identification by cross-examining the victim about any improper factors that may have influenced him when he identified defendant.

Appeal by Defendant from judgments entered 22 July 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

COLLINS, Judge.

Defendant Jamall Monte Glenn appeals from judgments entered upon jury verdicts of guilty of robbery with a dangerous weapon, two counts of assault with a deadly weapon with intent to kill and inflicting serious injury, two counts of attempted first-degree murder, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. Defendant argues that (1) there was insufficient evidence of both his identity as the perpetrator and of a conspiracy to commit robbery with a dangerous weapon; (2) the trial court erred by sustaining the State's objection to a question asked on cross-examination concerning a civil lawsuit filed by a witness; and (3) the trial court committed plain error by failing to strike ex mero motu an in-court identification of Defendant as the perpetrator. We discern no error.

I. Procedural History

On 3 January 2017, Defendant was indicted on two counts of attempted first-degree murder, two counts of robbery with a dangerous weapon, two counts of assault with a deadly weapon with intent to kill and inflicting serious injury, one count of conspiracy to commit robbery with a dangerous weapon, one count of possession of a firearm by a felon, and one count of resisting a public officer. Before trial, the State dismissed the misdemeanor resisting arrest count and one count of robbery with a dangerous weapon. Defendant was tried before a jury in Mecklenburg County Superior Court between 15 and 22 July 2019. At the conclusion of the State's evidence, Defendant moved to dismiss all charges. The trial court denied the motion. Defendant did not present any evidence and renewed his motion to dismiss, which the court again denied. The jury found Defendant guilty of all charges, and the trial court sentenced Defendant to consecutive prison terms of 180 to 228 months, 180 to 228 months, and 60 to 84 months. Defendant gave notice of appeal in open court.

II. Factual Background

The evidence at trial tended to show the following: Between 7:00 and 7:30 p.m. on 17 December 2016, Bruce and Joanne Parker went to dinner with a group of friends in Charlotte, North Carolina. After dinner, the Parkers walked to a nearby brewery. Between 10:30 and 10:45 p.m., the Parkers left the brewery to return to their pickup truck, which they had parked before dinner. The parking lot was large, dark, and had few other cars.

As Mr. Parker approached, he saw a medium-sized dark-colored car that had backed into the parking spot next to the driver's side of their truck. Mrs. Parker saw at least three people in the car. Mr. Parker first went to the passenger side of the truck to open the door for Mrs. Parker. Once Mr. Parker had moved around to the driver's side of the truck, he heard someone at the back of the dark-colored car, near its trunk, ask "Hey, man, do you have a jack?" Mr. Parker saw a silhouette of a person at the back of the car; Mrs. Parker saw "a black individual [who] had long dreadlocks." Mr. Parker responded that he did not have a jack.

Immediately after, Mr. Parker saw the driver's side door of the car opening. He saw a "large black male . . . [who] had a little difficulty getting out of [the car] because he was such a large man." Mr. Parker estimated that the man was approximately six feet two to six feet three inches tall and described him as heavy set, with short hair, and having a "kind of a large face with puffy cheeks."

After exiting the driver's side door of the car, the man told Mr. Parker, "Don't resist." This was a different voice than had asked for a jack. Mr. Parker responded by putting his hands up and saying, "Here, take what you want." At that point, Mr. Parker estimated that the man who had exited the driver's side of the car was a foot to a foot and a half away from him. The man forced Mr. Parker to the ground. Once he was on the ground, Mr. Parker was shot in his side. At that time, he saw only the man who had exited the car. After being shot, Mr. Parker handed the man his wallet and his phone.

Mrs. Parker then started to come around to the driver's side of the truck and asked her husband if he was okay. At that point, she heard someone say to her, "shut the f*#k up, bi*#h." When she reached the back of the truck, she saw a "very large" black male "holding a gun in his right hand" leaning over the open driver's side door of the car. She then felt a searing pain in her abdomen as she was shot.

That night, two officers with the Charlotte-Mecklenburg Police Department, Shabeer Mohammad and Bret Balamucki, were preparing for off-duty work. While driving in Balamucki's police car, the officers heard a gunshot nearby. They turned into the parking lot where they believed the gunshot occurred and Balamucki saw Mrs. Parker falling. Mohammad exited the patrol car and observed Mr. Parker hunched over. The dark-colored car was exiting the parking lot, approximately fifty to sixty feet away, and Mr. Parker pointed out the car to Mohammad and identified the driver as the shooter. Mohammad saw a "black Toyota Camry with a large black male wearing a black jacket on the driver's side of the vehicle" who was "either putting something in the vehicle or trying to enter the vehicle." Balamucki observed a "large black male wearing a black jacket" who was "very husky, with short hair" entering the car and throwing something in the floorboard behind the driver.

Balamucki, still in his patrol car, began to pursue the Camry as it drove away. He followed the Camry out of the parking lot and maintained pursuit without losing sight until it collided with another car near Novant Health Presbyterian Hospital, crashed into a barrier, and came to a stop. Balamucki approached the accident and "observed two African-American males running from the car" towards the hospital. He could not tell what seat each of the men had gotten out of. He could tell, however, that one of the men running toward the hospital parking garage was the same person whom Mr. Parker had identified as the shooter and who had gotten into the back of the Camry.

Balamucki exited his car and pursued one of the men, who had dreadlocks and was wearing a peacoat-style black jacket. As he did so,

he saw the other man going into the parking garage. Balamucki apprehended the man in the peacoat, who was identified as Antonio Worthy. Surveillance video showed two persons in the hospital garage, a "heavy set, tall black male with a short haircut" and "a light-skinned black female with a heavy coat on, long hair, [and] dark colored pants." The two were recorded exiting the garage at 12:16 a.m.

On the driver's seat floorboard of the crashed car, officers found the gun used to shoot the Parkers. Mr. Parker's cell phone and wallet were also recovered from the car, as was a purse and driver's license belonging to Ebonee Ward.

While Balamucki was pursuing the Camry, the Parkers were taken to the hospital. Before being taken to surgery, Mr. Parker again gave a description of the shooter. Mr. Parker recalled describing the shooter as "a black male . . . approximately 280 pounds, 6-foot-2, and short hair." Officer Joseph Ellis, who briefly spoke with Mr. Parker in an elevator at the hospital, testified that Mr. Parker described the shooter as "[a] big black guy," and that Mr. Parker agreed that the shooter looked six foot five and 300 pounds. During the investigation, Mr. Parker gave officers a description of the shooter as having "a large face" and being "heavyset" with a "round face, with large facial features," and "puffy cheeks." He could not recall what the shooter was wearing.

At around 1:00 a.m. on 18 December, Defendant called the police to report a carjacking. When officers arrived to take the report, Ms. Ward was present and Defendant identified her as his girlfriend. Defendant reported that at around 9:00 p.m. the previous night he was pumping gas when someone held him at gunpoint, made Ms. Ward and him remove their clothes, and took his 2013 black Toyota Camry and his belongings. The paperwork and vehicle identification number that Defendant provided for the Camry showed that it was the same Camry involved in the shooting of the Parkers. After Defendant gave another statement concerning the alleged carjacking, officers noticed multiple inconsistencies in the details of the report.

Approximately three to four days after the shooting, a detective with the Charlotte-Mecklenburg Police Department came to Mr. Parker's hospital room and asked him to look at a photo lineup. At that time, Mr. Parker was unsure that he could identify the shooter, but agreed to look at the lineup. Mr. Parker identified one of the six persons in the photo lineup as the shooter. Though Defendant's photo was in the lineup, Mr. Parker identified another person. Mr. Parker did not learn that he had not identified Defendant until the day prior to the trial.

On redirect examination, Mr. Parker indicated that he was able to make out the shooter's face during the attack. The prosecution asked Mr. Parker, "Whose face were you able to make out?" Mr. Parker then, without objection, identified Defendant in the courtroom. Mr. Parker indicated that Defendant was "pretty much the same man as he was that night," only that he "appear[ed] a little bit thinner."

III. Discussion

A. Sufficiency of the Evidence

Defendant first argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence both that he was the perpetrator of the offenses, and that there was a conspiracy to commit robbery with a dangerous weapon. We disagree.

This court reviews a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455 (quotation marks and citations omitted).

1. Identity of the Perpetrator

[1] The State introduced the following evidence at trial that Defendant was the perpetrator of the attack: When the officers arrived on scene, Mr. Parker pointed to a black Toyota Camry with a temporary license plate

and a man nearby and said, "That's the guy who shot me." Balamucki looked and saw "a large black male wearing a black jacket, with a black hood. Darker pants. And he's . . . very husky, with short hair." Likewise, Mohammad saw Mr. Parker point and heard him say, "He just shot me." When Mohammad looked, he saw "a black Toyota Camry with a large black male wearing a black jacket on the driver's side of the vehicle. Kind of either putting something in the vehicle or trying to enter the vehicle." That night, Mr. Parker told officers that his attacker "was approximately 6-2. Approximately 280 pounds. A black male. And short hair." While Mr. Parker was hospitalized, he described the shooter as "a large male" with "a large face" who was "heavy set" with "puffy cheeks."

These descriptions matched a person shown on surveillance footage walking through the Novant Health Presbyterian Hospital parking garage after the black Toyota Camry collided with another car near the hospital, crashed into a barrier, and came to a stop. Defendant was the owner of the black Toyota Camry.

Additionally, Mr. Parker identified Defendant as the shooter in court:

> Q: . . . Were you able to make out anyone's face?
>
> A: Yes.
>
> Q: All right. Whose face were you able to make out?
>
> A: Jamall Glenn.
>
> Q: And why do you say that now?
>
> A: Because I can recognize him in this courtroom.
>
> . . . .
>
> Q: . . . Why after now, sitting here today and seeing him, why do you now say you recognize him?
>
> A. Because he's almost—he's pretty much the same man as he was that night.
>
> Q: Okay. Does he appear different to you now that you've seen him for the first time in almost three years?
>
> A: He appears a little bit thinner.

Mr. Parker testified that he was "maybe a foot, foot and a half" from the shooter during the attack and could make out his attacker's face.

Although Defendant reported that his car was stolen from him at gunpoint on the night of the attack and Mr. Parker identified someone other

than Defendant as the shooter in a photo lineup, such contradictions and discrepancies in the evidence "do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Defendant also argues that the forensic evidence contradicts his identity as the driver of the Camry and the shooter. This argument is unavailing. Though the DNA samples found in the car and on the gun do not conclusively match Defendant, they are not inconsistent with Defendant either.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence to submit the question of whether Defendant was the perpetrator to the jury. Accordingly, the trial court did not err by denying the motion to dismiss.

2. Conspiracy to Commit Robbery with a Dangerous Weapon

[2] "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975). While an agreement may be shown by direct proof of an express agreement, it is "generally inferred from an analysis of the surrounding facts and circumstances." *State v. Fleming*, 247 N.C. App. 812, 819, 786 S.E.2d 760, 766 (2016). "The proof of a conspiracy 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' " *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (citation omitted).

The execution of an attack in a coordinated manner and joint flight after the attack have been held sufficient evidence to survive a motion to dismiss a conspiracy charge. *State v. Lamb*, 342 N.C. 151, 155-56, 463 S.E.2d 189, 191 (1995); *State v. Miles*, 833 S.E.2d 27, 31 (N.C. Ct. App. 2019). In *Lamb*, our Supreme Court found sufficient evidence of a conspiracy to commit robbery with a dangerous weapon where "defendant met with two other men, one of whom was armed" and "the three men drove to the home of the victim . . . left the vehicle and entered the victim's home, robbed the victim, and shot him." 342 N.C. at 155-56, 463 S.E.2d at 191. Similarly, in *Miles* this Court found sufficient evidence of a conspiracy to commit robbery with a dangerous weapon where defendant was one of four people in two cars at the scene of the crime, one of the cars honked the horn to get the victim's attention, defendant approached the victim with a weapon and exchanged gunfire, three men including defendant were witnessed fleeing the scene, and defendant got back into one of the cars. 833 S.E.2d at 31.

As in *Lamb* and *Miles*, the State has introduced sufficient evidence of a conspiracy to commit robbery with a dangerous weapon. Viewing the evidence in the light most favorable to the state, a reasonable juror could conclude that Defendant acted in coordination with Mr. Worthy and Ms. Ward to rob the Parkers with a dangerous weapon. Mr. Parker heard the voice of one person ask for a jack and the voice of another from his attacker. Once the robbery was underway, Mr. Parker heard two people outside of the car: the man who attacked him, and another person near the car's trunk area. After knocking Mr. Parker to the ground, the assailant shot him and took his phone and wallet. Following the shooting and robbery, the three persons fled in the car together. When the car crashed, police apprehended Mr. Worthy and found the gun, Mr. Parker's phone, and Mr. Parker's wallet in the car. Meanwhile, Defendant and Ms. Ward continued to flee together through the hospital parking garage. They later called police claiming that Defendant's car was stolen. When a detective showed Defendant surveillance video from the hospital, he responded that "It wasn't me driving," a tacit admission that he was in the car. Taken together, these facts are sufficient to permit an inference by the jury that Defendant was a member of a conspiracy to commit robbery with a dangerous weapon. The trial court therefore did not err by denying the motion to dismiss that charge.

B. Testimony Concerning the Civil Lawsuit

[3] Defendant also argues that the trial court erred by sustaining the State's objection to Defendant's question concerning a civil lawsuit filed by the Parkers. We disagree.

The admissibility of evidence under N.C. Gen. Stat. § 8C-1, Rule 401, is governed by a threshold inquiry into its relevance. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Trial court rulings on relevancy technically are not discretionary." *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). "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.), *appeal dismissed*, *review denied*, 373 N.C. 175, 833 S.E.2d 806 (2019).

On cross-examination, Defendant asked Mr. Parker, "And [Mr. DeVore's] the attorney that you and your wife have hired and have filed a civil lawsuit in this case; correct?" The State objected and the jury was excused. Through argument of counsel and the trial court's questioning, it was determined that the Parkers had filed a lawsuit alleging ineffective or inadequate security against the owner of the parking lot in which the attack at issue took place. Defendant was identified in the lawsuit as the assailant.

Defense counsel explained that he only intended to ask that single question, that he may request a jury instruction on "a person interested in the outcome of the case[,]" and that "we know that in that circumstance, that's a monetary thing." Defendant further explained, "I simply want [Mr. Parker] to acknowledge, which he has, that there is a civil suit."

In ruling on the objection, the trial court stated:

> [A]s I would understand the issue for the civil complaint, liability is being argued on the basis that there was a violent armed robbery and attack in this parking lot.
>
> It's not necessary to prove in that civil lawsuit that it was [Defendant], but simply that that attack occurred. And that's what would potentially give rise to liability on the part of the parking lot owner or management company. So whether or not [Defendant] was involved is, I think, actually immaterial to the lawsuit.
>
> Because his involvement is . . . immaterial in that lawsuit and . . . the defense is not contesting that the robbery and shooting occurred. That's what would give rise to the liability [in the civil suit]. Based on that analysis I find that it's not material to this case, therefore not relevant.[1]

The trial court therefore sustained the State's objection and instructed the jury to disregard Defendant's last question and the witness's last statement.[2]

On appeal Defendant argues, as he did at trial, that the civil lawsuit was relevant because it showed that the Parkers had an interest in the

1. The trial court stated that the ruling did not necessarily apply if defense counsel wished to impeach Mr. Parker's criminal trial testimony with statements he had made under oath in the civil complaint. Defense counsel stated that he would not be doing so, and did not attempt to do so at trial.

2. The record does not clearly reflect whether Mr. Parker answered the question concerning the civil suit.

outcome of the criminal prosecution. In conducting a de novo review of the trial court's decision, we agree with its analysis on this issue. "A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation." *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902 (1954). Our courts have consistently held that where a witness for the prosecution has filed a civil suit for damages *against the criminal defendant himself*, the pendency of the suit is admissible to impeach the witness by showing the witness's interest in the outcome of the criminal prosecution. *See id.* at 711, 80 S.E.2d at 902; *State v. Dixon*, 77 N.C. App. 27, 31-32, 334 S.E.2d 433, 436 (1985); *State v. Grant*, 57 N.C. App. 589, 591, 291 S.E.2d 913, 915 (1982).

Defendant did not seek to question Mr. Parker about a suit the Parkers had filed against *Defendant*, but instead sought to question Mr. Parker about a suit the Parkers had filed against *a third party*–the parking lot owner. As the trial court explained, it is not necessary for the Parkers to prove in the civil suit that Defendant was the assailant, but simply that the attack occurred. Defendant's alleged involvement in the attack was immaterial to the civil suit. Thus, unlike in *Hart*, *Dixon*, and *Grant*, the pendency of the civil suit did not show Mr. Parker's interest in the outcome of the criminal prosecution and was accordingly not admissible to impeach the witness.

Defendant also argues, for the first time on appeal, that the civil lawsuit was relevant to Mr. Parker's in-court identification of Defendant. Specifically, he asserts that the "jury could not properly weigh [Mr. Parker's] identification of [Defendant] as the assailant without knowledge of what Mr. Parker had been told during preparation for the civil lawsuit." Defendant contends that the jury should have been able to consider the civil suit because it "showed Mr. Parker more likely than not had garnered knowledge from the civil investigation into the incident which tainted his identification of Mr. Glenn at the 2019 criminal trial."

Defendant did not raise this argument as to relevance at trial and it is not preserved for our review. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "[I]t is well settled in this jurisdiction that defendant cannot argue for the first time on appeal [a] new ground for admissibility that he did not present to the trial court."

State v. Sharpe, 344 N.C. 190, 195, 473 S.E.2d 3, 6 (1996). Defendant cannot now argue that the civil suit was relevant to Mr. Parker's in-court identification. Accordingly, the trial court did not err by sustaining the State's objection.

C. In-Court Identification

[4] Defendant's remaining argument is that the trial court plainly erred by failing to exclude ex mero motu Mr. Parker's in-court identification. Specifically, Defendant asserts that the identification was tainted such that its admission violated his rights to due process and a fair trial. We disagree.

As an initial matter, the State argues that Defendant has failed to preserve this issue for our review because he did not move to suppress the identification prior to trial. Defendant was not seeking to suppress a pre-trial identification of Defendant; the need to exclude the in-court identification did not arise until Mr. Parker identified Defendant at trial. Thus, "defendant did not have reasonable opportunity to make the motion before trial[,]" N.C. Gen. Stat. § 15A-975(a) (2019), and Defendant was not required to file a motion to suppress the in-court identification to preserve the issue.

Defendant was, however, required to timely object to the in-court identification, N.C. R. App. P. 10(a)(1); this he failed to do. However, because Defendant has "specifically and distinctly contended" that the admission of the identification "amount[ed] to plain error," we will review the admission of the identification for plain error despite Defendant's failure to object at trial. N.C. R. App. P. 10(a)(4).[3]

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's

3. Although Defendant argues both plain error and that the trial court failed to intervene ex mero motu, this elevated ex mero motu standard applies to opening and closing arguments to the jury. *See, e.g.*, *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) ("Where, as here, defendant failed to object to the arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu."). We will review this issue for plain error, the appropriate analysis for unpreserved evidentiary issues. *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000) ("Where . . . a criminal defendant fails to object to the admission of certain evidence, the plain error analysis, rather than the ex mero motu or grossly improper analysis, is the applicable standard of review.").

finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (citation omitted).

Our Supreme Court has stated that

> [i]dentification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification. . . . If it is determined that the pretrial identification procedure is impermissibly suggestive the court must then determine whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification.

State v. Powell, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335 (1988). The United States Supreme Court has clarified that "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure . . . ." *Perry v. New Hampshire*, 565 U.S. 228, 232 n.1 (2012). "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Id.* at 237.

Here, Defendant does not contend that the pre-trial photo lineup conducted by a detective while Mr. Parker was hospitalized was impermissibly suggestive, nor does Defendant challenge any pre-trial identification procedure employed by law enforcement. Instead, on appeal, Defendant argues that the in-court identification was tainted by Mr. Parker's

exposure to media coverage of the case, his filing of a civil lawsuit which named Defendant as the assailant, the lapse of time, and his identification of someone other than Defendant in the photo lineup. Accordingly, Defendant's argument does not trigger due process concerns.

At trial, Mr. Parker testified on direct examination that he was one to one and a half feet away from his assailant, he was able to make out the assailant's face, and the assailant was Defendant. Defendant did not object. Following the in-court identification, Defendant cross-examined Mr. Parker concerning his exposure to media coverage of the case, the amount of time that had passed, the fact that Mr. Parker did not recant the initial identification in the photo lineup, and the circumstances under which Mr. Parker gave the descriptions and completed the photo lineup. During this cross-examination, Defendant did not seek to impugn Mr. Parker's in-court identification on the basis that it was tainted by the Parkers' civil lawsuit, as discussed above. The trial court subsequently instructed the jury that they were "the sole judges of believability of witnesses" and "must decide for [them]selves whether to believe the testimony of any witness."

Defendant had the opportunity to test the reliability of Mr. Parker's in-court identification "through the rights and opportunities generally designed for that purpose[,]" *Perry*, 565 U.S. at 233, and the defects of the in-court identification Defendant complains of were solely issues of credibility for the jury to resolve, *State v. Simpson*, 327 N.C. 178, 189, 393 S.E.2d 771, 777 (1990) (initial misidentification by witness did "not disqualify him from thereafter testifying that he saw defendant on the night of the murder"); *State v. Miller*, 270 N.C. 726, 732, 154 S.E.2d 902, 906 (1967) ("Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury . . . .").

Without any indication that the in-court identification was tainted by an impermissibly suggestive pre-trial identification procedure, there was no error, let alone plain error, in admitting Mr. Parker's in-court identification.

IV. Conclusion

Because there was sufficient evidence of Defendant's identity as the perpetrator and that Defendant conspired to commit robbery with a dangerous weapon, the trial court did not err by denying his motions to dismiss. The trial court did not err by concluding that cross-examination concerning the Parkers' civil suit was irrelevant. Without a showing that the police used impermissibly suggestive procedures in a pre-trial

identification, the trial court did not err by admitting Mr. Parker's in-court identification; the credibility of that identification was a question for the jury.

NO ERROR.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
ZACHARY DALLAS McDARIS, DEFENDANT

No. COA20-7

Filed 17 November 2020

1. Burglary and Unlawful Breaking or Entering—first-degree burglary—underlying felony—breaking or entering with the intent to terrorize or injure

There was insufficient evidence to support defendant's conviction for first-degree burglary where the trial court, acting as finder of fact, found that the "with the intent to commit a felony therein" element was satisfied by the underlying felony of breaking or entering with the intent to terrorize or injure (N.C.G.S. § 14-54(a1)). Section 14-54(a1) could not be the underlying felony here because it would require that defendant broke into the victims' residence with the intent to break into another residence and therein terrorize the victims.

2. Burglary and Unlawful Breaking or Entering—first-degree burglary—underlying felony—breaking or entering with the intent to terrorize or injure—reversal—remedy

Where the Court of Appeals held that the felony of breaking or entering with the intent to terrorize or injure (N.C.G.S. § 14-54(a1)) could not logically serve as the underlying felony of first-degree burglary, the appropriate remedy was remand for entry of judgment on the lesser-included offense of misdemeanor breaking or entering. Even though the trial court, acting as finder of fact, found that all the elements of N.C.G.S. § 14-54(a1) were met, that offense was not charged in the indictment and was not a lesser-included offense of the charged offense (first-degree burglary).

Judge YOUNG concurring in result only.

Appeal by Defendant from judgment entered 6 August 2019 by Judge Daniel A. Kuehnert in Caldwell County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Hugh A. Harris, for the State.

Mark L. Hayes for defendant-appellant.

MURPHY, Judge.

The trial court erred in denying a motion to dismiss a first-degree burglary charge when it considered N.C.G.S. § 14-54(a1) as the felony underlying the first-degree burglary charge and the evidence failed to support this theory, which was used as the sole basis for the conviction. We reverse Defendant's conviction and remand for entry of judgment on the lesser included offense of misdemeanor breaking or entering, which was supported by the evidence.

BACKGROUND

At approximately 1:00 a.m. on 1 January 2018, Defendant Zachary Dallas McDaris ("Defendant") woke Roy Ridenhour ("Mr. Ridenhour") and his wife, Cynthia Ridenhour ("Mrs. Ridenhour"), by loudly banging on the front door of their residence in Hickory. Mr. Ridenhour looked out the window and thought a neighbor was at the front door. When Mr. Ridenhour went to the front door and flipped the deadbolt, Defendant violently pushed the front door open. The door struck Mr. Ridenhour and knocked him backwards approximately six feet. After shoving the door open, Defendant entered the house and stated, "I'm your savior. You're going to hell for your sins."

Defendant then began beating Mr. Ridenhour, who shouted for his wife to call the police and grab his pistol. Defendant struck Mr. Ridenhour multiple times, causing him to fall down a flight of stairs and knocking him unconscious. Mr. Ridenhour sustained a laceration to his head, a large knot on the back of his head, and bruises and cuts to his shoulder and back. Mrs. Ridenhour entered the hall, pointed a gun at Defendant, and told him to leave. In response, Defendant exited the house, and Mr. Ridenhour regained consciousness and locked the door. Defendant briefly walked in the front yard but returned and began banging on the front door again. Caldwell County Sheriff's Deputies arrived at the scene and detained Defendant at the front door.

Following these events, Defendant was indicted for first-degree burglary and the lesser included offense of felonious breaking and entering. Defendant's indictment read:

> The jurors for the State upon their oath present that on or about [1 January 2018], in [Caldwell County] [Defendant] unlawfully, willfully and feloniously did during the nighttime hours, break and enter a building actually occupied by Roy Ridenhour and wife, Cynthia Gail Ridenhour, used as a residence located at [Street Address], with the intent to commit a felony or larceny therein. This act was in violation to [first-degree burglary and felonious breaking and entering under N.C.G.S. § 14-54(a)].

At a pretrial hearing on 5 August 2019, Defendant waived his right to a jury trial in accordance with N.C.G.S. § 15A-1201(b), and a bench trial began the following day. After the State presented its evidence, Defendant unsuccessfully moved to dismiss for insufficient evidence. Defendant presented evidence and renewed his motion to dismiss. During both the motion and renewed motion, Defendant argued the State had not presented sufficient evidence of his intent to commit an underlying felony when he entered the Ridenhour house, as required for first-degree burglary. *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996).

The trial court denied both the motion to dismiss and renewed motion. During the subsequent charge conference, there was a discussion of potential underlying felonies to satisfy the intent to commit a felony therein requirement of first-degree burglary, including N.C.G.S. § 14-54(a1), assault causing serious bodily injuries, and attempted murder; however, the trial court's explicit reasoning for denying Defendant's renewed motion to dismiss was unclear.

In suggesting potential underlying felonies, the State stated:

> The first one I would contend would be [N.C.G.S. § 14-54(a1)]. And I would note when we have the felony of breaking or entering, I would contend that that is a felony that, when the language says a felony or larceny therein, it can be considered. And I would point out to the Court that [N.C.G.S. § 14-54(a1)] is the specific language where it says, if any person who breaks or enters any building with the intent to terrorize or injure an occupant of a building is guilty of a Class H felony. Now, that is a separate or distinct way of violating, breaking or entering a building,

> because [N.C.G.S. § 14-54(a)], I would argue to the Court, is our more traditional approach. And it says any person who breaks or enters any building with the intent to commit any felony or larceny therein shall be punished as a Class H felony.
>
> . . .
>
> Now, what else could you consider if this were being argued to the jury? Assault inflicting serious bodily injury. Another felony is attempted murder.

The trial court stated if it were a jury trial it would instruct a jury on, and as finder of fact it was considering, larceny, attempted murder, and N.C.G.S. § 14-54(a1).[1] However, the trial court, as finder of fact, convicted Defendant of first-degree burglary solely on the basis of N.C.G.S. § 14-54(a1), stating

> So I have no doubt a jury could have found that . . . [D]efendant entered the house to attempt murder or a larceny or something to that effect, but I think what's important to the Court is . . . and from the Court's standpoint -- I'm saying this because if the case does get appealed, . . . I want the appellate court to understand that this Court, sitting as a jury, right or wrong, believed that . . . .
>
> That [] [D]efendant . . . committed first-degree burglary by committing the felony of [N.C.G.S. § 14-54(a1)] when he broke and entered into the building with the intent to terrorize and injure the occupant, because that's what happened. . . .
>
> . . .
>
> So . . . the Court doesn't have any reasonable doubt that [N.C.G.S. § 14-54(a1)] occurred and that [] [D]efendant intended to injure the occupants of the house once he broke in, at a minimum. He certainly terrorized them, and he may have certainly -- I think that statute applies, in other words. So the Court finds [] [D]efendant guilty of first-degree burglary.

Defendant entered written notice of appeal on 9 August 2019. On appeal, Defendant argues the trial court erred in denying his motion to

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1. The trial court ultimately concluded the assault inflicting serious bodily injury felony "wasn't brought up," and did not consider it.

dismiss, as breaking and entering with intent to terrorize cannot be the underlying felony for first-degree burglary.

ANALYSIS

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). "When ruling on a defendant's motion to dismiss, the trial court must determine whether [the State presented sufficient] evidence (1) of *each essential element* of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (emphasis added); *see* N.C.G.S. § 15A-1227 (2019). To be sufficient, the State must present "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"As always, [in our review of a ruling on] a motion to dismiss, we 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).

A. Underlying Felony

[1] Here, Defendant only challenges the sufficiency of the evidence supporting the felonious intent element of first-degree burglary, specifically arguing, *inter alia*, that N.C.G.S. § 14-54(a1) cannot be an underlying felony for first-degree burglary because "grammatically and logically, the initial breaking and entering must be distinct from the crime which a burglar subsequently intends to commit therein." We limit our analysis to the element of felonious intent because Defendant challenges no other element on appeal.

Also, like our Supreme Court did in *State v. Reese* when analyzing a motion to dismiss, we separately analyze the independent theories for the underlying felony element used in Defendant's first-degree burglary jury charge in evaluating whether the trial court erred in denying Defendant's motion to dismiss. *State v. Reese*, 319 N.C. 110, 144-45, 353 S.E.2d 352, 371-72 (1987), *overruled in part on other grounds by State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997). However, in determining the acting with the intent to commit therein element of first-degree burglary, the trial court acquitted Defendant of the felonies of attempted murder, assault inflicting serious bodily injury, and larceny when it found beyond a reasonable doubt Defendant had only

committed N.C.G.S. § 14-54(a1). *See State v. Smith*, 170 N.C. App 461, 473, 613 S.E.2d 304, 313 (2005), *aff'd as modified by* 360 N.C. 341, 626 S.E.2d 258 (2006) (quoting *Francis v. Franklin*, 471 U.S. 307, 313, 85 L.Ed.2d 344, 352 (1985)) ("The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' ").

Therefore, we examine the sufficiency of the evidence presented at trial supporting the State's theory that Defendant had felonious intent, as required by first-degree burglary, to commit the felony of breaking or entering with intent to terrorize or injure under N.C.G.S. § 14-54(a1) therein. *See State v. Parker*, 54 N.C. App. 522, 525, 284 S.E.2d 132, 134 (1981) ("[The d]efendant first assigns error to the trial court's denial of his motion to dismiss the charges of breaking or entering and larceny. . . . We [] note that no prejudicial error could have been committed by the court's denial of the defendant's motion to dismiss the breaking or entering charges, because [the] defendant was acquitted of these charges. Our sole task under this assignment of error is then to determine whether the trial court erred in failing to grant the motion to dismiss the larceny charges.").

> [I]n order for a defendant to be convicted of first[-]degree burglary, the State must present substantial evidence that there was '(i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony *therein*.'

State v. Goldsmith, 187 N.C. App. 162, 165, 652 S.E.2d 336, 339 (2007) (quoting *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996)); *see* N.C.G.S § 14-51 (2019) ("If the crime be committed in a dwelling house . . . and any person is in the actual occupation of any part of said dwelling house . . . at the time of the commission of such crime, it shall be burglary in the first[-]degree."). "The intent to commit a felony must exist at the time of entry." *State v. Norris*, 65 N.C. App. 336, 338, 309 S.E.2d 507, 509 (1983). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (2008).

Under N.C.G.S. § 14-54(a1), "[a]ny person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony." N.C.G.S. § 14-54(a1) (2019). In order to

evaluate N.C.G.S. § 14-54(a1) as an underlying felony for first-degree burglary, we must read the requirements of N.C.G.S. § 14-54(a1) in conjunction with the relevant elements of first-degree burglary. For N.C.G.S. § 14-54(a1) to satisfy the felonious intent element of first-degree burglary, a defendant must (1) break and enter a dwelling (2) with the intent to *therein* (3) break or enter a building (4) with the intent to terrorize or injure an occupant. Logically, this result could only occur if a building is encompassed within a dwelling.[2] However, the evidence presented below did not support such an application of N.C.G.S. § 14-54(a1).

Viewing the evidence in the light most favorable to the State, sufficient evidence was not presented to support the inference that Defendant broke and entered the Ridenhours' residence with the intent to *subsequently break or enter another building within the residence* and therein terrorize the Ridenhours. As a result, Defendant's motion to dismiss should have been granted as to N.C.G.S. § 14-54(a1). *See Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340 (holding the defendant's motion to dismiss a charge of first-degree burglary should have been granted where the victim was pulled out of the home and robbed because no evidence was presented that the defendant intended to commit a felony *inside* the victim's home).

The trial court wrongly considered N.C.G.S. § 14-54(a1) to be a supported underlying felony for the first-degree burglary charge. Since the trial court based its conviction of Defendant solely on N.C.G.S. § 14-54(a1) as the underlying felony, which was unsupported by the evidence, we must reverse Defendant's first-degree burglary conviction.

B. Remedy

[2] When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. *State v. Weaver*, 306 N.C. 629, 633, 295 S.E.2d 375, 377 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Generally, when vacating a conviction for first-degree burglary on motions to dismiss where the evidence of felonious intent was insufficient, we find "there was sufficient evidence to sustain a verdict of [the lesser included offense of]

2. According to N.C.G.S. § 14-54(c), " 'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C.G.S. § 14-54(c) (2019).

misdemeanor breaking or entering." *Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340; *see, e.g.*, *State v. Cooper*, 138 N.C. App. 495, 499, 530 S.E.2d 73, 76, *aff'd per curiam*, 353 N.C. 260, 538 S.E.2d 912 (2000); *State v. Dawkins*, 305 N.C. 289, 290-91, 287 S.E.2d 885, 886 (1982). Such an approach is appropriate here.[3] In finding Defendant committed first-degree burglary the trial court, as finder of fact, necessarily found that all elements of misdemeanor breaking or entering were satisfied. *See* N.C.G.S. § 14-54(b) (2019) ("Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor."). Therefore, we remand for entry of judgment for misdemeanor breaking or entering and resentencing.

Additionally, although the trial court, as finder of fact, found all the elements of N.C.G.S. § 14-54(a1) to be met, we cannot remand for entry judgment upon this offense. Generally, "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002). *See State v. Nixon*, 263 N.C. App. 676, 680, 823 S.E.2d 689, 692-93 (2019) ("an indictment for one offense may permit a defendant to be lawfully convicted of lesser included offenses"). *See also Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340; *Dawkins*, 305 N.C. at 290-91, 287 S.E.2d at 886; *State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating judgment of first-degree burglary and remanding for entry of judgment on the lesser included offense of second-degree burglary where evidence was insufficient to prove the greater offense). However, where an offense is not a lesser included offense of the offense a defendant was indicted on and convicted of, we cannot remand for entry of judgment on such an offense. *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) ("It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment."). N.C.G.S. § 14-54(a1) is not a lesser included offense of first-degree burglary and we cannot remand for entry of

3. We note that although "[f]elonious breaking or entering, N.C.[G.S. §] 14–54(a), is a lesser included offense of . . . burglary," the elements of felonious breaking and entering are not proven by Defendant's conviction of first-degree burglary. *State v. McCoy*, 79 N.C. App. 273, 275, 339 S.E.2d 419, 421 (1986). Like first-degree burglary, felonious breaking or entering requires a defendant to break or enter and subsequently intend to commit a felony or larceny therein. N.C.G.S. § 14-54(a) (2019) ("Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon."). Therefore, the same flaw in applying N.C.G.S. § 14-54(a1) to first-degree burglary is present in any application to felonious breaking or entering and we cannot remand for entry of judgment for felonious breaking or entering.

judgment on N.C.G.S. § 14-54(a1) based on Defendant's conviction of first-degree burglary.

"As a lesser included offense, 'all of the essential elements of the lesser crime must also be essential elements included in the greater crime.' " *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 439-440 (2007) (quoting *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982)). "[T]wo crimes are separate and distinct only if *both* have a unique element or fact, one not shared with the other. If the elements of either crime are wholly contained in the other, then the two crimes are not distinct, and one is a lesser-included offense of the other." *State v. Edmondson*, 70 N.C. App. 426, 428, 320 S.E.2d 315, 317 (1984). Here, N.C.G.S. § 14-54(a1) and first-degree burglary each require unique elements. Unlike first-degree burglary, N.C.G.S. § 14-54(a1) requires the "intent to terrorize or injure an occupant of the building [broken or entered into]." N.C.G.S. § 14-54(a1) (2019). Unlike N.C.G.S. § 14-54(a1), first-degree burglary requires "(i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony *therein*." *Singletary*, 344 N.C. at 101, 472 S.E.2d at 899. Each offense has unique elements, which are not encompassed within the other's elements. Therefore, N.C.G.S. § 14-54(a1) is not a lesser included offense of first-degree burglary and we cannot remand for entry of judgment based on N.C.G.S. § 14-54(a1).

CONCLUSION

In light of the lack of sufficient evidence of first-degree burglary due to the erroneous consideration of N.C.G.S. § 14-54(a1) as the underlying felony, the trial court's ruling on the motion to dismiss the charge of first-degree burglary is reversed. We remand for entry of judgment on misdemeanor breaking or entering under N.C.G.S. § 14-54(b) and a new sentencing hearing.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge YOUNG concurs in result only.

STATE OF NORTH CAROLINA
v.
MICHAEL WILLIAMS YELVERTON, DEFENDANT

No. COA19-1123

Filed 17 November 2020

1. Rape—second-degree forcible rape—jury instructions—defense—"reasonable belief of" consent

In a trial for second-degree forcible rape, the trial court did not commit error, much less plain error, by not instructing the jury on the defense of consent where defendant's proposed theory, "reasonable belief of consent," or mistaken belief of consent, is not a cognizable defense to rape in this state and where substantial evidence was presented that the victim expressly did not consent to defendant's advances.

2. Constitutional Law—effective assistance of counsel—rape trial—failure to request jury instruction on defense of consent

In a trial for second-degree forcible rape, where defendant was not entitled to a jury instruction on the defense of consent because defendant's theory of "reasonable belief of consent" is not a cognizable defense to rape in this state and given the substantial evidence that the victim expressly did not consent to defendant's advances, his counsel was not ineffective for failing to request such an instruction.

Appeal by Defendant from judgment entered 30 May 2019 by Judge Cy A. Grant, Sr. in Beaufort County Superior Court. Heard in the Court of Appeals on 23 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Mark Montgomery for Defendant-Appellant.

INMAN, Judge.

Michael Williams Yelverton ("Defendant") appeals from a judgment following a jury verdict finding him guilty of second-degree forcible rape. Defendant contends the trial court erred by not instructing on his "reasonable belief of consent" as a defense to rape. Defendant also claims he is entitled to a new trial because his counsel did not request

the same instruction. We hold that Defendant has failed to demonstrate reversible error.

I. FACTUAL & PROCEDURAL HISTORY

Evidence presented at trial tends to show the following:

Defendant and "Ivy"[1] were friends during high school but only started dating in 2017. Their sexual contact with each other had been limited to kissing and touching above the waist because Ivy "wanted to take it slow" and "was not ready" for anything more. Whenever Defendant did try to touch her below the waist, she told him to stop. Until August 2017, Defendant always respected Ivy's limits.

On 1 August 2017, Ivy visited Defendant at his home before picking up her brother from a car rental facility. At the time, Defendant's roommates were in the living room. Ivy went with Defendant into his bedroom and they began watching television. Their physical contact then became "hot and heavy." Defendant threw Ivy's phone aside, flipped her over, and began kissing her and touching her breasts. Defendant then removed Ivy's shirt as they continued "making out." Ivy was "okay" with all of this.

Defendant then attempted to put his hand down Ivy's shorts. She pushed him away and told him "no." Defendant removed his hand momentarily but made repeated attempts. Ivy twisted her legs to keep them together, but eventually Defendant was able to remove her shorts. She still had on her underwear. Ivy again told Defendant "no" and to stop because she "wasn't ready for that."

Defendant then pinned Ivy's hands over her head, pushed her underwear aside, and penetrated her vagina with his penis. Ivy told Defendant to stop and said "no," but Defendant continued to penetrate her. Eventually, Ivy gave up because Defendant did not listen. She did not yell or scream, she just "wanted it over with."

At some point Defendant stopped penetrating Ivy and she turned over to grab her phone to respond to text messages and calls from her brother. Defendant took her movement to mean that she "wanted more" and he tried to penetrate her from behind. Before he could, Ivy stood up, went into the bathroom, got dressed, and left the home. Defendant walked with her outside, asking if she was okay. Ivy told Defendant she was okay, but she felt disgusted. She left in her car to pick up her brother.

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1. We use a pseudonym for the adult victim of sexual crimes.

Defendant repeatedly texted Ivy after the incident and before she reported it to police. Minutes after Ivy left Defendant's home, he asked Ivy via text to promise him she was okay. Ivy responded, "I don't want to talk to you any more, Michael. I didn't want to do that. You wouldn't listen. I'm done." Defendant continued to text Ivy daily. At one point, Defendant asked Ivy why she turned over and did not object to his penetration, to which she replied, "did you not understand how I was trying to get out of there?" Defendant replied "Yes. I understand, and I'm sorry." Defendant later texted Ivy, "I hurt you badly, and I'm so ashamed of myself. I've never acted like that before." Ivy asked of Defendant, "Did I not keep trying to stop you, Michael?" to which he responded, "to an extent, yes." She wrote back, "Okay, but you knew I wasn't ready to have sex, right?" He replied, "yes, and I am sorry. I really am." Defendant made continued attempts to talk to and see Ivy, despite her pleas that he leave her alone.

Five days after Defendant forced himself on her, Ivy reported the incident to police. She was afraid to go to police on her own because she did not think she was strong enough. She did not want to talk about it and wanted to forget it happened. Ivy was also worried no one would believe her.

On 4 December 2017, a Beaufort County grand jury indicted Defendant on charges of second-degree forcible rape and attempted second-degree forcible rape. Defendant's case was called for trial on 28 May 2019.

At trial, Ivy testified, among other things, that before and on the date of the charged offenses, she had told Defendant she was not ready to have sex with him; that Defendant forcibly penetrated her vagina with his penis without her consent; and that Defendant attempted to penetrate her again from behind without her consent. The State also presented four witnesses to whom Ivy recounted being sexually assaulted—a friend Ivy spoke with minutes after leaving Defendant's home; Ivy's brother, whom she spoke with after reaching the rental car lot that night; and two other family members to whom Ivy reported the incident within the next several days.

Defendant testified that he thought Ivy consented to sex. Although he admitted Ivy stated "she was not ready" that night, he denied that she said "no" or "stop" multiple times, contrary to her testimony. Defendant did concede that "she may have pushed me a little bit" when he initiated sexual contact. Two of Defendant's roommates testified they did not hear any commotion or cries for help from the bedroom that night. They also testified that Defendant and Ivy walked out of the bedroom

holding hands, that Ivy did not seem upset, and Defendant and Ivy said goodbye at her car.

The trial court instructed the jury that the State must prove three things beyond a reasonable doubt for them to find Defendant guilty of second-degree forcible rape: 1) Defendant engaged in vaginal intercourse with Ivy, 2) Defendant used or threatened to use force sufficient to overcome any resistance Ivy might make, and 3) Ivy did not consent and it was against her will.

The jury found Defendant guilty of second-degree forcible rape and not guilty of attempted second-degree forcible rape. The trial court sentenced Defendant to a term of 60 to 132 months of imprisonment. Defendant gave notice of appeal in open court.

II. ANALYSIS

A. "Reasonable Belief" of Consent Defense to Rape

[1] Defendant argues that the trial court erred, or plainly erred, by failing to provide a jury instruction on the defense of consent based on Defendant's "reasonable belief" that Ivy consented to the sexual acts. We hold there was no error.

Defendant's counsel did not request an instruction on his reasonable belief that Ivy consented. Failure to request a jury instruction results in plain error review on appeal. *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995). As such, we review whether there was a fundamental error, establishing prejudice, that "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

A trial court must "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) (citation omitted). "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446-47 (2005) (citing *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 887-88 (2001)). A jury instruction is required for a defense if there is substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000). Substantial evidence is such evidence that a reasonable person would find sufficient to support a conclusion. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Failure to instruct upon all substantive or material features of

the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citations omitted).

Our General Statutes provide that:

> (a) A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse 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 the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.22(a) (2019) (emphasis added). "[A]gainst the will of the [person]" means "without [their] consent." *State v. Carter*, 265 N.C. 626, 630, 144 S.E.2d 826, 829 (1965). "Consent by the victim is a complete defense [to rape], but consent which is induced by fear of violence is void and is no legal consent." *State v. Alsto*n, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984); *see also State v. Smith*, 360 N.C. 341, 344, 626 S.E.2d 258, 260 (2006); *State v. Moorman*, 320 N.C. 387, 389-92, 358 S.E.2d 502, 504-06 (1987).

Defendant asserts that the trial court should have provided the jurors the following instruction on consent: "[I]f the defendant reasonably believed that the complainant was consenting to intercourse, [the jury] should return a verdict of not guilty." This Court has not recognized Defendant's proposed variation on the consent defense—a "reasonable belief of consent."[2] Nor has the North Carolina Supreme Court recognized such a defense. In *State v. Moorman*, our Supreme Court held that a defendant could be convicted of rape by force and against the will of the victim, who was incapacitated and asleep at the time, despite the defendant's testimony that he mistook the victim for someone he knew and believed she consented to vaginal intercourse. *Moorman*, 320 N.C. at 389-92, 358 S.E.2d at 504-06.[3]

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2. In an unpublished opinion, this Court expressly rejected this theory of defense to a rape charge. *State v. Gallegos*, No. COA16-1058, 2017 WL 3255195, at *2-3 (Aug. 1, 2017 N.C. Ct. App.) (rejecting a defendant's argument that his "reasonable belief" that the alleged victim was consenting should be recognized as an affirmative defense to rape).

3. The *Moorman* Court nonetheless overturned the defendant's rape conviction and awarded him a new trial on the grounds of ineffective assistance of counsel. *Moorman*, 320 N.C. at 402-03, 358 S.E.2d at 512.

The General Assembly has used language of reasonableness in other portions of our General Statute's Article 7b on "Rape and Other Sex Offenses." The legislature defines revocation of consent as "that [which] would cause a *reasonable person* to believe consent is revoked" under the article's definition section. N.C. Gen. Stat. § 14-27.20(1a)(b) (2019) (emphasis added). In the second-degree forcible rape provision, when considering a victim's mental disability, incapacitation, or physical helplessness and their ability to engage in consensual intercourse, "the person performing the act [must] know[] or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless" to be guilty of rape. *Id.* § 14-27.22(a)(2).

Consistent with the statutory language and our Supreme Court's holding in *Moorman*, we reject Defendant's argument that he was entitled to a jury instruction that he would not be guilty of rape if he mistakenly believed Ivy consented to vaginal intercourse. Because a defendant's knowledge of whether the victim consented is not a material element of rape and we have not recognized mistaken belief in consent as a defense to rape, the trial court did not err in failing to provide an instruction to that effect.

To support his argument for the defense of "reasonable belief of consent," Defendant relies on North Carolina Rule of Evidence 412(b)(3), which allows the admission of evidence of

> a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to *lead the defendant reasonably to believe that the complainant consented.*

N.C. Gen. Stat. § 8C-1, Rule 412(b)(3) (2019) (emphasis added). Defendant contends that this Court—through its application of Rule 412(b)(3)— recognized a defendant's reasonable belief in consent as a defense to rape in *State v. Ginyard*, 122 N.C. App. 25, 468 S.E.2d 525 (1996). We did not. In that case, this Court rejected the defendant's contention that he had a reasonable belief complainant consented to sex based on evidence of one prior consensual sexual encounter between complainant and two other men establishing "a distinctive pattern of sexual behavior [ ] relevant to the issue of consent" in his case. *Id.* at 32-33, 468 S.E.2d at 530 (citing *State v. Fortney*, 301 N.C. 31, 41, 269 S.E.2d 110, 116 (1980)). *Ginyard* is inapposite not only on its facts, but because Rule 412 concerns the admissibility of evidence at trial, not a substantive defense.

In this case, evidence of Ivy's past sexual behavior showed that she had *denied* consent to Defendant in every preceding encounter between them, telling him to "stop," that "she was not ready," and she "wanted to take it slow." This evidence, even when viewed in a light most favorable to Defendant, simply cannot support his claimed "reasonable belief" that Ivy consented to sexual acts on 1 August 2017. Defendant's argument that he believed Ivy consented to vaginal intercourse that night because he was able to achieve that goal simply underscores Defendant's mistake of law, not of any fact.

In *State v. Alston*, our Supreme Court held the State presented substantial evidence of non-consent when the victim "testified unequivocally that she did not consent to sexual intercourse" and told the defendant that she was not ready to go to bed with him immediately before penetration. *Alston*, 310 N.C. at 407-08, 312 S.E.2d at 475. Even when viewed in the light most favorable to Defendant, there was similar substantial evidence here that Ivy did *not* consent to sex with Defendant on 1 August 2017. Defendant admitted that Ivy said she "was not ready" that night and that Ivy "may have pushed him a little bit" in resistance to his sexual advances. Ivy said "no" to Defendant's advances when he put his hand down her pants. She said "stop" again before Defendant proceeded to remove her pants and penetrate her while forcibly holding her hands above her head.

The trial court properly instructed the jury on the second-degree forcible rape charge itself. In *State v. Rhinehart*, this Court upheld a similar jury instruction, reasoning that it was "clearly sufficient to convey the [substance of] defendant's request for a charge that consent is a defense to the crime of rape." 68 N.C. App. 615, 619, 316 S.E.2d 118, 121 (1984). Unlike the defendant in *Rhinehart*, in this case Defendant did not even request a consent defense instruction at trial.

The trial court was not required to give an instruction on the defense of consent based on Defendant's mistaken belief because this Court does not recognize such a defense and the evidence did not warrant an additional instruction. Defendant has failed to demonstrate error, much less plain error.

B. Ineffective Assistance of Counsel Claim

[2] In the alternative, Defendant argues he has been denied his right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), because his defense counsel did not request an instruction on Defendant's reasonable belief of consent defense. Because we have already concluded that Defendant was not

entitled to such an instruction, we conclude that Defendant was not denied the right to effective assistance of counsel.

III. CONCLUSION

Defendant has failed to demonstrate error, let alone plain error, in the trial court's failure to instruct the jury on "reasonable belief of consent" as a defense to the rape charge. Since Defendant's ineffective assistance of counsel argument relies upon counsel's failure to request the same instruction, that argument also fails.

NO ERROR.

Judges DILLON and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 NOVEMBER 2020)

BATTLE v. O'NEAL No. 19-1036	Mecklenburg (18CVD21550)	Affirmed in Part; Reversed and Remanded in Part
BRADLEY v. BRADLEY No. 20-48	Onslow (14CVD109)	Remanded
CHICA v. CHICA No. 19-856	Wake (16CVD9327)	Affirmed
GRIBBLE v. MADCAT ENTERS., INC. No. 19-1092	Mecklenburg (17CVS14721)	Affirmed
McSWAIN v. INDUS. COM. SALES & SERV., LLC No. 20-26	N.C. Industrial Commission (14-002870)	Dismissed
N.C. STATE BAR v. PHILLIPS No. 19-1093	Wake (18CVS5645)	Affirmed
STATE v. ALSTON No. 20-141	Wilson (18CRS52943)	Affirmed
STATE v. ANTHONY No. 18-1118-2	Rowan (17CRS51350) (17CRS51353) (17CRS51412) (17CRS51470) (17CRS974)	Reversed
STATE v. BEHAR No. 19-1158	Buncombe (18CRS84420) (18CRS84422-24) (18CRS84426)	Affirmed
STATE v. BRIMMER No. 19-1103	Onslow (17CRS57635)	No Error In Part; No Plain Error In Part.
STATE v. BROWN No. 19-983	Davidson (17CRS1409) (17CRS52490) (18CRS2469)	No Error
STATE v. WRIGHT No. 20-272	Duplin (18CRS51760)	Judgment vacated; Remanded for Resentencing.

STATE v. HUNTLEY No. 20-92	Mecklenburg (18CRS18332)	No Error
STATE v. MATTHEWS No. 19-1168	Cumberland (17CRS51855-56) (19CRS1066)	No Error
STATE v. MELTON No. 20-257	Jones (16CRS50395-97)	No Error
STATE v. RAHMAN No. 19-928	Robeson (16CRS50686)	No Error
STATE v. REDD No. 19-935	Forsyth (17CRS55799-800)	Affirmed
STATE v. WILLIAMS No. 20-209	Onslow (17CRS57968)	Reversed and Remanded
STATE v. WILLIS No. 20-260	Rutherford (18CRS53536) (18CRS53538) (19CRS341)	Vacated and Remanded
TAYLOR v. VAUGHAN No. 19-886	Beaufort (18CVS116)	Affirmed

IN RE K.S.

[274 N.C. App. 358 (2020)]

IN THE MATTER OF K.S.

No. COA20-37

Filed 1 December 2020

1. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—termination—two juvenile petitions

The Court of Appeals rejected an argument that the trial court lacked subject matter jurisdiction to terminate the guardianship of a minor child's grandparents on remand at a permanency planning hearing. The trial court's jurisdiction began with the filing of the first petition alleging the child to be neglected, and subsequent events—including the trial court's release of the department of social services from further reviews, the Court of Appeals' reversal of the trial court's adjudication and disposition orders on a second petition, and the trial court's purported dismissal of the second petition—did not terminate the trial court's subject matter jurisdiction.

2. Child Abuse, Dependency, and Neglect—remand—failure to comply with mandate—two juvenile petitions

The trial court erred in a juvenile case by failing to comply with the mandate of the Court of Appeals on remand. Instead of requiring the department of social services to present sufficient evidence to adjudicate the child neglected under the second juvenile petition, the trial court dismissed the second juvenile petition and allowed the department of social services to pursue a motion for review filed on the first juvenile petition. The matter was remanded for the trial court to comply with the previous mandate of the Court of Appeals.

Appeal by respondents from orders entered 4 October 2019 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 3 November 2020.

Mercedes O. Chut, P.A., by Mercedes O. Chut, for respondent-appellant Shonna Schindler.

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

Onslow County Department of Social Services, by Richard Penley, for petitioner-appellee Onslow County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

ARROWOOD, Judge.

Jason Schindler ("Mr. Schindler") and Shonna Schindler ("Mrs. Schindler") (collectively, the "Schindlers") appeal from orders entered 4 October 2019 terminating their guardianship of their juvenile grandchild, K.S. ("Kaitlyn").[1] On appeal, the Schindlers challenge only the termination of their guardianship as to Kaitlyn. For the reasons discussed herein, we reverse the orders entered 4 October 2019 and remand this matter to the trial court to proceed in accordance with the mandate of this Court.

I. Background

This case involves a prior appellate decision handed down by this Court on 3 July 2018 and subsequent orders entered by the trial court following remand. It appears the trial court and the Onslow County Department of Social Services ("DSS") attempted to execute a short cut to reach a preferred result while bypassing the clear and direct mandate of this Court. If the correct procedure had been followed, this appeal would be unnecessary.

Below, in addition to issues pertinent to the instant appeal, we recite many of the same facts and procedural events discussed in our prior decision. *Matter of M.N.*, 260 N.C. App. 203, 816 S.E.2d 925 (2018).

Kaitlyn was born in August 2007. Three months later, on 16 November 2007, DSS filed a juvenile petition alleging Kaitlyn to be neglected (the "First Petition").

On 11 December 2007, the trial court adjudicated Kaitlyn neglected and abused, and granted physical custody of Kaitlyn to her maternal grandmother, Mrs. Schindler. Additional orders continuing Mrs. Schindler's physical custody of Kaitlyn were entered on 12 March and 18 April 2008.

On 19 September 2008, and by orders entered that day and on 4 February 2009, the trial court changed the plan to relative custody and granted primary legal and physical custody of Kaitlyn to both Mr. and Mrs. Schindler and secondary legal and physical custody to the paternal grandmother. Reunification efforts with Kaitlyn's biological

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

mother were ceased at this time.[2] Subsequently, on 16 September 2009, the trial court entered an order (the "Guardianship Order") granting the Schindlers legal guardianship of Kaitlyn and "ceasing further reviews in this matter." *Id.* at 204, 816 S.E.2d at 927 (quotation marks omitted).

Nothing further was filed concerning Kaitlyn until 12 July 2016, when DSS filed a second petition alleging neglect and dependency stemming from the Schindlers' arrests on multiple drug-related charges (the "Second Petition"). The Second Petition differs from the First Petition insofar as the former alleges that Kaitlyn was neglected *and* dependent, and also offers different facts to support the allegations of neglect. Furthermore, the Second Petition, unlike the First Petition, related not only to Kaitlyn but also to two additional grandchildren and includes the Schindlers as respondents (and not the biological mother). Following several continuances, and a handful of non-secure custody hearings, the trial court held an adjudicatory hearing on the Second Petition on 13 February 2017. DSS dismissed its allegation of dependency and sought adjudication only on the issue of neglect. Following the hearing, on 9 March 2017, the trial court entered an order adjudicating Kaitlyn and two of her siblings neglected and dependent, notwithstanding DSS' dismissal of the latter ground. On 9 November 2017, the trial court entered a corrected order adjudicating Kaitlyn neglected and acknowledging the dismissal of the allegations of dependency (the "Adjudication Order"). In the Adjudication Order, the trial court found that the Schindlers were granted guardianship of Kaitlyn as of 16 September 2009, the date of the Guardianship Order. The Adjudication Order states that DSS removed the juveniles from respondents' custody and maintained full legal custody of the juveniles (including Kaitlyn) with full placement authority.

Following a dispositional hearing on 7 June 2017, the trial court entered an order on 14 November 2017 terminating the Schindlers' guardianship of Kaitlyn (the "Disposition Order"). Kaitlyn and the other juveniles were to remain in the custody of DSS. The Schindlers appealed the Adjudication Order (9 November 2017) and the Disposition Order (14 November 2017).

On 3 July 2018, this Court reversed the Adjudication and Disposition Orders with respect to the adjudication and disposition of Kaitlyn only, as the "trial court failed to make sufficient findings of fact in its adjudication order to support the conclusion that Kaitlyn is a neglected juvenile, [and] because no evidence was introduced to support those necessary findings of fact[.]" *Id.* at 208, 816 S.E.2d at 929. In addition, the Court

2. Kaitlyn's biological father is deceased.

remanded the action for further proceedings "not inconsistent with th[e] opinion." *Id.*

On 3 July 2018, the same day this Court filed its opinion, DSS filed a motion for review seeking to conduct a permanency planning hearing and to terminate the Schindlers' guardianship of Kaitlyn. DSS alleged that the Schindlers, Kaitlyn's maternal grandparents, continued to have substance abuse problems, specifically abusing heroin, oxycodone, and suboxone. DSS also asserted that the Schindlers had tested positive for unprescribed controlled substances and accumulated drug charges while Kaitlyn was in their care.

On 4 October 2018, Mr. Schindler filed a motion raising, among other things, the affirmative defenses of *res judicata* and estoppel as it related to the prior adjudications and the 3 July 2018 motion filed by DSS. Mrs. Schindler orally joined the motion at a hearing held 8 October 2018.

On 14 December 2018, the trial court conducted a hearing to address the opinion of this Court as well as the motion filed by Mr. Schindler on 4 October 2018. In an order dated 4 October 2019 ("Juvenile Order I"), the trial court concluded that this Court had remanded the case for "further proceedings on findings of fact." The trial court also determined that it retained original and exclusive jurisdiction over the case. More importantly, Juvenile Order I provided DSS with the option of addressing the matter on remand for further findings of fact as to the adjudication of Kaitlyn as a neglected juvenile or, alternatively, proceeding with its motion for review. The trial court explained that "[a]n action for petition to find a juvenile to be abused, neglected or dependent is a separate action altogether from a motion for review to terminate guardianship[.]" As such, the trial court decided that a "motion for review is the proper form of pleading to seek to terminate the guardianship of the Schindlers." The district court also denied the Schindlers' motion regarding *res judicata* and estoppel holding that these principles did not apply to a motion for review seeking to terminate guardianship.

On 24 April 2019, the trial court conducted a hearing pursuant to "N.C. Gen. Stat. §§ 7B-600 and 7B-906.1 on the motion for review/permanency planning" filed by DSS. As mentioned, DSS had previously filed a motion for review seeking to conduct a permanency planning hearing to terminate the Schindlers' guardianship of Kaitlyn on 3 July 2018. At the hearing, the Schindlers renewed their objections regarding their previous motions to dismiss based on *res judicata*, collateral estoppel, and violations of due process. The trial court overruled their objections as those issues had already been resolved by virtue of Juvenile Order I.

The trial court also acknowledged that DSS had opted not to proceed to adjudication on the Second Petition and that DSS was not offering any further evidence or argument with respect to the same. The trial court concluded that DSS had instead "elected to proceed with the motion for review/permanency planning hearing as permitted under [N.C. Gen. Stat. §] 7B-600 to review the court ordered guardianship of the juvenile with the [Schindlers]." For this reason, the trial court purported to dismiss the Second Petition as well as the associated Adjudication and Disposition Orders as they related to Kaitlyn.

Following the 24 April 2019 hearing, the trial court entered another order filed 4 October 2019[3] ("Juvenile Order II") terminating the Schindlers' guardianship of Kaitlyn and espousing a new permanent plan of guardianship for the juvenile with a secondary plan of custody with a court-approved caretaker. The Schindlers appealed Juvenile Orders I and II.

II. Discussion

[1] The Schindlers raise several issues on appeal. Collectively, the Schindlers contend that the trial court lacked subject matter jurisdiction to terminate their guardianship of Kaitlyn on remand at a permanency planning hearing. In addition, the Schindlers contend that the trial court failed to comply with the North Carolina Rules of Evidence at the review hearings held on remand and consequently allowed the entry of inadmissible evidence that was insufficient to support the findings of fact and conclusions of law in Juvenile Orders I and II.[4] The Schindlers also assert that the trial court's proceedings on remand were inconsistent with this Court's mandate and opinion filed 3 July 2018.

A. Subject Matter Jurisdiction

The Schindlers contend that the trial court lacked authority and jurisdiction to terminate their guardianship of Kaitlyn on remand at a hearing held pursuant to N.C. Gen. Stat. §§ 7B-600, 7B-906.1 (2019).

We review challenges to subject matter jurisdiction *de novo*. *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007) (citing *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002)).

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3. The district court entered two separate orders on 4 October 2019 memorializing its findings of fact and conclusions of law from the hearings held on 14 December 2018 and 24 April 2019.

4. The Schindlers also proffer arguments based on *res judicata*, collateral estoppel, and the law of the case doctrine. In light of our holdings below, we do not reach these issues.

Pursuant to North Carolina Juvenile Code, trial courts have "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2019). This jurisdiction extends to guardians, as well. *See id*. at § 7B-200(b).

"In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated." N.C. Gen. Stat. § 7B-1000(b) (2019). The trial court retains jurisdiction over a juvenile "until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a) (2019).

DSS filed the First Petition alleging Kaitlyn neglected on 16 November 2007. Approximately one month later, on 11 December 2007, the district court entered an order finding Kaitlyn to be neglected and abused. On 16 September 2009, the trial court entered the Guardianship Order—which was neither appealed nor affected by this Court's opinion filed 3 July 2018. The Guardianship Order granted the Schindlers legal guardianship of Kaitlyn and secondary legal and physical custody to Kaitlyn's paternal grandmother. The Guardianship Order stated that DSS is "allowed to cease further reviews in this matter." The Guardianship Order also released the guardian *ad litem* and attorney advocate "from further reviews in this matter." Nothing further was filed concerning Kaitlyn until 12 July 2016, when DSS filed the Second Petition alleging neglect and dependency stemming from the Schindlers' alleged continued substance abuse and involvement in criminal activity.

Notwithstanding subsequent events, which are discussed below, the trial court retained subject matter jurisdiction over this case as a result of the filing of the First Petition on 16 November 2007. The trial court did not terminate jurisdiction by allowing DSS to "cease further reviews" or by releasing the guardian *ad litem* and attorney advocate from "further reviews." *In re S.T.P.*, 202 N.C. App. 468, 473, 689 S.E.2d 223, 227 (2010) (holding that the district court did not terminate its jurisdiction by using the words "Case closed" in disposition order); N.C. Gen. Stat. § 7B-1000(b). Moreover, the trial court did not lose juvenile jurisdiction when it purported to dismiss the Second Petition on 4 October 2019, following remand by this Court. While this Court reversed (in part) the Adjudication and Disposition Orders, the opinion did not deprive the trial court of jurisdiction to review Kaitlyn's custody status under the First Petition. Because the district court has not terminated its jurisdiction by order, the trial court retains subject matter jurisdiction until

Kaitlyn reaches the age of eighteen years or is otherwise emancipated, whichever occurs first. N.C. Gen. Stat. § 7B-201(a).

B. Remand

[2] The Schindlers argue that the trial court failed to comply with this Court's mandate on remand by holding a permanency planning hearing (on the motion for review filed by DSS in the First Petition case) rather than requiring DSS to demonstrate harm or risk of harm to Kaitlyn by clear and convincing evidence in an adjudicatory hearing related to the Second Petition.

"The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *Metts v. Piver*, 102 N.C. App. 98, 100, 401 S.E.2d 407, 408 (1991) (citing *D&W Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966)). "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). While the Court has carved out minor exceptions to this general rule, the case law is abundantly clear that the inferior court must rigorously adhere to the mandate of the appellate tribunal on remand.

On 3 July 2018, this Court filed its opinion remanding and reversing in part the Adjudication and Disposition Orders. We concluded that the trial court failed to make sufficient findings showing harm or creation of a substantial risk of harm to adjudicate Kaitlyn neglected. *Matter of M.N.*, 260 N.C. App. at 207-208, 816 S.E.2d at 929. The Court reversed the Adjudication and Disposition Orders because the "trial court failed to make sufficient findings of fact in its adjudication order to support the conclusion that Kaitlyn is a neglected juvenile, [and] because no evidence was introduced to support those necessary findings of fact[.]" *Id.* at 208, 816 S.E.2d. at 929. More specifically, we stated the following:

> While the trial court did find that the Schindlers had been arrested on drug-related charges, it failed to make any findings as to harm or risk of harm to Kaitlyn as a result of her guardians' alleged drug activities. Indeed, neither DSS nor a court-appointed Guardian Ad Litem ("GAL") introduced any evidence to support findings of harm or risk of harm to Kaitlyn, and the lone witness at the hearing did not testify regarding those factual issues.

Id. at 205, 816 S.E.2d at 927. As such, and consistent with the relief requested by all parties on this issue, this Court reversed the portions of

the Adjudication and Disposition Orders adjudicating Kaitlyn neglected and remanded the action for further proceedings "not inconsistent with th[e] opinion." *Id.* at 208, 816 S.E.2d. at 929.[5]

In a surreptitious effort to avoid the mandate of this Court, on 3 July 2018, DSS filed a motion for review under the First Petition. The district court proceeded to hold an initial hearing on the motion on 14 December 2018. Thereafter, the district court entered Juvenile Order I on 4 October 2019. In Juvenile Order I, the district court stated the following: "The language of the Court of Appeals' opinion does not appear to be readily clear regarding what was reversed and what was remanded back to this trial Court." The trial court characterized the pertinent issue as follows: "The issue is whether the matter was reversed and closed as to the juvenile [Kaitlyn], or whether it was remanded for further proceedings for finding[s] of fact at adjudication as to the juvenile [Kaitlyn]." The district court ultimately determined that the Court of Appeals "intended to remand the matter for further proceedings on findings of fact." Notwithstanding this finding, because of the procedural differences between a petition alleging neglect, on one hand, and a motion for review to terminate guardianship, on the other, the district court concluded that DSS' motion for review was ripe and properly before the court. Indeed, the trial court seemingly encouraged DSS to circumvent the unambiguous mandate of this Court by allowing it to move "forward on the remand that the Court of Appeals has ordered **or** on their motion to review." DSS, of course, elected the latter option.

Subsequently, the district court held a hearing on 24 April 2019 to address the motion filed by DSS pursuant to N.C. Gen. Stat. §§ 7B-600, 7B-906.1. The district court thereafter entered Juvenile Order II on 4 October 2019, which set out its findings of fact and conclusions of law from this particular hearing. In a nutshell, Juvenile Order II purported to dismiss the Adjudication and Disposition Orders as well as the Second Petition; terminated the Schindlers' guardianship of Kaitlyn; released the Schindlers as parties; and entered a new permanent plan of guardianship for Kaitlyn.

The trial court erred by disregarding the unequivocal mandate of this Court. We reversed the Adjudication and Disposition Orders because the trial court failed to make sufficient findings of harm or the

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5. This Court also held that the Schindlers had standing to appeal the Adjudication and Disposition Orders. *Matter of M.N.*, 260 N.C. App. at 205, 816 S.E.2d at 928. We concluded that "[a]s court-appointed guardians and persons awarded legal custody of Kaitlyn, the Schindlers are parties to this action pursuant to [N.C. Gen. Stat. §] 7B-401.1 and have standing to . . . appeal pursuant to [N.C. Gen. Stat. §] 7B-1002." *Id.* at 208, 816 S.E.2d at 929.

creation of a substantial risk of harm. *Matter of M.N.*, 260 N.C. App. at 207-208, 816 S.E.2d at 929. We then remanded the case for further proceedings "not inconsistent with th[e] opinion." *Id.* at 208, 816 S.E.2d at 929. However, instead of requiring DSS to provide sufficient evidence to adjudicate Kaitlyn neglected (as alleged in the Second Petition) by showing harm or risk of harm, the trial court indicated it was dismissing the Second Petition and permitting DSS to pursue its motion for review filed in the First Petition case. The district court committed reversible error by conducting a permanency planning (or review) hearing terminating the Schindlers' guardianship of Kaitlyn without first conducting a new adjudicatory hearing on the Second Petition and actually adjudicating Kaitlyn to be neglected as instructed. *Compare* N.C. Gen. Stat. §§ 7B-401, 7B-402 (2019), *with* N.C. Gen. Stat. §§ 7B-600, 7B-906.1 (2019); *In re T.P.*, 254 N.C. App. 286, 292, 803 S.E.2d 1, 6 (2017).

In addition to attempting to circumvent the mandate of this Court, more troubling, Juvenile Order II purported to release (*i.e.*, remove over objection) the Schindlers as parties to the underlying actions. This portion of the order not only violates N.C. Gen. Stat. § 7B-401.1(c) (2019), but also contradicts this Court's unequivocal holding that the Schindlers were and are proper parties to these proceedings. *Matter of M.N.*, 260 N.C. App. at 208, 816 S.E.2d at 929 ("As court-appointed guardians and persons awarded legal custody of Kaitlyn, the Schindlers are parties to this action . . . .").

In short, by failing to comply with this Court's mandate, the trial court committed reversible error.

III. Conclusion

For the foregoing reasons, we reverse and vacate the orders entered 4 October 2019 insofar as they pertain to Kaitlyn. This matter is remanded to the district court to comply with the previous mandate of this Court. The court shall make findings of fact under the Second Petition regarding whether the alleged activities of the guardians constituted harm or risk of harm to Kaitlyn. Once those findings have been established, the trial court shall draw the appropriate conclusions of law therefrom with respect to the disposition of the matter. Thereafter, the parties may proceed as permitted under law while taking into consideration this Court's previous holdings.

REVERSED AND REMANDED.

Judges BRYANT and STROUD concur.

IN RE LENNANE

[274 N.C. App. 367 (2020)]

IN THE MATTER OF FRANK LENNANE, PETITIONER

ADT, LLC, EMPLOYER

AND

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, RESPONDENT

No. COA20-325

Filed 1 December 2020

Unemployment Compensation—disqualification from benefits—voluntary resignation—good cause attributable to employer analysis

The determination that petitioner was ineligible for unemployment benefits was affirmed where he failed to show that his good cause for leaving his job—he resigned because pain in his knees made it difficult to do security system installations—was attributable to the employer (as required by N.C.G.S. § 96-14.5(a)). The evidence showed petitioner's job duties (which included installations) did not change from the time he began his employment until his resignation, the employer tried to limit the number of installation jobs assigned to petitioner and provided technicians to assist him on larger installs, petitioner provided no medical restrictions to the employer and did not make any formal requests for workplace accommodations, and the employer could not provide administrative work because that work was only available out-of-state.

Judge INMAN dissenting.

Appeal by petitioner from order entered 17 February 2020 by Judge W. Robert Bell in Haywood County Superior Court. Heard in the Court of Appeals 21 October 2020.

North Carolina Department of Commerce, by Sharon A. Johnston, for appellee.

Legal Aid of North Carolina, Inc., by Joseph Franklin Chilton, Bettina J. Roberts, John R. Keller, and Celia Pistolis, for petitioner-appellant.

YOUNG, Judge.

This appeal arises out of a denial of unemployment insurance benefits. The findings of fact support the conclusion of law that Petitioner failed to show that he left work for good cause attributable to the employer. The superior court did not err in denying Petitioner's motion to dismiss. Accordingly, we affirm.

I. Factual and Procedural History

Frank Lennane ("Petitioner") worked as a service technician for ADT, LLC ("Employer") from 1 February 2012 until 16 November 2018. Petitioner's job duties included performing regular service calls, and occasional installations for residential and commercial security systems and alarm systems. On 8 January 2014, Petitioner injured his left knee while on the job. Petitioner had knee surgery and suffered fifteen percent permanent partial injury in his left knee. Following his knee surgery, Petitioner began to favor his right knee, which resulted in new, regular pain in his right knee.

In 2016, Employer went through a business merger and combined its service and installation departments. This change caused Employers to assign more installation work to service technicians. The added installation work was more difficult on Petitioner's knees than his previous job duties, and Petitioner began taking days off work to care for his knees. He sought treatment and was diagnosed with unilateral primary osteoarthritis in his right knee.

Since installations were hard on Petitioner's knees, he asked his manager if he could transfer or apply to other local jobs, such as administrative or clerical work, however, the only positions available would require relocation from North Carolina. Petitioner also requested to be assigned to service calls only, but the manager denied the request because he needed to keep a fair balance of work distribution among all the service technicians. Petitioner's workload was "consistent with the other employees," and the manager distributed work assignments based on Employer's business needs.

By July 2017, the condition of Petitioner's right knee began to worsen. Petitioner utilized the Family and Medical Leave Act ("FMLA") to take a five-week leave of absence to rest his knees and seek additional medical intervention. When Petitioner returned to work, he provided a doctor's note which provided that he would experience flareups and pain, and "a few days rest may be necessary." Petitioner continued to perform all of his duties and responsibilities, but his problems persisted. Petitioner again asked to perform only service calls, and his request was denied.

Petitioner then notified Employer that he was resigning, because he was no longer able to perform his job due to the poor condition of his knees.

Petitioner applied for unemployment insurance benefits, but an Adjudicator ruled that Petitioner left work without good cause attributable to the employer, and therefore Petitioner was disqualified from receiving benefits. Petitioner appealed the decision to an Appeals Referee which affirmed the Adjudicator's decision. Petitioner appealed to the Board of Review of Respondent North Carolina Department of Commerce, Division of Employment Security ("BOR"), which affirmed the Appeals Referee's decision in a split decision. Petitioner petitioned to the Superior Court, and the court entered an order affirming the BOR's decision in its entirety. Petitioner has now appealed to this Court.

II. Standard of Review

The standard for this Court is to determine whether the findings of fact of the final agency decision are supported by any competent evidence, and then determine whether those findings support the conclusion. N.C. Gen. Stat. § 96-15(i) (2020); *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005).

III. Final Agency Decision

Defendant contends that the superior court erred in affirming the BOR's decision that Petitioner failed to prove that his leaving work was for good cause attributable to the employer. We disagree.

> The Division must determine the reason for an individual's separation from work. An individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer. When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer.

N.C. Gen. Stat. § 96-14.5(a) (2020). "Good cause" and cause "attributable to the employer" are the two elements an employee must prove to be qualified to receive unemployment insurance benefits. "Good cause" has been interpreted by the courts to mean "a reason which would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work." *King v. N.C. Dep't of Commerce*, 228 N.C. App. 61, 65, 743 S.E.2d 83, 86 (2013). The Petitioner's cause for leaving work was the condition of his knees; however, Petitioner fails to show that his cause was attributable to the employer. The cause or reason for leaving

is attributable to the employer if it was "produced, caused, created or as a result of actions by the employer." *Id.*

For the entire period that Petitioner worked for Employer he was required to perform at least some installations. The number of installations increased after the 2016 merger; however, Petitioner's supervisor testified that "he was careful to limit the size of jobs that [Petitioner] went on installation-wise," and would have another technician work with him, if possible. The supervisor also testified that Petitioner only performed ten installation jobs in the three months prior to his resignation, and only one of those being a full installation. Another technician assisted Petitioner with that full installation. Petitioner has failed to show a change in job duties from the time he began his employment until the time he resigned.

In *Ray v. Broyhill Furniture Indus.*, this Court held that the claimant proved her reason for leaving "was attributable both to the employer's action (the threat to fire her if she went over her supervisor's head) and inaction (her supervisor's failure to put in her transfer request). 81 N.C. App. 586, 593, 344 S.E.2d 798, 802 (1986). However, here, Employer took actions to help Petitioner. Employer provided knee pads for kneeling and crawling, monitored Petitioner's work schedule and limited the installation jobs, as well as assigned him "lighter re-sales, add-ons, not full-blown installs." Employer also assigned other technicians to assist in the installations. Employer could not provide administrative work because that work was only available in other states. Petitioner provided no medical restrictions or limitations on bending, stooping, or crawling to Employer. The only medical request Petitioner gave Employer was in September 2017 that he not stand or walk for prolonged periods. Unlike in *Ray*, Employer took action in this case, even if the action was not what Petitioner wanted. As a result, these findings support the conclusion that Petitioner failed to show that he left work for good cause attributable to the employer.

IV. Findings of Fact

The standard for this Court is to determine whether the findings of fact of the final agency decision are supported by any competent evidence, and then determine whether those findings support the conclusion. N.C. Gen. Stat. § 96-15(i); *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005).

a. Finding of Fact No. 12

This finding, that "[t]he employer only had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee, and the

claimant was unwilling to relocate from North Carolina," is supported by Petitioner's testimony when he said that he knew office jobs existed, but that he didn't apply for those jobs because of the distance.

b. Findings of Fact No. 16 and No. 17

Finding of Fact No. 16, that "the claimant's manager made attempts thereafter to not dispatch the claimant on the most strenuous or large installations," is supported by Petitioner's supervisor's unrefuted testimony. The supervisor testified that Petitioner asked him for service work or lighter install jobs. He further testified that while he was not always able to accommodate the request, he "was careful to try to limit the size of the jobs that Petitioner went on installation-wise." Finding of Fact No. 17, "[i]f the claimant had to be dispatched on a large installation, then manager Goodson would try to ensure that he [claimant] had another service technician available to assist him," is supported by the supervisor's testimony that there were times he assigned another technician to help with Petitioner's installs. Petitioner also confirmed by his own testimony that the supervisor provided help on installs from time-to-time.

c. Finding of Fact No. 18

Finding of Fact No. 18 provides that, "[i]n October 2018, the claimant had an appointment with a surgeon to discuss treatment for his knees. At which time, the claimant was told that he could undergo surgery or stem cell therapy. The claimant was unwilling to undergo either option. This finding is supported by Petitioner's testimony of the types of treatments recommended for his knee, and that he "didn't even [want to] go down that avenue."

d. Finding of Fact No. 21

Finding of Fact No. 21 provides that "[p]rior to the claimant's resignation, he did not make any formal or written requests for workplace accommodations from either the employer's administrative or human resource staff members. During 2018, the claimant did not request intermittent leave via FMLA." This finding is supported by Petitioner's testimony that he did not consider any type of FMLA or other short-term disability. Petitioner did not provide Employer a letter from his doctor or surgeon requesting restrictions or limitations on his job. Petitioner relied on FMLA Certification by his doctor which only stated, "[p]rolonged standing and walking would be very difficult for this patient."

e. Finding of Fact No. 22

This finding, that "[t]he claimant left his job due to personal health or medical reasons," is supported by Petitioner's testimony that his knee problems caused him to resign.

Each of the above findings are supported by competent evidence of record. Additionally, each finding supports the conclusion that the Petitioner failed to establish that his good cause for leaving work was "attributable to the employer" as required by N.C. Gen. Stat. § 96-15(i). Accordingly, the superior court did not err in denying Petitioner's motion to dismiss, nor did the court err in finding that Petitioner was not entitled to unemployment insurance benefits. Therefore, we affirm the lower court's decision.

AFFIRMED.

Judge DILLON concurs.

Judge INMAN dissents.

INMAN, Judge, dissenting.

Because in my view precedent compels us to hold that Petitioner left work for good cause attributable to the employer, I respectfully dissent from the majority's holding to the contrary.

The Employment Security Act requires "the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed *through no fault of their own*." N.C. Gen. Stat. § 96-2 (2019) (emphasis added). We are bound by this Court's previous holding that "[t]he Act is to be liberally construed in favor of applicants," *Marlow v. N.C. Emp't Sec. Com'n*, 127 N.C. App. 734, 735, 493 S.E.2d 302, 303 (1997) (citation omitted), and that "statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims." *Id.* (citations omitted).

In *Ray v. Broyhill Furniture Indus.*, 81 N.C. App. 586, 344 S.E.2d 798 (1986), this Court held that an employee who left a job as a result of the employer's actions or inaction abandoned the employment due to "good cause attributable to her employer" and could not be denied unemployment benefits provided by the Act. *Ray*, 81 N.C. App. at 592, 344 S.E.2d at 802. We explained in *Ray* that "[t]he Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical

standards and against an affirmative or *de facto* policy of the employer to the contrary." *Id.* at 593, 344 S.E.2d at 802-03 (citation omitted).

Petitioner's deteriorating knee prevented him from performing the number of installations required of him by his employer. Respondent concedes he had good cause to resign. But, rather than giving up immediately, Petitioner sought to adapt his work to accommodate his injury by requesting he be assigned to a desk job. His employer declined that request unless he was willing to relocate to another state.

Petitioner then requested that he be assigned only to less strenuous service calls. That request was denied not because such work was unavailable, but because his employer's "business needs" required Petitioner to continue performing installations that his body could not support. Although the Petitioner's manager, per the findings of fact made below, "made *attempts* . . . to not dispatch the claimant on the most strenuous or large installations[,]" and "would *try* to ensure that [Petitioner] had another service technician available to assist him[,]" (emphasis added), the manager testified that their employer nonetheless required Petitioner to continue performing installations "consistent with the other employees" and to the detriment of his health. And while the evidence—but not any factual findings—shows that Petitioner's employer provided him with kneepads, that same evidence discloses that the kneepads were ineffective in preventing Petitioner's pain and were not a specific accommodation provided for purposes of addressing his osteoarthritis. "The Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or *de facto* policy of the employer to the contrary." *Ray*, 81 N.C. App. at 593, 344 S.E.2d at 802-03 (citation omitted).

It is not Petitioner's fault that his knee suffers from osteoarthritis, nor is it his fault that his employer's "business needs" precluded accommodations that would not require him to sacrifice his health. He was thus rendered "unemployed through no fault of [his] own[,]" N.C. Gen. Stat. § 96-2. As in *Ray*, Petitioner's employer's "inaction placed [him] in the untenable position of having to choose between leaving [his] job and becoming unemployed or remaining in a job which . . . exacerbated [his medical] conditions." 81 N.C. App. at 592-93, 344 S.E.2d at 802. Consistent with that precedent, I would hold that Petitioner left work for "good cause attributable to the employer" within the meaning of N.C. Gen. Stat. § 96-14.5(a) (2019) and should not be disqualified from receiving unemployment benefits. I respectfully dissent.

IN RE R.D.B.

[274 N.C. App. 374 (2020)]

IN THE MATTER OF R.D.B., A MINOR CHILD

No. COA19-1019

Filed 1 December 2020

Guardian and Ward—Chapter 35A guardianship proceeding—Rules of Evidence—applicability—admission or exclusion of evidence—prejudice

In a guardianship case filed by a minor child's grandparents, where the superior court upheld the assistant clerk of court's appointment of the child's stepfather as the child's legal guardian, the court erred in concluding that the North Carolina Rules of Evidence did not apply to Chapter 35A minor guardianship proceedings. However, neither this error nor any resultant admission or exclusion of evidence amounted to prejudicial error because, even setting aside any findings of fact that relied upon evidence the grandparents challenged on appeal, the unchallenged findings of fact by both the assistant clerk and the superior court supported the guardianship appointment.

Appeal by petitioners from order entered 9 April 2019 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 August 2020.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Jon R. Burns, for petitioners-appellants Ruby and Caleb Harkness.

Kip David Nelson for appellee Raymond Mann.

ZACHARY, Judge.

Petitioners Ruby and Caleb Harkness appeal from the superior court's order affirming the assistant clerk of court's order appointing Raymond Mann to serve as the guardian of the minor child, R.D.B. ("Robert").[1] After careful review, we affirm.

Background

Robert was born in September 2010. Robert's father died intestate on 4 August 2013. From 2011 to 2014, Robert and his mother, Tracee,

1. We employ a pseudonym to protect the identity of the juvenile.

lived with the Harknesses, Tracee's parents, in Georgia; in 2014, they moved in with Raymond Mann, Tracee's boyfriend, in Charlotte, North Carolina. About a year later, Tracee and Raymond were married. On 1 October 2017, Tracee died intestate, leaving Robert with no living biological parents, and thus no natural guardian. Robert continued to reside in Charlotte with Raymond after Tracee's passing.

On 31 October 2017, the Harknesses filed a guardianship application with the Mecklenburg County Clerk of Superior Court, seeking appointment as general guardians of Robert. The Harknesses named Raymond as a person "known to have an interest in this proceeding," and on 8 November 2017, a Mecklenburg County Sheriff's deputy served Raymond with a copy of the Harknesses' application and a notice of hearing On 22 November 2017, the assistant clerk[2] entered an order appointing a guardian *ad litem* for Robert.

In June 2018, over the course of six days, the guardianship case was tried before the assistant clerk. On 11 July 2018, the assistant clerk entered an order appointing Raymond to serve as Robert's guardian. The Harknesses gave timely notice of appeal to the Mecklenburg County Superior Court, pursuant to N.C. Gen. Stat. § 1-301.3(c).

On 15 January 2019, the Harknesses' appeal came on for hearing before the Honorable Carla Archie in Mecklenburg County Superior Court. The Harknesses argued that the assistant clerk erred by (1) failing to "consider any statements that were purportedly made by the minor child to anyone other than a guardian ad litem, or to a therapist, regarding what his preferences were in this case," particularly "anything that the child said to any grandparents, any aunts, [or any] uncles"; (2) "allow[ing] virtually most all statements made or purported to be made to witnesses in this case by Tracee Mann, the deceased mother"; and (3) admitting the testimony of Che'Landra Moore-Quarles, a licensed professional counselor, as an "expert in grief counseling."

On 9 April 2019, the superior court entered an order affirming the assistant clerk's appointment of Raymond as guardian. The superior court concluded, *inter alia*, that the minor guardianship hearing was held before the assistant clerk in accordance with section 35A-1223 of our General Statutes, "to which the North Carolina Rules of Evidence do not apply." In addition, the superior court concluded that "[t]here was no prejudicial error in the admission or exclusion of evidence" at

2. "An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk." N.C. Gen. Stat. § 7A-102(b) (2019).

the hearing. The Harknesses timely noticed their appeal of the superior court's order.

Discussion

The Harknesses raise two arguments on appeal to this Court. They contend that (1) "[t]he superior court reversibly erred in concluding that the North Carolina Rules of Evidence do not apply to this Guardianship Action"; and (2) "[t]he superior court reversibly erred in concluding that the clerk did not commit prejudicial error in admitting and/or excluding evidence at trial[.]"

I. Standard of Review

This Court has held that section 1-301.3 of our General Statutes governs the standard of review for an appeal arising from an order appointing a guardian. *In re Winstead*, 189 N.C. App. 145, 151, 657 S.E.2d 411, 415 (2008). Pursuant to this statute, the clerk "shall determine all issues of fact and law," and "shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." N.C. Gen. Stat. § 1-301.3(b).

"When a party appeals a judgment or order entered by the clerk of court to the superior court, the trial court sits as an appellate court." *In re Taylor*, 242 N.C. App. 30, 34, 774 S.E.2d 863, 866 (2015) (citation and internal quotation marks omitted). Under section 1-301.3, when sitting as an appellate court,

> the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d). "If the judge finds prejudicial error in the admission or exclusion of evidence, the judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record." *Id.*

"The standard of review in this Court is the same as in the Superior Court." *In re Estate of Johnson*, 264 N.C. App. 27, 32, 824 S.E.2d 857, 861 (2019) (citation omitted). The superior court's review is limited to "those findings of fact which the appellant has properly challenged by

specific exceptions." *In re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 854 (2006) (emphasis omitted) (citation and internal quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation and internal quotation marks omitted).

II. The Rules of Evidence

The Harknesses first challenge the superior court's conclusion of law that "the North Carolina Rules of Evidence do not apply" to minor guardianship hearings governed by section 35A-1223.

Chapter 35A of our General Statutes provides that "[a]ny person or corporation, including any State or local human services agency[,]" may apply "for the appointment of a guardian of the person or general guardian for any minor who [does not have a] natural guardian." N.C. Gen. Stat. § 35A-1221. The clerk of superior court will then conduct a hearing "to determine whether the appointment of a guardian is required, and, if so, consider[ ] the child's best interest in determining who the guardian(s) should be." *Corbett v. Lynch*, 251 N.C. App. 40, 42, 795 S.E.2d 564, 565 (2016) (citing N.C. Gen. Stat. § 35A-1223). At the guardianship hearing, the clerk may receive a broad array of evidence:

> If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest.

N.C. Gen. Stat. § 35A-1223.

The Harknesses argue that "[a] plain reading" of section 35A-1223, as well as "the superior court's standard of review for the appeal from an order awarding guardianship of a minor," make clear that the Rules of Evidence apply to such hearings. We agree—albeit for different reasons.

It is axiomatic that "[t]he primary goal of statutory construction is to arrive at legislative intent." *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). In the case at bar, the legislative intent is manifest.

Our Rules of Evidence "govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101." N.C.

Gen. Stat. § 8C-1, Rule 101. Rule 1101 states that "[e]xcept as otherwise provided in subdivision (b) or by statute," the Rules of Evidence "apply to all actions and proceedings in the courts of this State." *Id.* § 8C-1, Rule 1101(a).

Subdivision (b) provides that the Rules of Evidence, other than those respecting privileges, are inapplicable in certain listed situations:

> **(1) Preliminary Questions of Fact.** -- The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).
>
> **(2) Grand Jury. --** Proceedings before grand juries.
>
> **(3) Miscellaneous Proceedings. --** Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.
>
> **(4) Contempt Proceedings. --** Contempt proceedings in which the court is authorized by law to act summarily.

Id. § 8C-1, Rule 1101(b). Minor guardianship proceedings pursuant to section 35A-1223 are not included in Rule 1101(b)'s enumerated exceptions.

In addition, the General Assembly did not "otherwise provide[ ] . . . by statute," *id.* § 8C-1, Rule 1101(a), that the Rules of Evidence would not apply to minor guardianship proceedings pursuant to section 35A-1223. In particular, there is no mention of the Rules of Evidence in Chapter 35A of our General Statutes, "Incompetency and Guardianship."

Moreover, our statutes contain numerous examples of instances in which our General Assembly has specifically excepted certain proceedings from the Rules of Evidence, which it failed to do with regard to minor guardianship hearings. *See, e.g.*, *id.* § 7B-901(a) (initial dispositional hearings in juvenile actions under Chapter 7B); *id.* § 20-9(g)(4)(d) (hearings to review the restriction, cancellation, or denial of a driver's license, due to a person's physical or mental disability or disease); *id.* § 115C-325(j)(4) (hearings upon a superintendent's recommendation for the dismissal or demotion of a public-school teacher who is a "career employee," as defined by N.C. Gen. Stat. § 115C-325(a)(1a)).

In that the legislature did not except Chapter 35A minor guardianship proceedings from the application of the Rules of Evidence in Rule

1101(b) or by other statute, we conclude that the legislature intended for the Rules of Evidence to apply to minor guardianship proceedings. Accordingly, the Rules of Evidence apply to minor guardianship proceedings under section 35A-1223, and the trial court erred by concluding otherwise. *Cf. State v. Foster*, 222 N.C. App. 199, 203, 729 S.E.2d 116, 119 (2012) (holding that, because "motions for post-conviction DNA testing are not listed as an exception while the Rules of Evidence specifically list other exceptions, the Rules of Evidence apply to [such] motions or proceedings").

Nevertheless, for this to constitute reversible error, it must have been prejudicial to the Harknesses. *See* N.C. Gen. Stat. § 1-301.3(d); *see also In re Estate of Tucci*, 104 N.C. App. 142, 151, 408 S.E.2d 859, 865 (1991) ("A party asserting error on appeal must show from the record that the trial court committed error, and that he was prejudiced as a result."), *disc. review improvidently allowed*, 331 N.C. 749, 417 S.E.2d 236 (1992).

III. Prejudice

The Harknesses assert that "the superior court wrongly found no prejudicial error" in the assistant clerk's evidentiary rulings (1) excluding testimony of Robert's statements to others; (2) admitting testimony of Tracee's statements to others; and (3) admitting the expert testimony of Che'Landra Moore-Quarles, a licensed counselor who treats "a variety of mental health issues including depression, grief, trauma and substance abuse." In so arguing, the Harknesses challenge (1) the superior court's findings of fact 9 and 10 (upholding the assistant clerk's findings of fact 13 and 26, respectively); (2) the superior court's finding of fact 13 (upholding the assistant clerk's finding of fact 34);[3] and (3) the superior court's findings of fact 19 and 20 (upholding the assistant clerk's acceptance of Moore-Quarles as an expert witness, and the assistant clerk's finding of fact 27).

As previously stated, our review is limited to "those findings of fact *which the appellant has properly challenged by specific exceptions*." *Estate of Whitaker*, 179 N.C. App. at 382, 633 S.E.2d at 854 (citation and internal quotation marks omitted). The remaining "[u]nchallenged findings of fact are presumed to be supported by competent evidence

3. The Harknesses argue that the assistant clerk's finding of fact 36 is also "expressly based at least in part on this error," but they fail to challenge on appeal the superior court's finding of fact 17, which upheld, *inter alia*, the assistant clerk's finding of fact 36. Nevertheless, as illustrated below, excluding the assistant clerk's finding of fact 36 does not change our analysis.

and are binding on appeal." *Estate of Harper*, 269 N.C. App. at 215, 837 S.E.2d at 604 (citation and internal quotation marks omitted).

The assistant clerk's order contains 39 findings of fact. On appeal to the superior court, the Harknesses initially challenged 14 of those findings of fact, before withdrawing four of these challenges by the time of the superior court hearing. The superior court thus considered, and upheld in its order, ten of the assistant clerk's findings of fact. Before this Court, the Harknesses specifically challenge only five of the superior court's findings of fact—four of which uphold the assistant clerk's findings of fact, and one which upholds her acceptance of Moore-Quarles as an expert witness.

Of the findings of fact in the assistant clerk's order that the Harknesses never specifically challenged or that the superior court upheld in findings of fact that the Harknesses do not specifically challenge on appeal, we note the following:

> 18. The minor child is a member of a large, extended family inclusive of [Raymond], the Harknesses, his maternal sibling and relatives, his paternal siblings and relatives . . . , [Raymond]'s relatives, and close friends of [Raymond and Tracee].
>
> . . . .
>
> 24. [Robert] lived with his mother and [Raymond] in [Raymond]'s home in Charlotte, North Carolina from 2014 until [Tracee]'s death.
>
> 25. [Raymond] has played a significant role in [Robert]'s life since [Robert and Tracee] moved to Charlotte. [Raymond] assisted [Tracee] in providing care, support and supervision of [Robert].
>
> . . . .
>
> 28. [Raymond] is gainfully employed and provides for [Robert]'s basic needs and extracurricular activities.
>
> 29. [Raymond] is knowledgeable about [Robert]'s medical history and takes [him] to wellness appointments. [Raymond] also maintains medical and dental insurance for [Robert].
>
> 30. [Raymond] is knowledgeable about [Robert]'s educational needs and progress. [Raymond] previously enrolled

> [Robert] in school tutoring and [Raymond] has assisted [Robert] with his homework and special school projects.
>
> 31. [Raymond] opened a 529 Education account for [Robert] and . . . makes monthly contributions to that account.
>
> 32. [Raymond] demonstrates an active interest in [Robert]'s interests, activities and friendships. [Raymond] has coached [Robert]'s basketball team for three years.
>
> 33. [Raymond] has demonstrated respect and support of [Robert]'s relationship with his siblings and relatives. [Raymond] and [Robert] participated in a Balloon Release to honor the memory of [Robert's] late [father]. [Raymond] allowed [Robert] to attend a summer family event with [his late father's] family.
>
> . . . .
>
> 35. [Petitioner Ruby] . . . expressed appreciation for the role Raymond . . . played in her daughter's and grandchildren's lives.

The assistant clerk also made three unchallenged findings regarding Robert's best interest with respect to the appointment of a guardian:

> 37. The best interest of [Robert] would be best promoted by the appointment of a guardian of person who will support [his] ongoing development and physical, emotional, and social wellbeing.
>
> 38. The best interest of [Robert] would be best promoted by the appointment of a guardian of person who will ensure that [he] has appropriate contact with members of [his] diverse and extended family, inclusive of the Harknesses, [Robert's father's] family, [Raymond], [Raymond]'s relatives, and close friends of [Raymond and Tracee].
>
> 39. The best interest of [Robert] would not be promoted by appointing multiple guardians of the person, a guardian of estate, or a general guardian.

Our review of the voluminous record evinces substantial support for the assistant clerk's decision to appoint Raymond to serve as Robert's guardian, as well as the superior court's order affirming Raymond's appointment. Moreover, assuming, *arguendo*, that the superior court

erred by making the challenged findings of fact that upheld the assistant clerk's challenged findings of fact, the Harknesses have not shown that they were prejudiced by these errors. Even if we were to exclude the evidence that the Harknesses challenge on appeal, together with the challenged findings of fact supported by that evidence, the remaining unchallenged findings of fact amply support the remaining conclusions of law, which ultimately support the assistant clerk's appointment of Raymond as Robert's guardian and the superior court's affirmance of that appointment.

As regards the acceptance of Moore-Quarles as an expert witness, assuming, *arguendo*, that the trial court erred, the Harknesses' argument lacks merit insofar as they have not shown prejudice.

The Harknesses assert that the admission of Moore-Quarles' testimony, "including her purported expert opinions about how the minor child sees his life and whether his current environment should change," amounted to prejudicial error. However, Moore-Quarles was not mentioned with any detail in the assistant clerk's order. The superior court stated in its finding of fact 20—which the Harknesses challenge on appeal—that the assistant clerk "gave little weight to Ms. Moore-Quarles' testimony, as the only [finding of fact] regarding her involvement was that the minor child attended grief sessions." In that sole finding of fact, the assistant clerk stated that Raymond enrolled Robert in grief therapy sessions and that both parties "had opportunities to speak with the therapist about [Robert's] progress." Moreover, there is no description of that progress in the assistant clerk's order, nor is there any mention of Moore-Quarles' opinions. It is evident that the assistant clerk relied very little, if at all, on Moore-Quarles' testimony in making her decision. Thus, the Harknesses can show no prejudice from the admission of Moore-Quarles' testimony. *See Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) ("[W]e fail to see the prejudice to plaintiff . . . , especially since the trial judge made no reference to [the expert's] testimony in his order; thus, we may presume that the testimony played no role in his decision.").

Although the assistant clerk made other findings of fact that could have supported the appointment of the Harknesses to serve as Robert's guardians, the unchallenged findings of fact more than sufficiently support the assistant clerk's order appointing Raymond to serve as Robert's guardian. Despite the superior court's erroneous conclusion of law regarding the applicability of the Rules of Evidence, the Harknesses have not shown that they were prejudiced by that error, or by any resultant erroneous admission or exclusion of evidence.

Conclusion

The superior court improperly concluded that the Rules of Evidence do not apply to minor guardianship hearings governed by section 35A-1223. However, for the foregoing reasons, any alleged errors arising from the assistant clerk's evidentiary rulings did not prejudice the Harknesses. Accordingly, we affirm the superior court's order affirming the appointment of Raymond Mann as Robert's guardian.

AFFIRMED.

Chief Judge McGEE and Judge HAMPSON concur.

PETER MILLAR, LLC, Plaintiff-Appellant
v.
SHAW'S MENSWEAR, INC., d/b/a THE SHAW GROUP RETAIL CONSULTANTS, Third-Party Plaintiff-Defendant-Appellee
v.
JC NAPLES, INC., G.C. OF WINTER PARK, INC., JCWP, LLC, and HOWARD CRAIG DELONGY, Third-Party Defendants-Appellants

No. COA19-1078

Filed 1 December 2020

1. Appeal and Error—interlocutory order—N.C.G.S. § 1-75.12 motion to stay granted—right of immediate appeal

In a contract action in which a related suit was already pending in a Georgia court, the trial court's order granting defendant's motion to stay, in accordance with N.C.G.S. § 1-75.12(a), was immediately appealable pursuant to section 1-75.12(c).

2. Appeal and Error—interlocutory order—motion to dismiss third-party complaint for lack of jurisdiction and improper venue—right of immediate appeal

In a contract action in which a related suit was already pending in a Georgia court, the trial court's order denying a third-party defendant's motion to dismiss for lack of personal jurisdiction and improper venue was immediately appealable as affecting a substantial right.

3. Appeal and Error—interlocutory order—order granting attorney fees—not immediately appealable

In a contract action in which a related suit was already pending in a Georgia court, although immediate appellate review was available to review the trial court's order granting defendant's motion to stay and denying the third-party defendant's motion to dismiss (which alleged a lack of personal jurisdiction and improper venue), a challenge to the court's order granting attorney fees was dismissed because that order did not affect a substantial right.

4. Jurisdiction—contract dispute—related suit pending in another state—motion to stay granted—abuse of discretion analysis

In a contract action initiated by a North Carolina clothing manufacturer to collect a past due account from a Georgia clothing wholesaler, the trial court did not abuse its discretion by granting the wholesaler's motion to stay where the wholesaler had a pending related suit in Georgia (for breach of consignment agreements) against a Florida clothing retailer that held inventory made by the North Carolina manufacturer. Sufficient evidence was presented to support the court's determination that a substantial injustice would result if the North Carolina suit were permitted to go forward (pursuant to N.C.G.S. § 1-75.12(a)), due to the risk that inconsistent judgments might result from simultaneous proceedings in two different states regarding the same contractual issue.

5. Venue—forum selection clause—stipulation to clause being mandatory—enforceability—remand for entry of order dismissing action

In a contract action initiated by a North Carolina manufacturer against a Georgia wholesaler to collect on a past due account, where the wholesaler filed a third-party complaint against a Florida retailer that held the manufacturer's inventory, and where the wholesaler and retailer stipulated that their consignment agreement's forum selection clause was mandatory (listing Georgia as the proper forum for disputes), the Court of Appeals applied Georgia law and concluded that the clause was valid and enforceable. The wholesaler presented no evidence that litigating the matter in Georgia would be inconvenient—not only had the wholesaler drafted the forum selection clause but also it had availed itself of the clause by initiating a suit against the retailer in Georgia. The matter was remanded with instruction for the trial court to enter an order dismissing the third-party complaint for improper venue.

6. Jurisdiction—personal—long-arm statute—commercial transactions—lack of direct contact between nonresident retailer and North Carolina manufacturer

In a contract action initiated by a North Carolina manufacturer against a Georgia wholesaler to collect on a past due account, in which the wholesaler filed a third-party complaint against a Florida retailer that held the manufacturer's inventory, the wholesaler (as third-party plaintiff) failed to demonstrate the Florida retailer had sufficient direct contacts with the North Carolina manufacturer to be subjected to jurisdiction under this State's long-arm statute (N.C.G.S. § 1-75.4(5)(d)). The evidence showed that none of the manufacturer's shipments to the retailer were at the retailer's order or direction, but were instead directed by the wholesaler, and all orders and directions regarding the inventory occurred in either Florida or Georgia. The matter was remanded with instruction for the trial court to enter an order dismissing the third-party complaint for lack of personal jurisdiction.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by plaintiff-appellant and third-party defendants-appellants from order entered 6 August 2019 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 12 August 2020.

Williams Mullen, by Camden R. Webb and Lauren E. Fussell, for plaintiff-appellant.

Manning Fulton & Skinner P.A., by William S. Cherry, III and Jessica B. Vickers, for defendant-appellee.

Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe and J. William Graebe, for third-party defendants-appellants.

BERGER, Judge.

On August 6, 2019, the trial court entered an order denying Appellants JC Naples, Inc.; G.C. of Winter Park, Inc.; JCWP, LLC; and Howard Craig Delongy's (collectively, "Delongy Stores") motions to dismiss and granting Appellee Shaw's Menswear, Inc.'s ("Shaw") motion to stay. Appellant Peter Millar, LLC ("Millar") argues the trial court erred when it granted the motion to stay. Delongy Stores argues the trial court erred when it

(1) denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction, and (2) did not award attorneys' fees pursuant to the contract between the parties. For the reasons stated herein, we affirm the trial court's order granting the motion to stay and denying attorneys' fees. We remand with instructions to enter an order dismissing the third-party complaint for improper venue and lack of personal jurisdiction.

Factual and Procedural Background

Delongy Stores and Shaw are parties to various consignment agreements (the "Consignment Agreements"). Shaw, a men's clothing wholesaler in Georgia, agreed to purchase inventory from manufacturing suppliers for Delongy Stores, a group of men's clothing retailers in Florida. Pursuant to the Consignment Agreements, Delongy Stores "select[s] the inventory to be consigned" to them by submitting orders to the manufacturing suppliers using forms provided by Shaw. Shaw is "responsible for approving the amount of inventory requested by and to be consigned" to Delongy Stores. Then, Shaw will "deliver or cause to be delivered" the selected inventory to Delongy Stores. Shaw retains ownership of the inventory while it is in the possession of Delongy Stores. As Delongy Stores sells its consigned inventory, the sale proceeds are deposited in an account owned by Shaw. Shaw uses the proceeds to reimburse the manufacturing suppliers, take a commission, and pay the balance to Delongy Stores.

Millar, a North Carolina men's clothing manufacturer, provides inventory to Shaw, some of which was consigned in Delongy Stores. According to Millar's verified complaint, "[a]s part of Shaw's services, . . . on behalf of Delongy Stores," Shaw was required to "pay[] [Millar] for merchandise that [was] shipped to [Delongy Stores]." As of February 6, 2019, Shaw owed Millar $448,050.66 for inventory shipped to Delongy Stores.

On February 8, 2019, Shaw filed suit against Delongy Stores in Georgia Superior Court for default and breach of the Consignment Agreements. Shaw did not name Millar as a party in the Georgia action. Delongy Stores removed the Georgia action to the United States District Court for the Middle District of Georgia. However, that court remanded the action back to Georgia Superior Court because the forum selection clause in the Consignment Agreements "requires the suit to take place in [the proper Georgia Superior court.]"

On February 6, 2019, Millar filed suit against Shaw in Durham County (North Carolina) Superior Court for the past due account. Shaw filed an answer, and also filed a third-party complaint against Delongy Stores.

Delongy Stores subsequently filed a motion to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction. Shaw filed a motion to stay the North Carolina action.

On August 6, 2019, the trial court entered an order denying Delongy Stores' motions to dismiss and granting Shaw's motion to stay. Millar argues the trial court erred when it granted Shaw's motion to stay. Delongy Stores argues the trial court erred when it (1) denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction, and (2) did not award attorneys' fees pursuant to the Consignment Agreements. We address each issue below.

Analysis

I. Interlocutory Appeals

[1] "As a general rule, there is no right of appeal from an interlocutory order." *Edwards v. Foley*, 253 N.C. App. 410, 411, 800 S.E.2d 755, 756 (2017).

However, when "a motion for a stay . . . is granted, any nonmoving party shall have the right of immediate appeal." N.C. Gen. Stat. § 1-75.12(c) (2019). Thus, Millar's appeal is properly before this Court.

[2] In addition, Delongy Stores' appeal of its motion to dismiss the third-party complaint for lack of personal jurisdiction is properly before this Court. "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" N.C. Gen. Stat. § 1-277(b) (2019).

Further, Delongy Stores' appeal of its motion to dismiss the third-party complaint for improper venue is properly before us. This Court has previously stated, "an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 n.1 (2002). *See Hill v. StubHub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) ("immediate appellate review of an interlocutory order is available . . . when the interlocutory order affects a substantial right under N.C. Gen. Stat. § 1-277(a)[.]").

[3] However, an "order granting attorney's fees is interlocutory as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500, 503 (1988) (citation and quotation marks omitted). Here, the trial court's decision to not award attorneys' fees

is interlocutory and is "best left until the underlying action has been resolved[.]" *Andaloro v. Sawyer*, 144 N.C. App. 611, 614, 551 S.E.2d 128, 131 (2001). Therefore, we dismiss this issue as interlocutory.

II. Motion to Stay

[4] "We review a trial court's grant of a motion to stay for an abuse of discretion." *Bryant & Assocs., LLC v. ARC Fin. Servs., LLC*, 238 N.C. App. 1, 4, 767 S.E.2d 87, 90 (2014) (citation omitted). This Court

> [does] not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute our judgment in place of the trial court's, we consider only whether the trial court's [grant] was a patently arbitrary decision, manifestly unsupported by reason.

Id. at 4, 767 S.E.2d at 90 (citation omitted). "[A]ppellate review is limited to insuring that the decision could, in light of the factual context in which it was made, be the product of reason." *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 118, 493 S.E.2d 806, 809 (1997) (citation omitted).

> If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State.

N.C. Gen. Stat. § 1-75.12(a) (2019). Traditionally, our Courts have considered the following factors to determine whether a substantial injustice would result if the trial court denied the stay:

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. v. Nexsen, Pruet, Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (citation omitted).

"A court will not have abused its discretion in failing to consider each enumerated factor." *Id.* at 357, 435 S.E.2d at 574.

> Further, in determining whether to grant a stay, it is not necessary that the trial court find that all factors positively support a stay, as long as it is able to conclude that (1) a substantial injustice would result if the trial court denied the stay, (2) the stay is warranted by those factors present, and (3) the alternative forum is convenient, reasonable, and fair.

Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd., 201 N.C. App. 507, 520, 687 S.E.2d 487, 495 (2009) (citation omitted).

Millar argues that the trial court did not make a finding of fact that Shaw would suffer a substantial injustice if the trial court denied the stay. However, the trial court is not required to make written findings of fact and conclusions of law, rather, these are necessary on motions only when requested by a party. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2019). Here, Millar made no specific request for findings of fact or conclusions of law, therefore, the trial court was not required to find facts. *See Allen v. Trust Co.*, 35 N.C. App. 267, 269, 241 S.E.2d 123, 125 (1978) (holding that "absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts . . . and it is presumed that the [j]udge, upon proper evidence, found facts to support this judgment." (citation omitted)).

Here, there was sufficient evidence to support the trial court's order granting the motion to stay because the potential for inconsistent judgments from simultaneous proceedings in two different states addressing the same issue could result in a substantial injustice. *See Wachovia Bank*, 201 N.C. App. at 520-21, 687 S.E.2d at 495-96. In the Georgia action, Shaw alleges that Delongy Stores breached the Consignment Agreements in several respects, some of which may directly impact this action. In addition, "the stay is warranted by [the *Lawyers Mutual*] factors[,]" including: the nature of the case, the convenience of the witnesses, the availability of compulsory process to produce witnesses, and the relative ease of access to sources of proof. *Id.* at 521, 687 S.E.2d at 496.

Accordingly, the trial court did not totally abandon consideration of the *Lawyers Mutual* factors and was able to conclude that a substantial injustice would result if it denied the stay. *See Wachovia Bank*, 201 N.C. App. at 521, 687 S.E.2d at 496. Because the trial court did not make "a patently arbitrary decision, manifestly unsupported by reason," the trial court did not abuse its discretion when it granted the motion to stay. *Bryant & Assocs., LLC*, 238 N.C. App. at 4, 767 S.E.2d at 90 (citation omitted). Accordingly, we affirm the trial court's order granting the motion to stay.

III. Motions to Dismiss

Delongy Stores argues that the trial court erred when it denied the motions to dismiss the third-party complaint for improper venue and for lack of personal jurisdiction. We agree.

A. Improper Venue

[5] "A trial court's interpretation of a forum selection clause is an issue of law that is reviewed *de novo*." *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 382, 800 S.E.2d 716, 720 (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." *Sony Ericsson Mobile Communications USA, Inc. v. Agere Systems, Inc.*, 195 N.C. App. 577, 579, 672 S.E.2d 763, 765 (2009) (citation and quotation marks omitted).

> In general, a court interprets a contract according to the intent of the parties to the contract. Further, the Supreme Court of North Carolina has held that where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.

Szymczyk v. Signs Now Corp., 168 N.C. App. 182, 186, 606 S.E.2d 728, 732 (2005) (citations and quotation marks omitted). Specifically, when a contract contains a mandatory forum selection clause, it "vest[s] exclusive jurisdiction" in a particular state or court. *US Chem. Storage*, 253 N.C. App. at 383, 800 S.E.2d at 720; *see also S&S Family Bus. Corp. v. Clean Juice Franchising, LLC*, No. COA19-264, 2020 WL 549627, *3 (N.C. Ct. App. Feb. 4, 2020) (unpublished) ("A mandatory forum selection clause vests exclusive jurisdiction in a particular state or court.").

Delongy Stores and Shaw stipulated that the forum selection clause at issue here is mandatory. In fact, the forum selection clause explicitly states that the Consignment Agreements are subject to "the laws of the State of Georgia." Thus, we apply Georgia law to determine whether the forum selection clause is valid.

> Georgia courts have adopted the United States Supreme Court's ruling in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 SC 1907, 32 LE2d 513 (1972), that forum selection clauses are prima facie valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances.

Equity Tr. Co. v. Jones, 339 Ga. App. 11, 11, 792 S.E.2d 458, 459 (2016) (citation and quotation marks omitted).

To invalidate a mandatory forum selection clause under Georgia law,

> the opposing party must show that trial in the chosen forum will be so inconvenient that he will, for all practical purposes, be deprived of his day in court. A freely negotiated agreement *should be upheld* absent a compelling reason such as fraud, undue influence, or overweening bargaining power.

OFC Capital v. Colonial Distrib.'s, 285 Ga. App. 815, 817, 648 S.E.2d 140, 142 (2007) (emphasis added) (citation and quotation marks omitted).

Shaw contends that enforcement of the forum selection clause may increase the risk of inconsistent outcomes. However, Shaw has not demonstrated that trial in Georgia would be "so inconvenient" that it will "be deprived of its day in court." *Id.* at 817, 648 S.E.2d at 142 (citation and quotation marks omitted). In fact, Shaw is having its day in court as evidenced by the lawsuit that it filed against Delongy Stores in Georgia. Moreover, Shaw has failed to allege or demonstrate a compelling reason that the forum selection clause, which establishes venue in Shaw's home state, was the result of "fraud, undue influence, or overweening bargaining power." *Id.* at 817, 648 S.E.2d at 142 (citation and quotation marks omitted). We note that not only did Shaw draft the forum selection clause, but has also relied on its enforceability in the pending Georgia case. Specifically, Shaw previously stated that the "contractual forum selection clause is enforceable and is mandatory and that any dispute between Shaw and the Delongy [Stores] arising out of the Consignment Agreement *must be litigated* in the Putnam County, Georgia Superior Court." (emphasis added).

Based on the record, Shaw has failed to demonstrate that the forum selection clause is unenforceable. Thus, the trial court erred when it failed to enforce the mandatory forum selection clause and granted Delongy Stores' motion to dismiss for improper venue. *Id.* at 817, 648 S.E.2d at 142. We remand with instructions to enter an order dismissing Shaw's third-party complaint for improper venue.

B. Lack of Personal Jurisdiction

[6] "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of Am. Secs. LLC v. Evergreen Int'l*

Aviation, Inc., 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (citation and quotation marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (citation omitted).

When a defendant challenges personal jurisdiction pursuant to Rule 12(b)(2),

> a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. . . . Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (citations omitted). When "the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Secs.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (*purgandum*). It is not for this Court to "reweigh the evidence presented to the trial court." *Don't Do It Empire, LLC v. Tenntex*, 246 N.C. App. 46, 57, 782 S.E.2d 903, 910 (2016) (citation and quotation marks omitted).

When reviewing the issue of personal jurisdiction on appeal, this Court "employs a two-step analysis." *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). "First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state's long-arm statute." *Id.* at 119, 638 S.E.2d at 208 (citation omitted). "Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* at 119, 638 S.E.2d at 208.

"[N.C. Gen. Stat. §] 1-75.4 is commonly referred to as the 'long-arm' statute." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). Specifically, a North Carolina court has personal jurisdiction "[i]n any action which . . . [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]" N.C. Gen. Stat. § 1-75.4(5)(d) (2019). "Essentially, this section of the long-arm statute reaches defendants who engage in commercial transactions with residents of this state." *Skinner*, 361 N.C. at 120, 638 S.E.2d at 209 (citing *Johnston Cnty. v. R.N. Rouse & Co. Inc.*, 331 N.C. 88, 95, 414 S.E.2d 30, 35 (1992)

(describing N.C. Gen. Stat. § 1-75.4(5) as "authoriz[ing] the courts of North Carolina to exercise jurisdiction over a nonresident contracting within the state or contracting to perform services within the state")). As the third-party plaintiff, Shaw "has the burden of establishing prima facie evidence that one of the statutory grounds [for personal jurisdiction] applies." *Chapman v. Janko, U.S.A. Inc.*, 120 N.C. App. 371, 374, 462 S.E.2d 534, 536 (1995) (citation omitted); *see also Miller v. Szilagyi*, 221 N.C. App. 79, 84-85, 726 S.E.2d 873, 878-79 (2012) ("[T]he plaintiff bears the burden of proving, by a preponderance of the evidence, grounds for exercising personal jurisdiction over a defendant." (citation omitted)).

Here, Millar did not act "at the order or direction" of Delongy Stores, but rather at the "order or direction" of Shaw. Pursuant to the Consignment Agreements, Delongy Stores "select[s] the inventory to be consigned to them" and Shaw is then "responsible for approving the amount of inventory requested[.]" Once approved, Shaw then "deliver[s] or cause[s] to be delivered" the selected inventory to Delongy Stores. Further, there was evidence before the trial court that "since about 2012 . . . [Millar] has always sent its invoices and its account statements directly to Shaw, and Shaw has always paid those invoices and account statements for merchandise that was shipped to [Delongy Stores]." The only goods "shipped from [North Carolina]" were those items that Shaw contracted for and purchased from Millar, which Delongy Stores previously requested from Shaw. Moreover, all of Delongy Stores' orders and directions to Shaw occurred in either Florida or Georgia, not North Carolina. *See Skinner*, 361 N.C. at 120, 638 S.E.2d at 209 (finding N.C. Gen. Stat. § 1-75.4(5)(d) did not confer personal jurisdiction over a nonresident defendant because "[t]here [was] no direct contact between plaintiffs and the [nonresident defendant].").

Although Shaw argues Delongy Stores ordered directly from Millar, there is no competent evidence in the record to suggest that there was direct contact between Millar and Delongy Stores. Rather, the only evidence in the record alleging direct orders between Delongy Stores and Millar are conclusory statements in Shaw's answer and interrogatories. These general statements, without more, do not demonstrate direct orders between Delongy Stores and Millar. Thus, Shaw, as the third-party plaintiff, has failed "to establish itself within some ground for the exercise of personal jurisdiction" over Delongy Stores. *Parker v. Pfeffer*, 274 N.C. App. 18, 24, 850 S.E.2d 615, 619 (2020). Therefore, the trial court's finding that N.C. Gen. Stat. § 1-75.4(5)(d) applies here is not supported by competent evidence.

While the dissent asserts that Delongy Stores and Millar "dealt with each other directly with relation to goods shipped from this State" and that this ought to be "sufficient to maintain personal jurisdiction" under our long-arm statute, this reasoning ignores the second operative portion of N.C. Gen. Stat. § 1-75.4(5)(d). In fact, N.C. Gen. Stat. § 1-75.4(5)(d) requires both that the action relate to goods shipped from our State and also that those goods were shipped to *the defendant* on *the defendant's* order or direction. The General Assembly could have applied this long-arm provision to all transactions involving goods shipped from this State, but instead chose narrower language. Accordingly, we must apply that plain language and, here, there simply is no evidence to satisfy the second prong of N.C. Gen. Stat. § 1-75.4(5)(d).

Here, Shaw served as a consignment intermediary between Millar and Delongy Stores, and there is insufficient evidence of direct contact or of a contractual agreement between Millar and Delongy Stores to confer jurisdiction under N.C. Gen. Stat. § 1-75.4(5)(d). Even assuming Shaw "caused [Millar] to deliver[]" the selected inventory shipments directly to Delongy Stores, this is insufficient for purposes of N.C. Gen. Stat. § 1-75.4(5)(d) because Delongy Stores did not directly order from Millar. *See Robbins v. Ingham*, 179 N.C. App. 764, 769, 635 S.E.2d 610, 614-15 (2006) (refusing to impute the affirmative actions of an intermediary to a third-party defendant for purposes of establishing personal jurisdiction under N.C. Gen. Stat. § 1-75.4(5)(d)). Therefore, "[b]ecause [Shaw] has failed to meet [its] burden of proving a statutory basis for personal jurisdiction, we need not conduct a due process inquiry because any further inquiry will be fruitless." *Parker*, 274 N.C. App. at 25, 850 S.E.2d at 620; *see also Skinner*, 361 N.C. at 120, 638 S.E.2d at 209 (ending its personal jurisdiction analysis after concluding that "[a]lthough [N.C. Gen. Stat. § 1-75.4(5)(d)'s] grant of jurisdiction is far-reaching, the transactions in this case do not fall within its grasp.").

Thus, we remand with instructions to enter an order dismissing the third-party complaint for lack of personal jurisdiction.

Conclusion

For the foregoing reasons, we dismiss Delongy Stores' appeal on the issue of attorneys' fees as interlocutory. We affirm the trial court's order granting the motion to stay, and remand with instructions to enter an order dismissing Shaw's complaint for improper venue and lack of personal jurisdiction.

DISMISSED IN PART; AFFIRMED IN PART; AND REMANDED IN PART.

Judge DIETZ concurs.

Judge ARROWOOD concurs in part, dissents in part.

ARROWOOD, Judge, concurs in part and dissents in part.

I concur in the portion of the majority opinion that affirms the trial court's order granting the motion to stay. I further agree that the forum selection clause under the contract is valid, however, I would vacate the order denying dismissal with respect to that issue and remand this matter to the trial court to enter an order making appropriate findings of fact with respect to the issue of whether there are appropriate reasons under Georgia law as constrained by United States Supreme Court precedent for North Carolina to refuse to honor that provision of the contract. I respectfully dissent from the portion of the majority opinion holding the trial court lacked personal jurisdiction over the third-party defendants.

I. Venue

Although the cases which address contract forum selection clauses normally deal with both jurisdiction and venue and the two issues are sometimes "blurred," the two inquiries are different. *ITS Leasing, Inc. v. RAM DOG Enterprises, LLC*, 206 N.C. App. 572, 578, 696 S.E.2d 880, 884 (2010) (citing *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 144, 423 S.E.2d 780, 783 (1992)). Generally, "courts no longer view forum selection clauses as ousting the courts of their jurisdiction[,]" but instead "allow a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum." *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992).

In this case, the Consignment Agreements between Delongy and Shaw include the following forum selection clause, in relevant part:

> This Agreement will be governed by and construed in accordance with the laws of the State of Georgia. The parties agree that the situs and venue of any suit commenced under this contract shall be Putnam County, Georgia. The parties further agree that any negotiations on transactions affecting this contract and the entry into this contract shall be deemed to have taken place in Putnam County, Eatonton, Georgia. [Delongy Stores] hereby consents to the personal jurisdiction of the courts of Putnam County, Georgia, and agrees to acknowledge service of any suit filed against [Delongy Stores] by [Shaw] in Putnam County, Georgia.

As the clause makes apparent, although the venue "shall be" designated in Georgia, the matter of jurisdiction is separate.

Defendant concedes that the forum selection clause is enforceable, however, they argue that they can avoid its enforcement by showing that it is "unfair or unreasonable." *See Perkins*, 333 N.C. at 146, 423 S.E.2d at 784 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513 (1972)).

I believe that the trial court needs to make findings of fact and conclusions of law with respect to this enforceability under the standard for enforceability set forth by the United States Supreme Court in *Bremen* in order for us to appropriately review the same. I do not believe that we, as a matter of law, can make the determination reached by the majority that the forum selection clause is enforceable without findings from the trial court under the test established by *Bremen* as to whether it would be unfair or unreasonable to enforce based upon the facts of this case. Therefore, I would hold that the trial court erred in failing to make appropriate findings of fact and conclusions of law with respect to why the forum selection clause should not be enforced. I would vacate that portion of the order and remand this issue to the trial court to make the appropriate finding and conclusion.

II. Personal Jurisdiction

The majority concludes that the forum selection clause is mandatory and vests exclusive jurisdiction in Georgia, in addition to asserting that there was not competent evidence to establish grounds for the exercise of personal jurisdiction under the long-arm statute. I respectfully disagree with the majority's statutory analysis and application of our caselaw.

As previously noted, the issues of venue and jurisdiction require separate analyses in the context of forum selection clauses. The general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause with respect to jurisdiction without some further language that indicates the parties' intent to make jurisdiction exclusive. *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 74, 637 S.E.2d 230, 232 (2006), *aff'd*, 361 N.C. 347, 643 S.E.2d 586 (2007). Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive. *Id.* This Court has not interpreted the phrase "shall be" as sufficient to create a mandatory forum selection clause. *R.H. Donnelley Inc. v. Embarq Corp.*, 228 N.C. App. 568, 749 S.E.2d. 112, 2013 WL 4005261, *3

(2013) (unpublished) (citing *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 568, 566 S.E.2d 160, 162 (2002); *Cable Tel Servs., Inc. v. Overland Contr'g, Inc.*, 154 N.C. App. 639, 645, 574 S.E.2d 31, 35 (2002)).

In this case, the forum selection clause states that the "situs and venue of any suit commenced under this contract *shall be* Putnam County, Georgia[,]" and goes on to acknowledge that Delongy Stores "consents to the personal jurisdiction of the courts of Putnam County, Georgia[.]" While this certainly allows Georgia courts to exercise jurisdiction over Delongy Stores, it does not include language that indicates that the parties intended to make jurisdiction exclusive, nor does it preclude the exercise of jurisdiction in North Carolina.

In examining whether a non-resident defendant is subject to personal jurisdiction in our courts, we engage in a two-step analysis. *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 302, 838 S.E.2d 158, 161 (2020) (citing *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006)). First, jurisdiction over the defendant must be authorized by N.C. Gen. Stat. § 1-75.4—North Carolina's long-arm statute. *Id.* Second, "if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* (quotation marks omitted).

A. The Long-Arm Statute

This Court has held that "[w]hile choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist and due process was met." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 700, 611 S.E.2d 179, 186 (2005) (internal quotation marks and citation omitted). Thus, while we must consider this clause in our due process analysis, it does not, standing alone, operate to defeat personal jurisdiction over third-party defendants. *R.H. Donnelley Inc.*, 2013 WL 4005261 at *3 (citing *Banc of Am. Secs. LLC*, 169 N.C. App. at 700, 611 S.E.2d at 186).

In this case, I would hold that there is statutory authority under N.C. Gen. Stat. § 1-75.4(5)(d). A North Carolina court has personal jurisdiction "[i]n any action which . . . [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." N.C. Gen. Stat. § 1-75.4(5)(d) (2019). "Essentially, this section of the long-arm statute reaches defendants who engage in commercial transactions with residents of this [S]tate." *Skinner*, 361 N.C. at 120, 638 S.E.2d at 209.

North Carolina's long-arm statute

> is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. Accordingly, when evaluating the existence of personal jurisdiction pursuant to [this statute], the question of statutory authorization collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.

Lulla v. Effective Minds, LLC, 184 N.C. App. 274, 277, 646 S.E.2d 129, 132 (2007) (citation omitted).

Although the majority seeks to engage in a plain language analysis of the long-arm statute, I would adhere to the liberal construction of the long-arm statute in accordance with our precedent. I am concerned by the potential implications of the majority's holding. By narrowly interpreting the long-arm statute, the majority opinion effectively creates a loophole to allow individuals and corporations to shield themselves from the exercise of personal jurisdiction in North Carolina by conducting business through an intermediary. Although I do not seek to apply the long-arm statute to all transactions involving goods shipped from this State, as the majority suggests, I believe the facts of this case, specifically the intertwined nature of the business relationships and the knowledge of Delongy Stores that it was ordering goods from a North Carolina vendor, require a holding that the third-party defendants are subject to the jurisdiction of North Carolina courts. While the facts in this case are unique in that the North Carolina entity that sold and shipped the goods is not seeking to invoke jurisdiction against the ultimate recipient of those goods, because they are suing a third-party to recover for those goods, I believe that this provision of the long-arm statute is met and that jurisdiction lies against the third-party defendants to the extent that it is not violative of due process.

I further dissent from the majority's holding that there was insufficient evidence to support the trial court's order denying the motion to dismiss. Under N.C. Gen. Stat. § 1A-1, Rule 52(a)(2), the trial judge need not make findings of fact and conclusions of law when making a decision on a motion unless they are requested by a party or required by Rule 41(b) which is not applicable here. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). When the record contains no findings of fact, " '[i]t is presumed . . . that the court on proper evidence found facts to support its judgment.' " *Id.* (quoting *Sherwood*

v. Sherwood, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976)). On review, this Court is "not free to revisit questions of credibility or weight that have already been decided by the trial court." *Banc of Am. Secs. LLC*, 169 N.C. App. at 695, 611 S.E.2d at 183.

In this case, as in *Fungaroli* and *Banc of America Securities LLC*, the record contains no indication that the parties requested that the trial judge make specific findings of fact, nor did the order contain any findings of fact. Accordingly, we must presume that the trial judge made factual findings sufficient to support ruling in favor of Shaw. It is this Court's task to review the record to determine whether there is any evidence to support the trial court's conclusion that North Carolina courts may exercise jurisdiction over Delongy Stores without violating Delongy Stores' due process rights.

The record reflects that the third-party defendants Delongy Stores ordered merchandise directly from plaintiff, Millar, who then shipped the merchandise from North Carolina. The majority's observation that defendant Shaw's received "invoices and account statements for every bit of merchandise that was shipped," ignores the fact that Delongy Stores and Millar dealt with each other directly with relation to goods shipped from this State. Although defendant Shaw was primarily involved in the overall business arrangement, the alleged "over-orders" by Delongy Stores and the direct transactions between Delongy Stores and Millar are in my opinion sufficient to maintain personal jurisdiction over Delongy Stores in this matter. The existence of Shaw as an intermediary does not change the fact that Delongy Stores has availed themselves of the privilege of purchasing and receiving goods from this State.

B. Due Process

The second step under N.C. Gen. Stat. § 1-75.4 is whether the exercise of personal jurisdiction by North Carolina courts violates due process of law. "By the enactment of [N.C. Gen. Stat. §] 1-75.4(1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977).

To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). In

each case, there must be some act by which the defendant purposefully avails themselves of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). This relationship between the defendant and the forum must be "such that [they] should reasonably anticipate being haled into court there." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365-66, 348 S.E.2d 782, 786 (1986) (internal quotation marks and citation omitted). Following the mandate of the United States Supreme Court, our courts have rejected any *per se* rule of long-arm jurisdiction. *Buying Group v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979).

Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of personal jurisdiction if it has a substantial connection with this State. *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786. In *Tom Togs*, our Supreme Court analyzed whether a contract between a North Carolina resident plaintiff and a non-resident defendant for the sale of shirts presented a substantial connection with this State. The defendant in *Tom Togs* was aware that the plaintiff was a North Carolina resident, and that the shirts were to be shipped from this State. *Id.*, 318 N.C. at 367, 348 S.E.2d at 787. Accordingly, our Supreme Court held that the contract and business dealings between defendant and plaintiff created a "substantial connection" with this State.

Here, as in *Tom Togs*, third-party defendants Delongy Stores were aware that plaintiff Millar is a North Carolina resident, and each party maintained a series of business transactions involving the shipment of clothing from a North Carolina resident plaintiff to a non-resident defendant. Although there was not a written contract between Delongy Stores and Millar, the nature of the business transactions and the ongoing business relationship between the plaintiff and the third-party defendants which resulted in the alleged debt that plaintiff is suing defendant Shaw over in my opinion presents a "substantial connection" with this State.

Accordingly, both steps of analysis under the North Carolina long-arm statute are satisfied, and the exercise of personal jurisdiction over Delongy Stores does not violate due process requirements. Therefore, I would hold that the trial court did not err in denying the third-party defendants' motion to dismiss for lack of personal jurisdiction.

III. Conclusion

I would affirm the order denying the motion to dismiss for lack of jurisdiction, vacate the order denying the motion to dismiss for improper venue and remand for the trial court to make findings of fact with respect to whether third-party plaintiff can meet the standard established under *Bremen* to circumvent the forum selection clause under the contract between Shaw and Delongy Stores. While Georgia law applies, it is constrained by the overarching mandate of the United States Supreme Court with respect to the enforcement of forum selection clauses.

STATE OF NORTH CAROLINA
v.
DERICK CLEMONS, DEFENDANT

No. COA20-45

Filed 1 December 2020

1. Evidence—authentication—standard of review—de novo

The Court of Appeals reviewed the state's case law and held that the appropriate standard of review for authentication of evidence is de novo.

2. Evidence—authentication—screenshots of social media posts — photographs and written statements—circumstantial evidence

In a prosecution for defendant's violation of a domestic violence protective order, screenshots of social media posts were properly admitted where sufficient circumstantial evidence authenticated the screenshots as both photographs and written statements. The victim gave sufficient testimony that she had taken the screenshots and that defendant was the person who had made the comments—even though the comments were made through their daughter's account, the evidence permitted the reasonable conclusion that defendant had access to the daughter's account and wrote the comments after he was released from jail.

Judges BRYANT and BERGER concurring in result only.

Appeal by Defendant from judgment entered 28 August 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Benjamin J. Kull for defendant-appellant.

MURPHY, Judge.

Before screenshots of an online written statement on social media can be admitted into evidence they must be authenticated as both a photograph and a written statement. To authenticate evidence in this manner, there must be circumstantial or direct evidence sufficient to conclude a screenshot accurately represents the content on the website it is claimed to come from and to conclude the written statement was made by who is claimed to have written it. Here, screenshots of comments on Facebook posts, made by an account not in Defendant's name, were properly authenticated because there was sufficient circumstantial evidence to show the screenshots of the Facebook comments in fact depicted the Facebook posts and comments and to show the Facebook comments were made by Defendant. We hold there was no error.

BACKGROUND

On 9 June 2017, Inez DeJesus renewed her domestic violence protective order ("DVPO") prohibiting contact of any kind by Defendant, Derick Clemons, in anticipation of his release from prison. Later in June 2017, Defendant was released from prison and picked up by his and DeJesus's daughter. Shortly after, on 5 July 2017, DeJesus started receiving phone calls from a restricted number, which later were determined to all come from the same number. She received these calls every day and often multiple times in a single day from 5 July 2017 to 11 July 2017, sometimes also receiving voicemails left in Defendant's voice and referring to events she and Defendant had engaged in together. During this time period, there were comments made on DeJesus's Facebook posts, from her daughter's account, that DeJesus didn't think her daughter would have posted ("Facebook comments").

On 11 July 2017, DeJesus reported these events to police and showed police officers the Facebook comments and the phone calls from a restricted number, and played the voicemails left by the number. Based on these communications, police officers obtained a warrant for Defendant's arrest for violation of the DVPO, and he was subsequently arrested. Following his arrest, DeJesus did not receive any more calls from restricted numbers, or Facebook comments from her daughter's account seeming to come from someone else.

Pre-trial, Defendant filed a motion in limine seeking to exclude testimony regarding the Facebook comments based on a lack of connection between Defendant and his daughter's Facebook account. The trial court denied this motion based on the State's assertion DeJesus would testify the posts came from Defendant, not their daughter.[1] At trial, the Facebook comments were admitted and considered authenticated based on the testimony of DeJesus. Prior to the admission of the screenshots of the Facebook comments, DeJesus testified as follows:

> [THE STATE:] Any idea who met him when he was released?
>
> [DEJESUS:] Yes, I do know who.
>
> [THE STATE:] Who is that?
>
> [DEJESUS:] Our daughter, Ashley Clemons.
>
> [THE STATE:] What is your relationship like with Ashley?
>
> [DEJESUS:] As of right now, it's getting better.
>
> [THE STATE:] How has it been prior to now?
>
> [DEJESUS:] It was very rocky.
>
> [THE STATE:] Why was it a rocky relationship with Ashley?
>
> [DEJESUS:] Because, you know, she was our first daughter, his first daughter. So she has a real good connection with her dad.
>
> [THE STATE:] After you became aware that [D]efendant was released, did you have any -- in those initial days, did you receive any sort of strange contact?
>
> [DEJESUS:] Not right -- right before he got out – not during -- he got -- not -- I have, but not as soon as he got out.
>
> [THE STATE:] Okay. About how long after he got out did you start receiving the contact?
>
> [DEJESUS:] Maybe a week or two.

1. In part, the State contended police reports would show Defendant made these comments, not the daughter, however these reports were not introduced into evidence and are not a part of the Record.

[THE STATE:] Okay. And did you receive phone calls on your cell phone from a private or blocked number?

[DEJESUS:] Yes, I have.

[THE STATE:] When did you start receiving those calls?

[DEJESUS:] It was July 5th.

[THE STATE:] Of what year?

[DEJESUS:] Of 2018 -- 2017.

[THE STATE:] The phone number that you had back in 2017, how long had you had that phone number?

[DEJESUS:] Since 2011.

[THE STATE:] So in 2011, you changed your cell phone number?

[DEJESUS:] I did.

. . .

[THE STATE:] Prior to July 5th of 2017, had you been receiving calls on your cell phone from either a blocked or private number?

[DEJESUS:] No, I haven't.

[THE STATE:] How many calls, Inez, would you estimate you received from a private or blocked number starting on July 5th and continuing thereafter?

[DEJESUS:] I don't know -- I can't remember how many, but it was -- it was plenty enough for me to call.

[THE STATE:] Did you answer any of those calls?

[DEJESUS:] I did not. If I don't know the person, I won't. If it was important, they will leave a message.

[THE STATE:] When you initially started getting those unknown or private calls on your cell phone, were voice messages left?

[DEJESUS:] There was.

[THE STATE:] Okay. Did that occur right away or did that occur some time later?

[DEJESUS:] Maybe like two days after.

[THE STATE:] Okay. About how long were you receiving those calls and voice messages from the blocked or private number?

[DEJESUS:] Up until July 11th.

[THE STATE:] So from July 15th -- I'm sorry, July 5 to July 11, 2017?

[DEJESUS:] Correct.

[THE STATE:] Do you recall what, if anything, was left on any of those voice messages?

[DEJESUS:] To stand out, we went on vacation to Miami and we went to Bahamas on a cruise ship.

[THE STATE:] And when you say "we went," who is "we"?

[DEJESUS:] Me and him and two females.

[THE STATE:] Okay. And when did you go on that vacation to Miami and the Bahamas?

[DEJESUS:] I don't know the exact year, but it was maybe like April sometime.

[THE STATE:] Okay. That was before 2011?

[DEJESUS:] Right. It was sometime in 2000s, when we were in a marriage together.

[THE STATE:] Okay. Is it fair to say it was a long time before 2017?

[DEJESUS:] Yes.

[THE STATE:] When you say that one of those messages said "Miami, Bahamas," was that the extent of the message?

[DEJESUS:] That's all that was said.

[THE STATE:] Did you recognize the voice –

[DEJESUS:] I did.

[THE STATE:] -- in that voice mail?

[DEJESUS:] I did.

[THE STATE:] And whose voice was that?

[DEJESUS:] Mr. Clemons.

[THE STATE:] That's the defendant in this case?

[DEJESUS:] Yes.

[THE STATE:] Why is that particular event, the Miami, Bahamas, of significance to you?

[DEJESUS:] Because he is the only guy that I went on a trip with.

[THE STATE:] Was this something that would have been common knowledge to people?

[DEJESUS:] No, not -- if I told them.

[THE STATE:] Do you recall any of the other voice messages that were left?

[DEJESUS:] There was one I really -- I forgot what it said, but it was something like –

[DEFENDANT:] Oh, Your Honor, I'm sorry. We would move to strike the evidence as far as the phone calls based on the arguments that we previously made. We'd move to strike -- object to the questions and move to strike the testimony based on arguments we previously made to the Court.

THE COURT: Right. That objection is overruled. You may answer the question.

[THE STATE:] To go back, Inez, do you recall any other voice messages that were left for you from an either blocked or private number?

[DEJESUS:] Yes.

[THE STATE:] Okay. And do you recall the voice on that voice message?

[DEJESUS:] Yes. [THE STATE:] Whose voice was that?

[DEJESUS:] Mr. Clemons.

[THE STATE:] Okay. And do you recall the content of that voice message?

[DEJESUS:] Yes.

[THE STATE:] What was contained in that voice message?

[DEJESUS:] It was something like he's going to come get me or get something -- I don't really clearly remember.

[THE STATE:] Did you perceive it as threatening?

[DEJESUS:] Yes.

[THE STATE:] Did you receive any other voice messages that you can recall?

[DEJESUS:] I did, but it wasn't like -- it was no voice after. It was just like him just being on the phone breathing.

[THE STATE:] You could hear breathing on the phone?

[DEJESUS:] Yes.

[THE STATE:] What times of day were these calls and voice messages coming in to you?

[DEJESUS:] I can recall one was like in the morning, one was in the afternoon and one was in the evening time.

[THE STATE:] So all throughout the day?

[DEJESUS:] Yeah.

[THE STATE:] During this same time period, did you start to receive -- do you have a Facebook page?

[DEJESUS:] I do have a Facebook.

[THE STATE:] And is that page something that has your name on it that identifies you?

[DEJESUS:] Yes.

[THE STATE:] Did you also start to receive comments left on posts that you made on Facebook?

[DEJESUS:] I did.

MS. FETTER: Your Honor, may I approach?

THE COURT: Yes.

(State's Exhibits 4 - 6 marked for identification.)

[THE STATE:] Inez, I'm showing you what's been previously marked for identification purposes as State's Exhibit 4, 5 and 6. Will you take a look at those please and let me know if you recognize them.

[DEJESUS:] Yep. Yes, I do.

[THE STATE:] What are State's Exhibit 4, 5 and 6?

[DEJESUS:] They're my posts on -- Facebook posts.

[THE STATE:] And what about State's Exhibit 4, 5 and 6 – did you take screenshots?

[DEJESUS:] I did.

[THE STATE:] Okay. Is that what these are?

[DEJESUS:] Yes.

[THE STATE:] And why did you specifically screenshot State's Exhibits 4, 5 and 6 from your Facebook page?

[DEFENDANT:] Your Honor, again, we would object to the questions and move to strike the testimony based on arguments previously made in court.

THE COURT: The objection's overruled.

[DEJESUS:] Because I know my daughter wouldn't write none of this stuff on my page. She never posts on my Facebook.

[THE STATE:] And we'll talk about that in one second, Inez. These are messages that –

[DEJESUS:] Yes.

[THE STATE:] -- you received on Facebook?

[DEJESUS:] Yes.

[THE STATE:] Your Honor, at this time the State moves Exhibits 4, 5 and 6 into evidence.

[DEFENDANT:] Objection on the grounds previously stated.

THE COURT: The objection is overruled. Four, Five and Six are admitted.

(State's Exhibits 4 - 6 admitted into evidence.)

On appeal, Defendant contends the admission of the testimony and exhibits related to the Facebook comments was improper because the Facebook comments were not properly authenticated as being made by Defendant. Additionally, on appeal the parties dispute whether abuse of discretion or de novo review is appropriate for authentication issues.

ANALYSIS

A. Standard of Review

[1] Defendant contends we review de novo a decision regarding authentication; whereas, the State contends we review for an abuse of discretion. "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, 632-633, 669 S.E.2d 290, 294 (2008) (citations and internal marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We hold the appropriate standard of review for authentication of evidence is de novo.[2]

At first glance, "[t]he cases from the Court of Appeals are in conflict regarding whether an abuse of discretion or de novo standard of review is appropriate in the context of authentication of documentary evidence." *In re Lucks*, 369 N.C. 222, 231, 794 S.E.2d 501, 508 (2016) (Hudson, J., concurring). However, upon a closer look, it appears our rule is to review trial court decisions regarding authentication de novo. The two cases cited by the State here and Justice Hudson in *In re Lucks* to support the idea that abuse of discretion review has been conducted on authentication issues are not convincing. *See In re Lucks*, 369 N.C. at 231, 794 S.E.2d at 508 (Hudson, J., concurring) (citing *In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. 190, 200, 789 S.E.2d 835, 842 (2016); *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006)).

In the first case, *In re Foreclosure by Goddard & Peterson, PLLC*, we treated the issue of authentication as abandoned due to the appellant's

2. While not making any determination as to the prejudicial effect of such an abuse of discretion, we note if we were to accept the State's standard of review argument, we would find the trial court's decision to be an abuse of discretion based on its misapprehension of law when it said, "I think that it goes to the weight rather than the admissibility. It is a question for the jury to decide who authored those posts." On the contrary, there must be sufficient evidence to conclude Defendant authored the posts before the jury could review the evidence. *See State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) ("When a trial [court] acts under a misapprehension of the law, this constitutes an abuse of discretion.").

failure to cite legal authority to support the claim as required by N.C. R. App. P. 28(b)(6). *In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. at 200, 789 S.E.2d at 843. This case does not establish or discuss a standard of review for a trial court's determination regarding the authentication of evidence.

In the second case, *Brown v. City of Winston-Salem*, we reviewed whether spreadsheets intended to be introduced into evidence were properly authenticated. *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753. In *Brown*, we determined the spreadsheets were not properly authenticated and held "the trial court's ruling that petitioners' spreadsheets could be admitted only for the limited purpose [the parties had stipulated to] was proper, and did not constitute an abuse of discretion." *Id.* at 506, 626 S.E.2d at 753. Although we determined the evidence was not properly authenticated, we did not address the authentication determination; instead, we concluded an abuse of discretion did not occur in the decision to admit the evidence for the limited purpose stipulated to by the parties. At no point did we set out a standard of review for authentication specifically. We simply stated "[o]n appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753 (2006) (citing *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (2005)). Additionally, *Williams* only referred to decisions to exclude evidence and ultimately concluded the excluded evidence there was irrelevant under Rule 401. *Williams*, 167 N.C. App. at 678, 606 S.E.2d at 439. At no point does *Williams* discuss authentication. *Id.*

Conversely, the cases in which we review authentication explicitly state de novo is the appropriate standard of review. We have repeatedly stated "[a] trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *See State v. DeJesus*, 265 N.C. App. 279, 288, 827 S.E.2d 744, 751, *disc. review denied*, 372 N.C. 707, 830 S.E.2d 837 (2019); *State v. Allen*, 258 N.C. App. 285, 288, 812 S.E.2d 192, 195, *disc. review denied*, 371 N.C. 449, 817 S.E.2d 202 (2018); *State v. Ford*, 245 N.C. App. 510, 517, 782 S.E.2d 98, 104 (2016); *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015); *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014) (applying this standard of review to text messages); *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011). *Crawley* was the first case to state this rule in these terms and its holding can be traced back to *State v. LeDuc*.

In *LeDuc*, our Supreme Court addressed the requirements of authentication in the context of comparing handwritings, stating:

> Before handwritings can be submitted to the jury for its comparison, however, the trial [court] must satisfy [itself] that one of the handwritings is genuine. The statute so provides. We hold, in addition, that the trial [court] must also be satisfied that there is enough similarity between the genuine handwriting and the disputed handwriting, that the jury could reasonably infer that the disputed handwriting is also genuine. *Both of these preliminary determinations by the trial [court] are questions of law fully reviewable on appeal.*

State v. LeDuc, 306 N.C. 62, 73-74, 291 S.E.2d 607, 614 (1982) (emphasis added), *overruled in part on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987); *see also State v. McCoy*, 234 N.C. App. 268, 269-71, 759 S.E.2d 330, 332-33 (2014); *State v. Owen*, 130 N.C. App. 505, 509-10, 503 S.E.2d 426, 429-30 (1998). This reasoning is equally applicable to authentication situations outside of handwriting. *See*, *e.g.*, *Watlington*, 234 N.C. App. at 591, 759 S.E.2d at 124 (discussing de novo review when the authentication of text messages was at issue).

Furthermore, in *State v. Snead*, our Supreme Court, without explicitly stating it, conducted de novo review of whether the authentication of a video was appropriate.[3] *State v. Snead*, 368 N.C. 811, 815-16, 783 S.E.2d 733, 737 (2016). In reversing our decision as to authentication, our Supreme Court stated:

> Given that [the] defendant freely admitted that he is one of the two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video. Regardless, [the witness's] testimony was sufficient to authenticate the video under Rule 901. [The witness] established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced by the surveillance system

3. We also note in *State v. Snead*, we held "[a] trial court's determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal." *State v. Snead*, 239 N.C. App. 439, 443, 768 S.E.2d 344, 347 (2015), *rev'd in part on other grounds*, 368 N.C. 811, 783 S.E.2d 733 (2016) (citing *Crawley*, 217 N.C. App. at 515, 719 S.E.2d at 637).

> contain safeguards to prevent tampering. Moreover, [the witness] established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. [The witness's] testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

Id. Although not explicitly stated, our Supreme Court analyzed this issue de novo as it "considered the matter anew" and at no point did our Supreme Court reference language related to the abuse of discretion standard in determining this issue.

Based on *Snead*, *LeDuc*, and our extensive caselaw explicitly applying de novo review on issues of authentication, we conduct de novo review of whether the evidence at issue here was properly authenticated.

B. Authentication

[2] Defendant contends the screenshots of the Facebook comments were written statements that must have been authenticated as statements; whereas, the State contends these screenshots were photographs that only needed to be authenticated as photographs. We hold these Facebook comments must have been authenticated as both photographs and written statements.

Rule of Evidence 901(a) reads "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2019). The State used the screenshots of the Facebook comments to show Defendant violated the DVPO by communicating with DeJesus. In order for the screenshots of the Facebook comments to support finding Defendant contacted DeJesus, the screenshots must have accurately reflected DeJesus's Facebook page. N.C.G.S. § 8C-1, Rule 901(a) (2019). Therefore, the screenshots must have been authenticated as photographs. However, the screenshots of the Facebook comments are also statements—the State wanted the jury to use the screenshots to conclude Defendant communicated with DeJesus in violation of the DVPO through the Facebook comments. These are not being introduced simply to show DeJesus's Facebook posts had comments from her daughter's account because this would not show any communication by Defendant

in violation of the DVPO. The evidence must show Defendant was responsible for the Facebook comments in order to show he communicated with DeJesus in violation of the DVPO. In light of this purpose, the Facebook comments also needed to be authenticated by evidence sufficient to support finding they were communications actually made by Defendant. N.C.G.S. § 8C-1, Rule 901(a) (2019).

"In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be." *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994). Here, the screenshots were properly authenticated as required for photographs. On direct examination of DeJesus, the following exchange occurred:

> [THE STATE:] During this same time period, did you start to receive -- do you have a Facebook page?
>
> [DEJESUS:] I do have a Facebook.
>
> [THE STATE:] And is that page something that has your name on it that identifies you?
>
> [DEJESUS:] Yes.
>
> [THE STATE:] Did you also start to receive comments left on posts that you made on Facebook?
>
> [DEJESUS:] I did.
>
> [THE STATE:] Your Honor, may I approach?
>
> THE COURT: Yes.
>
> (State's Exhibits 4 - 6 marked for identification.)
>
> [THE STATE:] Inez, I'm showing you what's been previously marked for identification purposes as State's Exhibit 4, 5 and 6. Will you take a look at those please and let me know if you recognize them.
>
> [DEJESUS:] Yep. Yes, I do.
>
> [THE STATE:] What are State's Exhibit 4, 5 and 6?
>
> [DEJESUS:] They're my posts on -- Facebook posts.
>
> [THE STATE:] And what about State's Exhibit 4, 5 and 6 – did you take screenshots?
>
> [DEJESUS:] I did.

> [THE STATE:] Okay. Is that what these are?
>
> [DEJESUS:] Yes.
>
> [THE STATE:] And why did you specifically screenshot State's Exhibits 4, 5 and 6 from your Facebook page?
>
> [DEFENDANT:] Your Honor, again, we would object to the questions and move to strike the testimony based on arguments previously made in court.
>
> THE COURT: The objection's overruled.
>
> [DEJESUS:] Because I know my daughter wouldn't write none of this stuff on my page. She never posts on my Facebook.
>
> [THE STATE:] And we'll talk about that in one second, Inez. These are messages that –
>
> [DEJESUS:] Yes.
>
> [THE STATE:] -- you received on Facebook?
>
> [DEJESUS:] Yes.
>
> [THE STATE:] Your Honor, at this time the State moves Exhibits 4, 5 and 6 into evidence.
>
> [DEFENDANT:] Objection on the grounds previously stated.
>
> THE COURT: The objection is overruled. Four, Five and Six are admitted.

As Defendant concedes, the above inquiry was sufficient to authenticate the screenshots of the Facebook comments as photographs. DeJesus testified she took the screenshots of the comments on her Facebook posts, which showed the screenshots were in fact what they purported to be. Since the screenshots of the Facebook comments were properly authenticated as photographs, we next determine if they were properly authenticated as written statements.

"Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *Allen*, 258 N.C. App. at 288, 812 S.E.2d at 195 (quoting *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896 (2001)). Our Supreme Court has stated "[i]t was not error for the trial court to admit the [evidence] if it could reasonably determine that there was sufficient evidence to

support a finding that 'the matter in question is what its proponent claims.' " *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993) (quoting N.C.G.S. § 8C-1, Rule 901). According to Rule 901(b)(4), Rule 901(a) can be satisfied by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C.G.S. § 8C-1, Rule 901(b)(4) (2019). Furthermore, we have acknowledged "the authorship and genuineness of letters, typewritten or other, may be proved by circumstantial evidence[.]" *State v. Young*, 186 N.C. App. 343, 354, 651 S.E.2d 576, 583 (2007) (quoting *State v. Davis*, 203 N.C. 13, 28, 164 S.E. 737, 745, *cert. denied*, 287 U.S. 649, 77 L. Ed. 561 (1932)).

Applying Rule 901(b)(4) here, the Facebook comments were properly authenticated prior to admission as the distinctive characteristics of the post in conjunction with the circumstances are sufficient to conclude Defendant wrote the comments. As stated above, this evidence was introduced to show Defendant made a written statement to DeJesus in violation of the DVPO. Before State's Exhibits 4, 5, and 6 were admitted, circumstantial evidence was presented that was sufficient to conclude Defendant had access to his daughter's Facebook account allowing him to make the Facebook comments. This circumstantial evidence includes: Defendant and DeJesus's daughter picked up Defendant from jail upon his release; their daughter has a strong relationship with Defendant and a "very rocky" one with DeJesus; DeJesus began to receive the Facebook comments a week or two after Defendant was released; and DeJesus took the screenshots of the Facebook comments because "[she knew her] daughter wouldn't write none of this stuff on [her Facebook] page. [Her daughter] never posts on [her] Facebook." The Facebook comments made from the daughter's account, which were unlike her, in conjunction with Defendant's recent interaction and close relationship with his daughter is circumstantial evidence sufficient to conclude Defendant had access to her Facebook account.

In conjunction with Defendant's potential access to his daughter's Facebook account, there was sufficient circumstantial evidence to conclude the person who posted these comments from the daughter's Facebook account was Defendant. This circumstantial evidence includes: Defendant had ignored a DVPO before by calling DeJesus and sending her letters from jail in 2013 and 2015[4]; a week or two after

4. This evidence was limited at trial in the following instruction: "Evidence has been received tending to show that despite an existing domestic violence protective order, [D]efendant attempted to make telephone contact and communicate by letter with Ms. DeJesus in 2013 and 2015. This evidence was received solely for the purpose of showing:

Defendant's release, on 5 July 2017 until 11 July 2017, DeJesus received phone calls and voicemails from a blocked number to the same phone number DeJesus had used since 2011; these voicemails had Defendant's voice and one referred to an event that took place with Defendant and DeJesus, one was just breathing, and one was threatening; DeJesus had a Facebook page in her name and in the same week-long period she also started to receive comments on her posts, which were shown in State's Exhibits 4, 5, and 6; and these were screenshots she took of her posts because "[she knew her] daughter wouldn't write none of this stuff on [her] page. [Her daughter] never posts on [her] Facebook." The above circumstantial evidence, in conjunction with the circumstantial evidence of Defendant's access to the daughter's Facebook account, was sufficient to find Defendant posted the Facebook comments because Defendant had access to the Facebook account to make the comments, and the Facebook comments were not made by the daughter but were made in the same timeframe as the phone calls Defendant made to DeJesus.

According to *Young*, the circumstantial evidence here is appropriate to authenticate the Facebook comments as there was circumstantial evidence that was sufficient to find the Facebook comments were written by Defendant. Additionally,

> [o]nce evidence from which the jury could find that the writing is genuine has been introduced, the writing becomes admissible. Upon the admission of the writing into evidence, it is solely for the jury to determine the credibility of the evidence both with regard to the authenticity of the writing and the credibility of the writing itself.

Young, 186 N.C. App. at 354, 651 S.E.2d at 583 (quoting *Milner Hotels, Inc. v. Mecklenburg Hotel, Inc.*, 42 N.C. App. 179, 180-81, 256 S.E.2d 310, 311 (1979)). The evidence was sufficient to support the trial court's authentication and admission of the Facebook comments, and upon admission it was for the jury to decide the authenticity and credibility of the writing. *Id.*

The identity of the person who committed the crime charged in this case, if it was committed; That [D]efendant had a motive for the commission of the crime charged in this case; That [D]efendant had knowledge, which is a necessary element of the crime charged in this case; The absence of a mistake. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose." Our use of the prior violation of a DVPO here is permissible since it is used to show knowledge of the phone number.

CONCLUSION

The trial court reasonably determined there was sufficient evidence to conclude the Facebook comments were made by Defendant. It was proper for the jury to determine whether the evidence supported a violation of the DVPO.

NO ERROR.

Judges BRYANT and BERGER concur in result only.

STATE OF NORTH CAROLINA
v.
AIJALON DERICE DOVE

No. COA20-143

Filed 1 December 2020

1. Criminal Law—jury instructions—acting in concert—supported by the evidence

In a case involving first-degree felony murder, the trial court did not err—much less commit plain error—by instructing the jury on the doctrine of acting in concert where the evidence showed defendant and another man were instructed by defendant's brother to collect a drug debt, the two men drove to a parking lot near the house where the victim was on the back porch, the men were captured on video walking to the house, defendant entered the house and gunshots were fired, the two men ran to the car, and the other man drove defendant from the scene.

2. Evidence—witness testimony—lack of first-hand knowledge—prejudice analysis

The trial court erred in a first-degree felony murder trial by allowing a lay witness to testify that she believed defendant was holding a gun in a surveillance video where her opinion was based on her viewing of the video and not based on first-hand knowledge or perception, and she was in no better position than the jury to determine if defendant was holding a gun. However, the error was not prejudicial because there was substantial other evidence of defendant's guilt, and the prosecutor only asked the witness once about what the defendant was holding in the video.

STATE v. DOVE

[274 N.C. App. 417 (2020)]

Appeal by defendant from judgments entered 29 July 2019 by Judge Imelda J. Pate in Wayne County Superior Court. Heard in the Court of Appeals 22 September 2020.

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

Marilyn G. Ozer for defendant-appellant.

ZACHARY, Judge.

Sammy Evans was visiting a friend when he was fatally wounded by gunfire. A police investigation into Evans's death led to the arrest of Defendant Aijalon Derice Dove, who was convicted of first-degree felony murder, possession of a firearm by a felon, discharging a weapon into occupied property, and felonious possession of cocaine.

On appeal, Defendant argues that the trial court (1) plainly erred by instructing the jury on the doctrine of acting in concert, and (2) erred by admitting lay opinion testimony that usurped the role of the jury. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

On 19 July 2019, Defendant's case came on for jury trial in Wayne County Superior Court, the Honorable Imelda J. Pate presiding. The State's evidence tended to show that on the evening of 21 November 2017, Sammy Evans was visiting the home of a friend, Renee Thompson, and the two of them were doing laundry. The washer and dryer were located on the enclosed back porch. While Thompson went to fold clothes in the bedroom, Evans stepped out back to smoke some marijuana.

Shortly after going into the bedroom, Thompson heard six gunshots, fired in quick succession, and Thompson and her other visitors took cover. When the shooting stopped, Thompson and her daughter found Evans lying in a pool of blood on the enclosed back porch, and Thompson called 911. The house, some property inside the house, and Thompson's daughter's van were damaged by the gunfire.

Law enforcement officers and EMS responded to the call. EMTs pronounced Evans dead at the scene. Law enforcement officers found seven shell casings along the edge of the property, and spent projectiles inside the van and the washing machine. Surveillance cameras captured Defendant near the scene of the crime with his friend, Octavious,

and showed the license plate number of Defendant's car. Footage also showed Defendant carrying a gun.[1] Later that morning, after finding Defendant's vehicle at the Econo Lodge Inn, law enforcement officers executed a search warrant for Defendant's hotel room, where they discovered a loaded gun and some cocaine. A forensic scientist in the firearms unit of the North Carolina State Crime Laboratory testified that his examination of the cartridge cases found at Thompson's house revealed that they were from 9mm Luger bullets, which were fired from the gun found in Defendant's hotel room.

Defendant's evidence painted an entirely different picture. He testified that he and Octavious left Bob's No. 2, a local game room and convenience store, to visit Octavious' grandmother at Thompson's house on North Herman Street. Octavious drove Defendant's mother's car, and parked in the Piggly Wiggly parking lot. From there, the men walked toward Thompson's house. As they were walking, Defendant stopped to urinate in the bushes while Octavious went on without him. When Defendant heard gunshots, he ran back to the car. Octavious ran back to the car as well, and they returned to Bob's No. 2. Defendant eventually left to meet his girlfriend at the Econo Lodge Inn. While he was at the Econo Lodge, Octavious telephoned Defendant, and Defendant retrieved the gun from the car. However, Defendant testified that he did not know there was a gun in the car prior to the call from Octavious, and that he did not know Evans.

Octavious' testimony conflicted with Defendant's.[2] Octavious testified that Evans owed money to Defendant's brother, and that he and Defendant went to get the money from Evans. Octavious drove Defendant's car to the Piggly Wiggly parking lot, and the two men walked to Thompson's house. Octavious said that Defendant did not stop to urinate in the bushes. Instead, because Octavious was not allowed in Thompson's house, he waited at the neighbor's while Defendant went to collect the money from Evans. Shortly after Defendant left Thompson's house, Octavious heard gunfire and saw Defendant run past him. Octavious followed Defendant to the car, and Octavious then drove them back to Bob's No. 2. Octavious further testified that he did not call Defendant that evening; that neither he nor Defendant had a gun; and that Octavious did not check on his aunt and grandmother afterward.

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1. On appeal, Defendant challenges the admissibility of this evidence.

2. At the time of Defendant's trial, Octavious was also charged with the first-degree murder of Evans.

The jury found Defendant guilty of first-degree murder under the theory of felony murder, possession of a firearm by a felon, discharging a weapon into occupied property, and felonious possession of cocaine. For the offense of first-degree felony murder, the trial court sentenced Defendant to life imprisonment without parole in the North Carolina Division of Adult Correction. The trial court arrested judgment on the charge of discharging a firearm into occupied property, as the underlying felony supporting the conviction for felony murder. For the offenses of possession of a firearm by a felon and felony possession of cocaine, the trial court sentenced Defendant to 19-32 months' imprisonment set to begin at the expiration of his sentence for first-degree murder.

Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court (1) "committed plain error by instructing the jury [that] [D]efendant could be found guilty of the murder and shooting into an occupied dwelling based on the theory of acting in concert"; and (2) "erred by allowing a witness to testify to her opinion on an issue [of] which she had no personal understanding and that was properly in the province of the jury." We address each argument in turn.

I. Jury Instructions

[1] Defendant first contends that the trial court plainly erred by instructing the jury on the theory of acting in concert, in that the evidence offered at trial did not support this instruction.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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). Thus, because "[D]efendant failed to object to the jury instruction at trial, he must show plain error by establishing that the trial court committed error, and that absent that error, the jury probably would have reached a different result." *State v. Poag*, 159 N.C. App. 312, 321-22, 583 S.E.2d 661, 668, *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

It is axiomatic that in order to constitute plain error justifying a new trial, the error must "be so fundamental that [the] defendant, in light of the evidence, the issues and the instructional error, could not have received a fair trial." *State v. Abraham*, 338 N.C. 315, 345, 451 S.E.2d 131, 147 (1994). "[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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). "It is generally prejudicial error for the trial court to instruct the jury on a theory of [the] defendant's guilt that is not supported by the evidence." *Poag*, 159 N.C. App. at 322, 583 S.E.2d at 668.

Under the doctrine of acting in concert, "[a] person may be found guilty of committing a crime if he is at the scene acting together with another person with a common plan to commit the crime, although the other person does all the acts necessary to commit the crime." *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993); *accord State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) ("To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose."). As our Supreme Court has explained, "[i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle[.]" *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

In the instant case, there was sufficient evidence to support the State's theory that Defendant was guilty by acting in concert with Octavious, and to justify instructing the jury on the doctrine of acting in concert. The evidence at trial tended to show that Defendant, Defendant's brother, and Octavious met up at Bob's No. 2, a local game room and convenience store. Defendant and Octavious were identified together there in the surveillance video footage, and Defendant was pictured holding a gun. After Octavious and Defendant's brother discussed the fact that Evans owed money to Defendant's brother, Defendant's brother instructed Octavious and Defendant to collect the money. Evans was visiting the home of Octavious' aunt, Renee Thompson, on North Herman Street, and Evans's Cadillac was parked in the driveway. Rather than drive all the way to Thompson's home, Octavious parked Defendant's car in the parking lot of the Piggly Wiggly near her home, and the men walked from there. Defendant and Octavious were identified together in surveillance video footage from the Piggly Wiggly and in surveillance video footage from North Herman Street. When they arrived, Defendant entered Thompson's house alone, because Octavious was not allowed in the house.

After gunshots were fired, the men ran to the car, and Octavious drove Defendant to Bob's No. 2. Defendant and Octavious were identified together, fleeing the scene, on two surveillance videos. The gun that fired the bullet that killed Evans—which contained live rounds at the

time it was discovered by police—was found in Defendant's hotel room hours after the shooting.

Taken together, and in light of the "heavy burden of plain error analysis" that a defendant is required to shoulder, *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001), we conclude that the evidence sufficiently supports the conclusion that Defendant acted in concert with Octavious in committing the charged offenses. Thus, the trial court did not err, much less plainly err, by instructing the jury on the doctrine of acting in concert. This argument lacks merit.

II. Evidentiary Rule 602

[2] Defendant next argues that the trial court erred in allowing Octavious's aunt, Renee Thompson, to testify that she believed that Defendant was holding a gun in his hand in video footage from a surveillance camera at Bob's No. 2 and from screen shots produced from that footage.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). "A trial court abuses its discretion if the ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Weldon*, 258 N.C. App. 150, 154, 811 S.E.2d 683, 687 (2018) (citation and internal quotation marks omitted). However, even if the trial court erred by allowing such testimony, the defendant must show that the error was prejudicial. *See* N.C. Gen. Stat. § 15A-1443(a); *State v. Buie*, 194 N.C. App. 725, 733, 671 S.E.2d 351, 356, *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009).

It is well established that "the jury is charged with determining what inferences and conclusions are warranted by the evidence." *Buie*, 194 N.C. App. at 730, 671 S.E.2d at 354. "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). However, Rule 701 permits a lay opinion witness to offer "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701.

Relatedly, Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal

knowledge may, but need not, consist of the testimony of the witness himself." *Id.* § 8C-1, Rule 602. "The Commentary to Rule 602 further provides that the foundation requirements may, of course, be furnished by the testimony of the witness h[er]self; hence personal knowledge is not an absolute but may consist of what the witness thinks [s]he knows from personal perception." *State v. Harshaw*, 138 N.C. App. 657, 661, 532 S.E.2d 224, 227 (internal quotation marks omitted), *disc. review denied*, 352 N.C. 594, 544 S.E.2d 793 (2000).

Defendant contends that Thompson's "opinion of what can be seen in a video is inadmissible as she was in no better position to know what the video showed than the jurors," and that "[t]here is a reasonable possibility that if the trial court had granted Defendant's motion to strike [Thompson's] opinion testimony a different result would have been reached at trial."[3]

It is undisputed that Thompson's testimony that Defendant was holding a gun at Bob's No. 2 on the evening of Evans's death was not based on Thompson's firsthand knowledge or perception, but rather solely on her viewing of surveillance video footage and screen shots extracted from the video footage. Thompson was not at the scene, and instead relied upon the same footage shown to the jury. Indeed, Thompson was clearly in no better position to correctly determine what Defendant was holding in his hand than the jury. *See State v. Belk*, 201 N.C. App. 412, 418, 689 S.E.2d 439, 443 (2009), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). Thus, the admission of Thompson's testimony was error.

Nonetheless, Defendant must demonstrate that he was prejudiced by this error by showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a). After careful review, we conclude that Defendant has not satisfied this burden.

In the instant case, there was substantial other evidence on which the jury could base a finding of Defendant's guilt. Octavious testified

3. The State notes that "Defendant did not specify the basis of his objection at trial," without further analysis or argument. While a party seeking to preserve an issue for appellate review "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," N.C. R. App. P. 10(a)(1), stating the specific grounds for the objection is necessary only "if the specific grounds were not apparent from the context." *Id.* Having reviewed Thompson's testimony and the prosecutor's line of questioning, we are satisfied that the objection to Thompson's testimony was "apparent from the context." *See State v. Phillips*, 268 N.C. App. 623, 634, 836 S.E.2d 866, 873 (2019).

that Evans owed money to Defendant's brother, and that Defendant's brother instructed them to collect on the debt just before they left Bob's No. 2. The State effectively traced Defendant's trek with Octavious from Bob's No. 2 to Thompson's home, his arrival at the scene just before the shooting, and his quick return to Bob's No. 2. The jurors also viewed the surveillance videos and screen shots in which Defendant and Octavious were identified together at Bob's No. 2 and along roads leading to Thompson's home, as well as the expended cartridge casings that officers found bordering the edge of Thompson's property. A forensics expert testified that these casings were fired from the gun discovered in Defendant's hotel room. Moreover, Thompson's challenged testimony was minimal and brief. The prosecutor did not linger on this issue, only asking Thompson once what Defendant was holding.

In sum, even if the jurors credited Thompson's testimony on this point, we are not convinced that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a). Accordingly, this final argument must fail.

Conclusion

Defendant failed to show that the trial court plainly erred by instructing the jury on the doctrine of acting in concert, and failed to demonstrate that he was prejudiced by the trial court's admission of Thompson's testimony.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE v. GAMBLE

[274 N.C. App. 425 (2020)]

STATE OF NORTH CAROLINA
v.
SHELLEY LOVETTE GAMBLE

No. COA20-83

Filed 1 December 2020

Sentencing—felony embezzlement—aggravating factor—taking of property of great monetary value—ratio of amount embezzled to threshold amount of offense

In a case where defendant was convicted of eight counts of embezzlement of property received by virtue of office or employment, the trial court did not err by applying the aggravating factor of "taking of property of great monetary value" when it sentenced defendant for one of the convictions—a conviction for Class C felony embezzlement of more than $100,000. Defendant's conviction on that charge was based on her embezzlement of $202,242.62, and the ratio between the amount embezzled and the statutory threshold, as well as the total amount of money embezzled, supported application of the aggravating factor.

Appeal by Defendant from judgment entered 25 July 2019 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 17 November 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

COLLINS, Judge.

Defendant challenges her sentence following conviction of eight counts of embezzlement of property received by virtue of office or employment. She argues that the trial court erred by applying the aggravating factor of "taking of property of great monetary value," N.C. Gen. Stat. § 15A-1340.16(d)(14), to one of her convictions because the value embezzled, $202,242.62, was not far greater than the $100,000 threshold amount required to support a conviction of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c). We discern no error.

I. Factual Background and Procedural History

Brushy Mountain Group Homes is a nonprofit which runs three group homes in Wilkes County for adults with intellectual disabilities. Brushy Mountain first hired Defendant as a manager in 1989. Defendant subsequently became Brushy Mountain's executive director in July 2001.

In July 2016, Defendant informed Brushy Mountain's Board of Directors that the nonprofit was out of funds. Between June 2012 and July 2016, the balance in Brushy Mountain's various accounts had fallen from over $400,000 to $440. Concerned, the Board of Directors forwarded Brushy Mountain's financial records to its attorney, and then to the State Bureau of Investigation ("SBI"). An SBI investigation revealed $410,203.41 in unauthorized expenditures. These expenditures included 373 checks totaling $26,251.81 in 2014, $202,242.62 in 2015, and $168,240.00 in 2016, as well as $13,468.98 in credit card charges spanning 2012 to 2016. All of the checks were deposited into Defendant's checking account or endorsed by Defendant. Defendant resigned her position as executive director in August 2016.

On 4 September 2018, Defendant was indicted on eight counts of embezzlement of property received by virtue of office or employment, pursuant to N.C. Gen Stat. § 14-90; two of the counts alleged Defendant embezzled property valued $100,000 or more. Each individual indictment corresponded to the sum of one particular year's unauthorized checks or credit card transactions. Defendant was tried before a jury in Wilkes County Superior Court from 22 to 25 July 2019. The jury found Defendant guilty of all charges.

At sentencing, Defendant pled guilty to the aggravating factor that one of the offenses involving unauthorized credit card transactions and all three offenses involving unauthorized checks "involved an . . . actual taking of property of great monetary value." *See* N.C. Gen. Stat. § 15A-1340.16(d)(14) (2019). The trial court applied the aggravating factor to Defendant's conviction of embezzlement of $202,242.62 in 2015, and sentenced Defendant to 92 to 123 months' imprisonment.[1] The trial court consolidated the remaining convictions and imposed sentences within the presumptive range, suspended for 60 months of supervised probation. Additionally, the trial court ordered Defendant to pay $25,000 in restitution. Defendant gave notice of appeal in open court.

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1. While the trial court consolidated Defendant's convictions for the 2015 and 2016 checks for the purposes of sentencing, it only applied the aggravating factor on the basis of the $202,242.62 Defendant was convicted of embezzling in 2015.

II. Discussion

Defendant's sole argument on appeal is that the trial court erred by imposing a sentence in the aggravated range. Specifically, Defendant contends that the "great monetary value" aggravating factor cannot be applied because the value embezzled, $202,242.62, was not far greater than the $100,000 amount required to support a conviction of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c). Alleged statutory sentencing errors are questions of law which we review de novo. *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016).

When sentencing a criminal defendant, the trial court must consider "evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate . . . ." N.C. Gen. Stat. § 15A-1340.16(a) (2019). A "defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury . . . ." *Id.* § 15A-1340.16(a1) (2019).

"Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." *Id.* § 15A-1340.16(d) (2019). The aggravating factor at issue in this case is whether "[t]he offense involved an attempted or actual taking of property of great monetary value . . . ." *Id.* § 15A-1340.16(d)(14). One of the elements of Class C felony embezzlement of property received by virtue of office or employment is that the value of the property taken was $100,000 or more. *Id.* § 14-90(c) (2019).

Though a conviction for Class C felony embezzlement requires evidence of this threshold value, a trial court may still be permitted to apply the "great monetary value" aggravating factor when sentencing a defendant for the offense. *See State v. Cobb*, 187 N.C. App. 295, 297, 652 S.E.2d 699, 700 (2007) (permitting application of the "great monetary value" aggravating factor where the defendant pled guilty to three counts of Class C felony embezzlement). The trial court's ability to do so is not subject to a

> rigid test based upon a ratio of the amount embezzled to the threshold amount of the offense. Rather, the ratio is a factor to be considered along with the total amount of money actually taken in deciding whether it is appropriate to find this aggravating factor.

Id. at 298, 652 S.E.2d at 701.

For example, in *Cobb*, the defendant pled guilty to three counts of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c). *Id.* at 296-97, 652 S.E.2d at 700. At sentencing, the trial court applied the "great

monetary value" aggravating factor to the counts involving embezzlement of $404,436 and $296,901. *Id.* at 297, 652 S.E.2d at 700. This Court held that the trial court did not err because these "were sums of 'great monetary value' when compared with the threshold amount required for the offense of $100,000.00." *Id.* at 298, 652 S.E.2d at 701.

In the context of Class H felony larceny under N.C. Gen. Stat. § 14-72(a)—an offense which requires a threshold value of more than $1,000—this Court has held that values between $2,500 and $3,000 are sufficient to support application of the "great monetary value" aggravating factor. *State v. Pender*, 176 N.C. App. 688, 694-95, 627 S.E.2d 343, 347-48 (2006); *State v. Simmons*, 65 N.C. App. 804, 806, 310 S.E.2d 139, 141 (1984). Additionally, "there is no bar that prevents this Court from holding that a great monetary amount" for the purpose of a Class H felony larceny conviction "may include an amount less than [$2,500]." *Pender*, 176 N.C. App. at 695, 627 S.E.2d at 348.

Here, both the ratio between the amount embezzled and the statutory threshold, as well as the total amount of money embezzled, support the application of the "great monetary value" aggravating factor. Defendant was convicted of embezzling $202,242.62 in 2015, more than two times greater than the applicable $100,000 threshold. *See* N.C. Gen. Stat. § 14-90(c). Defendant's argument that "[t]his Court has never approved use of the 'great monetary amount' aggravator where the ratio of the amount taken and the offense's threshold amount was less than 2.5" disregards our disavowal of any rigid test based upon a fixed ratio. *Cobb*, 187 N.C. App. at 298, 652 S.E.2d at 701.

Additionally, $202,242.64 is, from the standpoint of an ordinary person, a great value of money. Defendant's assertion that "the amount at issue here is only somewhat above the $100,000 threshold" is not credible. Defendant's argument that the trial court erred by applying the "great monetary value" aggravating factor when sentencing her is overruled.

III. Conclusion

Because Defendant was convicted of embezzling $102,242.62 in excess of the $100,000 threshold required for a conviction of Class C felony embezzlement under N.C. Gen. Stat. § 14-90(c), the trial court did not err by applying the aggravating factor of "taking of property of great monetary value" when sentencing Defendant.

NO ERROR.

Judges DIETZ and ZACHARY concur.

STATE v. GRADY

[274 N.C. App. 429 (2020)]

STATE OF NORTH CAROLINA
v.
ADELL GRADY

No. COA19-1025

Filed 1 December 2020

1. Evidence—other crimes, wrongs, or acts—uncharged similar crime—Rules 403 and 404(b)—chain of events—no unfair prejudice

In a prosecution for felony breaking and entering and felony larceny, there was no error in the admission of evidence regarding an uncharged breaking and entering that occurred on the same morning and one street over from the crimes for which defendant was on trial. The evidence was admissible under Evidence Rule 404(b) because it was not admitted solely to show defendant's propensity to commit the charged offenses, but depicted a chain of events that tended to show the same person committed the two break-ins in close temporal and spatial proximity. Moreover, the evidence was not unfairly prejudicial and therefore did not have to be excluded pursuant to Evidence Rule 403.

2. Evidence—hearsay—statements from neighbor regarding second break-in—present sense impression exception

In a prosecution for felony breaking and entering and felony larceny, the trial court did not err by admitting statements made by a nearby resident—whose house had also been broken into on the same morning and one street over from the break-in that gave rise to the charged offenses—to law enforcement because the statements qualified under the present sense impression exception to the hearsay rule (Evidence Rule 803(1)). The statements were made within minutes after the resident was aware that his house had been broken into, and the resident made the statements in an agitated and angry manner.

3. Firearms and Other Weapons—possession of firearm—sufficiency of evidence—circumstantial evidence

In a prosecution for felony breaking and entering and felony larceny, the trial court properly denied defendant's motion to dismiss a charge of possession of a firearm by a felon where there was sufficient evidence, albeit circumstantial, that defendant possessed a bag holding three guns that were taken during a house break-in.

Surveillance video near the house showed an empty-handed man (later identified as defendant) approaching the house and then, shortly afterward, leaving with a bag that had items sticking out of it; soon after that, law enforcement met the owner at the house, and the owner discovered his three guns were missing.

Appeal by defendant from judgments entered 7 March 2019 by Judge John E. Nobles Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant.

DIETZ, Judge.

Defendant Adell Grady appeals his convictions for felony breaking and entering, felony larceny, and possession of a firearm by a felon. He argues that the trial court erred by admitting the State's evidence that he committed another similar breaking and entering. Grady also argues that an officer's testimony about that other break-in involved inadmissible hearsay. Finally, Grady argues that there was insufficient evidence that he stole any guns during the break-in and thus the charge of possession of a firearm by a felon should have been dismissed.

We reject these arguments. The evidence of the other break-in, which took place on a neighboring street, at around the same time, on the same day, by someone with the same general features and dressed in the same clothes as the perpetrator of the charged offenses, was properly admitted under Rule 404(b) for various reasons other than solely to show Grady's propensity to commit those offenses.

Likewise, the officer's description of what the victim of that other break-in told him, just minutes after that break-in occurred, was admissible as a present sense impression. Finally, the State's evidence was sufficient to overcome a motion to dismiss the charge of possession of a firearm by a felon, even without any direct evidence that Grady stole the guns, based on the evidence that those guns were present in a locked house before the break-in, that they were missing afterward, and that Grady was the perpetrator of the break-in. We therefore find no error in the trial court's judgments.

Facts and Procedural History

In 2018, Officer Jesse Moore with the Wilmington Police Department responded to a report of a breaking and entering at a home on Fowler Street. When Moore arrived, he observed that the front door was kicked in. The resident of the home, Jason Gray, was not there.

Gray's next-door neighbors, the Overbys, had called 911. They were waiting outside for police to arrive. Ms. Overby reported that her husband had been across the street feeding a neighbor's dog that morning when she heard a loud noise, looked outside, and saw a man walk across the corner of their driveway from the direction of Gray's house, and then walk east on Fowler Street toward a nearby apartment complex. Ms. Overby described the man as African-American, wearing a red and black hoodie, and carrying a Game Stop bag. Shortly after, Ms. Overby saw a gold car drive by several times making a loud noise.

As Mr. Overby was walking back from the neighbor's house, the gold car, a Dodge Neon, stopped in front of the Overbys' house. The driver asked Mr. Overby for directions. Mr. Overby described the driver as a black man with grayish hair and beard, probably in his 40s or 50s, and wearing a red and black hoodie. After the man drove off, Mr. Overby went to check on Gray's house, saw that the front door was kicked open, and told Ms. Overby to call the police.

Ms. Overby later checked their security system video footage, where she again saw the man with the red and black hoodie. The video captured the man walking next door toward Gray's home with nothing in his hands and then coming out across the front of the Overbys' house with a Game Stop bag in his hands. The Overbys testified that they couldn't see what was in the bag, but "you could tell by looking at it, it was kind of – stuck out on different sides or whatever and you could tell there was weight in the bag." The Overbys provided their surveillance footage to Officer Moore. Ms. Overby also viewed footage showing the man walking to the gold car parked at the nearby apartment complex, getting in the car, and driving towards the Overbys' home. The Overbys were unable to provide that portion of the footage to police due to a system malfunction.

After Officer Moore notified Jason Gray, the home's resident, of the break-in, Gray returned home to find that his front door was broken open, the house had been ransacked, and many of his belongings were missing. The missing items included multiple electronic devices, video games and gaming consoles, and three firearms (two handguns and a shotgun). Gray testified that he had Game Stop bags in his residence at the time of the break-in.

On the same morning as the Fowler Street break-in, Officer William Rose investigated a breaking and entering at a house on Dexter Street, one street over from Fowler Street. Officer Rose arrived shortly before 10:20 a.m. As Officer Rose was approaching the Dexter Street house, the home's resident, James Smith, arrived and ran towards the backyard. Officer Rose followed him. Smith identified himself as the resident of the home and as "the person who had called 911 because of the house being broken into." Smith was "agitated," "excited," and "angry" and told Officer Rose that his house had just been broken into.

Smith showed Officer Rose a portion of a video that was automatically sent to his cell phone from his home's security camera, showing that there was someone inside the residence. The time stamp on the video was 10:17 a.m. After waiting for other officers to arrive, Officer Rose entered the residence. There was property damage to the rear door frame of the residence where the surveillance video showed the suspect had entered. Officer Rose then asked Smith if anything was missing from the residence, and Smith told the officer that a television was missing.

Sergeant Brian Needham later reviewed security video footage from both Fowler Street and Dexter Street. Both videos showed a black man wearing a red and black hooded sweatshirt. The man could be seen entering the home on Dexter Street and carrying away a television. Upon comparing the videos, Sergeant Needham concluded that the same individual committed both the Dexter Street and Fowler Street break-ins. After locating the gold Dodge Neon from the Fowler Street surveillance footage and identifying its owner, Needham went on Facebook where he found a photo of the car's owner with a man who closely resembled the description given by the Overbys and the man in the security videos. Needham identified the man as Defendant Adell Grady and found a Facebook photo from the previous month showing Grady wearing a red and black hooded sweatshirt that was the same style of sweatshirt worn by the suspect in the surveillance videos.

Police then located Grady and arrested him. At the time of his arrest, Grady was wearing what officers believed to be the same red and black Nike hooded sweatshirt shown in the surveillance videos. Grady was charged with breaking and entering, larceny, and possession of a firearm by a felon in connection with the Fowler Street break-in.

Corporal Carlos Lamberty and Detective Robert Ferencak interviewed Grady after his arrest and showed him still shots from the surveillance videos of the break-ins. Grady then admitted to his direct involvement in the Dexter Street break-in and admitted to his presence on Fowler Street around the time of that break-in. He implicated a man

named Cedric Age as the perpetrator of the break-ins. Grady admitted to driving the gold Dodge Neon in the Fowler Street video and to being in the house on Dexter Street. He also admitted to knowing about the television taken from the Dexter Street house, which he believed was later sold for drugs. But Grady denied breaking into the Fowler Street house and said he had nothing to do with the missing guns.

On 11 June 2018, Grady was indicted for felony breaking and entering, felony larceny, injury to real property, possession of a firearm by a felon, and attaining habitual felon status, all in connection with the Fowler Street break-in. The State did not move forward with any charges related to the Dexter Street break-in because James Smith, the home's resident, later refused to cooperate with the prosecution.

On 4 March 2019, the case went to trial. Following a *voir dire* with the law enforcement officers involved, the trial court admitted the State's evidence regarding the uncharged Dexter Street break-in under Rule 404(b) over Grady's repeated objections. Officers Rose, Needham, Lamberty, and Ferencak testified to the details of their investigation as described above. The trial court admitted Officer Rose's testimony about Smith's statements to him at the scene of the Dexter Street break-in, overruling Grady's hearsay objection. At the close of evidence, Grady moved to dismiss the charges and the trial court denied the motion.

On 7 March 2019, the jury convicted Grady of felony breaking and entering, felony larceny, and possession of a firearm by a felon. Grady then admitted his status as a habitual felon and also pleaded guilty to unrelated breaking and entering and larceny charges. The trial court sentenced Grady as a habitual felon to 111 to 146 months in prison plus restitution of $4,854.96 for breaking and entering, and concurrent sentences of 111 to 146 months for larceny and 120 to 156 months for possession of firearm by a felon. Grady also received a concurrent sentence of 12 to 24 months on the charges to which he pleaded guilty. Grady appealed.

Analysis

I. Admission of Rule 404(b) evidence of Dexter Street break-in

[1] Grady first argues that the trial court erred by admitting the State's Rule 404(b) evidence of the uncharged breaking and entering and larceny that occurred on Dexter Street on the same morning as the Fowler Street break-in at issue in this case. Grady contends that the evidence was inadmissible under Rule 404(b) because it merely "showed a

propensity for him to commit the crime" and, even if it was admissible under Rule 404(b), it should have been excluded under Rule 403 because its probative value was outweighed by the risk of unfair prejudice. We reject this argument.

This Court reviews the legal conclusion that evidence is, or is not, within the coverage of Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). We review the trial court's corresponding Rule 403 determination for abuse of discretion. *Id.* "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cagle*, 346 N.C. 497, 506–07, 488 S.E.2d 535, 542 (1997).

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. R. Evid. 404(b). Our Supreme Court has made clear that Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Thus, evidence of another offense "is admissible so long as it is relevant to any fact or issue other than the character of the accused." *Id.* at 278, 389 S.E.2d at 54 (emphasis omitted).

Still, there are limits to the use of Rule 404(b) evidence. The "rule of inclusion described in *Coffey* 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). These requirements can be satisfied where a defendant's prior wrongful acts were "part of the chain of events explaining the motive, preparation, planning, and commission of the crime." *State v. Parker*, 140 N.C. App. 169, 173, 539 S.E.2d 656, 660 (2000). "When the incidents are offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test" in Rule 403. *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385 (1989).

We begin by examining whether the challenged evidence was admitted solely to show Grady had a propensity to commit the charged

offenses. It was not. The evidence of the Dexter Street break-in was offered for proper Rule 404(b) purposes. *Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54; N.C. R. Evid. 404(b). Specifically, there was evidence of a break-in on Fowler Street. There also was evidence that a person in a red and black hoodie walked toward the Fowler Street residence around the time of the break-in and later walked away from it carrying a bag. But there was no direct evidence that this person in a red and black hoodie committed the Fowler Street break-in.

Thus, an important part of the State's case was presenting circumstantial evidence that this person in the red and black hoodie committed the crime. One permissible way to establish this fact was through evidence that a person matching that same description broke into a residence just one street over that same morning and stole a television.

This evidence was not used to show that the person in that red and black hoodie was Grady or that Grady was the type of person who breaks into people's homes. Rather, it showed that the same person likely committed both crimes because there were two similar break-ins that took place on neighboring streets, at around the same time, on the same day, by someone with the same general features, dressed in the same clothes. This evidence was a natural account of a chain of similar break-ins that occurred that day and was used to establish that the person observed by witnesses and security cameras on Fowler Street committed the break-in. It was therefore admissible under Rule 404(b). *Parker*, 140 N.C. App. at 173–74, 539 S.E.2d at 660.

We next consider whether the trial court abused its discretion by determining that the probative value of this evidence was not substantially outweighed by any prejudicial effect under Rule 403. *Pruitt*, 94 N.C. App. at 266, 380 S.E.2d at 385. In his appellate brief, Grady argues that this evidence was "overwhelmingly prejudicial to his defense" without explaining why.

To be fair, this evidence certainly was prejudicial to Grady's defense in the sense that it was quite incriminating, but all evidence "which is probative in the State's case will have a prejudicial effect on the defendant." *Cagle*, 346 N.C. at 506, 488 S.E.2d at 542. Rule 403 addresses *unfair* prejudice. *Id.* We see nothing in this evidence that makes it so unfairly prejudicial that the trial court's decision to admit it was manifestly arbitrary and lacking in reason. *Id.* at 506–07, 488 S.E.2d at 542. Accordingly, the trial court did not abuse its discretion by determining that this evidence was admissible under Rule 403.

II. Admission of hearsay statements from the Dexter Street break-in

[2] Grady next argues that the trial court erred by admitting hearsay testimony from James Smith, the resident of the Dexter Street home. We also reject this argument.

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c). Under the hearsay rule, "[h]earsay is not admissible except as provided by statute or by these rules." N.C. R. Evid. 802.

Grady challenges the portion of Officer Rose's testimony in which the officer described what James Smith told him when he arrived in response to Smith's 911 call. In his appellate brief, Grady focuses entirely on the trial court's failure to determine that Smith was unavailable and the court's corresponding failure to conduct the "six-part inquiry to ascertain whether the hearsay evidence should be admitted" based on that unavailability.

We need not address this argument because this was not the hearsay exception asserted by the State or embraced by the trial court below. Instead, this case concerns the hearsay exception for present sense impressions in Rule 803. A "present sense impression" is defined as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C. R. Evid. 803(1).

"The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Blankenship*, 259 N.C. App. 102, 114, 814 S.E.2d 901, 912 (2018). "There is no rigid rule about how long is too long to be immediately thereafter." *Id.* Importantly, our Supreme Court has held statements to a law enforcement officer by someone who witnessed a crime are admissible as present sense impressions when the lapse in time between the witness's perception and their statement was solely the short amount of time it took for the witness to arrive in the presence of the officer. *See State v. Morgan*, 359 N.C. 131, 155, 604 S.E.2d 886, 900–01 (2004) (collecting cases).

Here, law enforcement received a call reporting a break-in on Dexter Street. Officer Rose arrived in response to that call at the same time that Smith, the resident of the home and the person who reported the break-in, also arrived. Smith was "agitated," "excited," and "angry." He explained to Officer Rose that his home had just been broken into and showed the officer video footage of the break-in that was automatically sent to Smith's cell phone through his home's security system after the system detected motion inside the home. Smith then examined his home and informed Officer Rose that a television was missing.

The time stamp on the security footage from Smith's phone was 10:17 a.m. Both Officer Rose and Smith arrived at the Dexter Street home within minutes after Smith viewed that footage and reported the crime.

In light of these facts, the trial court properly admitted Officer Rose's testimony under the present sense impression exception to the hearsay rule. Smith's statements were made within minutes after he first perceived the break-in through the security footage and then contemporaneously as he perceived the situation at his home when he arrived. These statements were "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" and thus properly fall within the exception for present sense impressions. *Morgan*, 359 N.C. at 154, 604 S.E.2d at 900.

We also note that, even if the challenged testimony—Officer Rose's testimony about what Smith told him—was inadmissible hearsay, nearly all the key facts from that testimony also were admitted through other evidence, primarily from Officer Rose's own observations of the scene when he arrived. That testimony, combined with Grady's own admissions of his involvement in the Dexter Street break-in, left no reasonable possibility that, had this portion of Officer Rose's testimony been excluded as hearsay, the jury likely would have reached a different result. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001). Accordingly, even if we found error—and we do not—any error was harmless.

III. Denial of motion to dismiss the possession of firearm charge

[3] Finally, Grady argues that the trial court erred by denying his motion to dismiss the possession of a firearm by a felon charge. Grady contends that "there was no evidence whatsoever of any firearms either on or in the vicinity of" him in any witness account or security footage.

"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 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted).

"The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016). Grady challenges only the sufficiency of the evidence as to the possession element. Possession can be shown by circumstantial evidence. *State v. Marshall*, 206 N.C. App. 580, 583, 696 S.E.2d 894, 897 (2010).

Here, the State's evidence showed that Jason Gray had three guns and Game Stop bags in his house prior to the break-in and that he locked his house when he left home that morning. While Gray was gone, his next-door neighbor heard a loud noise coming from the direction of Gray's house and then saw a man, later identified as Grady, walking away from Gray's house carrying a bag. The neighbor checked her surveillance footage and saw Grady approach the home with nothing in his hands and then leave a short time later carrying a Game Stop bag. Although no witnesses saw what was in the Game Stop bag, Mr. Overby testified that there were "things in that bag . . . you could tell by looking at it" because it "stuck out on different sides or whatever and you could tell there was weight in the bag." Shortly thereafter, the neighbors went to check on Gray's house, found the door was kicked in, called police,

and waited outside for them to arrive. When Gray returned home after being notified of the break-in, he found that his three guns were missing. The neighbors did not see anyone else around Gray's house that day.

This evidence is readily sufficient to overcome a motion to dismiss. Viewed in the light most favorable to the State, the evidence established that there was a break-in at the Fowler Street house, that the only way the guns could have gone missing from the house were as a result of that break-in, and that Grady was the one who broke into the house. From this, the jury reasonably could infer that Grady stole the guns and carried them away. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223; *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Accordingly, the trial court did not err by denying Grady's motion to dismiss.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Chief Judge McGEE and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
CARMELO LOPEZ, DEFENDANT

No. COA19-743

Filed 1 December 2020

1. Evidence—relevance—sexual offenses against a child—immigration status of victim's mother

In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not err by precluding defendant from cross-examining the victim's mother about her immigration status, where defendant argued at trial that the mother—an illegal immigrant—had a motive to fabricate the sexual abuse allegations in order to apply for a U Visa. Under Evidence Rule 401, the mother's immigration status was irrelevant to the issue of whether any sexual abuse occurred, and defendant could not support his theory about the mother's credibility because she never applied for a U Visa.

2. Evidence—Rule 403—testimony—defendant's refusal to test for sexually transmitted disease—sexual offenses against a child

In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not abuse its discretion by allowing the victim's mother to testify that defendant refused to get tested for herpes after the victim had tested positive for herpes. Although defendant eventually got tested pursuant to a search warrant, the mother said nothing about defendant's positive test results, which the trial court had already excluded under Evidence Rule 403 because the results did not show whether defendant had the same type of herpes as the victim; therefore, the mother's testimony did not create a danger of unfair prejudice.

3. Sexual Offenses—first-degree statutory sexual offense—sexual act—penetration—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of first-degree statutory sexual offense where there was sufficient evidence of penetration needed to establish the "sexual act" element of the crime. Specifically, the victim testified that defendant touched her with his fingers "in the inside" in "the place where she goes pee."

Judge MURPHY concurring in the result only with separate opinion.

Appeal by defendant from judgments entered on or about 22 January 2019 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

W. Michael Spivey, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for two counts of first degree statutory sexual offense and two counts of taking an indecent liberty with a child. Defendant contends the trial court erred in two evidentiary issues: not allowing evidence of the immigration status of a witness and allowing evidence that he refused a medical test; defendant also contends the trial court erred in denying his motion to dismiss. For the following reasons, we conclude there was no error.

I. Background

The State's evidence showed that in 2016 defendant invited his girlfriend and her then approximately six-year old daughter, Jane,[1] to move in with him. Due to Jane's mother's work schedule, defendant was alone with Jane at night, and on multiple occasions she said he would take off her pants and "do bad stuff to me." Defendant used "[h]is hands and his tongue" to "touch[Jane] in the place that [she] go[es] pee[.]" Defendant would touch "with his fingers" "in the inside" of "the place where [she go[es] pee[.]" Defendant would also touch "inside" "where [she] pee[d]" "with his tongue[.]"

Jane told her mother defendant "did something bad to [her]." Jane's mother confronted defendant; he originally denied the allegations but then asked her "not to charge him" and said "he had a lot of money in Mexico and he could give [her] whatever [she] needed." Soon after, Jane developed a rash "where [she] go[es] pee" that burned when she urinated. Jane's mother took Jane to the doctor, and she was diagnosed with genital herpes. Jane's mother was tested for genital herpes; she requested defendant also get tested, but he refused. A search warrant was then executed requiring defendant get tested; he tested positive.

A jury found defendant guilty of two counts of first degree statutory sexual offense and two counts of taking an indecent liberty with a child. The trial court entered judgment on the two counts of statutory sexual offense and arrested judgment on the two counts of taking an indecent liberty with a child. Defendant appeals.

II. Admission of Evidence

Defendant makes two arguments contending the trial court erred in the admission of evidence.

A. Standard of Review

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for

1. A pseudonym is used to protect the identity of the minor involved.

> a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.
>
> Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C–1, Rule 401 (2013). Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

State v. Blakney, 233 N.C. App. 516, 520–21, 756 S.E.2d 844, 847–48 (2014) (citations, quotation marks, and brackets omitted). "We review a trial court's Rule 403 determination for an abuse of discretion. An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Baldwin*, 240 N.C. App. 413, 418, 770 S.E.2d 167, 171 (2015) (citations and quotation marks omitted).

B. Evidence Regarding Immigration Status of Jane's Mother

[1] Defendant contends the trial court erred in not allowing him to cross-examine Jane's mother regarding her immigration status. Defendant's argument at trial was that by alleging her daughter was a victim of a crime, Jane's mother could apply for a U Visa.[2] While defendant frames this as a "cross-examination" issue, the trial court allowed defendant to make an extensive proffer of Jane's mother's immigration status, and ultimately ruled the evidence was irrelevant; thus we address the actual legal issue before us, the relevancy of Jane's mother's immigration status.

The State's attorney noted how far afield the questions had wandered and summarized Jane's mother's testimony during *voir dire* that she

2. "The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity." https://www.uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-criminal-activity-u-nonimmigrant-status (last visited 1 July 2020).

> stated that she and the Defendant at no time discussed her applying for a Visa in this case. She has not applied for a Visa in this case. I can as an officer of the Court tell you that she has not applied for a Visa with our office as a victim in this case because I would have been consulted about it.

The discussion continued:

> THE COURT: She's the parent of the victim. She's not the victim.
>
> [State's Attorney]: Correct, your Honor. She can't apply. She can't apply under the law for U Visa, so she can't make application. I understand that [defendant's attorney] feels like this goes to the credibility of the witness. I don't understand how [Jane's] immigration status or [Jane's mother's] status in light of the fact that no application has been filed and that they did not discuss it in reference to this case, how that therefore allows for [defendant's attorney] to parade [Jane's mother's] immigration status in front of the jury. She's already insinuated it to the jury. I don't get to parade the fact that Mr. Lopez is here illegally and that despite whatever happens with this case he's getting deported, I don't get to say that in front of the jury. She can ask questions that goes to credibility as it goes to this case, have you applied for a Visa, did you ever talk to Mr. Lopez about applying for a Visa in this case, but she has not provided enough for those issues to go in front of the jury. It is irrelevant, all of the questions about applying for marriage licenses and all of that. It's not relevant whatsoever to this case.

The trial court then asked defendant's attorney about the relevancy of the information she was seeking: "[W]hat does the information that you're seeking to elicit, what are facts of consequence does it make more or less probable?" Defendant's attorney responded simply, "Well, whether or not any sexual abuse actually occurred." The trial court then excluded the immigration status evidence under Rule of Evidence 401 and 403. Defendant now contends he had a right to question Jane's mother about her immigration status because "she may have had a motive to instigate, encourage, coach, or embellish allegations of abuse to avoid possible deportation because she was an illegal immigrant."

We agree with the trial court's ruling on relevancy of the evidence and disagree with defendant's assertions that Jane's mother's immigration status "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[;]" the fact here being "whether or not any sexual abuse actually occurred." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Defendant has not demonstrated how fabricating sexual abuse would allow Jane's mother "to avoid possible deportation because she was an illegal immigrant[,]" particularly in light of the fact that Jane's mother had not applied for the U Visa defendant was claiming as the motive for the lie.

Defendant focuses his argument to this Court on the importance of being able to question a witness's credibility and bias. We note that to the extent defendant wanted to question Jane's mother about fabricating the sexual abuse or to attack her credibility, he was free to do so; the only prohibition was information regarding her immigration status. Accordingly, we overrule this argument. Because Jane's mother's immigration status was not relevant, we need not address defendant's argument regarding Rule 403. *See generally* N.C. Gen. Stat. § 8C-1, Rule 403 (2017) (noting relevancy as a precursor to other considerations of exclusion).

C. Evidence Regarding Testing for Herpes

[2] During defendant's trial there was much discussion regarding whether evidence of defendant's positive herpes test, taken after being arrested, should be admitted as evidence to the jury. As to the issue on appeal, the trial court allowed Jane's mother to testify that she asked defendant to be tested after Jane had tested positive for herpes, and he refused to be tested. Later, a search warrant was executed to test defendant for herpes; that test was positive, but it did not distinguish whether defendant had the same type of herpes, Type 1 or Type 2, that Jane had. The State sought to present evidence of defendant's positive herpes test, but the trial court excluded that evidence based on Rule 403 because the positive test results did not show that the type of herpes was the same as that which infected Jane. Again, "[w]e review a trial court's Rule 403 determination for an abuse of discretion. An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Baldwin*, 240 N.C. App. at 418, 770 S.E.2d at 171.

Defendant contends that "the trial court erred by admitting evidence that . . . [defendant] would not submit to testing for herpes after it

excluded the results of any test upon . . . [defendant] because the danger of unfair prejudice substantially outweighed the probative value of the evidence." (Original in all caps.) Defendant does not contest the relevance of Jane's mother's testimony under Rule 401 regarding her request that defendant be tested but only contends that it was unfairly prejudicial. Beyond stating general law regarding Rule 403 and the admission of evidence, defendant cites no law supporting his contention of error by the trial court.

Defendant's general contention is that "[t]he State's case rested heavily upon convincing the jury that [Jane] must have been infected with herpes by Mr. Lopez." If the State intended for its case to rest heavily on this fact, the trial court's exclusion of the results of defendant's herpes test frustrated that intent. Defendant's objections to evidence of the test results were sustained. The trial court did not allow the State to present evidence regarding defendant's test results. But over the defendant's objection, the jury heard evidence of defendant's refusal to be tested upon Jane's mother's request. Even if the trial court had sustained defendant's objections and not allowed the contested testimony, the jury would still have been in the same position. There was evidence that Jane had herpes but there would be no evidence as to whether defendant was ever tested or what the results of that test were – since defendant successfully objected to the State's proffered evidence that he was later tested and the type of herpes was unknown.

The *only* information that Jane's mother actually provided is that defendant refused to be tested, and we do not deem that to be unfairly prejudicial or otherwise prohibited under Rule 403. *See id.* N.C. Gen. Stat. § 8C-1, Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The trial court did not abuse its discretion in overruling defendant's objection to this evidence. This argument is overruled.

III. Motion to Dismiss

[3] Last, defendant contends the trial court erred when it denied his motion to dismiss one of the charges of first degree statutory sexual offense due to the insufficiency of the evidence. Defendant challenges only the statutory sexual offense convictions based on penetration with his fingers; he does not challenge the conviction of statutory sexual offense based on cunnilingus or the two convictions for taking an indecent liberty with a child.

> The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Key, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007) (citations and quotation marks omitted). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

"A person is guilty of first-degree statutory sexual offense if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.29(a) (2017). A "sexual act" for purposes of this conviction "means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.20(4) (2017). In *State v. Bellamy*, this Court determined that the standard of proving penetration for a sexual offense was the same as that of rape: "evidence that the defendant entered the labia is sufficient to prove the element of penetration." 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005) ("Our Supreme Court has held that in the context of rape, evidence that the defendant entered the labia is sufficient to prove the element of penetration. We find no reason to establish a different standard for sexual offense." (citation omitted)).

Defendant compares his case to two others where the evidence of penetration was found to be insufficient. *See State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987); *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961). In *Hicks*, the witness provided "ambiguous testimony that defendant 'put his penis in the back of me.' " 319 N.C. at 90, 352 S.E.2d at 427. In *Whittemore*, the witness testified,

> He then told me to pull off my pants[.] I pulled my pants below [m]y knees. After I pulled my panties down below my knees, he put his privates against mine. He was laying on his back and made me lay down on him. I stayed inside the house about two or three minutes before he

> told me to pull my panties down. After he went in the house, he pulled his trousers off of one leg and laid down flat on his back on the floor. He made me put my hands on his privates and he put his hand on my privates. He kept it there about two or three minutes; he just left it there. After he had done that for two or three minutes, he put his mouth on my breast and after that he put it on my privates and kept his mouth there about one or two minutes. He just left it there[.] He had his privates at my privates rubbing it up and down. I said at. He did that about one or two minutes[.]

255 N.C. at 586, 122 S.E.2d at 398 (asterisks omitted). We conclude *Whittemore* and *Hicks* are inapposite.

Here, Jane testified that defendant touched her with his fingers "in the inside" in "the place where [she] go[es] pee[.]" Jane testified,

> You said that [defendant] would touch you with his hands. What part of his hand would [defendant] touch you with?
>
> A His fingers.
>
> Q And what did Carmelo do with his fingers when he would touch you? Did he move his fingers at all when he would touch you?
>
> A Yes.
>
> Q Okay. And how would he move his fingers when he touched you? Do you think you could show me what he did with his fingers? If you like held your fingers up in the air, do you think you could show me what he did with his fingers? If you don't think you can, you can tell me that. That's okay. [Jane], I'm going to ask you a different question. Okay?
>
> A Okay.
>
> Q Do you know that the place where you go pee has an inside and an outside?
>
> A Yes.
>
> Q When Carmelo would touch you with his fingers, would he touch you on the inside or on the outside?
>
> A I think in the inside.

Q Okay. Did that hurt? How did it feel?

A It felt really bad.

Jane's statements are not like in *Hicks* wherein it is unclear where exactly the defendant put his penis on the witness's private parts, and *Whittemore* where it is unclear what exactly defendant did to the witness's private parts. *See Hicks*, 319 N.C. at 90, 352 S.E.2d at 427; *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398. As this Court has previously noted,

> a prosecuting witness is not required to use any particular form of words to indicate that penetration occurred. While we encourage the State to clarify the testimony of a witness, we note the tendency of our appellate courts to permit a wide range of testimony to indicate penetration. Our standard of review requires us to view the evidence in the light most favorable to the State[.]

State v. Kitchengs, 183 N.C. App. 369, 375–76, 645 S.E.2d 166, 171 (2007) (citations omitted).

Our Supreme Court has noted that young children often do not use technically correct terminology to refer to their body parts, but if the meaning is clear, the evidence may be sufficient to prove the elements of the crime. *See generally State v. Rogers*, 322 N.C. 102, 105, 366 S.E.2d 474, 476 (1988).

> Although the victim did not use the word "vagina," or "genital area," when describing the sexual assault perpetrated upon her, she did employ words commonly used by females of tender years to describe these areas of their bodies, of which they are just becoming aware. Other cases have come before this Court in which young children have used words similar or identical to those used by the victim to describe the male and female sex organs, and the children's testimony was found to be sufficient to prove the essential elements of a sexual offense. *See, e.g.*, *State v. Griffin*, 319 N.C. 429, 355 S.E.2d 474 (1987) (nine-year-old victim testified defendant touched her on her "private parts"); *State v. Watkins*, 318 N.C. 498, 349 S.E.2d 564 (1986) (seven-year-old victim testified defendant placed his finger in her "coodie cat" and used dolls to indicate the vaginal area); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985) (four-year-old victim testified defendant

> touched her "project" with his "worm" and pointed to her vaginal area).

Id. Here, Jane testified that defendant touched her "inside" the place where she goes pee; this testimony alone is sufficient evidence of a sexual act and thereby of a sexual offense, and thus we need not address the other corroborating evidence. This argument is overruled.

IV. Conclusion

We conclude the defendant received a fair trial, free of error based upon the issues presented on appeal.

NO ERROR.

Judge BRYANT concurs.

Judge MURPHY concurs in the result only with separate opinion.

MURPHY, Judge, concurring in result only.

A. Immigration Status of Jane's Mother

I concur in result only with part II-B of the Majority, as the trial court correctly found the evidence irrelevant based on the lack of information presented to the trial court and on appeal to support the availability of a U-Visa to mother, but write separately to address the more general issue of the relevance of immigration status in this situation.

At trial, Defendant attempted to cross-examine Jane's mother regarding her immigration status and knowledge of U-Visas, which permit an undocumented immigrant to gain legal status if they are a victim of a crime, among other requirements. *See* 8 U.S.C. § 1101(a)(15)(U) (2019). After the State objected, the trial court permitted a voir dire proffer of testimony from Jane's mother, which in relevant part included:

> [DEFENDANT:] So you are aware that there is a Visa that's available to somebody who is a victim of a crime?
>
> [Jane's mother:] Yes.
>
> . . .
>
> [DEFENDANT:] Is [Jane] a citizen of the United States?
>
> [Jane's mother:] Yes.

> [DEFENDANT:] And you are not a documented -- you do not have documentation to be in this country; correct?
>
> [Jane's mother:] Exactly.
>
> [DEFENDANT:] Do you worry about being separated from [Jane] because of your status?
>
> [Jane's mother:] Of course I do.
>
> [DEFENDANT:] Is that something that you think about every day?
>
> [Jane's mother:] Of course.
>
> [DEFENDANT:] And if you were able to apply for a Visa, then you would be able to stay legally in this country; correct?
>
> [Jane's mother:] Of course.
>
> [DEFENDANT:] And then you would not have to worry about being separated from [Jane]; correct?
>
> [Jane's mother:] Exactly

Following this proffer of evidence, Defendant argued:

> [DEFENDANT]: Your Honor, I believe that this information is relevant in this case of there is the issue of the delayed disclosure. And one reason why there could be a delayed disclosure is due to coaching. And some of the information that was provided by the mother could be motivation for coaching [Jane] about what to say. And it also goes to the credibility of the witness.

The State then asked if Jane's mother had "applied for a Visa because [Jane] was a victim of [Defendant]," to which she replied "[n]o." There was the following discussion of the relevance of the proffered testimony:

> THE COURT: [Defendant], what does the information that you're seeking to elicit, what are [sic] facts of consequence does it make more or less probable?
>
> [DEFENDANT]: Well, whether or not any sexual abuse actually occurred.
>
> THE COURT: Well, she's not the testifying witness in regards to that. If you wanted to use that in regards to

> [Jane's] testimony, maybe, maybe you're on a better track but -- of [Jane] -- if in fact the evidence is to be believed by the jury, [Jane] would be the victim. This is the parent of the victim. There is a long bridge to cross to get to the point to where [Jane's mother] has created a situation, coached the victim. I just don't have information at this point to get to that conclusion. It may be something that you in your case in chief you may can explore in order to -- motive to create a story on behalf of [Jane's mother].
>
> Regardless under Rule 401 whether the evidence is relevant or not, the issue is whether or not [Defendant] committed first degree sexual offense and indecent liberties with a child. The immigration status will consume all the oxygen in the room and we will end up with an impromptu exploration, basically a Discovery session in regards to probably exploring the feelings of the prospective jurors as they might relate to the legal status of folks. I don't think the evidence is relevant at this point under Rule 401. It may become relevant. You may be able to get to that point in your case in chief, but at this point there's not a substantial enough relationship between this evidence that I believe it is relevant to any fact or circumstance or fact of consequence.
>
> But even if it is, in the discretion of the Court the probative value of such evidence is substantially outweighed by the probability that the confusion of issues will mislead the jury in regards to the issues to be determined in this case. So at this point based on Rule 401 I don't believe that the evidence is relevant. But even if it is, if a court of review later determines that it is, in my discretion I will exclude the evidence under Rule 403 in my discretion. So it may be a situation where you can develop that as you go through and get the two respective universes of what we're here for and the immigration status question together and build a bridge and it may not – I don't want to foreclose the possibility of that. There is the possibility it can be done. At this point I don't have -- they're just too far apart.

Based on the evidence presented by Defendant below, I agree with the trial court's, and Majority's, conclusion the evidence was not yet relevant. *Supra* at 444. Rule 401 defines "relevant evidence" as "evidence

having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). For Jane's mother's immigration status and knowledge of U-Visas to be relevant, such information must have had a tendency to make it more likely Jane or her mother fabricated the sexual assault and her mother coached Jane to testify falsely. To do this, Defendant must have presented some evidence Jane's mother was aware of the possible availability of the U-Visa to her before reporting the alleged assault or, since credibility is for the jury, shown the U-Visa was in fact available to her.

Defendant did not present such evidence or legal authority below or on appeal. At most, Defendant presented evidence that Jane's mother was aware U-Visas are available to *victims* of crimes; however, the victim of the crime, Jane, was already a United States citizen. There is no indication from the evidence at trial, the Record on appeal, or any legal argument made, that a U-Visa could be available to Jane's mother or that Jane's mother believed it was available to her. As a result, Jane's mother's immigration status and knowledge of the availability of U-Visas to *victims* did not have any tendency to make it more or less likely that the sexual assault did or did not occur. Since this evidence was not relevant as presented below and in this appeal, it was properly excluded by the trial court under Rule 402. *See* N.C.G.S. § 8C-1, Rule 402 (2019) ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.").

While there is an argument to be made that a U-Visa could be available to Jane's mother as an indirect victim of a crime,[1] Defendant has failed to present any such argument to the trial court or on appeal.

---

1. To be eligible for a U-Visa, 8 U.S.C. § 1101(a)(15)(U) requires, among other things, "the alien [to have] suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii)." 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2019). The meaning of "victim of criminal activity" is clarified by 8 C.F.R. § 214.14(a)(14)(i), which states, "[t]he alien spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity." 8 C.F.R. § 214.14(a)(14)(i) (2020). Read together, there is a meritorious argument that, as indirect victims, certain family members of young victims of crime can petition for a U-Visa if they satisfy all elements of 8 U.S.C. § 1101(a)(15)(U). *See, e.g.*, Elizabeth M. McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 Stan. L. & Pol'y Rev. 587, 612-620 (2011) (describing the origins of indirect victims' eligibility for U-Visas).

> The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a). "[I]t is the appellant's burden to show error occurring at the trial court, and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein." *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018), *rev. denied*, 828 S.E.2d 617 (N.C. 2019); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). As a result, Defendant's argument is limited to what was preserved at the trial court and presented on appeal, and I do not address the potential eligibility of U-Visas to Jane's mother.

Here, there is no persuasive argument advanced for us to find Jane's mother's immigration status and knowledge of U-Visas were relevant for cross-examination. However, generally when there is proper evidence at trial of the applicability of U-Visas to a witness, or of a witness's belief that she would be eligible for a U-Visa as a result of being the victim of a crime, such evidence would be relevant evidence under Rule 401 that a defendant could cross-examine a witness about to attempt to show a motive to lie or to coach an alleged victim to lie. In such a situation, the evidence would still need to satisfy Rule 403. However, this reasoning is inapplicable where Defendant failed to present evidence or an argument that would make Jane's mother's immigration status and knowledge of U-Visas relevant.

B. Defendant's Refusal to Be Tested for Herpes

I concur in result only with part II-C of the Majority as to the evidence regarding Defendant's refusal to be tested for herpes. Defendant argues "[t]he trial court erred by admitting evidence that [Defendant] would not submit to testing for herpes after it excluded the results of any test upon [Defendant] because the danger of unfair prejudice substantially outweighed the probative value of the evidence." In addressing this issue, the Majority states

> [e]ven if the trial court had sustained [D]efendant's objections and not allowed the contested testimony, the jury

> would still have been in the same position. There was evidence that Jane had herpes but there would be no evidence as to whether [D]efendant was ever tested or what the results of that test were – since [D]efendant successfully objected to the State's proffered evidence that he was later tested and the type of herpes was unknown.

Supra at 445. I disagree.

If Jane's mother's testimony regarding Defendant's refusal of her request to be tested for herpes had been excluded, then Defendant would not have been in the same position at trial. This testimony could have been read by the jury to suggest Defendant knew or suspected he had herpes and refused to be tested because he knew it could suggest he had sexually assaulted Jane. In the absence of this testimony, there was no evidence tending to show Defendant had herpes, might have had herpes, or might have suspected he infected Jane with herpes. If the evidence had been excluded, then Defendant would not have been in the same position at trial. Nonetheless, I agree with the Majority's conclusion the trial court did not abuse its discretion in admitting the evidence under Rule 403. *Supra* at 445.

Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2019). "We review a trial court's Rule 403 determination for an abuse of discretion. . . . An abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Baldwin*, 240 N.C. App. 413, 418, 770 S.E.2d 167, 171 (2015) (internal citations and marks omitted). Defendant only contends the evidence was unfairly prejudicial, so I only address if the testimony's probative value was substantially outweighed by the danger of unfair prejudice. "Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one." *Id.* (internal marks and alterations omitted). It was not an abuse of discretion to admit Jane's mother's testimony that Defendant refused to be tested for herpes.

The evidence had strong probative value because it potentially indicated Defendant's unwillingness to be tested for herpes because he was concerned it would suggest he sexually assaulted Jane. There was no danger of unfair prejudice as the evidence did not improperly suggest

Defendant was guilty merely because he might have had herpes; it also focused on Defendant's willingness to discover the source of Jane's herpes. Even if the evidence did present a danger of unfair prejudice, Defendant has not shown any danger of unfair prejudice, much less shown it substantially outweighed any probative value and was an abuse of discretion not to exclude. As a result, I agree with the Majority's conclusion the trial court did not abuse its discretion in admitting evidence of Defendant's unwillingness to be tested for herpes under Rule 403. *Supra* at 445.

C. Motion to Dismiss

The Majority concludes Jane's testimony was sufficient evidence of penetration, in part relying on caselaw that acknowledges children use different words to describe genital areas. *Supra* at 445-49. I agree with the Majority's analysis and use of such caselaw to the extent Defendant takes issue with Jane's description of where Defendant touched her not using anatomical terms. However, I believe the Majority does not address part of Defendant's argument and I write separately to fully address it. Nonetheless, I agree with the Majority's conclusion there was sufficient evidence of digital penetration and the cases cited by Defendant are inapposite.

Defendant takes issue with the sufficiency of the evidence presented to prove penetration, arguing Jane's testimony "I think in the inside [of where I go pee]" when describing where Defendant touched her was "uncertain testimony [that] left the jury to rely on speculation and conjecture to decide whether penetration occurred" and "[n]o other substantive evidence addressed whether penetration occurred." Although Defendant initially appears to contend, in part, the description of where Jane was touched was "vague and ambiguous," Defendant clarifies in his reply brief that "[t]he ambiguity in [Jane's] testimony does not arise from the use of prepositions or a child's use of childish descriptive language, but because she was uncertain about whether [Defendant] put his fingers inside her." Therefore, I read Defendant's argument on this issue to be based on Jane's use of "I think" when describing where Defendant touched her.

As the Majority correctly lays out, in reviewing a motion to dismiss based on the insufficiency of the evidence we must determine if "there [was] substantial evidence [] of each essential element of the offense charged, and [] that [the] defendant is the perpetrator of the offense." *State v. Key*, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007). "Substantial evidence is such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion." *Id.* at 629, 643 S.E.2d at 448. Additionally, on a motion to dismiss for insufficient evidence we view the evidence in the light most favorable to the State. *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

> 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.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted).

Defendant challenges the sufficiency of the evidence for his conviction of N.C.G.S. § 14-27.29(a), which reads "[a] person is guilty of first-degree statutory sexual offense if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C.G.S. § 14-27.29(a) (2019). Defendant only challenges evidence of a sexual act on appeal, so only this element must be analyzed. N.C. R. App. P. 28 (2019) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."). "Sexual act" is defined as "the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C.G.S. § 14-27.20(4) (2019). Our Supreme Court has held ambiguous evidence of penetration cannot withstand a motion to dismiss for insufficient evidence. *See State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987) (finding victim's testimony that the defendant "put his penis in the back of me" to be ambiguous and insufficient to show penetration in the absence of corroborative evidence); *State v. Whittemore*, 255 N.C. 583, 586, 122 S.E.2d 396, 398 (1961) (finding victim's testimony that the defendant "put his privates against mine" and "had his privates at my privates rubbing it up and down" to be insufficient to show penetration on its own).

Here, Jane testified "I think in the inside" when asked if Defendant would "touch [her] with his fingers . . . on the inside or on the outside[.]" As the Majority makes clear, Jane's description of her genital area was sufficient to describe penetration. *Supra* at 447-49. However, still at issue is whether Jane's use of "I think" made this testimony ambiguous evidence of penetration. In order to resolve this issue, it is useful to survey Jane's use of "yes," "no," "I don't know," "I don't remember," and "I think" throughout her testimony.

[STATE:] Okay. So when you were in kindergarten, did you turn six years old that October?

[JANE:] *I think*.

[STATE:] Okay. Do you remember if you went to the same school that you do now?

[JANE:] *No*.

. . .

[STATE:] Okay. When you were in kindergarten and [Defendant] was a friend of your mom's, did you guys ever live together?

[JANE:] We -- my mom said -- actually [Defendant], he -- I think my mom and [Defendant] had a discussion and then -- then [Defendant] just picked me up and then he said if I wanted him to be my dad and I said *yes*.

. . .

[STATE:] Did anybody else live with you?

[JANE:] *No*.

[STATE:] No? Where had you lived before you lived with [Defendant] and your mom?

[JANE:] *I don't remember*.

. . .

[STATE:] No. Okay. When you would go to your grandma's house, [Jane], how would you get home after you went to your grandma's house?

[JANE:] Well, [Defendant] used to pick me up.

[STATE:] Did [Defendant] -- at the beginning of kindergarten when you guys first lived with [Defendant], when you and your mom first lived with [Defendant], did [Defendant] pick you up or did somebody else pick you up?

[JANE:] *I think* [Defendant] picked me up.

. . .

[STATE:] Do you remember if you were awake or you were asleep when your mom would come home?

[JANE:] Awake.

[STATE:] You were awake?

[JANE:] (*Witness nods head affirmatively.*)

[STATE:] Did you go back to sleep when your mom would come home? Would you go to bed when your mom came home?

[JANE:] *I think so.*

. . .

[STATE:] Okay. And when this would happen and you were laying on the bed, where was [Defendant]?

[JANE:] *I think* he was taking a shower.

[STATE:] He was taking a shower?

[JANE:] (*Witness nods head affirmatively.*)

[STATE:] When [Defendant] would touch you in a way that you didn't like, was he in the bedroom with you?

[JANE:] *Yes.*

[STATE:] Okay. So when you said that he was taking a shower, was that before or after he would touch you, if you remember?

[JANE:] *I don't remember.*

. . .

[STATE:] Do you know that the place where you go pee has an inside and an outside?

[JANE:] *Yes.*

[STATE:] When [Defendant] would touch you with his fingers, would he touch you on the inside or on the outside?

[JANE:] *I think in the inside.*

[STATE:] Okay. Did that hurt? How did it feel?

[JANE:] It felt really bad.

. . .

[STATE:] And would he touch where you pee with his tongue? Is that yes?

[JANE:] *Yeah.*

[STATE:] Okay. When [Defendant] would touch you with his tongue, did he touch you on the inside or on the outside with his tongue?

[JANE:] *Inside.*

[STATE:] And how did that feel?

[JANE:] Bad.

. . .

[STATE:] [Jane], when [Defendant] would do this to you, would you ever say anything to him? Did you say yes or no? Do you remember if you ever said anything to him?

[JANE:] *I don't remember.*

[STATE:] Okay. Do you remember if you ever tried to hit him or fight him off of you?

[JANE:] *I think.*

[STATE:] You think?

[JANE:] (*Witness nods head affirmatively.*)

. . .

[STATE:] Do you remember if [Defendant] ever held you down while he was doing this to you?

[JANE:] *I don't know.*

. . .

[STATE:] Do you remember if you went to the hospital or to see a doctor?

[JANE:] *I think* we first went to see a doctor.

. . .

[STATE:] And did the doctor ask you if anybody had ever touched you?

[JANE:] *I don't remember. . . .*

[STATE:] Did she ask you if anybody had ever touched you?

[JANE:] *I don't remember*.

. . .

[STATE:] And do you remember how many times you went to Treehouse?

[JANE:] Like *I think* ten.

[STATE:] Ten?

[JANE:] *Uh-huh*.

. . .

[STATE:] Okay. [Jane], after your -- did your rash get better after a little while?

[JANE:] *I think so*.

. . .

[STATE:] Okay. And did you tell her about how [Defendant] touched you where you pee with his fingers and with his tongue?

[JANE:] *I think so*.

. . .

[STATE:] Some happy. Did you make more than one happy drawing or just one happy drawing?

[JANE:] *I think* just one happy drawing.

. . .

[STATE:] Do you recognize what this is? Do you recognize what this book is?

[JANE:] *I think so*.

[STATE:] You think so. Is this the book that you sometimes drew in when you were in kindergarten?

[JANE:] *Yes*.

[STATE:] Okay. And is this the book that you drew the sad picture in?

[JANE:] *Yes*.

. . .

[STATE:] And did you know how to draw it, because that's what actually happened?

[JANE:] *Yes*.

[STATE:] Okay. Do you remember if you drew that multiple times for your mom?

[JANE:] *I think so*.

. . .

[STATE:] [Jane], the rash that you had, --

[JANE:] *Yes*.

[STATE:] -- do you still get that rash sometimes?

[JANE:] *I don't know*.

[STATE:] You don't know. Does it sometimes still hurt for you to go to the bathroom?

[JANE:] *No*.

. . .

[STATE:] Has anybody else ever put their fingers in the place where you go pee?

[JANE:] *No*.

[STATE:] Has anybody else ever put their mouth in the place where you go pee?

[JANE:] *No*. . . .

[STATE:] No? Okay. [Jane], [Defendant] is the one that did these things to you?

[JANE:] *Yes*.

. . .

[DEFENDANT:] And did you talk about what happened with [the State's attorney]? [The State's attorney] who just asked you a lot of questions.

[JANE:] *I don't know*.

(Emphasis added).

Defendant contends Jane's use of "I think" when addressing where Defendant touched her "was too vague and ambiguous to permit the jury to do any more than speculate that *maybe* penetration occurred." Although in some situations this argument could have merit, based on the testimony in this case it does not. Based on Jane's testimony, viewed in the light most favorable to the State, her testimony was not "vague and ambiguous" as to whether digital penetration occurred. When looking at the entirety of Jane's testimony, it is clear she used "yes" and "no" according to their normal meanings and she consistently said "I don't know" or "I don't remember" when she was unsure of something or did not know of its truth. Based on her use of language, in the light most favorable to the State she used "I think" as an expression of belief that something occurred, which was weaker than an absolute "yes," but stronger than "I don't know." Although this use of "I think" expresses some doubt, in that it was not an absolute "yes," it was not "vague and ambiguous" evidence that only "permit[s] the jury to . . . speculate that *maybe*" there was penetration, as Defendant contends. Instead, as it was used here, it was evidence that Jane believed Defendant touched her inside, which would constitute penetration.

Furthermore, Jane appears to have used "I think" interchangeably with "yes" at times, including in the following testimony:

> [STATE:] Do you recognize what this is? Do you recognize what this book is?
>
> [JANE:] *I think so*.
>
> [STATE:] You think so. Is this the book that you sometimes drew in when you were in kindergarten?
>
> [JANE:] *Yes*.
>
> [STATE:] Okay. And is this the book that you drew the sad picture in?
>
> [JANE:] *Yes*.

(Emphasis added).

Regardless of whether "I think" was used to reflect Jane's belief that Defendant touched her inside of where she goes pee, or used as an equivalent to "yes," Jane's testimony was sufficient evidence of penetration to survive a motion to dismiss. Even if "I think" indicated Jane had some doubt, the testimony does not rise to a level of ambiguity requiring dismissal, like in *Hicks* and *Whittemore*. Instead, Jane testifying "I think in the inside" in response to a question about where Defendant touched

her, was such relevant evidence as a reasonable mind might accept as adequate to support a conclusion Defendant did digitally penetrate her.

Furthermore, since this evidence of penetration was not ambiguous, it was appropriately presented to the jury, which determined the meaning of the phrase in light of the live testimony and how Jane used the phrase throughout her testimony. Ultimately, if "I think" reflected a lack of confidence, the jury was in the best position to determine what weight to give her testimony, and in finding Defendant guilty beyond a reasonable doubt of a sexual offense based on digital penetration the jury determined Jane's use of "I think" did not indicate uncertainty.

Finally, even if Jane's initial testimony was ambiguous, the following testimony was subsequently heard:

> [STATE:] Has anybody else ever put their fingers in the place where you go pee?
>
> [JANE:] No.
>
> [STATE:] Has anybody else ever put their mouth in the place where you go pee?
>
> [JANE:] No. . . .
>
> [STATE:] No? Okay. [Jane], [Defendant] is the one that did these things to you?
>
> [JANE:] Yes.

Jane testified "yes" in response to a question if Defendant was the only person who ever "put [his] fingers in the place where [she goes] pee[.]" This testimony on its own constitutes unambiguous relevant evidence that a reasonable mind might accept as adequate to support a conclusion Defendant digitally penetrated Jane.

In summary, throughout her testimony there was a difference in Jane's use of "yes," "no," "I don't know," "I don't remember," and "I think." Her use of "I think" here could reflect her belief something occurred with some doubt, or that something affirmatively did occur, but it was not used to indicate complete uncertainty and was not "vague and ambiguous" evidence of penetration, as Defendant contends. As a result, regardless of which of the two possible meanings of "I think" is accurate in how it was used here, in the light most favorable to the State, Jane's testimony that "[she] thinks [Defendant touched her with his fingers] in the inside [of where she goes pee]" was substantial evidence to support digital penetration. Additionally, even if this was ambiguous

evidence of penetration that could not have been relied upon by the jury, there was other unambiguous evidence of penetration. The trial court rightly denied the motion to dismiss.

STATE OF NORTH CAROLINA
v.
DEZMEION DUBWHA PARKER

No. COA18-1175

Filed 1 December 2020

1. Appeal and Error—preservation of issues—sufficiency of evidence—motion to dismiss—preserves all related issues

In a prosecution for second-degree kidnapping, where defendant moved to dismiss the charge for insufficient evidence of the "consent" element, defendant did not waive appellate review of his argument challenging the sufficiency of the evidence for the "removal" element. Appellate Rule 10(a)(3) does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of the evidence, and therefore defendant's motion preserved for appellate review all issues related to sufficiency of the evidence.

2. Kidnapping—second-degree—removal of person from one place to another—by fraud or trickery—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of second-degree kidnapping where the State presented substantial evidence that defendant, under the pretext of giving his cousin a ride to the cousin's community college, fraudulently induced his cousin to enter his car so that defendant could rob the cousin at gunpoint in a secluded location. Despite inconsistent testimony about whether it was defendant or his girlfriend who drove the car (which, at any rate, was for the jury to resolve and did not require dismissal), the evidence of defendant's use of fraud or trickery was enough to satisfy the "unlawful removal" element of second-degree kidnapping.

3. Constitutional Law—effective assistance of counsel—counsel's failure to stipulate to prior conviction—sufficiency of record on appeal

On appeal from convictions for possession of a firearm by a felon and other crimes, where defendant argued that his trial

attorney rendered ineffective assistance of counsel by failing to stipulate to defendant's prior conviction for felony larceny (thereby enabling the State to introduce evidence of that prior conviction in order to prove defendant's status as a felon—an essential element of the possession charge), the record on appeal was insufficient to permit meaningful review of defendant's argument. Consequently, defendant's ineffective assistance of counsel claim was dismissed without prejudice to his right to reassert the claim in a motion for appropriate relief before the trial court.

Appeal by defendant from judgments entered 26 February 2018 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 5 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Gilda C. Rodriguez for defendant-appellant.

ZACHARY, Judge.

Defendant Dezmeion Dubwha Parker appeals from judgments entered upon his convictions for robbery with a dangerous weapon, second-degree kidnapping, possession of a firearm by a felon, and attaining the status of a habitual felon. On appeal, Defendant argues: first, that the State presented insufficient evidence that Defendant "personally" effected the victim's unlawful removal from one place to another, and therefore, the trial court erred by denying his motion to dismiss the second-degree kidnapping charge; and second, that his trial attorney rendered ineffective assistance of counsel by failing to stipulate to Defendant's prior conviction for the purpose of establishing his status as a felon for the charge of possession of a firearm by a felon.

After careful review, we conclude that Defendant received a fair trial, free from error. However, because the appellate record is insufficient to enable full and fair review of Defendant's claim for ineffective assistance of counsel, we dismiss that portion of his appeal without prejudice to Defendant's right to reassert his claim in a subsequent motion for appropriate relief filed in the trial court.

Background

The evidence presented at trial, taken in the light most favorable to the State, tended to show the following:

Defendant met Zaquinton Best, the victim in this case, sometime in or around the summer of 2016, while Best was living with his half-brother. At that time, Best had a vehicle, and he would "drive [Defendant] around whenever he needed to go somewhere." Defendant and Best became "cousin[s] by marriage" soon thereafter.

In April 2017, Best's car was in the shop with a blown head gasket, so he took the bus to class at Nash Community College while his vehicle was under repair. On 26 April 2017, Best saw Defendant at the bus station, and they began talking. Defendant said that he had recently acquired a vehicle; he gave Best his phone number and told Best to call whenever he needed a ride.

The next day, on 27 April 2017, Best called Defendant and asked him for a ride to Walmart, and then to the Community College. Best told Defendant that he planned to cash a check at Walmart, and that he intended to use the money to pay bills and school fees, and to get his car out of the shop. Defendant agreed to give Best a ride, and they, joined by Defendant's girlfriend, traveled to Walmart.

Best entered Walmart alone and cashed his check. When he returned to the car approximately ten minutes later, Defendant informed him that "he had to make a quick stop somewhere" before he took Best to the Community College. Best asked where they were going, and Defendant answered that "he was going to show [Best]." Defendant was driving at that time, and he instructed Best to get in the backseat of the vehicle; Best trusted Defendant, so he complied and "just sat back."

After a while, however, Best realized that they were driving in the wrong direction from the Community College, and his concerns mounted as the area became less recognizable to him. But whenever Best requested further details about their destination for this unexpected detour, Defendant only said, noncommittally, that "he was going to show [Best]."

The vehicle eventually stopped on a secluded dirt road, surrounded by cotton fields and beehive boxes, in a remote area comprising "nothing but open land" more than 20 miles away from the Walmart (and in the opposite direction from the Community College). Defendant exited the vehicle, pointed a gun at Best, and ordered him to get out of the car. Defendant demanded that Best "give [him] everything" that he had, and Best surrendered the cash that he had been storing in his sock; Defendant, however, told Best that he knew that he had more money on him, and he instructed Best to remove his clothes. With Defendant's gun still in his face, Best "strip[ped] down" to his "underclothes" and

surrendered additional cash. Defendant took Best's cell phone, conducted a final pat-down search for any remaining cash, and then he and his girlfriend drove away, leaving Best alone in an isolated and unfamiliar area, and without any means to seek help. All told, Defendant took from Best $998 in cash, an iPhone, and a bookbag containing, *inter alia*, Best's basketball shoes, as well as textbooks valued at approximately $1,500.

Once Best felt sure that his assailants were gone, he got dressed and started walking. Although Best attempted to hitchhike and "had [his] thumb out" as he walked, he estimated that he nevertheless traveled "about a good ten miles before somebody finally picked [him] up." The driver encouraged Best to report the incident and helped him to contact Detective Matthew Johnson of the Edgecombe County Sheriff's Office.

After Best recounted the events, Detective Johnson's immediate "priority was to locate the crime scene," and he enlisted Best's assistance. Navigating from the backseat of Detective Johnson's vehicle, Best used street signs to direct Detective Johnson "straight to the site." Upon arrival, Detective Johnson observed "fresh tire marks" in the dirt path.

Best provided Detective Johnson with a physical description of the robber, who Best identified as "a cousin," but declined to name. Best's father and grandmother subsequently provided Detective Johnson with Defendant's "complete identity," including his full name and a physical description consistent with that provided by Best.

At Detective Johnson's request, on 23 May 2017, Detective Wade Spruill, Jr., administered a photo lineup to Best. From an array of six photographs of different individuals, Best quickly identified Defendant as the perpetrator of the offenses against him.

On 24 May 2017, a magistrate issued arrest warrants charging Defendant with (i) robbery with a dangerous weapon, (ii) second-degree kidnapping, and (iii) possession of a firearm by a felon. On 7 August 2017, a grand jury returned true bills of indictment formally charging Defendant with the same offenses, along with an additional charge of attaining the status of a habitual felon.

Defendant's case came on for a jury trial in Edgecombe County Superior Court on 26 February 2018, the Honorable Walter H. Godwin, Jr., presiding. At the conclusion of all the evidence, the jury returned verdicts finding Defendant guilty of the three substantive offenses. Defendant subsequently pleaded guilty to attaining the status of a habitual felon. The trial court entered judgments sentencing Defendant to three consecutive terms of 75-102 months in the custody of the

North Carolina Division of Adult Correction, with 266 days' credit for time served.

Defendant appeals.

Discussion

On appeal, Defendant argues that (1) the trial court erred in denying his motion to dismiss the second-degree kidnapping charge; and (2) Defendant was denied effective assistance of counsel due to his attorney's failure to enter into the record Defendant's stipulation to his prior conviction for felony larceny from the person. We address each issue in turn.

I. Motion to Dismiss

Defendant first argues that the trial court erred by denying his motion to dismiss the second-degree kidnapping charge because the State presented insufficient evidence of the essential element of "removal." We disagree.

A. Standard of Review

Upon a criminal defendant's motion to dismiss, "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 [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citations omitted). "The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Id.* "Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Id.* (citation and internal quotation marks omitted).

Moreover, in "ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *Id.* at 596–97, 573 S.E.2d at 869. The trial court must consider "[b]oth competent and incompetent evidence." *Id.* at 596, 573 S.E.2d at 869 (citation omitted). The defendant's evidence, however, "should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State." *Id.* (citations and internal quotation marks omitted).

On appeal, we conduct de novo review of the trial court's denial of a criminal defendant's motion to dismiss. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Issue Preservation

[1] We must first address the State's contention that Defendant waived appellate review of his challenge to the trial court's denial of his motion to dismiss. The State notes that, at trial, Defendant's motion to dismiss the second-degree kidnapping charge "addressed the specific element of consent and did not present a general challenge to the sufficiency of the evidence as to all elements of the charge." The State asserts, therefore, that "Defendant failed to preserve the issue of sufficiency of the evidence as to the other elements" of second-degree kidnapping, and accordingly, requests that we dismiss this portion of his appeal.

It is manifest that this Court will not entertain a defendant's challenge to the sufficiency of the evidence to prove the charged offense, absent a timely motion to dismiss made at trial:

> If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, [the] defendant's motion for dismissal . . . made at the close of [the] State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether [the] defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence.

> However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, [the] defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(a)(3).

During the pendency of this appeal, our Supreme Court issued its decision in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020), clarifying Rule 10(a)(3)'s preservation requirements for challenges to the sufficiency of the evidence in criminal appeals. In construing Rule 10(a)(3), the *Golder* Court first observed that "our Rules of Appellate Procedure treat the preservation of issues concerning the sufficiency of the State's evidence differently than the preservation of other issues under Rule 10(a)." 374 N.C. at 246, 839 S.E.2d at 788. "[A]lthough Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue, unlike Rule 10(a)(1)–(2), Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Id.* at 245–46, 839 S.E.2d at 788.

The Court thus reasoned:

> Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, it follows that, under Rule 10(a)(3), *a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review*.

Id. at 246, 839 S.E.2d at 788 (emphasis added).

In the present case, Defendant moved to dismiss the three substantive charges at the close of the State's case-in-chief, and then made *specific* arguments regarding certain elements of each offense. As to second-degree kidnapping, Defendant challenged the sufficiency of the evidence to support one element: consent. Specifically, Defendant argued that dismissal was appropriate because Best testified "that he got in that car willingly. He said [Defendant] kicked him out of the car. [Best] never said that he was kidnapped, that he was taken against his will." Defendant asserted nearly verbatim arguments when he renewed his motion to dismiss at the close of all the evidence.

On appeal, however, Defendant now challenges a different element of kidnapping: the victim's unlawful *removal* from one place to another. The State contends that, by abandoning his trial arguments regarding

the element of consent, "Defendant failed to preserve the issue of sufficiency of the evidence as to the other elements of kidnapping." However, as explained above, our Supreme Court's decision in *Golder* directly forecloses the State's argument. *See id.* at 249, 839 S.E.2d at 790 (abrogating a long-established line of this Court's "jurisprudence, which ha[d] attempted to categorize motions to dismiss as general, specifically general, or specific, and to assign different scopes of appellate review to each category," and deeming those prior decisions "inconsistent with Rule 10(a)(3)").

"[D]efendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." *Id.* at 246, 839 S.E.2d at 788. Accordingly, pursuant to our Supreme Court's holding in *Golder*, this issue is properly before our Court.

C. Evidence of "Removal"

[2] Kidnapping is a specific-intent crime, the elements of which are set forth by statute. *State v. China*, 370 N.C. 627, 637 n.6, 632, 811 S.E.2d 145, 151–52 n.6, 149 (2018). N.C. Gen. Stat. § 14-39 provides, in relevant part:

> (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 [the] flight of any person following the commission of a felony[.]

N.C. Gen. Stat. § 14-39(a)(2) (2019).

In that kidnapping is a specific-intent offense, the State must establish "that the defendant unlawfully confined, restrained, or removed" the victim for one of the statutorily enumerated purposes set forth under section 14-39(a). *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986); *see also* N.C. Gen. Stat. § 14-39(a)(1)–(6) (listing the purposes that may provide the specific intent necessary to support a kidnapping charge). "The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Moore*, 315 N.C. at 743, 340 S.E.2d at 404.

Where the indictment alleges that the defendant kidnapped another person for the purpose of facilitating the commission of a specific felony, N.C. Gen. Stat. § 14-39(a)(2), the State must prove that the defendant acted with "the particular felonious intent alleged." *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982) (citations omitted). "Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury." *Id.* at 48, 296 S.E.2d at 271 (citations omitted).

In the instant case, the relevant indictment charged Defendant with kidnapping in the second degree, based on the following allegations:

> COUNT II:
>
> The jurors for the State upon their oath present that on or about the date of offense shown and in the county and state named above, the defendant named above, unlawfully, willfully and feloniously did kidnap Zaquinton Best, a person who had attained the age of 16 years or more by unlawfully removing the victim from one place to another, without the consent of the victim, and for the purpose of facilitating the commission of a felony, Robbery with a Dangerous Weapon G.S. 14-87.

Accordingly, to convict Defendant of second-degree kidnapping, the State was required to prove that Defendant unlawfully removed Best from one place to another, without Best's consent, and for the purpose of facilitating the commission of armed robbery. *Id.* at 48, 296 S.E.2d at 270.

For purposes of N.C. Gen. Stat. § 14-39(a), to unlawfully "remove [a person] from one place to another" requires proof of "a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Whittington*, 318 N.C. 114, 121, 347 S.E.2d 403, 407 (1986) (citation omitted). "[T]o permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *Id.* (citation omitted); *cf. State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) ("[The drugstore employee's] removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish [the] defendant's objective of obtaining drugs it was necessary that either [the owner or the employee] go to the back of the store to the prescription counter and open the safe. [The d]efendant was indicted for the attempted armed robbery of both individuals. [The employee's]

removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.").

Whether the evidence supports a removal "separate and apart" from that which is "inherent" to the commission of another felony, or instead merely establishes "a technical asportation," is a fact-specific determination, made on a case-by-case basis. *See, e.g.*, *Whittington*, 318 N.C. at 121, 347 S.E.2d at 407; *see also State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978) ("[I]t was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed.").

On appeal, Defendant argues that the trial court erroneously denied his motion to dismiss the second-degree kidnapping charge because the State failed to prove that he "personally committed" the acts constituting Best's unlawful removal from one place to another. According to Defendant, the evidence demonstrates that he "did not have control over the means used to 'unlawfully remove' " Best, because "Best repeatedly testified that it was [Defendant's] *girlfriend*, and not [Defendant], who drove them from Walmart to the remote location where the robbery was alleged to have occurred."[1] (Emphasis added).

In support of his argument, Defendant cites two brief portions of Best's testimony, including the following exchange during cross-examination:

> [DEFENSE COUNSEL:] What kind of car did you say [Defendant] was driving?
>
> [BEST:] He wasn't driving. He had the girl with him that was driving. I think it was like [a] box Lincoln.

A careful and thorough review of the trial transcript reveals that Best's testimony regarding the driver's identity was, admittedly, inconsistent. For example, contrary to the statements that Defendant cites favorably on appeal, in the testimony below, Best clearly identifies *Defendant* as the driver:

---

1. Defendant also argues that because the trial court did not instruct the jury on any theory of vicarious liability, "the State failed to meet its burden of presenting substantial evidence 'on every essential element' of the offense of second-degree kidnapping."

Defendant correctly observes that the State did not request, and the trial court did not deliver, a jury instruction on acting in concert or any other theory of vicarious liability. Yet, as Defendant acknowledges, "the State chose to prosecute [Defendant] as personally responsible for the removal of [Best] in the commission of second-degree kidnapping. *The State could have advanced a vicarious liability theory but it did not.*" (Emphasis added). Accordingly, such an instruction would have been wholly inappropriate in this case.

> [THE STATE:] Okay. Now, tell me about the ride from Walmart. Where did you wind up going?
>
> [BEST:] He said he had to make a quick stop somewhere. Then I said where. He said he was going to show me. *He ended up driving*. I was just sitting back riding. He told me to go in the back seat he had back there. . . .
>
> . . . .
>
> Q. Sir, do you recognize the scene depicted in State's Exhibit 11?
>
> A. Yes, I do.
>
> Q. Where is this?
>
> A. *The road he took me to*. That's the field right there. Those are the boxes. (Indicating.)

(Emphases added).

Notwithstanding Best's lack of clarity regarding the driver's identity, upon Defendant's motion to dismiss, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve*." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869 (emphasis added). "In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Id.*

Viewed in the light most favorable to the State, this evidence supports a finding that Defendant drove from Walmart to the isolated site of the robbery, or alternatively, that both Defendant and his girlfriend drove the car at various times during these events. "While [D]efendant points to alternative inferences that the jury could draw" from Best's testimony on this issue, "the State is not required to exclude all other possible inferences in order to defeat a motion to dismiss." *State v. Davis*, 158 N.C. App. 1, 14, 582 S.E.2d 289, 298 (2003).

In any case, Defendant's suggestion that he could not be convicted of kidnapping if he "did not have control over the means used" to effect Best's unlawful removal—that is, if he did not drive the car—is simply incorrect. It is well settled that "[t]he use of actual physical force or violence is not always essential to the commission of the offense of kidnapping." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 901 (citations and internal quotation marks omitted), *cert. denied*, 513 U.S. 1006, 130

L. Ed. 2d 429 (1994). "Threats and intimidation are equivalent" substitutes for the use of force, *id.*, but misrepresentations or deceit may also suffice: indeed, "[a] kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation." *State v. Sturdivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981) (citations omitted).

Where fraud or misrepresentations "amounting substantially to a coercion of the [victim's] will" substitute for actual force in effecting a kidnapping—whether by unlawful confinement, restraint, or removal, as in this case—"there is, in truth and in law, no consent at all on the part of the victim." *State v. Jackson*, 309 N.C. 26, 40, 305 S.E.2d 703, 714 (1983) (citation and quotation marks omitted). To meet its burden of proof, the State must demonstrate "that the fraud or trickery directly induced the victim to be removed to a place other than where the victim intended to be." *Davis*, 158 N.C. App. at 13, 582 S.E.2d at 297 (citations omitted).

In the present case, on 27 April 2017, Best asked Defendant, his cousin by marriage, to drive him to Walmart, and then to the Community College, because his own vehicle was in the shop. Best told Defendant that he was going to Walmart to cash a check, the funds from which he intended to use for bills and to pay to get his car out of the shop. It is reasonable to infer from these statements that Best's check was for a significant amount of money. After Defendant agreed to give Best a ride, Defendant, his girlfriend, and Best traveled to Walmart together.

Best entered Walmart alone, cashed his check, and returned to the car approximately ten minutes later. But when he asked Defendant to take him to the Community College as planned, Defendant claimed that "he had to make a quick stop somewhere" first, and he instructed Best to get in the backseat of the car. Because he "trusted" his cousin and still believed that Defendant intended to take him to the Community College, Best complied and "just sat back." Best grew increasingly concerned, however, as he realized that they were driving in the wrong direction, and he no longer recognized the area; yet, whenever he asked Defendant "where he was going[,]" Defendant only responded, vaguely, that "he was going to show [Best]."

The vehicle eventually pulled off onto a remote dirt path more than 20 miles away from the Walmart, in an isolated area comprising "nothing but open land." There, Defendant pulled out a gun, ordered Best out of the car, robbed him at gunpoint, and drove away.

It is evident that Defendant's initial and continuing "trickery directly induced [Best] to be removed to a place other than where [he] intended

to be." *Id.* (citations omitted). Defendant fraudulently induced Best to enter the car under the pretext of providing him with a ride to the Community College; it is clear, however, that Defendant never intended to follow through on his illusory offer. "To this extent the action of removal was taken for the purpose of facilitating the felony" of armed robbery. *Whittington*, 318 N.C. at 122, 347 S.E.2d at 407 (citation omitted).

Moreover, Defendant's lie was quite clearly "designed to remove [Best] from the view of a passerby who might have hindered the commission of the crime." *Id.* (citation omitted). Defendant's misrepresentations regarding the parties' ultimate destination enabled him to remove Best to the secluded location, where Defendant robbed him at gunpoint:

> [THE STATE:] Now, what were you thinking when he had the gun pointed at you?
>
> [BEST:] This is the last time I be living. I thought he was going to kill me that day.
>
> Q. Were you afraid?
>
> A. I wasn't really afraid, but I was nervous. *When we was in the alley if he would have killed me there wouldn't nobody know*. The whole time, the whole thing [there] weren't no cars riding by there. *It was like a type of alley you really wouldn't know*.
>
> Q. Could you see any people at all around?
>
> A. *Huh-Uh. (No.) No cars went by that road.*

(Emphases added). *Cf. id.* at 122, 347 S.E.2d at 408 ("Defendant could have perpetrated the offense when he first threatened the victim. Instead, he chose to remove the victim away from a brightly lit area, near houses and the highway, to a darker, more secluded area. This removal, designed to facilitate [the] defendant's perpetration of the sexual assault, was not a mere technical asportation.").

Viewed in the light most favorable to the State, this evidence is more than sufficient to permit a reasonable juror to find that Defendant unlawfully removed Best by means of fraud or trickery, without Best's consent, for the purpose of facilitating the commission of armed robbery. Therefore, the trial court did not err by denying Defendant's motion to dismiss the charge of second-degree kidnapping.

II. Ineffective Assistance of Counsel

[3] Defendant next argues that he received ineffective assistance of counsel because his trial attorney failed to enter into the record Defendant's stipulation to his prior conviction for felony larceny from the person. Because we conclude that the record is insufficient to enable full appellate review on the merits, we dismiss this portion of Defendant's appeal without prejudice to Defendant's right to reassert this claim in a motion for appropriate relief filed with the trial court.

In order to demonstrate ineffective assistance of counsel, a defendant must prove that (1) his trial attorney's "performance was deficient[,] and (2) the deficient performance prejudiced the defense." *State v. Edgar*, 242 N.C. App. 624, 631, 777 S.E.2d 766, 770 (2015) (citation and internal quotation marks omitted). To establish prejudice, the defendant generally "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 631, 777 S.E.2d at 770–71 (citation omitted).

As our appellate courts have consistently reiterated, however, claims for ineffective assistance of counsel generally "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) (citation omitted), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

> This is so because on direct appeal, review is limited to the cold record, and the Court is without the benefit of information provided by [the] defendant to trial counsel, as well as [the] defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief. Only when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing will an effective assistance of counsel claim be decided on the merits on direct appeal.

Edgar, 242 N.C. App. at 632, 777 S.E.2d at 771 (citations and internal quotation marks omitted).

Accordingly, on appeal, we must first determine whether the defendant's "ineffective assistance of counsel claims have been prematurely

brought, in which event we must dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent motion for appropriate relief proceeding." *State v. McNeill*, 371 N.C. 198, 217, 813 S.E.2d 797, 811 (2018) (citation and internal quotation marks omitted), *cert. denied*, __ U.S. __, 203 L. Ed. 2d 417 (2019).

Here, Defendant asserts that he received ineffective assistance of trial counsel because his attorney failed to stipulate to his prior conviction for felony larceny from the person. Defendant maintains that due to defense counsel's error, the State subsequently introduced evidence of the nature of this prior conviction in order to prove Defendant's status as a felon, an essential element of the offense of possession of a firearm by a felon, N.C. Gen. Stat. § 14-415.1, and that Defendant was prejudiced as a result. After careful review, we conclude that the record is insufficient to enable appellate review of Defendant's claim.

Just before trial in this matter, the State inquired whether Defendant "would . . . be willing to enter any stipulations pretrial . . . . [s]pecifically, as to his felony status as to the felony by firearm charge." Defense counsel responded that he would need to "speak with [his] client first." The trial court agreed and instructed the parties to inform the court of their "decision on that prior to the [S]tate resting. That's what 15A-928 requires." Trial commenced shortly thereafter.

Later, during the State's presentation of evidence, but outside of the presence of the jury, the trial court asked if the parties had determined whether there would be "an admission" pursuant to N.C. Gen. Stat. § 15A-928. Defense counsel replied, "There will be an admission, Your Honor, I will stipulate." Immediately thereafter, the trial court conducted a colloquy with Defendant "concerning [his] . . . reaching the status of a[ ] habitual felon" and verifying that it was, in fact, Defendant's "plan to admit those prior convictions concerning that indictment." Defendant affirmed his intent to do so through his attorney.

Following the colloquy on Defendant's habitual-felon indictment, but before the jury's return to the courtroom, the State asked: "[R]egarding the possession . . . of a firearm by a felon, will we need a stipulation as to that element as well? Him being a prior convicted felon on that offense." The trial court replied:

> THE COURT: Well, upon the conviction of any of the felon[ie]s, that could elevate within that habitual indictment. Basically, I just was asking him is he going to admit the prior convictions and he said that he was. We'll have to make a determination as to the level of the enhanced

> punishment based on any conviction that may or may not be brought back by the jury before we go forward with that issue.

The jury was then returned to the courtroom for further evidence from the State.

The State's penultimate witness was Kimberly Harrell, an assistant clerk for the criminal division of the Edgecombe County Clerk of Superior Court. Harrell's testimony regarding State's Exhibit 9, a true copy of the judgment of Defendant's 16 February 2011 conviction for felony larceny from the person, provides the basis for Defendant's claim for ineffective assistance of counsel. In particular, Defendant complains that "[t]he record reflects no attempt by defense counsel to pre-empt [Harrell's] testimony" regarding Defendant's 2011 conviction. We agree, in that the record is *silent* as to this issue.

Consequently, here, "the cold record reveals that . . . further investigation is required" to enable full and fair review of the merits of Defendant's claim for ineffective assistance of counsel. *McNeill*, 371 N.C. at 217, 813 S.E.2d at 811. Before the State called Harrell to testify, the prosecutor requested that the trial court permit the parties to "approach just real briefly[.]" The court obliged, and the transcript indicates that an "OFF-THE-RECORD DISCUSSION AT THE BENCH" followed. However, the record contains no evidence of the issues and objections raised during this unrecorded bench conference, nor even of its duration.

Accordingly, we conclude that Defendant's claim for ineffective assistance of counsel "ha[s] been prematurely brought," and therefore, we dismiss this portion of Defendant's appeal without prejudice to his right to reassert this claim "during a subsequent motion for appropriate relief proceeding." *Id.*

Conclusion

For the reasons stated herein, the trial court did not err in denying Defendant's motion to dismiss the second-degree kidnapping charge. However, because the record is insufficient to enable our review of Defendant's claim of ineffective assistance of counsel, we dismiss that portion of his appeal without prejudice to Defendant's right to reassert his claim in a motion for appropriate relief filed with the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges MURPHY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
AMANDA WENDORF, DEFENDANT

No. COA20-227

Filed 1 December 2020

1. Contempt—criminal contempt—subpoena—failure to appear

Defendant's failure to appear after being subpoenaed to testify in a trial for assault on a female could be punished as criminal contempt since it constituted a willful disobedience of, resistance to, or interference with a court's lawful process under N.C.G.S. § 5A-11(a)(3).

2. Appeal and Error—criminal contempt—alleged defect in district court's show cause order—collateral attack on superior court's jurisdiction—appellate review

In an appeal from a superior court order finding defendant in criminal contempt, the Court of Appeals determined it had jurisdiction to consider defendant's argument that the district court lacked jurisdiction over the proceeding (due to a facially defective show cause order) because the argument constituted a collateral attack on the superior court's jurisdiction to enter its contempt order.

3. Contempt—criminal contempt—show cause order—pleading requirements—jurisdiction

In a criminal contempt case where defendant failed to appear after being subpoenaed as a witness in an assault on a female trial, the show cause order issued in district court was not facially defective for an alleged failure to comply with the pleading requirements of N.C.G.S. § 15A-924(a)(5) and the trial court had jurisdiction to find defendant in criminal contempt. The requirements of section 15A-924(a)(5) do not apply to proceedings for criminal contempt and the notice requirements for criminal contempt are less demanding than for ordinary criminal cases.

4. Contempt—criminal contempt—district court failure to indicate contempt based on reasonable doubt standard—jurisdiction in superior court

In a case where defendant was held in criminal contempt in district court when she failed to appear after being subpoenaed as a witness, the district court's failure to indicate in its order that it was holding defendant in criminal contempt based on the reasonable

doubt standard of proof did not deprive the superior court of jurisdiction on appeal from the district court's order.

5. Contempt—criminal contempt—appeal to superior court for de novo review—testimony of district court judge—Rule 605—no neutral or disinterested witness requirement

In the appeal of a district court criminal contempt order to the superior court for a de novo hearing, the superior court did not err by hearing testimony from the district court judge who entered the contempt order. There was no violation of Evidence Rule 605 because the district court judge was not the presiding judge in superior court. Further, even if the district judge was not a neutral or disinterested witness, such witnesses are not prohibited from testifying.

6. Contempt—criminal contempt—findings of fact—supported by the evidence

In a case where defendant was found in criminal contempt for failure to appear after being subpoenaed as a witness in a trial for assault on a female, there was competent evidence to support the trial court's findings that defendant was served with a subpoena instructing her to appear in court, she failed to appear on the date required, and her failure to appear was willful. The testimony showed that the district attorney's office had been in contact with defendant, defendant was personally served with the subpoena, defendant did not answer when the district attorney asked for victims and witnesses to answer during calendar call, and defendant never stood up or identified herself at any time during the criminal session of court.

Judge BERGER concurring by separate opinion.

Appeal by Defendant from order entered 7 November 2019 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ameshia A. Cooper, for the State.

Paglen Law PLLC, by Louise M. Paglen, for the Defendant.

BROOK, Judge.

Amanda Wendorf ("Defendant") appeals from the trial court's order finding her in criminal contempt. We affirm the order of the trial court.

I. Background

Defendant and Jamie Davis were involved in a romantic relationship in 2018 that featured episodes of domestic violence. After one of these episodes, Mr. Davis was charged with assault on a female on 23 June 2018. On 17 August 2018, Defendant was personally served with a subpoena compelling her to appear and testify at Mr. Davis's trial on 19 September 2018.

On 19 September 2018, the State's case against Mr. Davis came on for trial in Surry County District Court before the Honorable Marion Boone. The assistant district attorney made a statement at the beginning of the calendar call of cases set for hearing that day, asking that the individuals whose cases were set for hearing identify themselves when their names were called out and that victims and witnesses in the cases also identify themselves. When the assistant district attorney called Mr. Davis's name, Mr. Davis identified himself, but Defendant did not.

Later in the session of court, the assistant district attorney called Mr. Davis's case for trial and Mr. Davis approached the defense table. Noting the absence of Defendant, the State's only witness in the case against Mr. Davis, the assistant district attorney moved for a continuance, but Judge Boone denied the motion. The assistant district attorney therefore took a voluntary dismissal, and the case against Mr. Davis was dismissed. The assistant district attorney then moved that the court order Defendant to show cause why she should not be held in contempt for her failure to appear that day, which Judge Boone granted.

Defendant was personally served with the show cause order and the matter came on for hearing on 2 November 2018. Judge Boone found Defendant in criminal contempt that day and fined her $250 for her failure to appear on 19 September 2018. On 9 November 2018, Defendant appealed from Judge Boone's order to superior court.

The matter came on for hearing in Surry County Superior Court on 28 October 2019 before the Honorable Angela B. Puckett. Judge Puckett found Defendant in criminal contempt and fined her $250 in an order entered on 8 November 2019.

Defendant timely appealed from the superior court's order to our Court.

II. Standard of Review

In general, "our standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (internal marks and citation omitted). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019) (citation omitted). Of course, "[t]he issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal." *State v. Barnett*, 223 N.C. App. 65, 68, 733 S.E.2d 95, 98 (2012). Because subject matter jurisdiction is an issue of law, review is de novo. *Id.*

III. Analysis

Defendant makes essentially five arguments on appeal, which we address in turn.

A. Failure to Appear

[1] Defendant first argues that the failure to appear and testify when subpoenaed cannot be the basis for a finding of criminal contempt because it does not constitute "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." N.C. Gen. Stat. § 5A-11(a)(3) (2019). We disagree.

> Contempts of court are classified in two main divisions, namely: direct and indirect, the test being whether the contempt is perpetrated within or beyond the presence of the court. A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess which tend to subvert or prevent justice. An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice.

Galyon v. Stutts, 241 N.C. 120, 123, 84 S.E.2d 822, 824-25 (1954) (internal citations omitted). By statute, "[a]ny criminal contempt other than direct criminal contempt is indirect criminal contempt[.]" N.C. Gen. Stat. § 5A-13(b) (2019). Proceedings for criminal contempt are "brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders." *Galyon*, 241 N.C. at

123, 84 S.E.2d at 825. They "are punitive in their nature, and the government, the courts, and the people are interested in their prosecution." *Id.*

Under Rule 45 of the North Carolina Rules of Civil Procedure, applicable to subpoenas in North Carolina in criminal cases, *see* N.C. Gen. Stat. § 15A-801 (2019), "[f]ailure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court[,]" *Id.* § 1A-1, Rule 45(e)(1).[1] Definitionally, a subpoena is "[a] writ or order commanding a person to appear before a court . . . , subject to a penalty for failing to comply." *Subpoena*, Black's Law Dictionary 1563 (9th ed. 2009). Accordingly, our Supreme Court has held that willfully refusing to testify when subpoenaed can constitute criminal contempt of court, *In re Williams*, 269 N.C. 68, 75, 152 S.E.2d 317, 323 (1967), as can offering obviously false or evasive testimony, since it is equivalent to the willful refusal to testify, *Galyon*, 241 N.C. at 124, 84 S.E.2d at 825. Similarly, we have held that attempting to persuade a witness to disobey a subpoena and fail to appear constitutes criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) even where the witness, though frightened, still appears and testifies. *State v. Wall*, 49 N.C. App. 678, 679-80, 272 S.E.2d 152, 153 (1980).

Just as testifying evasively or obviously falsely is equivalent to refusing to testify in willful disobedience to the command of a subpoena, so too is willfully failing to appear when a subpoena compels a witness's appearance to testify. A valid subpoena is the lawful process of a court. *See Process*, Black's Law Dictionary 1325 (9th ed. 2009) (defining "process" as "[a] summons or writ, esp. to appear and respond in court"). The failure to appear when ordered is punishable as criminal contempt. *O'Briant v. O'Briant*, 313 N.C. 432, 434-35, 329 S.E.2d 370, 372-73 (1985). We therefore hold that failing to appear when subpoenaed can be punished as criminal contempt because it constitutes "[w]illful disobedience of, resistance to, or interference with a court's lawful process[.]" N.C. Gen. Stat. § 5A-11(a)(3) (2019).

B. Facial Validity of Show Cause Order

[2] Defendant complains of a number of defects in the district court's proceeding and order finding her in criminal contempt, many of which

1. Defendant argues that the absence of the word "criminal" in Rule 45(e)(1) means that compliance with subpoenas can only be enforced in proceedings for civil, rather than criminal contempt. N.C. Gen. Stat. § 5A-11(a)(3) has not been interpreted so narrowly, however. *See, e.g.*, *State v. Wall*, 49 N.C. App. 678, 680, 272 S.E.2d 152, 153 (1980) (criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) upheld where the defendant attempted to intimidate the witness into disobeying subpoena).

we lack jurisdiction to consider. However, her argument that the district court lacked jurisdiction over the proceeding because the show cause order initiating the proceeding was facially defective is a collateral attack on the jurisdiction of the superior court. Because this assertion, if true, would entail that the superior court lacked jurisdiction to find her in criminal contempt, we have jurisdiction to address it. We reject the argument, though, and hold that the show cause order in district court was not facially defective.

[3] Section 5A-17(a) of the General Statutes of North Carolina provides that "[a] person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge." N.C. Gen. Stat. § 5A-17(a) (2019). An appeal under N.C. Gen. Stat. § 5A-17(a) to superior court is not an appeal on the record, however, unlike an appeal to our Court or the Supreme Court. *See State v. Ford*, 164 N.C. App. 566, 569, 596 S.E.2d 846, 849 (2004). While a defendant in a criminal contempt proceeding is not entitled to a jury trial because criminal contempt does not qualify as a serious offense within the meaning of the Sixth Amendment, *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, 275 N.C. 503, 511, 169 S.E.2d 867, 872 (1969), an appeal de novo in superior court of a finding of criminal contempt in district court is otherwise "a new trial . . . from the beginning to the end[,]" *State v. Brooks*, 287 N.C. 392, 405, 215 S.E.2d 111, 120 (1975). "[I]t is as if the case had been brought there originally and there had been no previous trial." *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970).

Generally speaking, we lack jurisdiction to review a district court's contempt proceeding, *Jones v. Jones*, 121 N.C. App. 529, 530, 466 S.E.2d 344, 345 (1996), because N.C. Gen. Stat. § 5A-17(a) "vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt[,]" *Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985). Still, "[t]he jurisdiction of the superior court on appeal from a conviction in district court is derivative." *State v. Wesson*, 16 N.C. App. 683, 689, 193 S.E.2d 425, 429 (1972). If "a court has no authority to act, its acts are void, and may be treated as nullities anywhere, at any time, and for any purpose." *Corey v. Hardison*, 236 N.C. 147, 153, 72 S.E.2d 416, 420 (1952). And "[w]here a court enters an order without jurisdiction to do so, . . . the appropriate action on the part of the appellate court is to arrest judgment or vacate the order entered without authority." *State v. Briggs*, 257 N.C. App. 500, 502, 812 S.E.2d 174, 176 (2018) (internal marks and citations omitted).

Defendant argues that the district court never had jurisdiction to initiate the contempt proceeding because the show cause order was facially defective. N.C. Gen. Stat. § 5A-17(a) does not preclude our review of this issue because if the district court lacked jurisdiction to find Defendant in criminal contempt, so did the superior court, and its order is void. Defendant argues that the defect of the show cause order is that it did not comply with N.C. Gen. Stat. § 15A-924(a)(5), which codifies pleading requirements applicable to criminal cases in superior court. We disagree.

By way of background, there are two kinds of criminal contempt proceedings: summary proceedings, which are for direct criminal contempt, and plenary proceedings, which are for indirect criminal contempt. *See* N.C. Gen. Stat. § 5A-13 (2019). Whereas in plenary proceedings for indirect criminal contempt, a judicial official must "proceed by an order directing the [contemnor] to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court[,]" and provide a copy of the show cause order to the contemnor in advance of the hearing, *id.* § 5A-15(a), in summary proceedings, the notice requirement is much more minimal, *id.* § 5A-14(b) (contemnor need only be provided with "summary notice of the charges and a summary opportunity to respond").

We have observed that in a criminal contempt proceeding, "a show cause order is analogous to a criminal indictment[,]" an observation Defendant makes much of in her argument. *State v. Coleman*, 188 N.C. App. 144, 149, 655 S.E.2d 450, 453 (2008). However, a show cause order is not equivalent to an indictment. *See State v. Revels*, 250 N.C. App. 754, 762, 793 S.E.2d 744, 750 (2016). In fact, in *Revels*, we rejected the same argument Defendant now makes. *Id.* at 763 n.1, 793 S.E.2d at 750 n.1. The reason is that the requirements of N.C. Gen. Stat. § 15A-924(a)(5) do not apply to proceedings for criminal contempt, direct or indirect. The notice requirement in a plenary proceeding for indirect criminal contempt, for example, is much less demanding than in an ordinary criminal case in superior court. *Compare*, *e.g.*, *Revels*, 250 N.C. App. at 762, 793 S.E.2d at 750 (allowing incorporation by reference to a prior court order in a show cause order for indirect criminal contempt) *with* N.C. Gen. Stat. § 15A-924(a)(5) (requiring, among other things, a separate count for each offense and a factual statement supporting every element of each offense charged). And in a proceeding for direct criminal contempt, the notice requirement is even less demanding, and in some cases, almost nonexistent. *See In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999) (per

curiam) ("Notice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence."); *Ford*, 164 N.C. App. at 571, 596 S.E.2d at 850 (observing that some direct criminal contempt proceedings are of such "limited instance [that] there [are] no factual determinations for the court to make."). Accordingly, we hold that the district court had jurisdiction, and the show cause order was not defective.

C. Standard of Proof

[4] Defendant contends in the alternative that the district court's failure to indicate that it found she was in criminal contempt based on the reasonable doubt standard of proof is a jurisdictional defect that deprived the superior court of jurisdiction on appeal from the district court's order. None of the cases cited in Defendant's brief support this proposition, however. The cases cited in Defendant's brief support the proposition that proof beyond a reasonable doubt is the standard of proof applicable to criminal contempt proceedings and that the failure to apply the correct standard of proof, or indicate whether the correct standard of proof was applied, is a fatal defect in a superior court's order of criminal contempt. *See GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 249, 752 S.E.2d 634, 658-59 (2013); *State v. Phillips*, 230 N.C. App. 382, 386, 750 S.E.2d 43, 45-46 (2013); *State v. Coleman*, 188 N.C. App. 144, 151, 655 S.E.2d 450, 454 (2008); *State v. Ford*, 164 N.C. App. 566, 571, 596 S.E.2d 846, 850 (2004); *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979). Even where we have observed in dicta that a district court erred by failing to indicate it had applied the correct standard of proof, we have gone on to review the order entered in superior court on appeal from the district court's order – review that would be precluded if the district court's failure to indicate whether the correct standard of proof had been applied were an error depriving the superior court of jurisdiction on appeal. *Ford*, 164 N.C. App. at 570-71, 596 S.E.2d at 849-50. We hold that this defect in a district court's order is not jurisdictional. Accordingly, the superior court was not deprived of jurisdiction on appeal even though the district court's order did not indicate whether the correct standard of proof was applied.

D. De Novo Review in Superior Court

[5] Defendant next argues that it was plain error for the superior court to allow the judge who presided over the contempt proceeding in district court to testify during the de novo hearing in superior court on appeal from that judge's order. We hold that admitting this testimony was not error, much less plain error.

"Plain error analysis applies to [unpreserved] evidentiary matters and jury instructions." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (applying plain error standard in assessing admissibility of testimony pursuant to Rule 403); *see also State v. Coleman*, 227 N.C. App. 354, 357, 742 S.E.2d 346, 348 (2013) ("Plain error review is limited to [unpreserved] errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence.") (quoting *State v. Roache*, 358 N.C. 243, 275, 595 S.E.2d 381, 403 (2004) (alterations omitted)). To demonstrate plain error, the defendant must show that the error had a *probable* impact on the finder of fact's determination of guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Preserved evidentiary errors, on the other hand, are reviewed for whether "there is a *reasonable possibility* that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a) (2019) (emphasis added).

A witness's competency to testify is committed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Pope*, 24 N.C. App. 217, 219-20, 210 S.E.2d 267, 269-70 (1974). Demonstrating an abuse of discretion requires "a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kearney v. Bolling*, 242 N.C. App. 67, 72, 774 S.E.2d 841, 846 (2015).

Defendant suggests that a district court judge testifying as a witness during a de novo hearing for criminal contempt in superior court constitutes plain error because the district court judge cannot be neutral and disinterested while testifying in an appeal from his or her own ruling. Defendant contends in the alternative that a district court judge testifying at the de novo hearing in superior court violates Rule 605 of the North Carolina Rules of Evidence, which prohibits a judge from testifying in a proceeding over which he or she is presiding. We disagree on both counts.

First, these assertions seem predicated on a misapprehension of the scope of the superior court's review. As noted previously, de novo review in superior court in an appeal under N.C. Gen. Stat. § 5A-17(a) is "a new trial . . . from the beginning to the end[.]" *Brooks*, 287 N.C. at 405, 215 S.E.2d at 120. "[I]t is as if the case had been brought there originally and there had been no previous trial." *Sparrow*, 276 N.C. at 507, 173 S.E.2d at 902. District Court Judge Marion Boone was not presiding over the de novo hearing before Superior Court Judge Angela B. Puckett; she was testifying as a witness with knowledge of whether Defendant had failed to appear on 19 September 2018 in her courtroom. While there is a risk of prejudice whenever a judicial official testifies in

a subsequent proceeding of a case over which he or she has previously presided, offering this testimony does not in and of itself violate Rule 605 of the North Carolina Rules of Evidence. *State v. Lewis*, 147 N.C. App. 274, 279-80, 555 S.E.2d 348, 352 (2001). Rule 605 only prohibits the presiding judge from offering testimony. N.C. Gen. Stat. § 8C-1, Rule 605 ("The judge presiding at the trial may not testify *in that trial* as a witness.") (emphasis added). In the de novo hearing before Judge Puckett, Rule 605 prohibited Judge Puckett, not Judge Boone, from testifying.

Second, witnesses who are not neutral or disinterested are not categorically prohibited from testifying. Generally speaking, anyone can be a witness. *See id.* § 8C-1, Rule 601(a). While there is an exception for interested witnesses who derive their interest from people who are no longer alive, *id.* § 8C-1, Rule 601(c), trial courts enjoy discretion to guard against the risk of unfair prejudice by excluding testimony, including testimony by judges in prior proceedings of the same case, *Lewis*, 147 N.C. App. at 279-80, 555 S.E.2d at 352, much as they do under Rule 403 of the North Carolina Rules of Evidence,[2] which are matters within their inherent authority, *Schmidt v. Petty*, 231 N.C. App. 406, 410, 752 S.E.2d 690, 693 (2013). The interest or bias of a witness is a proper subject of cross-examination, *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902 (1954), but does not generally bear on whether the witness is competent to testify, *Albright v. Albright*, 67 N.C. 271, 272 (1870).

Accordingly, we hold that there was no violation of Rule 605 when Judge Boone testified at the hearing over which Judge Puckett presided. Moreover, Judge Puckett's decision to allow a witness with knowledge to testify about whether Defendant was present in court on 19 September 2018 was not arbitrary or manifestly unsupported by reason. It therefore was not error, much less plain error, for Judge Puckett to allow Judge Boone to testify.

E. The Superior Court's Findings of Fact

[6] Defendant finally argues that competent evidence did not support the trial court's findings related to her failure to appear because Judge Boone's testimony supporting these findings was inadmissible and there was no competent evidence to support the trial court's finding that her failure to appear was willful. We disagree.

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2. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2019) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

As noted above, the failure to appear when ordered can constitute willful disobedience punishable as criminal contempt. *O'Briant*, 313 N.C. at 434-35, 329 S.E.2d at 372-73. Furthermore,

> [w]here the trial court sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court.
>
> This Court can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.
>
> The trial court's findings turn in large part on the credibility of the witnesses, and must be given great deference by this Court.

Stancill v. Stancill, 241 N.C. App. 529, 531-32, 773 S.E.2d 890, 892 (2015) (citation omitted).

Lindsay Moose, who was employed as a victim coordinator with the Surry County District Attorney's Office on 19 September 2018, testified that she had been in contact with Defendant prior to that date; that Defendant had been personally served with the subpoena requiring her to appear and testify on 19 September 2018; that she called out Defendant's name before court that day; that she heard the assistant district attorney call out Mr. Davis's name and for victims and witnesses in Mr. Davis's case during the calendar call and nobody answered besides Mr. Davis; and that at no point during the criminal session of court on 19 September 2018 did Defendant stand up and identify herself.

Judge Boone testified that she was the presiding judge during the 19 September 2018 session of district court when the State's case against Mr. Davis was called; that the assistant district attorney instructed witnesses and victims to announce themselves when a defendant's name was called during the calendar call; that the assistant district attorney called Mr. Davis's case for trial and then called out Defendant's name twice, and when she did not answer, requested a continuance, which Judge Boone denied; and that the assistant district attorney took a voluntary dismissal of the case when Judge Boone denied his request for a continuance. Judge Boone testified that at no point during the criminal session of court on 19 September 2018 did Defendant stand

up and identify herself. Notably, Defendant's counsel chose not to cross-examine Judge Boone.

We hold that Ms. Moose and Judge Boone's testimony was competent and admissible evidence supporting the trial court's findings that Defendant was served with a subpoena instructing her to appear in court on 19 September 2018, that she failed to appear on said date, and that her failure to appear was willful. The trial court, having been "present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures," and so forth, *Stancill*, 241 N.C. App. at 531, 773 S.E.2d at 892, made findings supported by admissible, competent evidence, and these findings "must be given great deference by this Court," *id.* at 532, 773 S.E.2d at 892.

IV. Conclusion

We affirm the order of the trial court because the failure to appear when subpoenaed is punishable by criminal contempt of court, the superior court had jurisdiction over Defendant's appeal from the district court's finding of criminal contempt, and competent evidence supported the superior court's findings that Defendant failed to appear as subpoenaed and her failure to appear was willful.

AFFIRMED.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion, but concur in result only with regards to Section D. I write separately because, in that section, the majority should not have considered Defendant's Rule 605 argument. Moreover, the majority incorrectly engages in plain error review on an issue that is within the sound discretion of the trial court.

I. Rule 605

"The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." N.C. Gen. Stat. § 8C-1, Rule 605 (2019).

"Issues not presented in a parties 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). Further, "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *State v. Pabon*, 273 N.C. App. 645, 670-71, 850 S.E.2d 512, 530 (2020).

Defendant's Rule 605 argument, to the extent there is one, is not that Judge Boone was "presiding at the [hearing]." N.C. Gen. Stat. § 8C-1, Rule 605. Rather, Defendant merely cites to Rule 605 and contends that the trial court deprived him of a fair hearing when it failed to intervene *ex mero motu* to exclude Judge Boone's testimony. Although no objection is required under Rule 605 to preserve an argument for review, Defendant's argument is not grounded in Rule 605. Moreover, Defendant provides no legal support for an argument pursuant to Rule 605.

Because Defendant abandoned any argument under Rule 605, he is not entitled to appellate review.

II. Plain Error Review

The majority impermissibly engages in plain error review on an issue that is within the sound discretion of the trial court.

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

N.C. R. App. P. 10(a)(4).

> 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, 516-17, 723 S.E.2d 326, 334 (2012) (*purgandum*).

Our Supreme Court has stated that plain error review is not available on appeal for unpreserved evidentiary issues that fall within a trial court's sound discretion. *State v. Steen*, 352 N.C. 227, 255-56, 536 S.E.2d

1, 18 (2000) ("[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now.").

This Court, following our Supreme Court's clear direction, has consistently declined plain error review of evidentiary issues that fall within the trial court's discretion. *See State v. Blankenship*, 259 N.C. App. 102, 125-26, 814 S.E.2d 901, 918-19 (2018) (Dietz, J., concurring) ("[O]ur Supreme Court has held that plain error review does not apply to issues which fall within the realm of the trial court's discretion"); *State v. Norton*, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011) ("Because our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review, we need not address [defendant's] argument on this issue"); *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008) (refusing to evaluate Rule 403 balancing test for plain error because it falls within the trial court's discretion); *State v. Jones*, 176 N.C. App. 678, 687, 627 S.E.2d 265, 271 (2006) (declining to review Rule 403 balancing test because " '[t]his court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now' " (quoting *Steen*, 352 N.C. at 256, 536 S.E.2d at 18)); *State v. Cook*, COA08-628, 2009 WL 678633, *7 (N.C. Ct. App. Mar. 17, 2009) (unpublished) ("[T]he plain error rule is not applicable to issues that are within the trial court's discretion"). *See generally State v. Smith*, 194 N.C. App. 120, 126-27, 669 S.E.2d 8, 13 (2008) ("[D]iscretionary decisions by the trial court are not subject to plain error review"); *State v. Verrier*, 173 N.C. App. 123, 128-29, 617 S.E.2d 675, 679 (2005) ("Plain error review does not apply to decisions made at the trial judge's discretion").

Defendant failed to object at trial to Judge Boone's testimony. On appeal, Defendant contends that the trial court committed plain error because he was denied a fair hearing in Superior Court when it allowed Judge Boone to testify. However, "[i]t is generally accepted that a judge is competent to testify as to some aspects of a proceeding previously held before him." *State v. Lewis*, 147 N.C. App. 274, 280, 555 S.E.2d 348, 352, (2001) (citation and quotation marks omitted). Further, "it is within the trial court's discretion to allow or not allow a judicial official to testify." *Id.* at 280, 555 S.E.2d at 352.

The majority acknowledges that the competency of Judge Boone to testify is a matter within the trial court's sound discretion. Nonetheless, the majority impermissibly engages in plain error review and lays the foundation for the expanded use of plain error review of evidentiary issues that fall within a trial court's sound discretion. If our Supreme

Court intended to overturn *Steen* and the multitude of cases from this Court, it would have done so expressly. Until our Supreme Court takes that step, we are bound by the clear wording of *Steen* and the published cases from this Court.

JUSTIN WAYNE WARD, PLAINTIFF
v.
JESSICA MARIE HALPRIN, DEFENDANT

No. COA19-1065

Filed 1 December 2020

1. Child Custody and Support—custody order—joint legal custody—mother given final decision-making authority regarding major issues

In a custody matter in which the trial court gave two parents joint legal custody of their children but primary physical custody to the mother, the trial court did not err by giving the mother final decision-making authority over major issues with regard to the children in the event the parents could not reach a mutual agreement. The court's determination that giving the mother final authority over certain decisions was in the children's best interest was supported by its findings of fact, which included details about the parents' inability to communicate and co-parent and the effect of that inability on the children.

2. Attorney Fees—custody action—father to pay mother's attorney fees—N.C.G.S. § 50-13.6—sufficiency of findings and conclusions

In a child custody action, the trial court did not err by ordering the father to pay the mother's attorney fees where the court's findings and conclusions were in accordance with N.C.G.S. § 50-13.6. The unchallenged findings showed that the mother was awarded child support and arrears, acted in good faith, had insufficient means to defray the costs of the action, and incurred reasonable attorney fees, while the father failed to pay adequate child support and had the ability to pay attorney fees.

Judge MURPHY dissenting.

Appeal by plaintiff from orders entered 24 October 2018 and 2 May 2019 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 12 August 2020.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for plaintiff-appellant.

Fox Rothschild, LLP, by Michelle D. Connell, and Tom Bush Law Group, by Tom Bush and Rachel Rogers Hamrick, for defendant-appellee.

YOUNG, Judge.

This appeal arises out of orders for child custody and child support. The trial court did not err in ordering that Mother has final decision-making authority on all major issues involving the minor children. The trial court also did not err in ordering Father to pay Mother's attorney's fees. Accordingly, we affirm the decision of the lower court.

I. Factual and Procedural History

Justin Wayne Ward ("Father") and Jessica Marie Halprin ("Mother"), are the parents of two minor children. Mother and Father were married but separated on 3 November 2013. On 7 November 2014, Father filed for divorce, and on 3 June 2015, he filed for child custody and child support seeking full physical and legal custody of the minor children. The parties executed a Memorandum of Judgment outlining the terms for shared (50/50) custody on a temporary basis, then transferred the venue from Davie County to Mecklenburg County, North Carolina.

On 18 August 2015, Father filed a Motion for Temporary Restraining Order and Preliminary Injunction regarding unilateral decisions Mother was making regarding the minor children. On 11 September 2015 and 14 September 2015, Mother filed a Motion for a Temporary Parenting Arrangement and a Motion to Dismiss Father's Request for Preliminary Injunction. On 19 February 2016, the trial court entered its Order on Temporary Parenting Arrangement. On 24 October 2018, the trial court entered an Order for Permanent Child Custody and Permanent Child Support granting both parents joint legal custody of the minor children, granting Mother permanent primary physical custody of the minor children, and requiring Father to pay child support. Father filed timely written notice of appeal.

Post-trial motions resulted in the entry of an Order Granting Motion for Rule 52 Relief and an Amended Order Permanent Child Custody and

Child Support on 2 May 2019. In this Order, the trial court's findings of fact include that "[b]oth parties are fit and proper to have input into major decisions impacting the minor children," but that "[i]t is in the best interest of the minor children that the primary custodial parent have final decision-making authority where the parents cannot reach a mutual agreement." Although the trial court awarded joint legal custody, Mother was awarded the ability to make decisions "concerning the general welfare of the minor children, not requiring emergency action, including, but not limited to, education, religion, and non-emergency major medical treatment." The trial court found that "[b]oth Mother and Father have close, loving relationships with the minor children." However, both parents have made unilateral decisions which have made co-parenting ineffective. Father filed timely written notice of appeal from these orders.

II. Standard of Review

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 795, 798 (2006). An award for attorney's fees is also reviewed for an abuse of discretion. *In re Clark*, 202 N.C. App. 151, 168, 688 S.E.2d 484, 494 (2009). "An abuse of discretion is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Barton v. Sutton*, 152 N.C. App. 706, 710, 568 S.E.2d 264, 266 (2002).

III. Child Custody

[1] Father contends that the trial court erred in ordering that Mother has final decision-making authority on major issues involving the minor children. We disagree.

"[T]he General Assembly's choice to leave 'joint legal custody' undefined implies a legislative intent to allow a trial court 'substantial latitude in fashioning a 'joint legal custody arrangement.' " *Diehl v. Diehl*, 177 N.C. App. 642, 647, 630 S.E.2d 25, 28 (2006). "This grant of latitude refers to the trial court's decision to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Id.* "This Court must determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Hall v. Hall*, 188 N.C. App. 527, 535, 655 S.E.2d 901, 907 (2008).

In this case, the trial court made findings of fact which support its conclusion regarding legal custody. The findings of fact include: Mother

has more one-on-one interaction with the minor children's school; Mother makes significant efforts to maintain the minor children's connections with Father's family; the minor children are excelling academically; the parties have not been able to co-parent effectively; one of the minor children was significantly impacted by Mother and Father's inability to communicate; Mother made the unilateral decision to put the children in camp during Father's custodial time; Father refused to provide Mother with travel information for the children and failed to return the children at the agreed-upon time; Mother has been a constant presence and source of care for the children; Father's new marriage will be a new transition as he plans to move out of state, but he is willing to maintain a Charlotte residence to exercise his parenting time; both parents are fit and proper to have input on major decisions impacting the minor children; it is in the best interest of the minor children that the primary custodial parent have final decision-making authority where the parties cannot reach a mutual agreement; and the minor children attend a diverse school that is open to involvement with both parents. Based upon the findings of fact, the trial court concluded as a matter of law that "[i]t is in the best interest of the minor children for Mother to be granted primary custody, for Father to be given reasonable parenting time, and for the parties to have joint legal custody."

As required by *Diehl*, the trial court found that it is in the best interest of the minor children for the primary custodial parent to have final decision-making authority and found facts as to why Mother should have primary custody. As required by *Hall*, the trial court made findings of fact detailing past disagreements by the parties which illustrate their inability to communicate and the actual effect their contentious communications had on the minor children. Father has failed to show that the trial court's decision giving Mother final decision-making authority on major issues involving the children was manifestly unsupported by reason or that it could not have been the result of a reasoned decision. Accordingly, the trial court did not err.

IV. Attorney's Fees

[2] Father contends that the trial court erred in ordering him to pay attorney's fees to Mother. We disagree.

North Carolina General Statute §50-13.6 allows for counsel fees in actions for custody and support of minor children:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for

> custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. §50-13.6 (2020). Where the trial court did not make any findings or conclusions as to mother's good faith, it was sufficient that the evidence showed that she was an interested party acting in good faith. *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 185 (1992). "A party seeking attorney's fees must also show that the child support action [] was resolved in his favor." *Kowalick v. Kowalick*, 129 N.C. App. 781, 788, 501 S.E.2d 671, 676 (1998). Here, Mother was awarded child support and arrears.

Father does not challenge any specific finding of fact. Instead he contends only that Mother is not statutorily entitled to attorney's fees for her child custody and child support claims. Since Father did not challenge any of the findings of fact, they are deemed to be supported by competent evidence and are binding on appeal. The trial court made findings of fact to support the conclusion of law that "Mother is entitled to an award of attorney's fees for prosecuting her claims for child support and child custody, and her Motion to Compel."

The findings included Mother's attorneys' hourly rates, the customary fee for like work, the experience and ability of the attorneys, that Mother has insufficient means to defray the suit, that Mother was acting in good faith, that Father failed to pay adequate child support, that Mother has incurred reasonable attorney's fees, and that Father has the ability to pay. The findings and conclusions are in line with N.C. Gen. Stat. §50-13.6. Father failed to show that the trial court's decision was manifestly unsupported by reason or that it could not have been the result of a reasoned decision. Accordingly, the trial court did not err in ordering Father to pay attorney's fees.

AFFIRMED.

Judge TYSON concurs.

Judge MURPHY dissents.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority as the trial court erred in both awarding Mother the final decision-making authority without necessary supporting findings of fact and in ordering Father to pay Mother's attorney's fees where Mother had the resources to defray the expense of the suit.

A. Child Custody

The Majority properly relies on *Hall v. Hall*, 188 N.C. App. 527, 655 S.E.2d 901 (2008) and *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) in concluding the trial court must make specific findings of fact to warrant a division of joint legal decision-making authority. *Supra* at 496-97. However, the Majority concludes the trial court's specific findings of fact were sufficient to warrant an unequal division of joint legal decision-making authority. *Supra* at 497. I disagree.

"Legal custody" generally refers to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare. *See Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.2b at 13-16 (5th ed. 2002) ("If one custodian has the right to make all major decisions for the child, that person has sole 'legal custody.' "). As a general matter, the trial court has "discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28. In order to exercise its discretion the trial court must make "sufficient findings of fact to show that such a decision was warranted." *Id.* The trial court failed to do so. Here, the trial court found both parents are fit and proper to have input on major decisions impacting the minor children. Despite this, the trial court awarded Mother final decision-making authority. This decision conflicts with our prior caselaw which holds both parents must be granted equal decision-making authority for issues related to the minor children, unless the trial court explicitly makes findings of fact appropriate to justify unequal decision-making authority. *See Diehl*, 177 N.C. App. at 647-648, 630 S.E.2d at 28-29.

In *Diehl*, the trial court found both parents were fit and proper to have joint legal custody of the minor children and granted primary physical custody to the mother and permanent joint legal custody to both the mother and father, noting the mother has "primary decision[-]making authority." If a particular decision will have a substantial financial effect on the father either party may petition the Court to make the decision, if necessary. *Id.* at 646, 630 S.E.2d at 28. There, the trial court's findings of fact included:

> [T]he parties are currently unable to effectively communicate regarding the needs of the minor children . . . the children have resided only with [mother], and [father] has exercised only sporadic visitation; [father] has had very little participation in the children's educational and extra-curricular activities; [mother] has occasionally found it difficult to enroll the children in activities or obtain services for the children when [father's] consent was required, as his consent is sometimes difficult to obtain; and when [child's] school recommended he be evaluated to determine whether he suffered from any learning disabilities, [father] refused to consent to the evaluation unless it would be completely covered by insurance.

Id. at 647, 630 S.E.2d at 28. In determining whether the trial court erred by awarding the parties joint legal custody while simultaneously granting mother primary decision-making authority, we held:

> [A]lthough the trial court awarded the parties joint legal custody, the court went on to award "primary decision-making authority" on all issues to [mother] unless "a particular decision will have a substantial financial effect on [father]. . . ." In the event of a substantial financial effect, however, the order still does not provide [father] with any decision-making authority, but rather states that the parties may "petition the Court to make the decision . . . ." Thus, the trial court simultaneously awarded both parties joint legal custody, but stripped [father] of all decision-making authority beyond the right to petition the court to make decisions that significantly impact his finances. We conclude that this approach suggests an award of "sole legal custody" to [mother], as opposed to an award of joint legal custody to the parties.

Id. at 646, 630 S.E.2d at 28. We reversed the trial court's ruling awarding primary decision-making authority to the mother and remanded for

further proceedings regarding the issue of joint legal custody. *Id.* at 648, 630 S.E.2d at 29.

Relying on *Diehl*, in *Hall*, we reiterated "upon an order granting joint legal custody, the trial court may only deviate from 'pure' legal custody after making specific findings of fact." *Hall*, 188 N.C. App. at 535, 655 S.E.2d at 906. "The extent of the deviation is immaterial . . . [we] must determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Id.* Findings which support the conclusion to award primary *physical* custody to one parent are not enough. *Id.* at 535, 655 S.E.2d at 906-07. When a trial court determines both parents are fit and proper persons to be awarded joint legal custody, then both parents must be granted equal decision-making authority for issues related to the minor children, unless the trial court explicitly makes findings of fact appropriate to justify unequal decision-making authority.

In the case before us, the Majority concludes, in relevant part, "the trial court made findings of fact which support its conclusion regarding legal custody." *Supra* at 496. In support of this statement, the Majority refers to the following findings of fact:

> 34. Mother has more one-on-one interaction with the minor children's school. . . .
>
> 35. Mother makes significant efforts to maintain the minor children's connections with Father's family, including paternal grandfathers, aunts, and cousins. The minor children have a positive, close and loving relationship with maternal grandparents with whom the minor children and Mother currently reside.
>
> . . .
>
> 42. The minor children are excelling academically.
>
> 43. The parties have not been able to co-parent effectively since their separation as both parties have unilaterally made decisions regarding the minor children. Mother has made unilateral decisions about the minor children's school and camps. Father has made unilateral decisions related to issues related to custody exchange, including changing the times and locations of exchanges.
>
> 44. In the Fall of 2015, the minor child Paxton was significantly impacted by the parties' inability to communicate

when both parents enrolled the minor child in different schools and the child, in fact, attended the first week of school at two separate schools. Based on the credible evidence presented to the [c]ourt, Mother was aware that Father did not know that she had enrolled the minor child at Concord First Assembly School, and allowed Father to send the minor child to Dilworth Elementary School for an entire week knowing Paxton had already started school elsewhere.

45. In June of 2017, Mother unilaterally signed the children up for a camp that impeded on Father's custodial time.

46. In July of 2017, Father refused to provide Mother with substantive travel information for the children and unreasonably failed to return the minor children to Mother at the agreed-upon exchange time. In addition, Father frequently changes the exchange location at the last minute.

. . .

48. Throughout the transitions, Mother has been a constant presence and source of care for the minor children.

49. Father's [new] marriage [] will constitute an additional transition in the near future. Father is committed to building a new life with [his fiancé] in Tennessee. . .[but] Father intends to maintain [a] Charlotte residence to exercise his parenting time in Charlotte if necessary.

. . .

51. Both parties are fit and proper to have input into major decisions impacting the minor children. It is in the best interest of the minor children that the parties confer and discuss verbally or in writing, major issues relating to the minor children.

52. It is in the best interest of the minor children that the primary custodial parent have final decision-making authority where the parties cannot reach a mutual agreement.

The trial court's findings of fact do not support stripping Father of his decision-making authority. Similar to the findings in *Diehl*, the findings here predominately address the trial court's reasons for awarding

Mother primary *physical* custody of the children. *See Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 29 ("These findings, however, predominately address the trial court's reasons for awarding [mother] primary physical custody of the children . . . . 'Decisions exercised with physical custody involve the child's routine, not matters with long-range consequences.' "). When the findings addressing reasons for awarding physical custody are removed, all we are left with are facts pertaining to the parties' inability to communicate and their tumultuous relationship. *Hall* and *Diehl* rejected the proposition that such findings alone are enough to warrant an unequal split in decision-making authority.

The Majority asserts "[a]s required by *Hall*, the trial court made findings of fact detailing past disagreements by the parties which illustrate their inability to communicate and the actual effect their contentious communications have had on the minor children." *Supra* at 497. In support of this conclusion, the Majority refers to Findings of Fact 43-46, which state:

> 43. The parties have not been able to co-parent effectively since their separation as both parties have unilaterally made decisions regarding the minor children. Mother has made unilateral decisions about the minor children's school and camps. Father has made unilateral decisions related to issues related to custody exchange, including changing the times and locations of exchanges.
>
> 44. In the Fall of 2015, the minor child Paxton was significantly impacted by the parties' inability to communicate when both parents enrolled the minor child in different schools and the child, in fact, attended the first week of school at two separate schools. Based on the credible evidence presented to the Court, Mother was aware that Father did not know that she had enrolled the minor child at Concord First Assembly School, and allowed Father to send the minor child to Dilworth Elementary School for an entire week knowing Paxton had already started school elsewhere.
>
> 45. In June of 2017, Mother unilaterally signed the children up for a camp that impeded on Father's custodial time.
>
> 46. In July of 2017, Father refused to provide Mother with substantive travel information for the children and unreasonably failed to return the minor children to Mother at

> the agreed-upon exchange time. In addition, Father frequently changes the exchange location at the last minute.

These findings of fact show the parties' difficulty communicating with each other and their difficulty obtaining consent from one another when making decisions regarding the well-being of their children, as well as how these actions have affected at least one of their minor children. These findings of fact are insufficient to support an order abrogating the decision-making authority Father otherwise enjoys under joint legal custody. *See Carpenter v. Carpenter*, 225 N.C. App. 269, 280, 737 S.E.2d 783, 791 (2013) ("[J]oint custody implies a relationship where each parent has a degree of *control* over, and a measure of responsibility for, the child's best interest and welfare.").

While the trial court's order provides a "process" for Mother and Father to consult on decision-making via email or other written correspondence and a follow-up telephone call, Mother still has final decision-making authority on all major issues, leaving Father without recourse. So long as Mother goes through the steps of sending an email or responding to an email and having one phone call with Father, she can unilaterally make all major decisions for the children and still be in compliance with the trial court's order. The trial court erred by awarding veto power in decision-making responsibilities to Mother after awarding joint legal custody to both parties. This "process" does not remedy that error. The trial court's ruling regarding the unequal distribution of decision-making authority should be remanded for further proceedings regarding the issue of joint legal custody.

B. Attorney's Fees

An attorney's fees award pursuant to N.C.G.S. § 50-13.6 requires the party seeking the award to (1) be an interested party acting in good faith, and (2) have insufficient means to defray the suit. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723-24 (1980). "Whether these statutory requirements have been met is a question of law, reviewable [de novo] on appeal." *Id.* at 472, 263 S.E.2d at 724. Further, the trial court's findings regarding whether the statutory requirements have been met must be supported by competent evidence. *Id.* Here, there is insufficient evidence in the Record to support a finding that Mother has insufficient means to defray the expense of the suit.

1. Standard of Review

The Majority's analysis of attorney's fees under an abuse of discretion standard of review is incomplete because the Majority has not

reviewed whether the statutory requirements under N.C.G.S. § 50-13.6 have been satisfied. *Supra* at 496. While "[w]e typically review an award of attorney's fees under N.C.[G.S.] § 50-13.6 (2016) for abuse of discretion[,] . . . when reviewing whether the statutory requirements under [N.C.G.S. §] 50-13.6 are satisfied, we review *de novo*." *Sarno v. Sarno*, 255 N.C. App. 543, 548, 804 S.E.2d 819, 824 (2017) (discussing attorney's fees and N.C.G.S. § 50-13.6 in the context of child support). If we determine the statutory "requirements have been met[,] . . . the standard of review change[s] to abuse of discretion for an examination of the amount of attorney's fees awarded[,]" not before. *Sarno*, 255 N.C. App. at 548, 804 S.E.2d at 824. "In addition, the trial court's findings of fact must be supported by competent evidence." *Conklin v. Conklin*, 264 N.C. App. 142, 144, 825 S.E.2d 678, 680 (2019) (upholding an award of attorney's fees when trial court found the mother had insufficient means to defray the expense of the suit). "Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Schneider v. Schneider*, 256 N.C. App. 228, 229, 807 S.E.2d 165, 166 (2017); *see also Sarno*, 255 N.C. App. at 548, 804 S.E.2d at 824.

2. Statutory Requirements

Attorney's fees can be awarded to the prevailing party in a child custody or support case when the party acts in good faith and has insufficient means to defray the expense of the suit. *See* N.C.G.S. § 50-13.6 (2019). N.C.G.S. § 50-13.6 provides:

> In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C.G.S. § 50-13.6 (2019). In order to satisfy the requirements of N.C.G.S. § 50-13.6 for awarding attorney's fees in a custody and support action,

"[t]he facts required by the statute must be alleged and proved" to support the order, namely that the interested party "is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723-24. The Majority affirmed the award of attorney's fees after concluding there was no abuse of discretion; however before we can apply an abuse of discretion standard of review, we must first address whether the trial court properly complied with the mandate of N.C.G.S. § 50-13.6, which is a question of law subject to de novo review. *Supra* at 498.

a. Good Faith

In determining good faith under N.C.G.S. § 50-13.6, the trial court is "in the best position to evaluate the merits and sincerity of the claims of both parties and to determine whether [the party] was acting in good faith." *Conklin*, 264 N.C. App. at 149, 825 S.E.2d at 682-83. "[A] party satisfies [the good faith element] by demonstrating that he or she seeks custody in a genuine dispute with the other party." *Id.* at 145, 149, 825 S.E.2d at 680, 683. Here, the trial court made Findings of Fact 78 and 79 in the *Amended Order Permanent Child Custody and Permanent Child Support*:

> 78. Mother is an interested party acting in good faith who does not have sufficient means as set forth in the Findings of Fact as to her income and expenses.
>
> 79. The [c]ourt finds that Mother acted in good faith as she was the spouse originally sued and has prevailed on her child custody and child support claims, who does not have sufficient means to defray the expense of this action and is entitled to an award of attorney's fees to be paid by Father pursuant to the North Carolina General Statutes.

Mother demonstrated she sought custody and support in a genuine dispute with Father. I agree with the Majority in so much as it determined Mother was an interested party acting in good faith.

b. Insufficient Means to Defray the Expense of the Suit

Having determined Mother acted in good faith, we must next determine if the trial court erred in concluding she had insufficient means to defray the expense of the suit, here, her attorney's fees. In accurately summarizing our law on this issue, *Lee's North Carolina Family Law* states:

> The court may award attorney's fees only to a party who does not have sufficient means to defray the costs of the

action. A party has insufficient means to defray the costs of the action where the party is unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.

In determining whether a party has insufficient means, the trial court should examine the party's estate, income, and debts. Courts have found sufficient means where the requesting party had a separate estate of $930,484[.00], with debts of $264,831[.00] and the defendant had a separate estate of $747,553[.00], with debts of $254,612[.00]; where the gross incomes of plaintiff and defendant and their current spouses were similar; and where the requesting party had $27,000[.00] in a savings account.

A party may be found to have insufficient resources to defray costs even if he or she has assets that could be sold to pay attorney's fees. The courts have recognized that a party should not have to unreasonably deplete his or her estate in order to pay these fees. For example, if a parent's only asset is the parties' former marital home, a finding that he or she does not have sufficient means to defray the costs of the action should be upheld.

Likewise, if the [R]ecord shows that the obligee has been paying all of the uninsured medical expenses and that she has outstanding balances on those expenses at the time of the hearing, there is sufficient evidence of insufficient means. On the other hand, if the facts reveal that the obligee has a separate liquid estate of $88,000[.00], *the court must make a finding on whether resort to the separate estate would be an unreasonable depletion of that estate.*

The [appellate] courts have interpreted [N.C.G.S. § 50-13.6] to allow the trial court to compare the estates of the parties in making this determination. The court may compare the estates, for example, when the court is determining whether the depletion of the petitioner's estate would be reasonable or unreasonable. A comparison of the individual estates is not required where the evidence is clear that there would be no unreasonable depletion. The court may decide not to compare estates, for example, when the monthly income of the party seeking attorney's fees exceeds monthly expenses and the party has a large estate and no debts.

2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.72 at 602-03 (5th ed. 1999 & Supp. 2018) (internal citations and quotation marks omitted) (emphasis added). Thus, the trial court must make a two-step analysis in determining whether a party has insufficient means to defray the costs of the action: (1) would the payment of attorney's fees deplete the party's estate, and (2) if the payment of attorney's fees would deplete the party's estate, would the depletion be reasonable or unreasonable?

In determining Mother's estate, income, and debts, there is sufficient evidence in the Record to support the conclusion the payment of Mother's attorney's fees is a gift and not a debt. When asked about the payment of Mother's legal fees, Mother's parent testified

> [Father's Counsel]: Are you paying for [Mother's] legal fees?
>
> [Mother's parent]: Yes, I am.
>
> [Father's Counsel]: How much have you paid so far, approximately?
>
> [Mother's parent]: I'm going to say over $150,000[.00].
>
> [Father's Counsel]: Has [Mother] signed any promissory notes in regard to that?
>
> [Mother's parent]: No.
>
> [Father's Counsel]: Are you requiring her to pay that back?
>
> [Mother's parent]: No.

Therefore, the payment of Mother's attorney's fees is a gift, not a debt, and must be considered as part of her assets and estate. The trial court failed to take into account the impact of this gift on Mother's estate and further, did not inquire if Mother's payment of attorney's fees would deplete this estate. Additionally, the trial court failed to determine whether the depletion would be reasonable or unreasonable. The trial court did not properly satisfy the statutory requirements and therefore the issue should be remanded to the trial court to make a finding regarding whether Mother's payment of her attorney's fees would or would not be an unreasonable depletion of her estate.

CONCLUSION

The trial court erred in awarding Mother final decision-making authority without the necessary supporting findings of fact. This

issue should be remanded to the trial court to make specific findings of fact regarding whether a warrant of unequal division of joint legal decision-making authority is justified. Further, the trial court did not satisfy the statutory requirements in awarding Mother attorney's fees. For these reasons, I must dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 DECEMBER 2020)

HAUSER v. BROOKVIEW WOMEN'S CTR., PLLC No. 19-1073	Forsyth (16CVS860)	No Error
IN RE I.S.M. No. 20-1	Yadkin (18JA27)	Affirmed
IN RE J.S. No. 20-540	Pitt (17JB101)	Vacated and Remanded
N.C. STATE BAR v. ERICKSON No. 20-245	N.C. State Bar (18DHC46)	Affirmed
NOWAK v. METRO. SEWERAGE DIST. OF BUNCOMBE CNTY. No. 19-797	Buncombe (17CVS4548)	Affirmed
PRICE v. BOCCARDY No. 20-127	Ashe (18CVD43)	Affirmed
RADIATOR SPECIALTY CO. v. ARROWOOD INDEM. CO. No. 19-507	Mecklenburg (13CVS2271)	Affirmed in part; Dismissed in part
STATE v. BURLESON No. 20-379	McDowell (15CRS51148)	Reversed and Remanded
STATE v. CHRISCOE No. 20-63	Moore (17CRS52617)	No Error
STATE v. DANIELS No. 20-242	Wake (17CRS214884-86) (19CRS1832)	NO PREJUDICIAL ERROR
STATE v. ESSARY No. 19-917	Onslow (17CRS53569-70) (18CRS726)	No error in part, vacated in part
STATE v. GARNER No. 20-253	Randolph (18CRS52126) (18CRS52127)	NO ERROR IN PART; DISMISSED IN PART; DISMISSED WITHOUT PREJUDICE IN PART
STATE v. HARGETT No. 19-960	New Hanover (17CRS50468) (17CRS50474-75)	No Error

STATE v. HARRIS No. 19-1013	Union (17CRS052891)	No Error
STATE v. HAYNES No. 20-21	Columbus (16CRS050225) (16CRS50373) (16CRS50374)	No error in part; Vacated and remanded in part
STATE v. HINSON No. 19-245	Union (14CVS888) (18CRS920) (18CRS923)	Vacated and Remanded
STATE v. JENKINS No. 20-90	Mecklenburg (03CRS215620-21)	Affirmed; Remanded for Correction of Clerical Errors; Motion for Appropriate Relief Allowed and 03 CRS 215621 Remanded for Correction of Judgments.
STATE v. LOPEZ No. 19-823	Lincoln (17CRS53755)	No Error
STATE v. McINTYRE No. 19-407	Union (17CRS52022) (18CRS270)	No Error
STATE v. McKINNIE No. 19-1082	Mecklenburg (16CRS244124) (16CRS244125-26) (17CRS21140)	No Error
STATE v. PARULSKI No. 19-673	Wake (17CRS213316-17)	No Error
STATE v. SANDY No. 19-918	Wake (18CRS209112-118)	No Error
STATE v. SAPP No. 20-117	Guilford (18CRS89697) (19CRS25151)	No error in part, Dismissed without prejudice in part
STATE v. SHORE No. 20-168	Davidson (16CRS53938-40)	No Error
STATE v. URISINI No. 19-1163	Union (17CRS50196) (17CRS51845)	Affirmed

STATE v. VINING No. 20-51	Brunswick (18CRS50599)	No Error
STATE v. WATERFIELD No. 19-813	Pasquotank (16CRS702)	No Error
STATE v. WOOD No. 20-222	Guilford (18CRS90865) (18CRS90867-68) (19CRS25185)	Affirmed in part; dismissed in part.
THOMPSON v. DEP'T OF TRANSP. No. 19-72	Cumberland (15CVS2896)	Affirmed in Part, Remanded in part
WILLIAMS v. MARYFIELD, INC. No. 19-804	Guilford (17CVS4138)	Affirmed in Part; Vacated and Remanded in Part

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

the recorded statements were more probative than any other evidence were also based on the pre-trial ruling which was never reduced to writing. The erroneously admitted statements were prejudicial, since no other competent evidence supported the court's conclusions regarding abuse and neglect. **In re B.W., 280.**

Adjudication of abuse—lack of notice—allegations in petition limited to neglect—Where an abuse and neglect petition filed by a department of social services contained factual allegations of abuse regarding only one of three siblings, but neglect as to all three, the trial court's adjudication of one of the children as abused was vacated because the petition only alleged neglect with regard to that child. **In re B.W., 280.**

Adjudication—abuse and neglect—findings of fact—sufficiency of evidence —The trial court properly adjudicated the parties' children as abused and neglected where clear and convincing evidence supported its finding that respondent-father knew about respondent-mother's criminal charges (she took and distributed pornographic photos of one of the children and, at one point, burned down the family home) but did nothing to protect the children. Whether respondent-father believed in respondent-mother's guilt was irrelevant. **In re N.K., 5.**

Adjudication—abuse and neglect—sufficiency of evidence—The trial court properly adjudicated respondent-mother's son as abused where clear and convincing evidence supported its findings that respondent-mother took and distributed pornographic photos of the child and tried to frame her brother for it. Additionally, the trial court properly adjudicated both of respondent-mother's children as neglected where her abuse of the one child established that both children lived in an environment injurious to their welfare (N.C.G.S. § 7B-101(15)). **In re N.K., 5.**

Dispositional order—custody remaining with department of social services—best interests of the children—In an abuse and neglect case, the trial court did not abuse its discretion by ordering that the children remain in the department of social services' custody rather than placing them together in a home with relatives and frequent access to respondent-father, where the court's unchallenged findings of fact showed that it properly considered the children's best interests while evaluating all available placement options. **In re N.K., 5.**

Dispositional order—placement with a relative—statutory requirements— In an abuse and neglect case, the trial court did not abuse its discretion by declining to place the parties' children with a relative where, although respondent-father presented his half-sister and the children's great aunt as potential placements, the evidence showed that neither woman was able to provide "proper care and supervision" or a "safe home" (N.C.G.S. § 7B-903(a1)). Because the court found no relative who met the statutory requirements under section 7B-903(a1), the court was not required to make findings of fact about whether placement with a relative would be in the children's best interests. **In re N.K., 5.**

Dispositional order—visitation—improper delegation of judicial authority to third parties—In an abuse and neglect case, the visitation provisions of a dispositional order were vacated and remanded where, by forbidding respondent-mother to have any contact with her children until agreed upon by her therapist and the children's therapists, the trial court seemingly—and improperly—delegated its authority to allow and set the terms for visitation to third parties. **In re N.K., 5.**

CONSTITUTIONAL LAW—Continued

CONTEMPT

CONTEMPT—Continued

superior court for a de novo hearing, the superior court did not err by hearing testimony from the district court judge who entered the contempt order. There was no violation of Evidence Rule 605 because the district court judge was not the presiding judge in superior court. Further, even if the district judge was not a neutral or disinterested witness, such witnesses are not prohibited from testifying. **State v. Wendorf, 480.**

Criminal contempt—district court failure to indicate contempt based on reasonable doubt standard—jurisdiction in superior court—In a case where defendant was held in criminal contempt in district court when she failed to appear after being subpoenaed as a witness, the district court's failure to indicate in its order that it was holding defendant in criminal contempt based on the reasonable doubt standard of proof did not deprive the superior court of jurisdiction on appeal from the district court's order. **State v. Wendorf, 480.**

Criminal contempt—findings of fact—supported by the evidence—In a case where defendant was found in criminal contempt for failure to appear after being subpoenaed as a witness in a trial for assault on a female, there was competent evidence to support the trial court's findings that defendant was served with a subpoena instructing her to appear in court, she failed to appear on the date required, and her failure to appear was willful. The testimony showed that the district attorney's office had been in contact with defendant, defendant was personally served with the subpoena, defendant did not answer when the district attorney asked for victims and witnesses to answer during calendar call, and defendant never stood up or identified herself at any time during the criminal session of court. **State v. Wendorf, 480.**

Criminal contempt—show cause order—pleading requirements—jurisdiction—In a criminal contempt case where defendant failed to appear after being subpoenaed as a witness in an assault on a female trial, the show cause order issued in district court was not facially defective for an alleged failure to comply with the pleading requirements of N.C.G.S. § 15A-924(a)(5) and the trial court had jurisdiction to find defendant in criminal contempt. The requirements of section 15A-924(a)(5) do not apply to proceedings for criminal contempt and the notice requirements for criminal contempt are less demanding than for ordinary criminal cases. **State v. Wendorf, 480.**

Criminal contempt—subpoena—failure to appear—Defendant's failure to appear after being subpoenaed to testify in a trial for assault on a female could be punished as criminal contempt since it constituted a willful disobedience of, resistance to, or interference with a court's lawful process under N.C.G.S. § 5A-11(a)(3). **State v. Wendorf, 480.**

COSTS

Costs assessed in multiple criminal judgments—N.C.G.S. § 7A-304—meaning of "criminal case"—multiple related charges—Although defendant's criminal case for numerous drug charges resulted in four separate judgments against him, the trial court violated N.C.G.S. § 7A-304(a) by assessing costs in each of the four judgments. *State v. Rieger*, 267 N.C. App. 647 (2019), interpreted the statute's authorization of assessment of costs "[i]n every criminal case" as meaning only one assessment of costs for a case that encompasses multiple criminal offenses arising from the same act or transaction or series of acts or transactions. In this case, the State successfully moved to join all of defendant's charges for trial on the basis that the

CRIMINAL LAW—Continued

Defendant failed to satisfy the factors set forth in *State v. Beaver*, 291 N.C. 137 (1976), where the testimony of the witness who came forward was internally inconsistent and contrary to his sworn affidavit, trial counsel knew that the witness may have had information concerning the victim's death but failed to use available procedures to secure his testimony, and the testimony was inadmissible hearsay and not admissible under Evidence Rule 803(24) because defendant failed to file a proper notice of intent prior to the hearing on the motion for appropriate relief. **State v. Reid, 100.**

Prosecutor's closing argument—impugning defense expert's credibility—improper—not reversible—In defendant's trial for first-degree burglary, the prosecutor's statements during closing that the defense expert in forensic psychology had been paid by the defense "to give good stuff" and "to say good things for the defense" were clearly improper since they suggested that the expert was paid to make up an excuse for defendant's behavior, but did not constitute reversible error given the significant evidence of defendant's intent to commit burglary. **State v. Bowman, 214.**

DEEDS

Quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property in 1986 that benefitted defendants (a country club owners' association and forty homeowners who ratified the restrictions), plaintiff was entitled to judgment as a matter of law that the restrictions were extinguished by a foreclosure sale in 1990 of a senior deed of trust recorded in 1984, and therefore the trial court properly granted plaintiff's motion for judgment on the pleadings. Contrary to defendants' argument, the 1986 restrictions did not reattach to the property when plaintiff bought it at a second foreclosure sale on another deed of trust, which was recorded after the restrictions were recorded. **Home Realty Co. & Ins. Agency, Inc. v. Red Fox Country Club Owners Ass'n, Inc., 258.**

Quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—effect on ratifying homeowners—In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property in 1986 benefitting forty homeowners who ratified the restrictions (defendants), the trial court correctly found that the restrictions were extinguished by a foreclosure sale in 1990 of a senior deed of trust recorded in 1984, and therefore defendants were no longer entitled to any rights in the property arising from those restrictions. **Home Realty Co. & Ins. Agency, Inc. v. Red Fox Country Club Owners Ass'n, Inc., 258**.

Quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—equitable exception—In plaintiff's action seeking to quiet title property with a golf course, where the trial court granted plaintiff's motion for judgment on the pleadings after finding that certain land restrictions encumbering the property and benefitting defendants (a country club owners' association and forty homeowners who ratified the restrictions) had been extinguished by a foreclosure sale of a senior deed of trust, the equitable exception to the rule of extinguishment by foreclosure set forth in *Dixieland Realty Co. v. Wysor*, 272 N.C. 172 (1967), was inapplicable to the facts of this case. The exception only applies in cases where a trustor purchases his or her own secured property at a senior mortgage sale following foreclosure. **Home Realty Co. & Ins. Agency, Inc. v. Red Fox Country Club Owners Ass'n, Inc., 258**.

EVIDENCE

Authentication—screenshots of social media posts—photographs and written statements—circumstantial evidence—In a prosecution for defendant's violation of a domestic violence protective order, screenshots of social media posts were properly admitted where sufficient circumstantial evidence authenticated the screenshots as both photographs and written statements. The victim gave sufficient testimony that she had taken the screenshots and that defendant was the person who had made the comments—even though the comments were made through their daughter's account, the evidence permitted the reasonable conclusion that defendant had access to the daughter's account and wrote the comments after he was released from jail. **State v. Clemons, 401.**

Authentication—standard of review—de novo—The Court of Appeals reviewed the state's case law and held that the appropriate standard of review for authentication of evidence is de novo. **State v. Clemons, 401.**

Hearsay—statements from neighbor regarding second break-in—present sense impression exception—In a prosecution for felony breaking and entering and felony larceny, the trial court did not err by admitting statements made by a nearby resident—whose house had also been broken into on the same morning and one street over from the break-in that gave rise to the charged offenses—to law enforcement because the statements qualified under the present sense impression exception to the hearsay rule (Evidence Rule 803(1)). The statements were made within minutes after the resident was aware that his house had been broken into, and the resident made the statements in an agitated and angry manner. **State v. Grady, 429.**

Other crimes, wrongs, or acts—uncharged similar crime—Rules 403 and 404(b)—chain of events—no unfair prejudice—In a prosecution for felony breaking and entering and felony larceny, there was no error in the admission of evidence regarding an uncharged breaking and entering that occurred on the same morning and one street over from the crimes for which defendant was on trial. The evidence was admissible under Evidence Rule 404(b) because it was not admitted solely to show defendant's propensity to commit the charged offenses but depicted a chain of events that tended to show the same person committed the two break-ins in close temporal and spatial proximity. Moreover, the evidence was not unfairly prejudicial and therefore did not have to be excluded pursuant to Evidence Rule 403. **State v. Grady, 429.**

Relevance—impeachment—witness's civil suit against third party—interest in outcome of defendant's trial—In a prosecution for robbery with a dangerous weapon and other related offenses, the trial court properly sustained the State's objection on relevance grounds when defendant, on cross-examination, asked the victim about a civil lawsuit he filed against the owner of the parking lot where the armed robbery took place (alleging inadequate security), where defendant was identified in the lawsuit as the robber. Because it was unnecessary to prove that defendant was the robber in order to prevail against the parking lot owner in the civil suit, the pendency of that suit did not prove the victim's interest in the outcome of defendant's trial, and therefore was inadmissible to impeach the victim. **State v. Glenn, 325.**

Relevance—sexual offenses against a child—immigration status of victim's mother—In a prosecution for first-degree statutory sexual offense and taking an indecent liberty with a child, the trial court did not err by precluding defendant from cross-examining the victim's mother about her immigration status, where defendant

WORKERS' COMPENSATION—Continued

compensation only as set forth in the Act, and plaintiff lost his right to compensation pursuant to N.C.G.S. § 97-25.1 when two years had passed since the employer's last payment. **Dunbar v. Acme S., 251.**

Last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—equitable estoppel—Where two years had passed since the employer's last medical payment (because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change) and the Industrial Commission concluded that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation, the Court of Appeals rejected plaintiff's argument that the employer and insurer (defendants) should have been equitably estopped from asserting N.C.G.S. § 97-25.1 as a defense. There was no evidence that the insurer acted in bad faith to induce plaintiff into a false sense of security. **Dunbar v. Acme S., 251.**

Last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—notice of final payment—The Industrial Commission did not err by concluding that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation because two years had passed since the employer's last medical payment (which occurred because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change). Contrary to plaintiff's argument, section 97-18(h), which requires insurers to send notice when they have made their final payment, was unrelated to section 97-25.1 and inapplicable to plaintiff's case. **Dunbar v. Acme S., 251.**