NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019). Unpublished cases appear in *Italics*.

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2. This opinion was moved from its original filing date and is listed in Volume 277 of the N.C. App. Reports.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JANUARY 2021)

IN RE B.W. 2021-NCCOA-1 No. 20-2	Buncombe (18JA343)	Affirmed.
IN RE N.A. 2021-NCCOA-2 No. 20-298	Cumberland (18JA287)	Vacated and Remanded.

IN RE K.M.

[276 N.C. App. 2, 2021-NCCOA-3]

IN THE MATTER OF K.M.

No. COA20-482

Filed 2 February 2021

Juveniles—delinquency—evidence of mental illness—referral to area mental health services director required

After a juvenile was adjudicated delinquent, the trial court erred by entering a disposition order committing the juvenile to a youth development center without referring the matter to the area mental health services director, as required by N.C.G.S. § 7B-2502(c), upon evidence that the juvenile continued to need mental health treatment and was not seriously engaging in the treatment provided. Although the juvenile was evaluated by a service provider to the local management entity contemplated by the statute and the evaluation was considered by the trial court, the court was mandated by statute to make the referral before determining a disposition.

Appeal by juvenile from order entered 19 February 2020 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa K. Walker, for the State.

Appellate Defendant Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for juvenile-appellant.

ARROWOOD, Judge.

¶ 1 K.M. appeals from a dispositional order entered committing him to a youth development center ("YDC"). K.M. contends that the trial court erred by entering a new dispositional order without first referring him to the area mental health services director pursuant to N.C. Gen. Stat. § 7B-2502(c). K.M. further argues that the trial court violated his due process rights by recommitting him to YDC without proper notice, and that K.M. received ineffective assistance of counsel due to the alleged lack of notice. We hold that the trial court erred in failing to refer K.M. to the area mental health services director, vacate the dispositional order, and remand for a new hearing and referral to the mental health services director.

I. Background

¶ 2 On 16 April 2018, a Cumberland County juvenile court counselor approved the filing of petitions against K.M. alleging that he committed two counts of first-degree statutory sex offense and two counts of second-degree forcible sex offense. The trial court adjudicated K.M. delinquent of all four offenses on 17 October 2018. On 3 December 2018, the trial court entered a "Juvenile Order for Mental Health Services," which included a finding of fact stating "[t]his case involves mental health issues and/or the need for mental health services," and ordered a "Sexual Offender Specific Evaluation" with a report to be provided to the court. On 28 March 2019, the trial court entered a Level III disposition and committed K.M. to a YDC and further ordered that if a Level III group home could be identified for K.M., he was to be brought back before the court for a hearing to consider adjusting his placement. A Cumberland County juvenile court counselor filed a motion for review on 29 April 2019 indicating a Level III placement had been identified for K.M. On 30 May 2019, the trial court approved a community commitment for K.M. at Level III group home Falcon Crest Residential Group Home ("Falcon Crest").

¶ 3 On 20 December 2019, a Cumberland County juvenile court counselor filed another motion for review "to review community commitment status." At a hearing on 27 January 2020, a representative from the Department of Juvenile Justice ("DJJ") testified that K.M. "started to have some issues" in early December 2019. These issues included an in school suspension "for being disrespectful, getting out of the classroom and walking out, because he didn't like something the teacher said[,]" and for being caught with an MP3 player on which K.M. had downloaded inappropriate sexual content; the DJJ representative expressed concern that K.M. had asked the group home manager "not to tell anyone" about the incident with the MP3 player. Additionally, staff members at the group home found a "vape" and "vaping liquid" in K.M.'s possession, and noted that K.M. was not present at a specified meeting spot after school on at least two occasions. Based on these incidents, the DJJ report recommended that K.M. be removed from his community commitment placement and returned to the YDC.

¶ 4 The trial court reviewed a Risk and Needs Assessment ("Assessment") completed by the court counselor on 5 December 2019. The Assessment noted that K.M. was rejected by pro-social peers, had received one short-term suspension from school, "[m]ay use sexual expression/behavior to attain power and control over others," had mental health needs that were being addressed, and experienced domestic discord resulting

in emotional or physical conflict. The Assessment assigned K.M. with a Risk Score of 12, which placed K.M. in the upper range of Risk Level 4 (out of five possible risk levels), and a Needs Score of 17, placing K.M. in the "Medium Needs" level.

¶ 5 The trial court also reviewed a report from Falcon Crest performed on 22 January 2020. The Falcon Crest report noted that K.M. had been participating in group therapy and weekly outpatient therapy for the purpose of assisting K.M. "with adjustment to daily routine and scheduled to decrease stress, anger, and promote independence, competence, and security." While the report described K.M. as showing "some progress with his impulsive behavior," K.M. "puts himself and others at risk by making poor choices." The report described K.M. as "quick to blame others or make excuses[,]" and as continuing to "be impulsive and does not think before acting." With regards to the long term goals for K.M.'s therapy, the report noted that K.M. "is still attempting to understand the relationship between positive behaviors, getting along with his peers, following staff/school official directives, [and] respecting authority figures," and occasionally "struggles with . . . processing that his past behaviors, manipulating, and compl[ying] with probation is still [a] very important part of his current situation." A therapist's addendum to the report stated that K.M. "continues to need supervision, structure, education, and role modeling to assist him with managing negative impulses and behaviors."

¶ 6 The trial court then reviewed a Rehabilitated Support Services report from an assessment performed on 21 January 2020. Falcon Crest had requested that Rehabilitative Support Services conduct the assessment shortly after the Motion for Review was filed. The report, which referred to K.M. by an incorrect first name, stated that K.M. was at very low risk for re-offending and still required intensive treatment individualized to address his specialized needs, and recommended that K.M. remain in the Level III group home. The trial court disregarded the report due to the incorrect name.

¶ 7 K.M.'s trial counsel argued that K.M. had not received adequate notice because the motion simply directed the trial court "to review Community Commitment status[,]" and because there was no violation report filed. The State's trial counsel asked that "whatever the Court's decision . . . [K.M.]'s current acts clearly show that . . . he can benefit there with further treatment whether that's back in YDC, if he's going to get that, or another program. But . . . really that he gets the best treatment to take care of these situations[.]"

¶ 8 The trial court heard additional testimony from Lakkiyah Sellers ("Ms. Sellers"), K.M.'s social worker, George Adam ("Mr. Adams"), a Falcon Crest staff member, and K.M.'s mother. Ms. Sellers expressed concern that K.M. was not adequately engaging in his monthly treatment team meetings, and that "he's always reporting that everything is going well, when it is not." Mr. Adam testified that K.M. was "a likeable young man[,]" but that at times "his maturity level is not understanding how the severity of what his charges are[,] [a]nd the decisions that he makes is not, you know, reality based, because . . . his mind is not set to understand it, these serious charges." K.M.'s mother testified that K.M. did not have many incidents before December 2019, and that "the things that are being said in the courtroom, are not being said in the meetings. And they're not addressing [K.M.] about any of that. This is the first that I've [heard] something, and we go to every meeting."

¶ 9 At the close of testimony and argument, the trial court revoked K.M.'s community commitment and ordered him to return to YDC over the objection of K.M.'s trial counsel. The trial court noted that "initially there was [a] smooth transition with [K.M.'s] placement" at Falcon Crest, but that in the past month K.M. had "spiral[ed]" out. The trial court also expressed concern with K.M.'s "increase of impulsivity[,]" and that K.M. was "not engaging seriously in his treatment." The trial court noted K.M.'s trial counsel's objection and K.M. orally appealed.

II. Analysis

¶ 10 K.M. contends that the trial court erred by entering a new dispositional order without first referring K.M. to the area mental health services director. We agree.

¶ 11 When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed *de novo*. *In re G.C.*, 230 N.C. App. 511, 515-16, 750 S.E.2d 548, 551 (2013). Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012).

¶ 12 "Disposition of cases involving juveniles should '[p]rovide the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.' " *In re E.M.*, 263 N.C. App. 476, 478, 823 S.E.2d 674, 676 (2019) (quoting N.C. Gen. Stat. § 7B-2500(3)). When a juvenile comes before a trial court, "the court *may* order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert *as may be needed* for the court to determine the needs

of the juvenile." N.C. Gen. Stat. § 7B-2502(a) (2019) (emphasis added). When evidence of mental health issues is presented to the trial court, the authority to order the evaluation of a juvenile by certain medical professionals is no longer discretionary, but is required:

> If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court *shall* refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. . . . The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.

N.C. Gen. Stat. § 7B-2502(c) (emphasis added).

¶ 13 The use of the word "shall" indicates a statutory mandate that when the trial court is faced with any amount of evidence that a juvenile is mentally ill, the trial court must refer the juvenile to the area mental health services director for appropriate action, and failure to do so is error. *In re E.M.*, 263 N.C. App. at 478, 823 S.E.2d at 676 (citation omitted). This mandate requires the trial court to refer the juvenile to the area mental health services director regardless of whether the juvenile has already received mental health services prior to the disposition. *Id.* at 480, 823 S.E.2d at 677. This Court recently noted that the position of "area mental health services director" no longer exists as referenced in N.C. Gen. Stat. § 7B-2502(c) and is now identified as the "local management entity/managed care organization" found in N.C. Gen. Stat. § 122C-3(20b). *In re E.A.*, 267 N.C. App. 396, 400, n.3, 833 S.E.2d 630, 633, n.3 (2019). Because the General Assembly has not yet updated the language of N.C. Gen. Stat. § 7B-2502(c) to reflect this change, we will continue to refer to the position as the area mental health services director.

¶ 14 In this case, evidence was presented to the trial court establishing K.M.'s mental health issues. The trial court reviewed multiple reports that described K.M.'s continued need for mental health treatment, including the Risk and Needs Assessment that placed K.M. at Risk Level 4 and the "Medium Needs" level. The DJJ representative testified that K.M. had exhibited increasingly significant issues with impulse control and truthfulness in the months preceding the hearing, in addition to K.M.'s social worker expressing concern that K.M. was not seriously engaging in his mental health treatment. This evidence required the trial court to

refer K.M. to the area mental health services director, rather than revoke K.M.'s community status and order his return to YDC.

¶ 15 The State contends that this case is distinguishable from *In re E.M.* because prior to the hearing on the Motion for Review, K.M. was referred by Falcon Crest to Rehabilitated Support Services for evaluation. Rehabilitated Support Services is a provider for Alliance Health, the local management entity/managed care organization contemplated by the statute. The State argues that because the trial court considered the evaluation during the hearing, it was not required to refer K.M. to the area mental health services director. Additionally, the State argues that "[w]hile the statute envisions the area mental health services director's involvement in assisting the court with crafting a disposition . . ., nothing in [N.C. Gen. Stat. §] 7B-2502(c) allows the agency to usurp the court's discretionary authority in ultimately determining the appropriate disposition alternatives."

¶ 16 The State's argument incorrectly describes the trial court's statutory duty in this case. The text of N.C. Gen. Stat. § 7B-2502(c) plainly states that when there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the trial court "shall" refer the juvenile to the area mental health services director for appropriate action. The trial court does not have the discretionary authority to disregard this statute in favor of "appropriate disposition alternatives." The trial court's failure to make the statutorily mandated referral was error, and accordingly the trial court's order must be vacated.

¶ 17 Because we vacate the trial court's order for statutory error, we do not reach K.M.'s arguments regarding notice and due process.

III. Conclusion

¶ 18 For the foregoing reasons, we hold that the trial court erred in failing to refer K.M. to the area mental health services director, vacate the dispositional order, and remand for a new hearing and referral to the area mental health services director.

VACATED AND REMANDED.

Judges DILLON and INMAN concur.

SHEARIN v. BROWN

[276 N.C. App. 8, 2021-NCCOA-4]

HARLEY ELIZABETH SHEARIN, PETITIONER
v.
CORA B. BROWN, CURTIS JULIAN BLOCKER, SUE B. COMEAUX, PAUL C. BLOCKER, PATRICIA B. GILBERT, JOHN BLOCKER, JIMMY BLOCKER, BOBBY M. BLOCKER, SYLVIA B. LUCAS, ARTHUR CLEADES MULLIS, JR., DEBRA MULLIS HELMS, JAMES RAY SHEARIN, JEWEL LEE JAYNES, DONNIE SHEARIN, DAVID SHEARIN, WARREN LYNN SHEARIN, DANNY SHEARIN, FRANCES S. HUNT, HENRY D. SHEARIN, JR., INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE WADE SHEARIN, AND BETSY S. JONES, RESPONDENTS

No. COA20-389

Filed 2 February 2021

Adoption—equitable adoption—of an adult—remedy unavailable

Declining to expand *Lankford v. Wright*, 347 N.C. 115 (1997), the Court of Appeals held that decedent's biological son, whom decedent gave up for adoption at age nine, was not later equitably adopted during his adult years by decedent, and therefore petitioner—the daughter of decedent's biological son, who died before decedent—was not an heir to decedent's estate under the intestacy statutes. No matter how much decedent treated his biological son as his own son, the alleged equitable adoption occurred during the biological son's adult years, rendering *Lankford* inapplicable.

Appeal by Petitioner from judgment entered 5 February 2020 by Judge Josephine K. Davis in Halifax County Superior Court. Heard in the Court of Appeals 12 January 2021.

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P., by Candace M. Seagroves, for Petitioner-Appellant.

Ward and Smith, P.A., by Michael J. Parrish and E. Bradley Evans, for Respondents-Appellees Cora B. Brown, Julian Blocker, Sue B. Comeaux, Paul C. Blocker, John Blocker, Jimmy Blocker, Bobby M. Blocker, Sylvia B. Lucas, Arthur Cleades Mullis, Jr., Debra Mullis Helms, James Ray Shearin, Jewel Lee Jaynes, Donnie Shearin, David Shearin, Warren Lynn Shearin, Danny Shearin, Frances S. Hunt, Henry D. Shearin, Jr., Individually, and Betsy S. Jones.

No brief filed by Respondent-Appellee Patricia B. Gilbert.

No brief filed by Respondent-Appellee Henry D. Shearin, Jr., in his capacity as Administrator of the Estate of George Wade Shearin.

INMAN, Judge.

¶ 1 Harley Elizabeth Shearin ("Petitioner") appeals from an order dismissing her petition to be declared the sole heir to the Estate of George Wade Shearin ("Decedent") and granting judgment on the pleadings in favor of Decedent's other heirs ("Respondents"). Petitioner contends that her deceased father, Timothy Wade Shearin ("Timothy"), was equitably adopted by Decedent and that she is the sole heir to Decedent's Estate under North Carolina's intestacy statutes. After careful review, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The pleadings below, which we are required to review in a light most favorable to Petitioner, disclose the following:

¶ 3 Timothy, Decedent's only child, was born to Decedent and his then-wife, Vela Shearin, in 1967. While Timothy was a young child, Vela Shearin divorced Decedent and married Charles Verman Jenkins ("Mr. Jenkins") in Virginia. Mr. Jenkins legally adopted Timothy at age nine, and Timothy changed his last name from Shearin to Jenkins. Timothy lived with Mr. Jenkins until at least age 18 before moving back to North Carolina at age 21.

¶ 4 Timothy reconnected with his biological father upon his return to the state, with Decedent providing a cabin for Timothy on a tract in Halifax County owned by Decedent. Decedent paid for and helped build a workshop for Timothy behind the cabin, and he purchased a pontoon boat for Timothy's use. He also paid for Timothy's college tuition and hosted a party when Timothy graduated.

¶ 5 Timothy and Decedent also made their father-son relationship known in other, more public ways. A 1993 newspaper article about Timothy's mini stock car racing career listed Decedent as his father, and Timothy changed his last name back to Shearin in 1995. When Timothy got married two years later, Decedent paid for the rehearsal dinner, was identified as Timothy's father in the local paper's marriage announcement and the wedding program, served as Timothy's best man in the wedding ceremony, and witnessed the marriage certificate as Timothy's father. Timothy and his new wife continued to live in a home provided by Decedent, who later paid to survey and clear land on his property so that the newlyweds could build a larger home.

¶ 6 Petitioner was born to Timothy and his wife in May 1999, and the birth announcement acknowledged Decedent as her grandfather. In

December of that year, at age 32, Timothy died in a work-related accident. His death was reported in a newspaper article, which again identified Decedent as Timothy's father. Decedent received accidental death benefits as a beneficiary on Petitioner's policy and was listed as Timothy's father on the death certificate. A few months after Timothy's funeral, Decedent bought three burial plots surrounding Timothy's grave.

¶ 7 Petitioner and Decedent developed a close relationship following Timothy's death, and Decedent publicly expressed an intention that Petitioner receive Decedent's assets someday. Decedent died intestate in February 2019, nearly a decade after his son's death. Decedent's obituary identified Petitioner as Decedent's only grandchild.

¶ 8 Following Decedent's passing, Respondent Henry D. Shearin, Jr., applied for letters of administration for Decedent's estate. That application listed Respondents—not Petitioner—as the only heirs to Decedent's estate. Letters of Administration were subsequently issued to Henry D. Shearin, Jr.

¶ 9 Having been omitted from the list of heirs to Decedent's estate, Petitioner filed a petition to ascertain heirs, for declaratory judgment, and to revoke the letters of administration on the grounds that she was the sole heir under North Carolina's intestacy statutes by virtue of Decedent's alleged equitable adoption of her father. After the filing of their answers and the close of pleadings, Respondents filed a motion for judgment on the pleadings on the ground that "the facts alleged cannot sustain a finding of equitable adoption or that Petitioner is an heir of the Decedent as a matter of law." The trial court heard arguments on 13 January 2020, granted the motion, and entered judgment for Respondents on 5 February 2020. Petitioner filed timely notice of appeal.

II. ANALYSIS

¶ 10 Both parties agree that the disposition of this appeal is controlled by *Lankford v. Wright*, 347 N.C. 115, 489 S.E.2d 604 (1997), in which our Supreme Court applied the doctrine of equitable adoption for the first and only time. That decision, as the lone appellate decision employing the doctrine, delineates equitable adoption's necessary elements and expressly limits application of the doctrine to particular facts and circumstances. *Id.* at 118-20, 489 S.E.2d at 606-07. Petitioner acknowledges that *Lankford* was "narrowly focused on the case facts before it[,]" which concerned the equitable adoption of a minor by a foster parent, but requests this Court "expand the scope of . . . *Lankford* . . . to provide for the equitable adoption of an adult" so that she—rather than

the equitably adopted person, as in *Lankford*—can inherit the entirety of Decedent's estate under North Carolina's intestacy statutes. Because the circumstances presented here fall outside the operative facts of *Lankford* and this Court lacks any authority to redraw the boundaries of the doctrine as delineated in that decision, we hold that the trial court properly entered judgment for Respondents.

1. Standard of Review

¶ 11 We review a trial court's ruling on a motion for judgment on the pleadings *de novo*. *Barefoot v. Rule*, 265 N.C. App. 401, 403, 828 S.E.2d 685, 687 (2019) (citing *Samost v. Duke Univ.*, 226 N.C. App. 514, 517-18, 742 S.E.2d 257, 259-60 (2013)). Under this standard, the reviewing 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.

Samost, 226 N.C. App. at 517, 742 S.E.2d at 517 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). Judgment on the pleadings is proper when "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Id.* at 518, 742 S.E.2d at 260 (citation and quotation marks omitted).

2. **Lankford** *And Its Limits*

¶ 12 *Lankford* presented a single question to the Supreme Court: "whether North Carolina recognizes the doctrine of equitable adoption." 347 N.C. at 116, 489 S.E.2d at 605. In that case, a mother entered into an adoption agreement with her neighbors, the Newtons, for the care of her minor daughter. *Id.* at 117, 489 S.E.2d at 605. The daughter moved in with her new family, took Newton as her last name, and was known at school and in the community as the Newtons' daughter. *Id.* She was identified in Mr. Newton's obituary as his sole surviving daughter, referred to Mrs. Newton as "mother," and obtained a Social Security card under their shared last name. *Id.* She opened a bank account with Mrs. Newton and sent her foster mother a portion of her income while serv-

ing in the Navy. *Id.* When Mrs. Newton grew sick, her foster daughter took leaves of absence to provide care. *Id.*

¶ 13 Mrs. Newton passed away in 1994 without formally finalizing a legal adoption of her foster daughter. *Id.* Though she had prepared a will naming her foster daughter as co-executrix and making specific bequests to her, it could not be probated due to defacement of portions of the will by an unknown person. *Id.* Mrs. Newton was thus deemed to have died intestate, and her foster daughter filed a declaratory judgment action to determine whether she was a legal heir to her foster mother's estate. *Id.*

¶ 14 Our Supreme Court held that, based on the above facts, the plaintiff had been equitably adopted by the Newtons. *Id.* at 118, 489 S.E.2d at 606. Absent any precedent and tasked with establishing when and how the newly recognized doctrine could be applied, the Court stated that the remedy of equitable adoption is available "to protect the interest of a person who was supposed to have been adopted *as a child* but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption." *Id.* (citation and quotation marks omitted) (emphasis added). It further explained that the doctrine "does not confer the incidents of formal statutory adoption; it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents." *Id.* (footnote omitted).

¶ 15 The Supreme Court in *Lankford* noted that the new doctrine it recognized "is limited to facts comparable to those presented here. . . . A majority of the jurisdictions recognizing the doctrine have successfully limited its application to claims made by an equitably adopted child against the estate of the foster parent. By its own terms, equitable adoption applies only in limited circumstances." *Id.* at 119, 489 S.E.2d at 606 (citations omitted). The Court followed this statement by setting forth the doctrine's necessary elements:

> (1) an express or implied agreement to adopt the child,
>
> (2) reliance on that agreement,
>
> (3) performance by the natural parents of the child in giving up custody,
>
> (4) performance by the child in living in the home of the foster parents and acting as their child,
>
> (5) partial performance by the foster parents in taking the child into their home and treating the child as their own, and

(6) the intestacy of the foster parents.

Id. at 119, 489 S.E.2d at 606-07 (citing 2 Am. Jur. 2d *Adoption* § 54 (1994)). The Supreme Court crafted these elements with an eye towards constraint, writing that:

> [t]hese elements . . . limit the circumstances under which the doctrine may be applied. Specifically, the doctrine acts only to recognize the inheritance rights of a child whose parents died intestate and failed to perform the formalities of a legal adoption, yet treated the child as their own for all intents and purposes. The doctrine is invoked for the sole benefit of the foster child . . . .

Id. at 119, 489 S.E.2d at 607-08 (citations omitted). It then applied the doctrine to the facts before it, concluding that they "fit squarely within the parameters of the doctrine of equitable adoption and are indicative of the dilemma the doctrine is intended to remedy." *Id.* at 120, 489 S.E.2d at 607.

3. This case is different from Lankford

¶ 16 The facts of this case differ materially from those present in *Lankford* and preclude application of the equitable adoption doctrine as delineated by our Supreme Court. We decline Petitioner's invitation to expand *Lankford*'s holding.

¶ 17 This case does not involve a person who was: (1) taken in as a minor by foster parents; (2) raised by those foster parents from childhood as if he was their legally adopted son; and (3) effectively disinherited by his foster parents' failure to comply with adoption's legal formalities. Instead, it revolves around two biologically—but not legally—related adults who formed a personal relationship after both were over the age of majority. Timothy's age at the time he reconnected with Decedent alone precludes Petitioner from invoking the doctrine of equitable adoption, which, per our Supreme Court, "is a remedy to protect the interest of a person who was supposed to have been adopted *as a child*[.]" *Id.* at 118, 489 S.E.2d at 606 (citation and quotation marks omitted) (emphasis added). The Court later stated that "the doctrine is limited to facts comparable to those presented [in *Lankford*]," *id.* at 119, 489 S.E.2d at 606, and, in reciting the operative facts that established the necessary elements of equitable adoption, specifically relied on the fact that "the Newtons treated plaintiff as their child by taking her into their home, giving her their last name, and *raising* her as their child[.]" *Id.* at 120,

489 S.E.2d at 607 (emphasis added). We hold that the equitable adoption doctrine recognized in *Lankford* is unavailable to vindicate Petitioner's interests because this case involves a purported adoption of an adult.[1]

¶ 18 Though Timothy's age alone precludes application of the equitable adoption doctrine, other facts distinguish this case from *Lankford*. For example, Petitioner is not the adoptee in the equitable adoption she propounds. Our Supreme Court in *Lankford* observed that "[a] majority of the jurisdictions recognizing the doctrine have successfully limited its application to claims *made by an equitably adopted child* against the estate of the foster parent . . . for the *sole benefit of the foster child*[.]" *Id.* at 119, 489 S.E.2d at 606 (citation omitted) (emphasis added).[2]

¶ 19 We acknowledge Petitioner's argument that the policy concerns undergirding our intestacy statutes support extending equitable adoption beyond *Lankford*'s facts and its limited expression of the doctrine. However, "[w]e are an error-correcting body, not a policy-making or law-making one." *Connette v. Charlotte-Mecklenburg Hospital Authority*, 272 N.C. App. 1, 6, 845 S.E.2d 168, 172 (2020) (citation omitted). Furthermore, *Lankford* is a comprehensive opinion from our Supreme Court that we cannot modify, as "[o]nly the Supreme Court can do that." *Id.* So, while "it is the unique role of courts to fashion equitable remedies to protect and promote the principles of equity," *Lankford*, 347

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1. This prohibition against employing the doctrine to recognize an equitable adoption of an adult also "appears to be the substantially unanimous view of American courts." *Miller v. Paczier*, 591 So.2d 321, 322 (Fla. Dist. Ct. App. 1991); *see also Dampier v. Williams*, 493 S.W.3d 118, 124 (Tx. Ct. App. 2016) (noting "the refusal to allow an adult to be adopted by estoppel is in line with, what appears to be, the majority rule" and, "[a]s an intermediate appellate court, . . . declin[ing] . . . to broaden the doctrine to apply to adoption of adults" (citations omitted)). While Petitioner cites two decisions from other jurisdictions that touch on the issue of equitable adoption between adults, she acknowledges that they support only "a potential *extension* of the theory . . . to . . . the context of an adult adoption." (emphasis added). *See Matter of Mazzeo*, 95 A.D.2d 91, 93-94 (N.Y. S. Ct. 1983) (holding doctrine could be applied to an adult adoption to establish the adoptee as a creditor of an estate but not as an heir); *Herrera v. Clau*, 772 P.2d 682, 683 (Col. App. 1989) (resolving whether equitable adoption of two adult stepchildren gave them standing to bring a wrongful death action).

2. Petitioner points out that West Virginia allows the heir of an equitably adopted person to avail themselves of the doctrine to take from the adopter's estate by intestacy. *First Nat. Bank In Fairmont v. Phillips*, 344 S.E.2d 201 (W.Va. 1985). However, West Virginia, unlike North Carolina, does not follow the majority of states in its expression of the doctrine because it does not require a purported adoptee to show an implied or express adoption contract. *Id.* at 203. Also, West Virginia requires an adoptee "to prove by clear, cogent and convincing evidence that he has stood *from an age of tender years* in a position [e]xactly equivalent to a formally adopted child." *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 373 (W.Va. 1978) (emphasis added).

N.C. at 120, 489 S.E.2d at 607, this Court, as an intermediate appellate court, cannot extend equitable adoption beyond the "limited circumstances" established by our Supreme Court. *Id.* at 119, 489 S.E.2d at 606.

III. CONCLUSION

¶ 20 For the foregoing reasons, we affirm the trial court's order granting judgment on the pleadings for Respondents.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
ELEANOR BLACK, DEFENDANT

No. COA19-1125

Filed 2 February 2021

1. Sentencing—prior record level—out-of-state convictions—comparison with N.C. offenses—required—cannot be waived

The trial court erred by counting defendant's ten out-of-state convictions toward her prior record points for sentencing without first comparing each out-of-state offense to the appropriate similar North Carolina offense. Defendant could not waive the issue by stipulating to the prior convictions and classifications on the sentencing worksheet furnished by the State. Because a misclassification of even one of the ten out-of-state convictions would alter defendant's prior record level, the matter was remanded for resentencing.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

A civil judgment for attorney fees entered after defendant pled guilty to attempted identity theft and possession of a stolen motor vehicle was vacated because the trial court did not offer defendant an opportunity to be heard regarding the attorney's number of hours worked or requested fees.

Appeal by Defendant from judgment entered 17 May 2019 by Judge Peter B. Knight in Buncombe County Superior Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica V. Sutton, for the State.

Jarvis John Edgerton, IV, for Defendant-Appellant.

INMAN, Judge.

¶ 1 When enhancing a criminal defendant's sentence based on a prior criminal offense committed in another state, the trial court must consider the legal elements of the out-of-state offense to determine that it is substantially similar to a North Carolina offense. This is a legal issue that cannot be waived by a criminal defendant's stipulation.

¶ 2 Eleanor Black ("Defendant") contends that the trial court erred in calculating her prior record level for sentencing by finding that several out-of-state misdemeanor convictions were substantially similar to Class 1 or Class A1 misdemeanor offenses in North Carolina and by imposing a civil judgment for attorney's fees before offering Defendant the opportunity to be heard. After careful review, we hold the trial court erred in finding the out-of-state offenses were substantially similar to North Carolina misdemeanors without comparing the elements of each statute. We also hold that the trial court further erred in assigning attorney's fees without providing Defendant notice and the opportunity to be heard.

I. FACTUAL & PROCEDURAL HISTORY

¶ 3 Defendant pled guilty to attempted identity theft and possession of a stolen motor vehicle on 17 May 2019. Her plea agreement provided that the two Class H felony charges "will be consolidated into [one] judgment for supervised probation" but left open for the trial court to decide the remaining aspects of the sentence.

¶ 4 The sentencing worksheet prepared by the State indicated that Defendant had fourteen prior record points, based on ten out-of-state convictions, each assigned a corresponding number of points and calculated to fall within the range of a prior record level V for sentencing purposes. Four of the convictions were classified as Class I felonies, accounting for two points each and a total of eight of Defendant's prior record points. The remaining six out-of-state convictions were all classified as Class 1 misdemeanors; they were assigned one point each and accounted for the remaining six prior record points. Defendant and her counsel stipulated to these prior convictions and classifications by signing the sentencing worksheet under "Section III: Stipulation."

¶ 5 At the plea hearing, the State furnished the trial court with copies of each out-of-state misdemeanor statute as evidence that the offenses were "substantially similar" to a North Carolina offense to support their classification as Class 1 misdemeanors. The trial court accepted the copies of the statutes and, without further review, asked Defendant's counsel "whether you object my finding they're similar status in North Carolina." Defense counsel did not respond before the prosecutor addressed the return of Defendant's personal items. After that interruption, Defendant and her counsel ultimately agreed to "14 prior record points and a prior record level, therefore, of five for felony sentencing purposes."

¶ 6 Before sentencing, Defendant's counsel stated to the trial court, "I was appointed in this matter with 16 and a half hours at $990." The trial court did not ask Defendant about the attorney's hours or fees.

¶ 7 The trial court found a factual basis for the felony charges, accepted the signed plea agreement, and consolidated Defendant's felony convictions. The trial court found no aggravating or mitigating factors and sentenced Defendant within the presumptive range for a Class H felony and a prior record level V to a sentence of 15 to 27 months, suspended for 36 months of supervised probation. Defendant was also ordered to pay court costs and to reimburse the State $990 for her legal fees.

¶ 8 Defendant now appeals pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1) (2019), which allows a defendant to appeal a guilty plea as a matter of right when his or her prior record level has been miscalculated.

II. ANALYSIS

A. Prior Record Level

¶ 9 **[1]** Defendant first contends that the trial court erred by improperly counting out-of-state misdemeanor convictions toward her prior sentencing points without considering whether each conviction was substantially similar to any North Carolina Class A1 or Class 1 misdemeanor.

¶ 10 "The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80 (2013) (citations omitted). Even so, "[w]hether a particular out-of-state comparison is substantially similar to a particular North Carolina offense is subject to harmless error review." *State v. Weldon*, 258 N.C. App. 150, 160, 811 S.E.2d 683, 691 (2018) (citing *State v. Riley*, 253 N.C. App. 819, 824, 802 S.E.2d 494, 498 (2017)). A miscalculation of the points is harmless where "deducting the improperly assessed points would not affect the

defendant['s] [prior] record levels." *State v. Lindsay*, 185 N.C. App. 314, 316, 647 S.E.2d 473, 474 (2007) (citing *State v. Bethea*, 173 N.C. App. 43, 61, 617 S.E.2d 687, 698 (2005); *State v. Smith*, 139 N.C. App. 209, 219-20, 533 S.E.2d 518, 524 (2000)).

¶ 11 A prior record level is determined by calculating the sum of the points assigned to each of the offender's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a). When a prior misdemeanor conviction is for an offense not substantially similar to an offense defined by North Carolina law, the conviction is treated as a Class 3 misdemeanor and is not counted as a prior record point for sentencing purposes. *Id.* § 15A-1340.14(b)(5), (e). However,

> [i]f the *State proves by preponderance of the evidence* that an offense classified as a misdemeanor in the other jurisdiction is *substantially similar* to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

Id. § 15A-1340.14(e) (emphasis added). A Class A1 or Class 1 misdemeanor receives one prior record level point in sentencing calculation. *Id.* § 15A-1340.14(b)(5).

¶ 12 Certainly, a defendant may stipulate to a prior conviction, "admitting that certain past conduct constituted a stated criminal offense." *State v. Arrington*, 371 N.C. 518, 522, 819 S.E.2d 329, 332 (2018); N.C. Gen. Stat. § 15A-1340.14(f)(1). For an out-of-state conviction, a trial court "may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction" for sentencing purposes. *State v. Bohler*, 198 N.C. App. 631, 638, 681 S.E.2d 801, 806 (2009). But the trial court "may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor." *Id.* at 637-38, 681 S.E.2d at 806; *see also State v. Glover*, 267 N.C. App. 315, 326, 833 S.E.2d 203, 211 (2019), *reversed on other grounds by State v. Glover*, 376 N.C. 420, 851 S.E.2d 865 (2020) (declining to interpret our Supreme Court's recent holding in *Arrington* "to overrule our longstanding precedent that the parties may not stipulate to the substantial similarity of an out-of-state conviction, nor its resulting North Carolina classification").

¶ 13 Instead, "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citing *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006)). Printed copies of the out-of-state statutes "*and comparison of their provisions to the criminal laws of North Carolina* [are] sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (emphasis added); N.C. Gen. Stat. § 8-3(a).

¶ 14 In this case, the State presented the trial court with copies of each of the out-of-state criminal statutes underlying Defendant's prior convictions, but the prosecutor made no attempt to compare their provisions to the purportedly similar classified crimes in North Carolina. Further, there is no indication in the record that the trial court made any such comparison. *See Hanton*, 175 N.C. App. at 255, 623 S.E.2d at 604.

¶ 15 If even one of the out-of-state misdemeanors Defendant had committed were *not* substantially similar to a North Carolina offense, the miscalculation would alter Defendant's prior record level, constituting legal error. *See Lindsay*, 185 N.C. App. at 316, 647 S.E.2d at 474 ("Even if the trial courts did miscalculate the points involved, this constituted harmless error, because deducting the improperly assessed points would not affect the defendants' record levels.") (citations omitted). For example, as Defendant asserts, the Florida misdemeanor offense of petit theft is different on its face than the North Carolina misdemeanor larceny statute. Florida's petit theft statute, unlike North Carolina's misdemeanor larceny statute, does not require evidence of intent to permanently deprive the possessor of the stolen property's use—a temporary deprivation will suffice. *Compare* Fla. Stat. § 812.014(1), *with* N.C. Gen. Stat. § 14-72; *see also State v. Davis*, 226 N.C. App. 96, 100, 738 S.E.2d 417, 420 (2013) (holding that Georgia's theft by taking statute was not substantially similar to the North Carolina misdemeanor larceny statute because the Georgia statute provided that deprivation could be permanent or temporary). In other words, a person could be guilty of petit theft in Florida but not guilty of larceny in North Carolina if that person lacks the requisite intent to permanently deprive another of property as required by our state's criminal provisions. If the two offenses are not substantially similar, Defendant's Florida petit theft conviction would default to a Class 3 misdemeanor and it would not count toward Defendant's prior record points. As a result, Defendant would

lose one prior record point—from fourteen to thirteen total points—moving her into a prior record level IV where the highest end of the presumptive range is between 11 and 23 months—below the 15 to 27-month term imposed.

¶ 16 If the trial court determined that none of the five challenged out-of-state misdemeanors is substantially similar to a North Carolina offense, Defendant's point calculation would fall within a prior record level III, reducing Defendant's permissible sentence even further to 10 to 21 months.

¶ 17 Because the record does not indicate that the trial court compared the elements of each out-of-state statute to a purportedly similar North Carolina offense and any error in miscalculation of prior record points was not harmless, we remand the case for resentencing.

B. Attorney's Fees

¶ 18 **[2]** Defendant next argues, and the State concedes, that the trial court erred in entering a civil judgment for attorney's fees because the trial court did not properly allow Defendant to be heard on the issue.

¶ 19 Before entering civil judgments against indigent defendants for fees imposed by their court-appointed attorneys, *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005), "[a] convicted defendant is entitled to notice and an opportunity to be heard." *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004) (citation omitted). Specifically, "trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018).

¶ 20 Here, prior to sentencing, Defendant's counsel informed the court that he was appointed, claimed he had completed 16 and a half hours of work on the matter at $990, and presented the trial court with a fee application.

¶ 21 Because the trial court did not offer Defendant an opportunity to be heard regarding the total number of hours worked or the total amount of fees requested by her attorney, we vacate the imposed civil judgment as to the attorney's fees without prejudice to the State's right to apply for a judgment after due notice to Defendant and a hearing. *Jacobs*, 172 N.C. App. at 236-37, 616 S.E.2d at 317; *see also Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

III. CONCLUSION

¶ 22 For the above-mentioned reasons, we hold the trial court erred in concluding the out-of-state offenses were substantially similar to certain North Carolina crimes for sentencing purposes absent comparison of the elements of each statute, and it erred by imposing attorney's fees without providing Defendant the opportunity to be heard. Accordingly, we remand the case for resentencing and vacate the imposed civil judgment of attorney's fees.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MARQUES D. GRAYS

No. COA19-1140

Filed 2 February 2021

Constitutional Law—double jeopardy—State's motion for mistrial—newly discovered evidence—no manifest necessity

Defendant's right to be free from double jeopardy was violated where, after the jury had been impaneled in his trial for a jailhouse murder, the trial court declared a mistrial because the State had just received new allegedly corroborative evidence from the prison—bloody clothing belonging to defendant—and defendant was subsequently tried for the same charges in a new trial. There was no manifest necessity justifying a mistrial in the first trial because the State's "newly discovered" evidence was in the State's own possession the whole time and defendant objected to the mistrial.

Appeal by Defendant from an Order entered 21 May 2019 and Judgment entered 30 May 2019 by Judge Marvin K. Blount, III, in Bertie County Superior Court. Heard in the Court of Appeals 17 November 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Marques D. Grays (Defendant) appeals from a Judgment entered upon a jury verdict convicting him of Felony Possession of a Weapon by a Prisoner in Bertie County file number 16 CRS 120. In addition, Defendant appeals from an Order denying his Motion to Dismiss a charge of First-Degree Murder in 16 CRS 50352 on which the jury deadlocked, resulting in the trial court ordering a mistrial. On 19 February 2020, this Court granted Defendant's Petition for Writ of Certiorari to review the Order entered in 16 CRS 50352. This Court also consolidated the two appeals and issued a writ of supersedeas to stay any further trial proceedings pending appeal. Both appeals involve the same question of whether each of Defendant's trials violated his rights under the State and Federal Constitutions to be free from double jeopardy. The Record before us reflects the following:

¶ 2 On 1 August 2016, a Bertie County Grand Jury indicted Defendant on charges of First-Degree Murder (16 CRS 50352) and Possession of a Weapon by a Prisoner (16 CRS 120). Defendant's case first came for trial on 6 August 2018 in Bertie County Superior Court, Judge Cy A. Grant presiding. A jury was selected and impaneled on that day. During opening statements, the State explained the evidence would show on 10 June 2016, Defendant—a prisoner at the Bertie Correctional Institution—approached Joleski Floyd (Floyd) who was "hanging out with friends" watching television in a prison common area. Then, according to the State, the two men "exchanged words" and fought in a "back cell." Defendant walked out of the cell "bloody and visibly injured" a few moments later. According to the State, Defendant went to his cell and returned to the common area two hours later. Defendant then struck Floyd "twice in the head with an ice pick shaped weapon." Correctional officers apprehended Defendant. Floyd later died of his wounds.

¶ 3 The State began its case-in-chief by calling Demetrius Clark (Clark), the prison's assistant superintendent. After Clark testified, court was adjourned for the day. The next morning, the State announced it had received "evidence that had not been turned over from the prison." The State moved for a mistrial asserting this new evidence was "vital information that need[ed] to be tested." The State continued it "had no indication . . . about this evidence" and only learned of its existence when

Clark mentioned it while discussing his testimony with the prosecutor after court had adjourned the day prior. When Judge Grant asked what the evidence was, the prosecutor replied: "It is the bloody clothes that came from the defendant." Judge Grant then asked: "[W]hen was this discovered?" The prosecutor responded: "Yeah. Well, Your Honor, I -- what I can say for certain is that it was collected at the prison, it was kept at the prison."

¶ 4 The State described how law enforcement went to the prison to collect "whatever evidence" the prison had from the incident. According to the State, prison officials gave law enforcement "two shanks" but "never notified" law enforcement about the clothing. Judge Grant asked: "Why wasn't this stuff turned over? It just seems so obvious." Judge Grant continued: "I'm going to tell you Mr. Superintendent there, it's ridiculous. You know, it borders on incompetence . . . that this wasn't turned over to law enforcement." The prosecutor stated: "I want to put on the evidence to protect the integrity of the case as well as the State[.]"

¶ 5 Defense counsel objected "to a mistrial being granted in this case." Defense counsel further questioned whether the evidence was what the State said it was and expressed concern the evidence was not "maintained or kept in a manner that would be appropriate for purposes of trial or for evidence."

¶ 6 The prosecutor responded stating: "Your Honor, and frankly, that is part of the reason that we need a mistrial. We have no -- I don't know if this evidence is inculpatory, exculpatory, or irrelevant." Judge Grant expressed concern in granting a mistrial "once the jury has been impaneled" and when "there is newly discovered evidence by the State and the State asked for the mistrial[.]" Judge Grant added, "I mean, I would have no problems if [Defense Counsel] asked for a mistrial based upon this. But you have the State asking for a mistrial because they discovered new evidence that is helpful to their case." Judge Grant recessed court asking the parties to research "the law with regard to granting a mistrial for newly discovered evidence based on a motion for a mistrial by the State[.]"

¶ 7 When the trial resumed, the State again moved for a mistrial "under [N.C. Gen. Stat. §] 15A-1063" because it was "impossible for the State -- for the trial to proceed in conformity of the law" and there was "no reasonable probability of the jury's agreement upon a verdict." Defendant renewed his objection to a mistrial.

¶ 8 Judge Grant asked the State why it would be unfair to proceed with the trial. The State responded Defendant would have an ineffective assistance of counsel (IAC) claim on appeal if Defendant was found guilty

without testing this evidence. Defense counsel addressed the potential IAC claim stating: "no matter what . . . comes back" from testing, the results would be "beneficial to the State." Defense counsel continued "[the prosecutor has] not indicated that if it does turn out it's not Joleski Floyd's blood, then she will get rid of the case." Judge Grant agreed saying, "I don't put much stock in [the State's] argument on behalf of the defendant . . . common sense dictates" the State wanted the clothes tested because it would help the State's case against Defendant. Judge Grant ordered a hearing including testimony from Clark and two law enforcement officers regarding the discovery of the clothes at the prison and why the evidence was not disclosed before trial.

¶ 9 After the hearing, Judge Grant again asked the State why a mistrial was necessary. The State argued the evidence was "very significant" because, if DNA testing confirmed the alleged blood on the clothing was Defendant's, the evidence would corroborate witnesses who would testify they saw Defendant come "out of his room bleeding[.]" Judge Grant clarified this evidence, if admitted, would only corroborate witness testimony as to what witnesses saw during the first alleged fight between Defendant and Floyd. Defense counsel argued the discovery of the evidence did not justify a mistrial and that the putative evidence be excluded and the trial proceed.

¶ 10 As to the evidence's potentially exculpatory nature, Judge Grant again stated: "I have a really hard time thinking that you're making this argument thinking about what might be exculpatory for the defendant. . . .[Defendant's] own lawyers are not making that argument." Moreover, Judge Grant noted the evidence "wouldn't be exculpatory because you wouldn't even know when the blood got up there. . . . Even if it comes in, there's no indication when the blood got on the defendant's clothes."

¶ 11 After considering the testimony and arguments—and expressing disbelief at the prison's inability to notify law enforcement of the clothing and law enforcement's inability to ask for any clothing based on their own investigatory experience—Judge Grant concluded: "All right. . . . I'll grant the mistrial. I'll have to find some facts to support the conclusion." In his written Order granting a mistrial, Judge Grant made the following relevant Findings of Fact:

> 6. Mr. Clark testified at the hearing on August 7, 2018 that on Monday evening after the court recessed that he informed the prosecutor and the lead SBI agent Mr. Steven Stile that there were articles of clothing belonging to the defendant and the victim Joleski

Floyd at the prison which had not been collected by law enforcement officers.

7. Mr. Clark was directed by SBI Agent Steven Stile to go to the prison and locate the clothing.

8. Mr. Clark went to the prison and located articles of clothing belonging to the defendant and the victim.

9. The articles of clothing belonging to the defendant were found in a contraband locker inside a paper bag.

10. The paper bag had the defendant's name hand-written on the bag identifying the clothing as belonging to the defendant.

11. At the hearing[,] the bag of clothing purportedly belonging to the defendant was introduced as Defendant's Exhibit Number 2.

12. A pair of pants and a T-shirt[,] among other items of clothing[,] were removed from Defendant's Exhibit Number 2, which appeared to have bloodstains.

13. Mr. Clark testified he believes that the clothing in Defendant's Exhibit Number 2 were clothes found in the defendant's prison cell after an alleged second altercation between the defendant and the victim.

14. Mr. Clark testified that it is his belief that defendant was not permitted to return to his prison cell following the second altercation.

15. Mr. Clark testified that in his opinion the clothing found in the defendant's prison cell was not clothing worn by the defendant at the time of the alleged second altercation with the victim.

16. The prosecutor argues to the Court that the State would call as a witness, an inmate, who would testify that there was an altercation between the defendant and the victim, which occurred approximately two hours before the altercation which resulted in the victim's death.

17. And that the prison inmate would testify that he saw the defendant immediately following the first alleged altercation bleeding from his head area and

> he saw the defendant wipe blood from his wound into his clothing.
>
> 18. The prosecutor further argues that the stain seen on the defendant's clothing on Defendant's Exhibit Number 2 should be sent to the state's crime lab for testing to determine, one, if the stains are, in fact, blood, and, two, whose blood is it.
>
> 19. The prosecution further argues that if it is determined to be the defendant's blood[,] that fact would corroborate the prison inmate's testimony that the defendant wiped blood from his wound onto his clothing following the first altercation.
>
> 20. The prosecutor also argues that if the stains on the clothing are determined to be blood belonging to someone other than the defendant or the victim[,] it could be exculpatory to the defense.

Based on these Findings, Judge Grant concluded "as a Matter of Law that it is in the public's interest in a fair trial to enter an order of mistrial and have this trial continued to allow time for the State Bureau of Investigation to test" the clothing.

¶ 12 Defendant's case came on for a second trial on 20 May 2019, Judge Marvin K. Blount, III, presiding. Before jury selection, Judge Blount considered Defendant's pretrial Motion in Limine seeking to exclude the evidence on which the previous trial court based its Order for mistrial. The State consented to Defendant's Motion in Limine because the State was "not intending on introducing that evidence." Judge Blount also considered Defendant's pretrial Motion to Dismiss both charges on double jeopardy grounds. On 21 May 2019, after hearing arguments from the parties, Judge Blount orally denied Defendant's Motion to Dismiss and this order was entered. *See State v. Miller*, 368 N.C. 729, 738, 783 S.E.2d 194, 200 (2016) ("a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session."). Defendant objected to Judge Blount's ruling and gave oral Notice of Appeal in open court.

¶ 13 The second trial continued. At the close of the State's evidence and, again, at the close of all the evidence, Defendant renewed his Motion to Dismiss—Judge Blount denied each Motion. The second jury convicted Defendant of Possession of a Weapon by a Prisoner but deadlocked

on the First-Degree Murder charge. As a result of the hung jury, Judge Blount declared another mistrial on the First-Degree Murder charge and retained the case for a third trial. After Judge Blount entered Judgment on the charge of Possession of a Weapon by a Prisoner, Defendant gave oral Notice of Appeal.

¶ 14 As Defendant's First-Degree Murder charge remained pending for a third trial—rendering his appeal of Judge Blount's denial of his Motion to Dismiss interlocutory—Defendant filed a Petition for a Writ of Certiorari to review the denial and a Petition for a Writ of Supersedeas and Motion for a Stay of Proceedings in the third First-Degree Murder trial. In a 19 February 2019 Order, we granted Defendant's Petitions and Motions, and consolidated that appeal with Defendant's direct appeal of the Judgment upon his conviction of Possession of a Weapon by a Prisoner.

Issue

¶ 15 The dispositive issue in both appeals is whether the trial court erred in denying Defendant's Motion to Dismiss on the grounds double jeopardy barred Defendant's second trial after the trial court granted a mistrial in the first trial on the basis of the allegedly corroborative evidence belatedly found by the State.

Standard of Review

¶ 16 We review double jeopardy issues de novo. *State v. Sparks*, 362 N.C. 181, 185-86, 657 S.E.2d 655, 658 (2008); *see State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007) ("The standard of review for [double jeopardy issues] is de novo, as the trial court made a legal conclusion regarding the defendant's exposure to double jeopardy." (citation omitted)). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Analysis

¶ 17 "It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) (citations omitted); *see* U.S. Const. amend. V; N.C. Const. art. I, § 19. Under the Double Jeopardy Clause of the Fifth Amendment, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried . . . a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 154 L. Ed. 2d 588, 595

(2003) (citation omitted). "In a criminal prosecution, jeopardy attaches when a jury is impaneled to try a defendant on a valid bill of indictment." *State v. Schalow*, 251 N.C. App. 334, 343, 795 S.E.2d 567, 574 (citations omitted).

¶ 18 Ordinarily, "an order of mistrial in a criminal case will not support a plea of former jeopardy." *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971) (citation omitted). However, "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges *must* be granted." *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (emphasis added) (citations omitted).

¶ 19 "There must be a showing of 'manifest necessity' for an order of mistrial over defendant's objection to be proper." *Id.* (citation omitted); *see State v. Chriscoe*, 87 N.C. App. 404, 407-08, 360 S.E.2d 812, 814 (1987) (analyzing a trial court's declaration of mistrial under N.C. Gen. Stat. § 15A-1063(1)—which allows a trial court to declare a mistrial "if it is impossible for the trial to proceed in conformity with the law"—according to our "manifest necessity" principles). "Although this requirement does not describe a standard that can be applied mechanically, it does establish that the prosecutor's burden is a heavy one." *Chriscoe*, 87 N.C. App. at 407, 360 S.E.2d at 814 (alteration, citation, and quotation marks omitted); *see State v. Cooley*, 47 N.C. App. 376, 384, 268 S.E.2d 87, 92 (1980) ("[W]hen the prosecution seeks a mistrial, it has the burden of showing a high degree of necessity[.]" (citation omitted)).

¶ 20 In turn, "[w]hether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial court." *Schalow*, 251 N.C. App. at 347, 795 S.E.2d at 576 (citation and quotations omitted). Moreover:

> Since a declaration of a mistrial inevitably affects a constitutionally protected interest, the trial court must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.

Id. (citation and quotation marks omitted). "As such, the trial court's discretion in determining whether manifest necessity exists is limited." *Id.* at 348, 795 S.E.2d at 576 (citations omitted).

¶ 21 "Our courts have set forth two types of manifest necessity: physical necessity and the necessity of doing justice." *Id.* (citation omitted). "For example, physical necessity occurs in situations where a juror suddenly takes ill in such a manner that wholly disqualifies him from proceeding with the trial." *Id.* (citation omitted). "Whereas the necessity of doing justice arises from the duty of the [trial] court to guard the administration of justice from fraudulent practices and includes the occurrence of some incident of a nature that would render *impossible* a fair and impartial trial under the law." *Id.* at 348, 795 S.E.2d at 576-77 (emphasis added) (citation and quotation marks omitted); *see also Chriscoe*, 87 N.C. App. at 408, 360 S.E.2d at 814 (listing examples of manifest necessity under N.C. Gen. Stat. § 15A-1063(1), such as "some incapacity of either a member of the court, a juror or an attorney, or evidence of jury tampering" (citations omitted)).

¶ 22 Here, the first mistrial was not based on physical necessity; nor is there any allegation of fraudulent practices or misconduct by any party. Rather, the matter centers on whether manifest necessity justified a mistrial in Defendant's first trial over Defendant's objection where, during trial, the State belatedly uncovered evidence it claims was either corroborative of its case or potentially exculpatory to Defendant. The State contends manifest necessity existed to support the grant of mistrial based on the trial court's conclusion "it is in the public's interest in a fair trial to enter an order of mistrial . . . to allow time for the State Bureau of Investigation to test the items of clothing which were discovered in the prison's contraband locker." The State further argues the trial court's decision to grant the mistrial must be afforded great deference because Judge Grant carefully considered his decision. Indeed, Judge Grant's close and careful deliberation of this novel matter is abundantly clear on the Record.

¶ 23 However, the Supreme Court of the United States has indicated the amount of deference due to a trial court's mistrial decision operates on a spectrum. *See Arizona v. Washington*, 434 U.S. 497, 510, 54 L. Ed. 2d 717, 731 (1978). "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence." *Id.* at 507, 54 L. Ed. 2d at 729. "At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Id.* at 509, 54 L. Ed. 2d at 730. At the latter extreme, "there are especially compelling reasons for allowing the trial judge to exercise broad discretion" in making a determination of manifest necessity and, thus, "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is

therefore accorded great deference by a reviewing court." *Id.* at 509-10, 54 L. Ed. 2d at 730-31. However, at the former extreme, when "the basis for the mistrial is the unavailability of critical prosecution evidence," "the strictest scrutiny" applies to the question of manifest necessity. *Id.* at 508, 54 L. Ed. 2d at 730. Here, Defendant argues the State sought a mistrial for purposes of testing the newly discovered evidence in hopes it would corroborate witness testimony thereby buttressing its case against Defendant. However, two of Judge Grant's findings of fact that are unchallenged on appeal by Defendant state:

> 19. The prosecution further argues that if it is determined to be the defendant's blood[,] that fact would corroborate the prison inmate's testimony that the defendant wiped blood from his wound onto his clothing following the first altercation.
>
> 20. The prosecutor also argues that if the stains on the clothing are determined to be blood belonging to someone other than the defendant or the victim[,] it could be exculpatory to the defense.

¶ 24 "[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505, 54 L. Ed. 2d at 727-28. "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum v. United States*, 372 U.S. 734, 736, 10 L. Ed. 2d 100, 102-03 (1963). Indeed, in discussing the application of the "manifest necessity" standard, the Supreme Court of North Carolina has recognized the State controls prosecutions:

> The State has dominant control of criminal cases. It has at its command law enforcement officers to fully investigate alleged offenses and report the results of the investigation. From the information obtained it decides what, if any, the criminal charge shall be. It determines when it is ready for trial and fixes the time for the trial to begin. It has full opportunity to confer with its witnesses before the trial commences.

State v. Birckhead, 256 N.C. 494, 507, 124 S.E.2d 838, 848 (1962). Thus, the Court asked and answered:

> If [the State's] preparation has been faulty, is it thereby entitled to more than one full opportunity

> to make preparation and gain a conviction, when there has been no fraud or interference on the part of defendant or from any other source? On the other hand, if the prosecuting witness is uncertain of the details of the occurrence until testimony is being given on the trial in the court of competent jurisdiction, does justice require such stringent action based on the belated revelation? We think not.

Id.

¶ 25 More recently, in *State v. Resendiz-Merlos*, our Court held there was no manifest necessity to grant a mistrial where the State elected to empanel the jury and proceed with trial without ascertaining whether its witnesses were present. 268 N.C. App. 109, 119, 834 S.E.2d 442, 449 (2019). Relying, in part, on *Downum*, this Court acknowledged in such a case, the State "takes a chance" in proceeding to trial. *Id.* We noted, "[u]nder these circumstances, [according to the *Downum* Court] . . . the State has 'entered upon the trial of the case without sufficient evidence to convict[,]' thereby assuming the risk of jeopardy attaching and barring a later prosecution." *Id.*

¶ 26 In this case, the newly found evidence was in the possession, custody, and sole control of the State, but the State had simply failed to uncover it. Neither party offers any suggestion of fraud or misconduct, nor do they offer a reasoned justification for its belated discovery other than faulty preparation. Indeed, Judge Grant was incredulous at the fact prison officials, law enforcement officials, and the prosecutor never specifically asked for nor delivered clothes from the incident when collecting the evidence. Following the reasoning of the decisions from the Supreme Court of the United States and the Supreme Court of North Carolina, and this Court, when the State undertook to try Defendant without ascertaining whether it had found or tested all the evidence in its possession, the State took a chance. Therefore, "[u]nder these circumstances . . . the State has entered upon the trial of the case . . . assuming the risk of jeopardy attaching and barring a later prosecution." *Resendiz-Merlos*, 268 N.C. App. at 119, 834 S.E.2d at 449. Thus, the first mistrial was not justified by manifest necessity.

¶ 27 The State, however, argues and cites *Baum v. Rushton*, 572 F.3d 198 (4th Cir. 2009), as an instance where evidence discovered by the State mid-trial constituted a manifest necessity for a mistrial where the new evidence had the potential to either be exculpatory or inculpatory. It first bears mentioning the United States Court of Appeals for

the Fourth Circuit's (Fourth Circuit) decision was in the context of a *habeas corpus* review as to whether the underlying grant of a mistrial by a South Carolina state court was contrary to, or an unreasonable application of, Supreme Court of the United States' precedent. *Id.* at 212. Moreover, the facts of *Baum*, and particularly the circumstances of the newly discovered evidence, are markedly different than in this case. In *Baum*, the defendant had been indicted on murder charges and the trial began without law enforcement finding the victim's body. *Id.* at 202. On the second day of the trial, the prosecution notified all parties that law enforcement had found the body in a neighboring state, and the state trial court—upheld by the state court of appeals—granted a mistrial to review the new evidence. *Id.* at 202-04. In the context of its review, the Fourth Circuit concluded "Although we might consider manifest necessity a closer call than the state court of appeals apparently did, we cannot say that its determination was objectively unreasonable." *Id.* at 215. The Court based its conclusion on the state court's findings "the belated discovery of Pinion's body 'was in no way a result of any act, omission, negligence, bad faith, or lack of effort on the part of the State,' and that the potential evidentiary value of the body—not only as a source of exculpatory evidence for Baum, but also relevant evidence 'imperative' to a just judgment by the jury—was 'too great' to ignore." *Id.* (citation omitted).

¶ 28 However, *Baum* is inapposite here. First, the bloody clothes, merely alleged to be Defendant's and not worn during the alleged murder were offered purely as corroborative evidence, unlike the existence of a dead body which is almost literally direct evidence of the *corpus delicti*. Moreover, in *Baum*, the body was found in a different state and the prosecution had no idea where it was. Here, although the prosecution was apparently not aware of the bloody clothes, the State always had possession and control of the evidence and the ability to test it, but simply failed to even inquire from prison officials about the existence of such evidence.

¶ 29 Rather, we find the Fourth Circuit's decision in *United States v. Shafer*, 987 F.2d 1054 (4th Cir. 1993), to be instructive. In *Shafer*, the defendant was charged with arson and mail fraud after his manufacturing business burned down. *Id.* at 1055. At trial, the government, in an effort to establish a motive, called two witnesses to testify about circumstances suggesting the defendant was in financial distress. *Id.* at 1055-56. One week after the trial began, a state law enforcement officer brought in a cart of financial records recovered from the burned-down business, which had never been turned over to investigators. *Id.* at 1056. The evidence had been in local law enforcement's possession for six years. *Id.*

The records refuted the government's witnesses' claims, and the government stipulated the evidence was exculpatory to the defendant. *Id.*

¶ 30 The trial court ruled the government had failed to produce the evidence, after the defendant had requested all exculpatory evidence, and that failure was the government's fault because law enforcement should have known of its existence. *Id.* The defendant moved to dismiss the case; but, the trial court denied the dismissal, considered allowing a continuance for the defendant to inspect the evidence, and ultimately decided to declare a mistrial—over the defendant's objection—because the proceedings had been "tainted." *Id.*

¶ 31 On appeal, the Fourth Circuit held the mistrial violated the Double Jeopardy Clause because the trial court "ignored available alternatives" and because the "motivation for declaring the mistrial was partially to rescue" the government's case. *Id.* at 1059. The court explained, "the critical inquiry is whether less drastic alternatives were available." *Id.* at 1057 (citation omitted). Thus, the court reasoned, the trial court could have: ordered a brief continuance to study the material; inquired into the defendant's willingness to waive any prejudice suffered from the late disclosure and continue the trial; recalled the government's witnesses for additional cross-examination; and allowed the defendant to use the evidence in his case-in-chief. *Id.* at 1058.

¶ 32 As to the "improper motives" for the mistrial, the court reasoned: "The Double Jeopardy Clause strictly forbids the district court from granting a mistrial to allow the prosecution to strengthen its case." *Id.* (citation and quotation marks omitted). The trial court had stated these discovery violations hurt the government's case. However, the Fourth Circuit held "this self-inflicted injury cannot be used to afford the government a second chance to prosecute so that it may argue a recast theory of the case better supported by the evidence." *Id.* at 1059. Moreover, as to the contention the mistrial was partially motivated by concerns of prejudice to the defendant, the court stated: "we must put aside" such statements and "note that such reservations were not shared by [the defendant], who wanted the trial to continue." *Id.* at 1058. Accordingly, the Fourth Circuit reversed the defendant's conviction. *Id.* at 1059.

¶ 33 Here, the trial court could have ordered a brief continuance to establish the admissibility of the evidence. The trial court could have also held a colloquy with Defendant to see if he was willing to waive any prejudice resulting from the evidence being excluded—as in *Shafer*, the Record is "replete with indications" Defendant was willing to do so. *Id.* at 1058. Further, the evidence the State wanted to test, and possibly in-

troduce at a later trial, was evidence the State bore the risk of not having at the time the State decided to move forward with the first trial.

¶ 34 In fact, the State had possession of the clothing, whether it knew it or not, the entire time. As in *Shafer*, it was the State's failure to discover, request, or collect potentially relevant evidence it had in its possession leading to the late discovery of the evidence. As such, the State could not obtain a mistrial to gain another opportunity to try Defendant. Moreover, even if the new evidence in this case was potentially exculpatory, we "must put aside" those concerns as they "were not shared by" Defendant. *Id*.

¶ 35 Thus, on the facts of this case, the State bore the risk of proceeding to trial and jeopardy attaching based on an incomplete investigation of the evidence in its possession and was not entitled to a second prosecution of Defendant in an effort to buttress its case. Therefore, there was no manifest necessity justifying the mistrial in the first trial. Consequently, jeopardy attached in the first trial and the State was barred from further prosecuting Defendant. Accordingly, the trial court in the second trial erred in denying Defendant's Motion to Dismiss on grounds of former jeopardy. *Odom*, 316 N.C. at 310, 341 S.E.2d at 334 (citation omitted).

Conclusion

¶ 36 For the foregoing reasons, we vacate the Judgment entered against Defendant in 16 CRS 120 and reverse the trial court's denial of Defendant's Motion to Dismiss. We remand this matter to the trial court with instructions to grant Defendant's Motion to Dismiss in both 16 CRS 50352 and 120.

VACATED AND REMANDED FOR DISMISSAL.

Chief Judge STROUD and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 February 2021)

GASPER v. BRADY TRANE SERV., INC. 2021-NCCOA-7 No. 20-280	Wake (19CVS5393)	Reversed in part, affirmed in part, and remanded.
IN RE A.S. 2021-NCCOA-8 No. 20-77	Cabarrus (18JA172) (18JA173) (18JA174)	Vacated and Remanded
IN RE J.J. 2021-NCCOA-9 No. 20-264	Greene (19JA8) (19JA9)	Affirmed in part, Vacated in part and Remanded
EST. OF SEYMOUR v. ORANGE CNTY. BD. OF EDUC. 2021-NCCOA-10 No. 19-334-2	Orange (18CVS1029)	Reversed
STATE v. AVERY 2021-NCCOA-11 No. 19-992	Mecklenburg (09CRS240639)	Affirmed
STATE v. CHAMBERS 2021-NCCOA-12 No. 20-196	Union (19CRS50564) (19CRS50565) (19CRS620)	No Error in Part; Vacated in Part and Remanded for Resentencing
STATE v. EVANS 2021-NCCOA-13 No. 19-1121	Davidson (18CRS57083)	Dismissed
STATE v. KOEHN 2021-NCCOA-14 No. 20-33	Clay (17CRS42-43)	No Error
STATE v. MURRELL 2021-NCCOA-15 No. 20-314	Jones (17CRS50292)	New Trial
STATE v. SWINO 2021-NCCOA-16 No. 20-302	Lincoln (18CRS52064) (18CRS939)	No Error

JOHN WAYNE KING, JR. AND LESLIE LYLES KING, PLAINTIFFS
v.
DUKE ENERGY PROGRESS, LLC AND CAROLINA TREE EQUIPMENT, INC. D/B/A CAROLINA TREE CARE, DEFENDANTS

No. COA20-292

Filed 16 February 2021

Trespass—to timber—ornamental trees—real estate for personal use—diminution of value—replacement cost of trees

In a lawsuit arising from Duke Energy's illegal removal of ornamental Japanese Maple trees from plaintiffs' property, where the trees had little or no commercial value after they were cut down and plaintiffs owned their property for personal use, diminution of value was the appropriate measure of damages, and the replacement cost of the trees was sufficient evidence to bring the question of damages before the jury.

Appeal by Plaintiffs from judgment entered 6 January 2020 by Judge Gale Adams in Scotland County Superior Court. Heard in the Court of Appeals 27 January 2021.

Nichols & Crampton, P.A., by Adam M. Gottsegen, for the Plaintiffs-Appellants.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding, for the Defendants-Appellees.

JACKSON, Judge.

¶ 1 John Wayne King, Jr., and Leslie Lyles King ("Plaintiffs") appeal from the trial court's judgment granting a directed verdict in favor of Duke Energy Progress, LLC ("Duke Energy") and Carolina Tree Equipment, Inc. d/b/a/ Carolina Tree ("Carolina Tree") (collectively, "Defendants") and awarding Plaintiffs nominal damages. We reverse the judgment of the trial court because the cost of replacing the ornamental trees was competent evidence of the diminution in value of Plaintiffs' property, where the property was owned for personal use. Plaintiffs are entitled to a new trial.

I. Background

¶ 2 Plaintiffs live in Laurinburg, North Carolina, where they own real property on which several large Japanese Maple trees once stood. Plaintiffs purchased the property in March of 2013, and planned to raise a family there and one day, retire.

¶ 3 On 4 August 2016, while engaged by Duke Energy, Carolina Tree removed two large Japanese Maple trees from the property and severely damaged a third. Carolina Tree also damaged some landscape lighting that day. Before the trees were removed, they obscured the view of power lines on and near Plaintiffs' property. These power lines are now visible from Plaintiffs' sunset deck, which is above their master bedroom.

¶ 4 Plaintiffs initiated the present action on 6 September 2017. In their complaint, Plaintiffs alleged causes of action for violation of N.C. Gen. Stat. § 1-539.1, trespass to chattel, trespass, and negligence, and requested declaratory relief. Duke Energy answered on 12 December 2017 and Carolina Tree answered on 3 January 2018. On 21 November 2018, counsel for Carolina Tree substituted for Duke Energy's prior counsel, and thereafter represented both of Defendants.

¶ 5 The matter came on for trial on 13 November 2019 before the Honorable Gail M. Adams in Scotland County Superior Court. Judge Adams presided over a two-day jury trial. Defendants moved for a directed verdict at the close of Plaintiffs' evidence. After hearing argument on the motion for directed verdict, the trial court indicated that it was inclined to grant the motion, and released the jury. On 6 January 2020, the trial court entered a judgment directing a verdict in favor of Defendants and awarding Plaintiffs only nominal damages. Plaintiffs entered timely notice of appeal from the trial court's judgment.[1]

II. Standard of Review

> Under Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict at the close of the evidence offered by the opponent and at the close of all of the evidence. The motion is only proper in a jury trial. It tests the sufficiency of the evidence to go to the jury and to support a verdict for the non-moving party. Thus, a motion for a directed

1. Plaintiffs also noticed appeal from the trial court's order denying their partial motion for summary judgment. We do not reach the trial court's denial of Plaintiffs' partial motion for summary judgment because we reverse the trial court's judgment in favor of Defendants and remand this case for a new trial.

> verdict presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, is sufficient for submission to the jury.

Berke v. Fidelity Brokerage Servs., 841 S.E.2d 592, 595 (N.C. Ct. App. 2020) (internal marks and citation omitted).

III. Analysis

¶ 6 There are two questions presented by this appeal: first, the correct measure of damages in an action for trespass to timber where the trees are ornamental and therefore have little or no commercial value after they are cut; and second, whether evidence of the replacement cost of ornamental trees, by itself, is sufficient to demonstrate the diminution in value of real property owned for personal use from which said trees are removed. We address each issue in turn.

A. Damages for Trespass to Timber

¶ 7 Our Supreme Court has recognized two different, albeit similar measures of damages for the tort of trespass to timber. *Jenkins v. Montgomery Lumber Co.*, 154 N.C. 355, 358, 70 S.E. 633, 634 (1911). In some cases it has been held that the correct measure is the "value of the timber as a chattel[,] . . . as soon as it [is] severed from the land—at the stump[,]" *Bennett v. Thompson*, 13 Ired. 146, 148 (1851), whereas in others, the Supreme Court has held that the correct measure is "the difference in the value of the land before and after cutting," *Jenkins*, 154 N.C. at 358, 70 S.E. at 634. However, the Supreme Court has observed that, "[a]s to ornamental or fruit trees, the authorities are practically unanimous that the measure of damage is the difference in the value of the land before and after cutting." *Williams v. Elm City Lumber Co.*, 154 N.C. 306, 309, 70 S.E. 631, 632 (1911). *See also Bennett*, 13 Ired. at 149 (noting that the rule valuing the timber at the time of cutting is inapplicable to ornamental trees).

¶ 8 North Carolina General Statute § 1-539.1 provides a statutory cause of action for trespass to timber. Under N.C. Gen. Stat. § 1-539.1(a),

> [a]ny person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land

> for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

N.C. Gen. Stat. § 1-539.1(a) (2019). The statute thus authorizes awards of enhanced damages. *See id.* It has also been construed to impose strict liability. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 109-10, 264 S.E.2d 395, 398 (1980). However, under the statutory cause of action, only the commercial value of the timber at the time of cutting is recoverable. *Barnard v. Rowland*, 132 N.C. App. 416, 424, 512 S.E.2d 458, 464 (1999). Thus,

> [t]wo alternative measures of damages are available in a suit claiming unlawful cutting of timber:
>
> [o]ne gives the landowner the difference in the value of his property immediately before and immediately after the cutting. The other gives [the] plaintiff the value of the timber itself. This latter value is then doubled by reason of N.C.G.S. 1-539.1(a)[,] which allows [the] plaintiff to recover double the value of timber cut or removed.

Id. Accordingly, as a practical matter, for trees without commercial value after they are cut, enhanced damages under N.C. Gen. Stat. § 1-539.1 will be unavailable.

B. Replacement Costs as Evidence of Diminution in Value

¶ 9 This Court has held that the replacement cost of trees can be used to establish the diminution in value of real property from which they are removed where the property is owned for personal use. *Huberth v. Holly*, 120 N.C. App. 348, 354, 462 S.E.2d 239, 243 (1995). In *Harper v. Morris*, 89 N.C. App. 145, 147, 365 S.E.2d 176, 178 (1988), the first time our Court considered the question, we rejected the argument that the aesthetic value of the trees was inappropriate for the jury to consider when determining the extent to which the value of the real estate had been diminished. Instead, we held that the diminished value of the real estate could be determined by reference to the aesthetic value of the trees, as measured by "the cost of replacing or restoring the trees . . . as is reasonably practicable." *Id.* Likewise, in *Lee v. Bir*, 116 N.C. App. 584, 590-91, 449 S.E.2d 34, 38-39 (1994), we rejected the argument that the aesthetic value of the trees and the replacement cost of the trees, including the type of replacement trees used, were improper for the jury to consider when determining the landowner's damages. Thus, in an action for trespass to timber where the trees have little or no commercial

value after they are cut, we hold that evidence of the cost of reasonable remedial measures, such as replacement and restoration, constitutes competent evidence of the diminution in value of the real property, provided it is owned for personal use.

¶ 10 We have previously cited portions of the Second Restatement of Torts in this context, *see Huberth*, 120 N.C. App. at 354, 462 S.E.2d at 243, and note that it is consistent with our holding above. Comment b to § 929(1)(a) of the Restatement is illustrative:

> [I]f a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant's invasion.

Restatement 2d of Torts § 929, cmt. b (1979). Like the gardener in the Restatement, landowners injured by a trespass to ornamental trees on their property are entitled to recover the "difference in the value of the land before and after cutting." *Williams*, 154 N.C. at 309, 70 S.E. at 632. And they may demonstrate the extent of the diminution in value of their property by presenting evidence of "the cost of replacing or restoring the trees . . . as is reasonably practicable." *Harper*, 89 N.C. App. at 147, 365 S.E.2d at 178.

C. The Motion for Directed Verdict

¶ 11 Viewing the evidence in the light most favorable to Plaintiffs, as we must, *Berke*, 841 S.E.2d at 595, we hold that the trial court erred in directing a verdict in favor of Defendants because the replacement cost of the trees was competent evidence of the diminution in value of the real property from which they were removed, *Harper*, 89 N.C. App. at 147, 365 S.E.2d at 178. "[T]o survive a motion for directed verdict . . . , the plaintiff's evidence . . . does not have to be either strong, convincing, consistent, or even credible to anyone except the jury[.]" *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 709-10, 320 S.E.2d 909, 913 (1984). Instead, "[i]f there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied." *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C.

App. 27, 31, 795 S.E.2d 253, 257 (2016) (citation omitted). Defendants admitted to cutting down the trees illegally and the only fact question for the jury to consider was damages. Accordingly, the evidence of Plaintiffs' damages in the form of the replacement cost of the trees was sufficient "to go to the jury and to support a verdict[.]" *Berke*, 841 S.E.2d at 595.

IV. Conclusion

¶ 12 We reverse the judgment of the trial court granting Defendants' motion for directed verdict because the cost of remediating the damage to the ornamental trees at Plaintiffs' home was competent evidence of the diminution in value of the real property where the trees once grew. Accordingly, we remand this case for a new trial.

REVERSED AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
SHAWN DUPREE CORPENING, DEFENDANT

No. COA19-1063

Filed 16 February 2021

1. Appeal and Error—designation of order or judgment—failure—petition for writ of certiorari—allowed

Where a pro se criminal defendant failed to designate the judgment from which he appealed, in violation of Appellate Procedure Rule 3—instead appealing "in the above captioned case" and not distinguishing between the civil and criminal judgments against him—the Court of Appeals allowed the State's motion to dismiss. However, the court also allowed defendant's petition for writ of certiorari to review the civil judgment because defendant was diligent in pursuing the appeal and his argument on the substantive issue of attorney fees was meritorious.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

The civil judgment imposing attorney fees upon an indigent criminal defendant was vacated and remanded where the trial court

failed to provide defendant with notice and the opportunity to be heard regarding the attorney's fees and hours worked.

Appeal by Defendant from judgment entered 14 May 2019 by Judge Joseph N. Crosswhite in Burke County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Guy J. Loranger for Defendant-Appellant.

INMAN, Judge.

¶ 1 Shawn DuPree Corpening ("Defendant") seeks review of a civil judgment entered against him for attorney's fees. We allow the state's motion to dismiss Defendant's appeal but grant Defendant's petition for writ of certiorari and vacate and remand the judgment of attorney's fees.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 Defendant pled guilty to possession of cocaine and possession of methamphetamine on 14 May 2019. As part of a plea arrangement, the State refrained from indicting Defendant as a habitual felon and dismissed all other charges against him. At the plea hearing, the trial court conducted a plea colloquy and then addressed defense counsel asking, "How much time do you have in this?" Counsel replied "9.5 hours." The trial court accepted Defendant's plea and sentenced Defendant to two consecutive active terms of seven to 18 months each. In addition, the trial court ordered Defendant to pay $570 in attorney's fees and a $60 appointment fee.

¶ 3 Defendant, acting *pro se*, filed written notice of appeal on 22 May 2019. His handwritten notice read: "Shawn D. Corpening hereby gives notice of appeal in the *above captioned case t*o the North Carolina Court of Appeals. This the 22nd day of May, 2019." (emphasis added). Though Defendant did not designate the specific order or judgment from which he appealed, he only intended to appeal the *civil* judgment against him for attorney's fees.[1] Defendant, concurrently with his brief, filed a petition for writ of certiorari seeking review under North Carolina Rule of

1. Defendant does not appeal the *criminal* judgments entered against him on 14 May 2019 nor the orders denying his writ of habeas corpus or motion to dismiss, entered 6 June 2019 and 18 June 2019, respectively.

Appellate Procedure 21 in the event his notice of appeal does not comply with the jurisdictional mandates of North Carolina Rule of Appellate Procedure 3(d). The State moved to dismiss Defendant's appeal for jurisdictional defect on 10 August 2020.

II. ANALYSIS

A. State's Motion to Dismiss

¶ 4 **[1]** Civil judgments for attorney's fees require a defendant to comply with Rule 3 of the North Carolina Rules of Appellate Procedure. *See State v. Smith*, 188 N.C. App. 842, 845-46, 656 S.E.2d 695, 697 (2008) (citing *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007)). Rule 3(d) provides, in relevant part, "[t]he notice of appeal . . . *shall designate the judgment or order* from which appeal is taken." N.C. R. App. P. 3(d) (2021) (emphasis added). Failure to designate the order or judgment from which appeal is taken constitutes a jurisdictional defect that cannot be waived. *In re A.V.*, 188 N.C. App. 317, 321, 654 S.E.2d 811, 814 (2008) (dismissing an appeal of a juvenile's disposition order for failure to comply with Rule 3(d) because the notice of appeal only designated error in the adjudication order, not in the disposition order) (citing *Johnson & Laughlin, Inc. v. Hostetler*, 101 N.C. App. 543, 546, 400 S.E.2d 80, 82 (1991)).

¶ 5 Here, Defendant appeals only from the civil judgment of attorney's fees, but his handwritten notice of appeal refers broadly to "the above captioned case" and does not distinguish between the civil and criminal judgments against him, in violation of Rule 3(d). In his petition, Defendant also concedes "the notice fails to state whether [Defendant] appealed from the criminal and/or civil judgments entered against him." Therefore, we allow the State's motion to dismiss and now consider Defendant's petition for writ of certiorari.

B. Defendant's Petition for Writ of Certiorari

¶ 6 "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). Though the State contends that Defendant did not have a statutory right to appeal the civil judgment, N.C. Gen. Stat. § 7A-27(b)(1) provides a defendant the right to appeal "from *any* final judgment of a superior court, other than one based on a plea of guilty or nolo contendere." (emphasis added). "A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs." *State v. Mayo*, 263 N.C.

App. 546, 549, 823 S.E.2d 656, 659 (2019) (citing *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018)).

¶ 7 Defendant indeed had a statutory right to appeal the civil judgment against him. Although he lost that right because his notice of appeal was defective, we are satisfied that Defendant was "diligent in prosecuting the appeal" by providing his written notice. *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936) (requiring "diligence in prosecuting the appeal" and "merit, or that probable error was committed below" on an application for certiorari) (citation omitted). Also, as explained below, Defendant's argument on the issue of attorney's fees is meritorious. In our discretion, we allow the petition and issue the writ of certiorari to review the civil judgment of attorney's fees.

C. Attorney's Fees

¶ 8 **[2]** We now address Defendant's sole argument on appeal—that the trial court erred by failing to provide him notice and the opportunity to be heard regarding the fees and hours worked by his attorney. The State's brief does not address the merits of this issue.

¶ 9 "[A] trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). However, a defendant is entitled to notice and the opportunity to be heard before costs—including an attorney's fee—can be entered. *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004). "[T]rial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

¶ 10 Here, the record reveals that the trial court did not provide Defendant notice of the fees to be paid for his counsel or an opportunity to be heard on the issue, such as the number of hours counsel worked or the appointment fee. We vacate the imposed civil judgment of attorney's fees and remand for further proceedings. *Jacobs*, 172 N.C. App. at 236-37, 616 S.E.2d at 317; *see also Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

III. CONCLUSION

¶ 11 We vacate the trial court's order of attorney's fees and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges COLLINS and GRIFFIN concur.

STATE v. EDWARDS

[276 N.C. App. 45, 2021-NCCOA-19]

STATE OF NORTH CAROLINA
v.
MAJOR EARL EDWARDS, JR.

No. COA19-615

Filed 16 February 2021

Criminal Law—jury instructions—lack of flight—actions after defendant left crime scene

In a trial for first-degree felony murder, defendant was not entitled to an instruction on lack of flight—requested on defendant's belief that his cooperation when law enforcement came to his home to question him indicated lack of guilt—because defendant left the scene of the crime after shooting a cab driver to death and robbing him. Even if the instruction was warranted, any error was harmless given the overwhelming evidence of defendant's guilt, including witness testimony, surveillance footage, and forensic evidence.

Judge MURPHY concurring in part and concurring in result only in part with separate opinion.

Appeal by defendant from judgment entered 15 May 2018 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Deputy General Counsel Blake W. Thomas, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant.

DIETZ, Judge.

¶ 1 Defendant Major Earl Edwards, Jr. appeals his conviction for first degree felony murder. Edwards argues that the trial court erred by declining his request for an instruction on lack of flight.

¶ 2 As explained below, the trial court properly declined to give that instruction based on the evidence at trial. Moreover, even assuming the trial court erred, the overwhelming evidence of Edwards's guilt rendered that error harmless. We therefore find no error in the trial court's judgment.

Facts and Procedural History

¶ 3 In 2016, Amigo Taxi cab driver Jose Dominguez responded to a call for a taxi at an apartment complex in Raleigh. A man got into the cab, shot Dominguez in the head, dragged him out of the cab, and then robbed him as he lay dead on the ground.

¶ 4 In the days leading up to the murder of Jose Dominguez, Defendant Major Earl Edwards, Jr. texted with another man, Conrad Patterson, and described obtaining a handgun. Edwards later texted Patterson explaining that "I got to make a move to keep my lights or they going to be cut off tomorrow at 10:00."

¶ 5 Cell tower location data showed that Edwards and Patterson traveled from Edwards's hometown of Louisburg to Raleigh on the night of the murder. Late that night, at 12:56 a.m., Edwards's phone was used to look up the webpage for Amigo Taxi. At 1:04 a.m., Edwards's phone made a 31-second call to Amigo Taxi. At 1:05 a.m., Amigo Taxi dispatched Jose Dominguez to respond to that call at the pick-up location, a Raleigh apartment complex. One of Edwards's relatives also lived at that apartment complex.

¶ 6 During the time period when the cab was on its way to the apartments, Edwards and Patterson again exchanged text messages. At 1:14 a.m., Edwards texted Patterson that he was "at the building to your right." At 1:16 a.m., Patterson texted Edwards telling him to "delete all the messages out your phone that you sent to me, your girl, or anybody just in case."

¶ 7 Surveillance footage showed Dominguez's taxicab reach the apartment complex shortly after. As the cab slowly drove through the complex, Dominguez called Edwards's cell phone in a call that lasted 36 seconds.

¶ 8 Several witnesses saw the next series of events. First, Ray Jackson, who was visiting his girlfriend's residence at the apartment complex, heard a gunshot and saw a flash from within the passenger area of the taxicab. Jackson then saw the shooter get out of the back seat of the car and fire into the front of the cab. The shooter also reached into the cab, took off Dominguez's seat belt, and dragged him out of the car.

¶ 9 Around the same time, another witness, Eric Garrett, drove into the apartment complex and saw an "altercation" happening at the taxicab. Both witnesses saw the shooter rummaging through Dominguez's pockets as he lay on the ground with gunshot wounds. The shooter then saw Garrett and fired three times at Garrett but missed. Garrett and Jackson

saw the shooter run to a white car and get in. Surveillance video from this same time period showed a white, four-door car leaving the apartment complex.

¶ 10 Law enforcement and emergency personnel responded, but Dominguez already had died of his wounds at the scene, which included two gunshot wounds to the head. Investigating officers found a sweatshirt on the rear left floorboard of the taxicab. The sweatshirt had a cell phone in it. It was the prepaid cell phone that Edwards used to communicate with Patterson. The phone also had photos connecting it to Edwards, including photos of Edwards, his State-issued identification card, and his electric bill. The phone also had a fingerprint on it that matched Edwards's prints.

¶ 11 Officers went to Edwards's home and found Edwards, Patterson, and another man near a white, four-door car resembling the one in the surveillance footage from the crime scene. The officers asked the men if they were willing to come to the station for questioning. The men agreed and drove the white car to the police station themselves.

¶ 12 The white car belonged to Patterson's girlfriend, and she gave law enforcement officers consent to search it. The search uncovered blood matching Dominguez's DNA on the front passenger armrest and shards of broken glass that matched the glass from Dominguez's taxicab window. Investigators also found bloody clothes in a trash bin near Edwards's home. The blood on those clothes was consistent with Dominguez's blood sample. The bloody clothes included a gray sweater resembling one Edwards was seen wearing in surveillance footage on the day of the murder.

¶ 13 Edwards was indicted for first degree murder. The State presented the evidence described above. Edwards offered no evidence at the trial. Before the jury charge, Edwards requested an instruction on flight that permitted the jury to infer "innocence or a lack of guilt" from Edwards's decision not to flee when investigators approached him at his home. The trial court declined to provide the requested instruction. The jury found Edwards guilty of first degree felony murder. The trial court sentenced Edwards to life in prison without parole. Edwards appealed.

Analysis

¶ 14 Edwards argues that the trial court erred by rejecting his proposed jury instruction addressing lack of flight. 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.

¶ 15 Here, Edwards requested the following jury instruction concerning flight:

> **Proposed Jury Instruction—Lack of Flight**
>
> The evidence shows that the defendant did not flee. Evidence of flight may be considered to show a consciousness of guilt. Evidence of lack of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to a showing of innocence or a lack of guilt.

The trial court declined to give this requested instruction.

¶ 16 There are several fatal flaws in Edwards's argument with respect to this proposed instruction. As an initial matter, the instruction is not directed at Edwards's actions at the crime scene. To the contrary, uncontested evidence indicates that the shooter—a man the State alleged was Edwards—fled the scene in a white car after murdering Dominguez. It was only later, when investigators identified Edwards as a suspect, that they went to his home to question him and, at that time, he did not flee but instead cooperated with the investigation.

¶ 17 There are a number of cases from our Supreme Court indicating that, in this context, an instruction on lack of flight is inappropriate because it would permit defendants "to make evidence for themselves by their subsequent acts." *State v. Burr*, 341 N.C. 263, 297, 461 S.E.2d 602, 620 (1995). Thus, the "general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest." *Id.* Accordingly, the trial court did not err by declining to provide the requested instruction.

¶ 18 In any event, even assuming the trial court erred by refusing to give the requested instruction, that error was harmless. An error at trial is harmless "unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). As explained in the recitation of facts above, the State had overwhelming evidence showing Edwards murdered Dominguez in a botched robbery, including witness testimony; surveillance footage;

DNA, blood, and fingerprint analysis; and Edwards's own statements in text messages on the cell phone he left at the crime scene. In light of all this evidence, there is no reasonable possibility that, had the court given the requested instruction on lack of flight, the jury would have reached a different result. *Id.* Accordingly, even if the trial court's failure to instruct on lack of flight was error, that error was harmless and could not result in reversal of the trial court's judgment.

Conclusion

¶ 19 We find no error in the trial court's judgment.

NO ERROR.

Judge TYSON concurs.

Judge MURPHY concurs in part and concurs in result only in part with separate opinion.

MURPHY, Judge, concurring in part and concurring in result only in part.

¶ 20 I concur in the portion of the Majority which properly summarizes the current status of the law that an instruction on lack of flight is unavailable to Defendant.[1] However, in writing separately, and of little solace to Defendant, I agree that if we are going to continue to instruct jurors on flight, the opposite instruction must also be available to a defendant who does not flee. *See State v. Thorne*, No. COA19-159, 267 N.C. App. 692, 833 S.E.2d 254, 2019 WL 4803677, *2 n.1 (2019) (unpublished), *review denied*, 373 N.C. 590, 837 S.E.2d 896 (2020); *State v. Ellis*, No. COA19-820, 848 S.E.2d 756, 2020 WL 6140639, (N.C. Ct. App. 2020) (unpublished).

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1. Note that the law as correctly stated by the Majority in its citation to *Burr*, *supra* at ¶ 17, traces back to an 1868 decision by our Supreme Court, which begins:

> It is no ground to quash an indictment, that it was found by a grand jury drawn from a *venire* in which there were no colored freeholders-- the jury list, as constituted by the county court in accordance with the law in force at the time of its constitution, not contai[ni]ng the names of such colored freeholders.

State v. Taylor, 61 N.C. 508, 508 (1868). To suggest it is time for our Supreme Court to revisit the application of and reference to such an outdated case and one-sided application of jury instructions is self-evident.

¶ 21 As Defendant accurately observes in his brief, whether appropriate or not in our secular system, the principles underlying the flight instruction derive from Proverbs, "[t]he wicked flee when no one pursues, but the righteous are bold as a lion." Proverbs 28:1 (English Standard Version); *See State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977); *State v. Dickerson*, 189 N.C. 327, 331, 127 S.E. 256, 258 (1925). Flight is either important for the jury's consideration of the evidence of Defendant's guilt, or it is not.[2]

¶ 22 As we are bound by caselaw to reject Defendant's argument as to the availability of his requested instruction, I concur in the analysis and result reached by the Majority. However, I do not join in the Majority's harmless error analysis as I would find such consideration to be moot.

2. I would also point out that the availability of an instruction that helps carry the burden of only one party in a criminal prosecution is itself constitutionally questionable. However, no such arguments have been raised at any point in this action and are not before us in this appeal.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 FEBRUARY 2021)

BRESNAHAN v. KIRK 2021-NCCOA-20 No. 20-207	Henderson (16CVS2354)	Dismissed
IN RE S.P-H. 2021-NCCOA-21 No. 20-229	Granville (19SPC152) (19SPC50)	Affirmed
KLAVER v. KLAVER 2021-NCCOA-22 No. 19-860	Iredell (18CVD54)	Affirmed
POULOS v. POULOS 2021-NCCOA-23 No. 20-365	Cumberland (18CVS4955)	Dismissed
STATE v. BRIDGES 2021-NCCOA-24 No. 19-838	Cleveland (16CRS199-201) (16CRS50361)	No Prejudicial Error.
STATE v. DiPIETRO 2021-NCCOA-25 No. 20-8	Rowan (19CRS50489) (19CRS756)	No Error.
STATE v. EAKES 2021-NCCOA-26 No. 19-745	Cleveland (17CRS1461-62) (17CRS51240)	No Error
STATE v. GADDY 2021-NCCOA-27 No. 20-286	Buncombe (15CRS88399)	Vacated
STATE v. HARRIS 2021-NCCOA-28 No. 20-62	Wilson (18CRS51062-64)	No error; Remanded for Correction of Clerical Error.
STATE v. HOWIE 2021-NCCOA-29 No. 20-284	Mecklenburg (17CRS33194) (17CRS33195)	Reversed
STATE v. JONES 2021-NCCOA-30 No. 20-281	Pamlico (17CRS50369) (19CRS68)	No prejudicial error.
STATE v. LINDSEY 2021-NCCOA-31 No. 20-91	Guilford (18CRS70242) (19CRS25204)	No Plain Error

STATE v. McSPADDEN 2021-NCCOA-32 No. 20-109	Davidson (19CRS51462-63)	No Error
STATE v. SILVERNALE 2021-NCCOA-33 No. 20-55	McDowell (18CRS51493)	Dismissed
STATE v. TABB 2021-NCCOA-34 No. 20-131	Forsyth (17CRS61652)	AFFIRMED IN PART AND REMANDED.
WILMINGTON SAV. FUND SOC'Y, FSB v. HALL 2021-NCCOA-35 No. 20-176	Durham (18CVS1208)	Affirmed.

FARMER v. TROY UNIV.

[276 N.C. App. 53, 2021-NCCOA-36]

SHARELL FARMER, Plaintiff
v.
TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY, Defendants

No. COA19-1015

Filed 2 March 2021

Constitutional Law—interstate sovereign immunity—out-of-state public university—local recruiting office

The trial court properly dismissed plaintiff's claims against his former employer—a public university incorporated and primarily located in Alabama—and two former co-workers on the grounds of interstate sovereign immunity pursuant to *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019) (*Hyatt III*), where defendant university did not explicitly waive its sovereign immunity (including by registering its local recruiting office as a foreign non-profit corporation) and *Hyatt III* required retroactive application. Plaintiff's alternative state constitutional claim could not trump the doctrine of interstate sovereign immunity, and the claims against the individual defendants in their official capacities were properly dismissed because the individual defendants were also protected by Alabama's interstate sovereign immunity.

Appeal by plaintiff from order entered 1 July 2019 by Judge Andrew T. Heath in Cumberland County Superior Court. Heard in the Court of Appeals 20 October 2020.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Ford & Harrison LLP, by Julie K. Adams, and Wesley C. Redmond, pro hac vice, for defendants-appellees.

ZACHARY, Judge.

¶ 1 Plaintiff Sharell Farmer appeals from an order granting Defendants' motion to dismiss pursuant to Rules 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure, on the grounds of interstate sovereign immunity. After careful review, we affirm the trial court's order.

Background

¶ 2 From May 2014 until 9 September 2015, Plaintiff was employed as a college recruiter for Defendant Troy University. Troy University is

a public university, incorporated and primarily located in the State of Alabama. However, Troy University has a recruiting office in Fayetteville, North Carolina, out of which Plaintiff was based, and where Plaintiff worked with Defendants Pamela Gainey and Karen Tillery (the "individual Defendants").

¶ 3 Plaintiff alleges that, while he was employed by Troy University, the individual Defendants committed several acts of "sexual harassment and fraudulent conduct" against him, and that such conduct began "his first day on the job" and continued "throughout his employment," with the individual Defendants making "frequent sexually suggestive remarks to" him. Plaintiff reported the individual Defendants' actions to "the appropriate officials" at Troy University, but following his complaint, Defendant Gainey "immediately retaliated" and suspended him from work for two days for poor performance. On 9 September 2015, Defendant Gainey terminated Plaintiff's employment with Troy University.

¶ 4 On 24 July 2018, Plaintiff filed suit against Troy University and the individual Defendants. Plaintiff asserted claims against Troy University for (1) wrongful discharge from employment, in violation of public policy; and (2) negligent retention and/or supervision of an employee. Plaintiff asserted claims against all Defendants for (1) intentional infliction of mental and emotional distress; and (2) tortious interference with contractual rights. In the event that the trial court determined that his claims were barred by the doctrine of sovereign immunity, Plaintiff also asserted an alternative claim against all Defendants, alleging a violation of his rights under the North Carolina Constitution.

¶ 5 On 3 October 2018, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, which the trial court denied by order entered on 9 November 2018. On 6 December 2018, Defendants filed their answer to Plaintiff's complaint, generally denying Plaintiff's claims and asserting several defenses, including the defense of sovereign immunity.

¶ 6 On 13 May 2019, the Supreme Court of the United States filed its opinion in *Franchise Tax Board of California v. Hyatt* ("*Hyatt III*"), holding that "States retain their sovereign immunity from private suits brought in the courts of other States." ___ U.S. ___, ___, 203 L. Ed. 2d 768, 774 (2019). On 15 May 2019, citing *Hyatt III*, Defendants filed another motion to dismiss on the grounds of interstate sovereign immunity, pursuant to Rules 12(b)(2) (lack of personal jurisdiction) and (6) (failure to state a claim). In the alternative, Defendants moved for judgment on the pleadings, pursuant to Rule 12(c). On 24 May 2019, Defendants

filed an amended motion to dismiss, or in the alternative, for judgment on the pleadings. On 3 June 2019, Plaintiff filed his response.

¶ 7 On 1 July 2019, the trial court entered its order granting Defendants' motion to dismiss pursuant to Rules 12(b)(2) and (6), citing *Hyatt III* in support of its ruling. Plaintiff timely filed his notice of appeal.

Discussion

¶ 8 Plaintiff asserts that the trial court erred in granting Defendants' motion to dismiss. Specifically, Plaintiff argues that (1) the doctrine of interstate sovereign immunity does not apply in this case; (2) Defendants waived sovereign immunity when Troy University registered in North Carolina as a nonprofit corporation; (3) *Hyatt III* must be construed prospectively, not retroactively; (4) Plaintiff's claim under the North Carolina Constitution survives, regardless of whether Defendants' sovereign immunity defense succeeds; and (5) the trial court committed reversible error in dismissing the individual Defendants from the lawsuit. After careful review, we affirm the trial court's order.

I. Standard of Review

¶ 9 When a trial court grants a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), we must review the record to determine whether there is evidence that would support the trial court's determination that exercising its jurisdiction would be inappropriate. *See Martinez v. Univ. of N.C.*, 223 N.C. App. 428, 430, 741 S.E.2d 330, 332 (2012).

¶ 10 On appeal from a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), this Court conducts de novo review to determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citation and internal quotation marks omitted).

II. Sovereign Immunity

¶ 11 Plaintiff first argues that Defendants cannot avail themselves of the doctrine of interstate sovereign immunity, in that the Supreme Court's holding in *Hyatt III* is inapplicable to the present case. We begin with a brief overview of *Hyatt III*.

A. Hyatt III

¶ 12 Hyatt claimed to have moved from California to Nevada, a state that "collects no personal income tax," after obtaining a patent that Hyatt an-

ticipated would yield him millions of dollars in royalties. *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 772. However, the "Franchise Tax Board of California (Board), the state agency responsible for assessing personal income tax, suspected that Hyatt's move was a sham," and it accused Hyatt of misrepresenting his residency in order to avoid paying income taxes in California. *Id.* The Board audited Hyatt, who later "sued the Board in Nevada state court for torts he alleged the agency committed during the audit." *Id.* at ___, 203 L. Ed. 2d at 773. The Board invoked the State of California's sovereign immunity as a defense. *Id.*

¶ 13 Applying Nevada immunity law, "[t]he Nevada Supreme Court rejected [the Board's sovereign immunity] argument and held that, under general principles of comity, the Board was entitled to the same immunity that Nevada law afforded Nevada agencies[.]" *Id.* And pursuant to then-existing Supreme Court precedent, "each State [was permitted] to decide whether to grant or deny its sister States sovereign immunity" as a matter of comity. *Id.* at ___, 203 L. Ed. 2d at 783 (Breyer, J., dissenting) (citing *Nevada v. Hall*, 440 U.S. 410, 59 L. Ed. 2d 416 (1979)).

¶ 14 In *Hyatt III*, however, the United States Supreme Court explicitly overruled *Hall*, holding that "States retain their sovereign immunity from private suits brought in the courts of other States." *Id.* at ___, 203 L. Ed. 2d at 774 (majority opinion). "The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id.* at ___, 203 L. Ed. 2d at 780.

B. Application

¶ 15 Plaintiff first attempts to distinguish the facts of the instant case from the facts of *Hyatt III*, in the hopes of defeating the application of interstate sovereign immunity. Plaintiff argues that in *Hyatt III*, "the legal dispute had its genesis in the State of California. The state taxes owed to California were based on business activities that occurred within the [S]tate of California. The [S]tate of California was involved solely in governmental activity, i.e., collecting state taxes." By contrast, Plaintiff asserts that here, "all the tortious conduct occurred within the sovereign boundaries of North Carolina. The individual tort feasors [sic] were residents in North Carolina." This argument is without merit.

¶ 16 It is evident that for purposes of interstate sovereign immunity, the state in which the allegedly tortious conduct was committed is not a distinguishing fact of any relevance; the dispositive issue is whether one state has been "haled involuntarily" into the courts of another state. *Id.* at ___, 203 L. Ed. 2d at 776. The approach to interstate sovereign im-

munity laid out in *Hyatt III* is "absolute." *Id.* at ___, 203 L. Ed. 2d at 783 (Breyer, J., dissenting). Regardless, in both the present case and in *Hyatt III*, the tortious conduct occurred in the state in which the plaintiff filed suit. Here, Plaintiff alleges that he was injured by Defendants in North Carolina, where he filed suit; in *Hyatt III*, "[t]he Franchise Tax Board sent its California employees into the state of Nevada[,]" where the employees allegedly committed the torts for which Hyatt sought compensation in the Nevada courts. *Id.* at ___, 203 L. Ed. 2d at 772–73 (majority opinion). Thus, Plaintiff's first argument is inapt.

¶ 17 Plaintiff further contends that allowing the doctrine of sovereign immunity to bar his suit against Defendants erroneously extends the scope of the Alabama Constitution to embrace illegal conduct by North Carolina residents in North Carolina, rather than properly limiting the Alabama Constitution's application to "conduct within the sovereign boundaries of Alabama." Plaintiff then proclaims that

> [t]he sovereignty of North Carolina controls conduct within this state. . . . The sovereignty of North Carolina is sacrosanct. It is absolute. For this Court to apply Alabama sovereign immunity under Article I, § 14 of the Alabama Constitution to conduct which occurred exclusively within the sovereign boundaries of North Carolina would constitute an intrusion on the sovereignty of this State.

¶ 18 However, the United States Supreme Court succinctly foreclosed this argument in *Hyatt III*:

> The problem with [Plaintiff's] argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its sister States. One such limitation is the inability of one State to hale another into its courts without the latter's consent.

Id. at ___, 203 L. Ed. 2d at 779–80 (citation and internal quotation marks omitted). Under *Hyatt III*, it is clear that the "intrusion"—if any—upon the sovereignty of North Carolina occurred upon the ratification of the United States Constitution, and not upon the trial court's dismissal of Plaintiff's claims on the grounds of interstate sovereign immunity.

¶ 19 Plaintiff next argues that the doctrine of interstate sovereign immunity does not apply in this instance because Troy University was not exercising a governmental function, but rather "came into North Carolina and leased office space in Fayetteville *for a business and commercial venture*." (Emphasis added). This argument is similarly unavailing.

¶ 20 To begin, Alabama courts consider the State's universities, including Troy University, to be arms of the State of Alabama entitled to the sovereign immunity enjoyed by the State. *See*, *e.g.*, *Ex parte Troy Univ.*, 961 So. 2d 105, 109–10 (Ala. 2006); *Stark v. Troy State Univ.*, 514 So. 2d 46, 50 (Ala. 1987). Like North Carolina, Alabama does not recognize a "business and commercial ventures" exception to its sovereign immunity. *Ex parte Troy Univ.*, 961 So. 2d at 109–10.

¶ 21 In addition, although the *Hyatt III* Court did not address the governmental and proprietary function distinction, the United States Supreme Court has previously made clear that a state's waiver of its sovereign immunity must be explicit; as will be more thoroughly explained below, states cannot implicitly waive sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277, 284, 179 L. Ed. 2d 700, 709 (2011); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 144 L. Ed. 2d 605, 620 (1999).

¶ 22 Finally, we note that in advancing this argument, Plaintiff conflates our jurisprudence regarding the doctrines of sovereign immunity and governmental immunity.

> Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. These immunities do not apply uniformly. *The State's sovereign immunity applies to both its governmental and proprietary functions*, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.

Evans v. Hous. Auth., 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (emphasis added) (citation and internal quotation marks omitted).

¶ 23 As an arm of the State of Alabama,[1] Troy University is immune from suit under the doctrine of sovereign immunity, not governmental immunity. This immunity applies to both its proprietary and governmental functions, *see id.*, unless that immunity is explicitly waived, *see Sossamon*, 563 U.S. at 284, 179 L. Ed. 2d at 709.

¶ 24 Accordingly, Plaintiff's argument that interstate sovereign immunity does not apply in this case lacks merit. Having so concluded, we address Plaintiff's argument that Troy University waived sovereign immunity.

III. Waiver of Sovereign Immunity

¶ 25 Plaintiff next argues that the trial court erred in granting Defendants' motion to dismiss because Troy University waived its sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation, thus enabling it to sue and be sued in its corporate name. We disagree.

¶ 26 As an Alabama nonprofit corporation, Troy University applied for and received a certificate of authority to conduct its affairs in North Carolina as a foreign nonprofit corporation, pursuant to Article 15 of the Nonprofit Corporation Act. *See* N.C. Gen. Stat. § 55A-15-03 (2019). The Nonprofit Corporation Act states, in pertinent part:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:
>
> (1) *To sue and be sued, complain and defend in its corporate name*[.]

Id. § 55A-3-02(a)(1) (emphasis added).[2]

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1. *See* Ala. Code § 16-56-1 (2018).

2. Article 15 of the Nonprofit Corporation Act further states:

> Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

N.C. Gen. Stat. § 55A-15-05(b).

¶ 27 The United States Supreme Court has held that a state's waiver of its sovereign immunity cannot be implied; it must be explicitly expressed. *Sossamon*, 563 U.S. at 284, 179 L. Ed. 2d at 708–09. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank*, 527 U.S. at 682, 144 L. Ed. 2d at 620 (citation and internal quotation marks omitted).

¶ 28 The *Hyatt III* Court held that one state may not be "haled involuntarily" into the courts of a sister state without its consent. *See* ___ U.S. at ___, 203 L. Ed. 2d at 780. Here, Alabama has explicitly *not* consented to be sued:

> The wall of immunity erected by [Ala. Const. 1901] § 14 is nearly impregnable. This immunity may not be waived. This means not only that the state itself may not be sued, but that this cannot be *indirectly* accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to *affect the financial status of the state treasury*.

Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002) (citations omitted).

¶ 29 Our Supreme Court has similarly held that "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983). "Statutory authority to 'sue or be sued' is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State." *Id.* at 538, 299 S.E.2d at 627.

¶ 30 In *Guthrie*, our Supreme Court determined that an enabling statute that "vests the Ports Authority with the authority to 'sue or be sued,' " when read together with the provisions of the State Torts Claims Act, N.C. Gen. Stat. § 143-291 *et seq.*, did not constitute "consent for the Ports Authority to be sued in the courts of the State[,]" *Guthrie*, 307 N.C. at 538, 299 S.E.2d at 627. Rather, the Court concluded that the statutes evince "a legislative intent that the Authority be authorized to sue as [a] plaintiff in its own name in the courts of the State but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act." *Id.*

¶ 31 Plaintiff's argument in the case at bar is no more successful than that considered and rejected by our Supreme Court in *Guthrie*. Assertions

of statutory waivers of state sovereign immunity are subject to strict construction. *Id.* at 537–38, 299 S.E.2d at 627. Unlike *Guthrie*, which concerned a suit against an agency of the State of North Carolina upon which the enabling legislation explicitly bestowed the authority to "sue or be sued," *id.*, Plaintiff here has not shown any similarly explicit waiver of state sovereign immunity, either in the Alabama statutes authorizing Troy University's activities or in our General Statutes.

¶ 32 In that interstate sovereign immunity is a fundamental right "embed[ded] . . . within the constitutional design," *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 780, we must "indulge every reasonable presumption against [its] waiver," *Coll. Sav. Bank*, 527 U.S. at 682, 144 L. Ed. 2d at 620. Accordingly, we will not read into the Nonprofit Corporation Act a blanket waiver of interstate sovereign immunity for an arm of another state that registers as a nonprofit corporation in the State of North Carolina, absent clear and express statutory authority to do so.

¶ 33 Troy University has not waived its interstate sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation. We therefore proceed to Plaintiff's next issue presented: whether the Supreme Court's decision in *Hyatt III* may be applied retroactively.

IV. Retroactive Application of Hyatt III

¶ 34 Plaintiff next asserts that *Hyatt III* "must be construed prospectively such that it only applies to causes of action that accrue after May 13, 2019, the date of the Supreme Court Opinion," and consequently, the decision cannot affect his case, because his "legal rights vested on September 9, 2015," the date Defendant Gainey terminated Plaintiff's employment with Troy University. We disagree.

¶ 35 To support this contention, Plaintiff cites the landmark case of *Smith v. State*, in which our Supreme Court held that when the State enters into a valid contract, it implicitly waives its sovereign immunity with regard to claims for breach of that contract. 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976). In *Smith*, the Court also denied retroactive application of its holding, stating that "in this case, and in causes of action on contract arising after the filing date of this opinion, . . . the doctrine of sovereign immunity will not be a defense to the State." *Id.*

¶ 36 Our Supreme Court's decision in *Smith* is clearly distinguishable from *Hyatt III* and the case before us. *Smith* addressed the sovereign immunity of the State of North Carolina, in its own courts, from suits arising out of contracts into which the State entered voluntarily. *See id.* at 309–11, 222 S.E.2d at 417–18. Interpreting such questions of

intrastate sovereign immunity is a matter of state law. *See id.* at 313–20, 222 S.E.2d at 419–23.

¶ 37 Conversely, *Hyatt III* concerns the federal constitutional implications of *interstate* sovereign immunity, in which one state is haled into the courts of another state without its consent. ___ U.S. at ___, 203 L. Ed. 2d at 774. As the Supreme Court explained, "although the [federal] Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at ___, 203 L. Ed. 2d at 775. Stated another way, "[i]nterstate immunity . . . is implied as an essential component of federalism." *Id.* at ___, 203 L. Ed. 2d at 781 (citation and internal quotation marks omitted). Accordingly, in that *Smith* addressed *intrastate* sovereign immunity—a matter of state law—and not *interstate* sovereign immunity with its attendant federal constitutional concerns, *Smith* is not persuasive on the issue of whether *Hyatt III* applies retroactively, or merely prospectively, as Plaintiff contends.

¶ 38 Furthermore, *Smith* stands as a clear exception to our appellate courts' traditional adherence to the "Blackstonian Doctrine":

> Under a long-established North Carolina law, a decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation. This rule is based on the so-called "Blackstonian Doctrine" of judicial decision-making: courts merely discover and announce law; they do not create it; and the act of overruling is a confession that the prior ruling was erroneous and was never the law.

Cox v. Haworth, 304 N.C. 571, 573, 284 S.E.2d 322, 324 (1981) (citations omitted). The presumption of retrospectivity "is one of judicial policy, and should be determined by a consideration of such factors as reliance on the prior decision, the degree to which the purpose behind the new decision can be achieved solely through prospective application, and the effect of retroactive application on the administration of justice." *Id.*

¶ 39 *Hyatt III* appears to portend its own retroactive application. In considering the effect of overruling *Nevada v. Hall*, the Supreme Court "acknowledge[d] that some plaintiffs, such as Hyatt," had demonstrated reliance upon *Hall* "by suing sovereign States." *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 782. Yet, despite this recognition, the Court noted the unfortunate reality that "in virtually every case that overrules a controlling

precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below." *Id.* "Those case-specific costs are not among the reliance interests that would persuade . . . an incorrect resolution of an important constitutional question." *Id.*

¶ 40 Moreover, the Court was quite clear that its prior holding in *Hall* was "irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." *Id.*

¶ 41 After careful consideration of the Supreme Court's opinion in *Hyatt III*, and in light of our courts' presumption that the decision of a higher court generally operates retroactively, *Cox*, 304 N.C. at 573, 284 S.E.2d at 324, we conclude that retroactive application of *Hyatt III* is required to achieve the purpose of the Court's holding. In so concluding, this Court simply recognizes the interstate sovereign immunity—an implicit and "essential component of federalism[,]" *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 781—which the State of Alabama never waived.

¶ 42 We find additional support for our conclusion in the opinions of other states that have already decided this issue. "In the absence of persuasive and binding North Carolina cases, we examine the law of other states." *Russell v. Donaldson*, 222 N.C. App. 702, 706, 731 S.E.2d 535, 538 (2012).

¶ 43 Several other states have applied *Hyatt III* retroactively. The Supreme Court of Kentucky applied *Hyatt III* retroactively, reversing the denial of the State of Ohio's motion to dismiss claims against it in a lawsuit filed in Kentucky before *Hyatt III* was decided. *Ohio v. Great Lakes Minerals, LLC*, 597 S.W.3d 169, 171–73 (Ky. 2019), *cert. denied*, ___ U.S. ___, 208 L. Ed. 2d 87 (2020). The Appellate Court of Connecticut similarly applied *Hyatt III* retroactively, affirming the dismissal of a suit filed in 2018 by one of its citizens against the State of Rhode Island, one of its agencies, and several of its agents. *Reale v. State*, 218 A.3d 723, 726–27 (Conn. App. Ct. 2019). And the Supreme Court of New York, Appellate Division, applied *Hyatt III* retroactively in affirming a New York trial court's pre-*Hyatt III* grants of motions to dismiss made by an agency of the State of Arizona and one of its employees. *Trepel v. Hodgins*, 121 N.Y.S.3d 605, 606 (N.Y. App. Div. 2020).

¶ 44 Recognizing that "sovereign immunity is a jurisdictional issue[,]" *M Series Rebuild, LLC v. Town of Mount Pleasant, N.C.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257, *disc. review denied*, 366 N.C. 413, 735 S.E.2d 190 (2012), and consonant with *Hyatt III*'s analysis of interstate sovereign

immunity as a "fundamental aspect" of each state's sovereignty, ___ U.S. at ___, 203 L. Ed. 2d at 775, as well as our courts' presumption of retrospectivity, *see Cox*, 304 N.C. at 573, 284 S.E.2d at 324, we conclude that *Hyatt III* is appropriately applied retroactively, and that Plaintiff's argument to the contrary must fail.

V. North Carolina Constitutional Claim

¶ 45 Plaintiff also contends that the trial court erred in granting Defendants' motion to dismiss his claim under Article 1, Section 19 of the North Carolina Constitution alleging "a violation of equal protection of the law," which he asserted in the event that the trial court determined that his other claims were barred by sovereign immunity. Citing our Supreme Court's decision in *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), Plaintiff maintains that his "alternative state constitutional claim . . . trump[s] the doctrine of sovereign immunity." We disagree.

¶ 46 It is well established that a plaintiff may not proceed with a claim directly under the North Carolina Constitution when an adequate alternative remedy is available. *Corum*, 330 N.C. at 784, 413 S.E.2d at 291. In *Corum*, a North Carolina resident complaining of injury resulting from the actions of an arm of the State of North Carolina asserted a direct constitutional claim, which the State contended was barred by the doctrine of sovereign immunity. *Id.* at 766, 413 S.E.2d at 280. Our Supreme Court determined that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights" of our State Constitution. *Id.* at 785–86, 413 S.E.2d at 291. "[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Thus, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under [the North Carolina] Constitution." *Id.* at 782, 413 S.E.2d at 289.

¶ 47 Nonetheless, *Corum*, like *Smith* discussed above, involved issues of *intrastate* sovereign immunity, and is therefore similarly inapplicable to the case at bar. Again, the instant case raises an issue of *interstate* sovereign immunity, in that Plaintiff has asserted claims against an arm of the State of Alabama and its agents, the individual Defendants. While the Declaration of Rights in the North Carolina Constitution may indeed trump our State's *intrastate* sovereign immunity, in the *interstate* context, the federal Constitution protects the several states' sovereign immunity vis-à-vis one another; indeed, it is "embed[ded] . . . within

the [federal] constitutional design." *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 780.

> Interstate sovereign immunity is . . . integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. *The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity*, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is implied as an essential component of federalism.

Id. at ___, 203 L. Ed. 2d at 781 (emphasis added) (citation and internal quotation marks omitted).

¶ 48 Accordingly, Plaintiff's *Corum* claim is without merit. The trial court did not err in granting Defendants' motion to dismiss this claim.

VI. The Individual Defendants

¶ 49 Lastly, Plaintiff argues that the trial court committed reversible error by granting Defendants' motion to dismiss with respect to the individual Defendants as well as Troy University. Two of Plaintiff's assertions on this issue sound from his prior arguments: (1) that Troy University is not entitled to sovereign immunity, so "the individual Defendants, who are residents and citizens of North Carolina, cannot legitimately raise the issue of sovereign immunity"; and (2) the individual Defendants committed intentional torts as "employees of a non-profit corporation doing business in North Carolina" and "should be treated like any other employees of a non-profit corporation in this state." These arguments lack merit.

¶ 50 "A suit against a public official in [her] official capacity is a suit against the State." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation and internal quotation marks omitted). Our Supreme Court has held that "when the complaint does not specify the capacity in which a public official is being sued for actions taken in the course and scope of [her] employment, we will presume that the public official is being sued only in [her] official capacity." *Id.* at 360–61, 736 S.E.2d at 167.

¶ 51 In his complaint, Plaintiff avers that the individual Defendants were "agent[s] and employee[s]" of Troy University. At no point in his com-

plaint, however, does Plaintiff specify that he is suing either individual Defendant in her personal capacity. Accordingly, we must presume that he sued the individual Defendants in their official capacities. *Id.* As such, his claims against the individual Defendants are as much against the State of Alabama as are his claims against Troy University, *see id.* at 363, 736 S.E.2d at 168, and his argument to the contrary is without merit. Thus, the individual Defendants are protected by the sovereign immunity afforded to Troy University, and the trial court did not err in dismissing Plaintiff's claims against the individual Defendants.

Conclusion

¶ 52 For the foregoing reasons, Plaintiff has not shown that the trial court erred in granting Defendants' motion to dismiss. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges MURPHY and COLLINS concur.

CHERYL HALTERMAN, PLAINTIFF
v.
BRADEN HALTERMAN, DEFENDANT

No. COA19-912

Filed 2 March 2021

Child Custody and Support—petition to register—foreign child support order—substance and form

Where the father moved to Virginia and the mother moved to North Carolina with the children, the trial court did not err by dismissing the mother's petition to register a foreign child support order for failure to state a claim and for lack of subject matter jurisdiction where the petition was, in form and in substance, a petition to register a foreign custody order under N.C.G.S. § 50A-305.

Appeal by plaintiff from order entered 27 June 2019 by Judge Warren McSweeney in District Court, Moore County. Heard in the Court of Appeals 28 April 2020.

Chris Kremer, for plaintiff-appellant.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Mother appeals the trial court's order granting Father's Motion under North Carolina Rules of Civil Procedure 12(b)(1) and (6) to dismiss her Petition to Register a foreign child support order. Because Mother's Petition to Register was in substance and in form a petition to register a foreign *custody* order under North Carolina General Statute § 50A-305, not a petition to register a foreign child support order under North Carolina General Statute § 52C-6-602, the trial court did not err by granting Father's Motion to Dismiss.

I. Procedural and Factual Background

¶ 2 Mother and Father had two children during their marriage. In 2008, the parties were divorced in Broward County, Florida. In their Florida divorce proceedings, the parties entered into a Marital Settlement Agreement which was later adopted by the court as a court order. The 2008 Marital Settlement Agreement ("2008 Order") resolved all of the parties' claims related to their marriage, including child custody, child support, alimony, and equitable distribution. In 2009, the Florida court entered an "Agreed Final Order on Former Husband's Supplemental Petition for Modification of Final Judgment" ("2009 Order") which modified Father's child support obligation and provided that "should [Father] become incarcerated in Federal Prison, the child support award shall be abated until he has been released." In 2012, the Florida court entered an "Agreed Final Order on the Former Wife's Supplemental Petition to Permit Relocation with Minor Children" ("2012 Order") which allowed Mother to "relocate on a permanent basis" to North Carolina and "defers on the issues of child support and timesharing until such time as [Father] is released from [incarceration]."

¶ 3 On 20 August 2015, Father filed a "Complaint, Motion to Register A Foreign Order and Motion to Modify Child Custody," which included a motion to register the two Florida orders regarding custody, the 2008 Order and the 2012 Order, in North Carolina, and a motion to modify child custody. The motion to modify child custody alleged that Father had been released from incarceration and the parties had been unable to agree on a new visitation schedule. The Complaint alleged grounds to register the 2008 and 2012 custody orders under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The Complaint also included allegations regarding North Carolina's modification juris-

diction under the UCCJEA. The Complaint alleged that Father is a citizen and resident of the Commonwealth of Virginia, while Mother and the children reside in North Carolina.

¶ 4 Four days later, Mother filed a "Petition to Register Foreign Child Custody and Support Order" ("Petition to Register"). The Petition to Register stated it was filed under "N.C.G.S. 50A-305(a), petitioning this Court to register a foreign custody Order." Mother's Petition to Register included all three Florida orders, including the 2009 Order. The allegations of the Petition to Register track the requirements of North Carolina General Statute § 50A-305(a), including that Father was a citizen and resident of Virginia; Mother and the children were residents of North Carolina; details regarding the Florida orders entered in 2008, 2009, and 2012; and that the custody provisions of those orders had not been changed. Certified copies of the orders were attached, and her Petition to Register was verified. She requested only to register the "attached foreign orders" but did not assert any requests for modification or enforcement. Mother also filed a "Notice to Register of Foreign Child Custody and Support Orders." The Notice states that Mother "gives Notice that the Registration of the Foreign Custody Order entered the 14 October 2008, in the County of Broward, State of Florida" and cites North Carolina General Statute § 50A-305 as statutory authority. The Notice tracks the statutory language required for registration of a foreign child *custody* order under the UCCJEA.

¶ 5 On 8 September 2015, Father filed a "Motion to Dismiss [Mother's] Claim to Register the Foreign Child Support Order" ("Motion to Dismiss"). Father moved to dismiss the Petition to Register under Rules 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a cause of action upon which relief may be granted, and for failure to meet the requirements of North Carolina General Statute § 52C-6-602. Father alleged that he is a resident of Virginia, and he has never resided in North Carolina. He alleged that North Carolina General Statute § 52C-6-602(a) "requires the registration of a Support Order to be in the county where the obligor resides" and the Petition to Register failed to meet other requirements of North Carolina General Statute § 52C-6-602.

¶ 6 On 22 September 2015, the trial court entered an "Order Registering a Foreign Child Custody Order" ("Registration Order"). The Registration Order was entered by agreement of the parties and was based upon the UCCJEA. The Registration Order finds that the 2012 Order "anticipated the minor children moving to North Carolina and releasing jurisdiction to North Carolina" and Mother and minor children had been residing

in North Carolina more than six months preceding Father's motion for modification of custody.

¶ 7 On 18 February 2016, the parties entered into a Child Custody Order by consent ("2016 Consent Order"), granting the parties joint custody, with primary custody to Mother and setting out a detailed visitation schedule for Father. The 2016 Consent Order also included a provision that "This Order fully resolves all pending matters in Moore County File Numbers: 15 CVD 1078 and 15 CVD 1090." But the trial court did not address Father's Motion to Dismiss Mother's claim to register a foreign child support order.

¶ 8 On 2 January 2019, Father filed a motion to activate the case and a Rule 60 Motion requesting the trial court strike the language in the 2016 Consent Order stating that "this resolves all pending issues" in the case, since his Motion to Dismiss had not been resolved. Mother did not oppose Father's Rule 60 Motion and the trial court entered an order allowing the motion and striking the language regarding full resolution of all claims, as Father's Motion to Dismiss had never been addressed.

¶ 9 On 21 May 2019, the trial court heard Father's Motion to Dismiss. On 27 June 2019, the trial court entered an order allowing Father's Motion to Dismiss based upon "Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure and NCGS 52(c)-6-602." Specifically, the trial court concluded, "The pleading is insufficient to register a foreign Child Support Order. This Court lacks subject matter jurisdiction and said petition fails to state a cause of action upon which relief can be granted." Mother timely filed notice of appeal from the 27 June 2019 Order allowing Father's Motion to Dismiss.

II. Standard of Review

¶ 10 This Court reviews an order allowing a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted *de novo*. *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 809 (2011) (noting the standard of review for lack of subject matter jurisdiction); *Birtha v. Stonemor, N.C., LLC*, 220 N.C. App. 286, 291, 727 S.E.2d 1, 6 (2012) (providing the standard of review for failure to state a claim upon which relief can be granted).

III. Registration of Foreign Order

¶ 11 The arguments of both parties conflate the statutory requirements for registration of a foreign support order and the jurisdictional issues arising from modification or enforcement of a foreign support order.

Normally, when a support order is registered, the obligee or a child support enforcement agency is seeking to enforce the order, or a party is seeking modification of the order. *See* N.C. Gen. Stat. § 52C-6-609. Here, Mother sought only to register the three Florida orders. No issue as to modification or enforcement was raised by either party. Father's Motion to Dismiss raised a defense based on the failure of Mother's Petition to Register to meet the requirements of North Carolina General Statute § 52C-6-602 for registration of a foreign support order. Thus, we first address the issue of whether Mother's Petition to Register Foreign Child Custody and Support Order substantially complied with North Carolina General Statute § 52C-6-602.

¶ 12 North Carolina General Statute § 52C-6-602 sets out the requirements for registration of a foreign support order in North Carolina:

> (a) Except as otherwise provided in G.S. 52C-7-706, a support order or income-withholding order of another state or a foreign support order may be registered in this State by sending the following records to the appropriate tribunal in this State:
>
> (1) A letter of transmittal to the tribunal requesting registration and enforcement;
>
> (2) Two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> (3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> (4) The name of the obligor and, if known:
>
> a. The obligor's address and social security number;
>
> b. The name and address of the obligor's employer and any other source of income of the obligor; and
>
> c. A description and the location of property of the obligor in this State not exempt from execution; and
>
> (5) Except as otherwise provided in G.S. 52C-3-311, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

> (b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as an order of another state or a foreign support order, together with one copy of the documents and information, regardless of their form.
>
> (c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this State may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.
>
> (d) If two or more orders are in effect, the person requesting registration shall do each of the following:
>
> > (1) Furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this section.
> >
> > (2) Specify the order alleged to be the controlling order, if any.
> >
> > (3) Specify the amount of consolidated arrears, if any.
>
> (e) A request for a determination of which is the controlling order may be filed separately or with a request for registration and enforcement or for registration and modification. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination.

N.C. Gen. Stat. § 52C-6-602 (2019).

¶ 13 Here, the Petition to Register was filed directly by Mother and was not initiated by the Florida court. Direct registration is allowed under North Carolina General Statute § 52C-3-301:

> An individual petitioner or a support enforcement agency may initiate a proceeding authorized under this Chapter by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state or a foreign country which has or can obtain personal jurisdiction over the respondent.

N.C. Gen. Stat. § 52C-3-301(c) (2019). North Carolina General Statute § 52C-6-605 also requires that the "nonregistering party," here Father, be notified of the registration and of his right to contest it:

> (a) When a support order or income-withholding order issued in another state or a foreign support order is registered, the registering tribunal of this State *shall* notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.
>
> (b) A notice *must* inform the nonregistering party:
>
> (1) That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this State.
>
> (2) That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice, unless the registered order is under G.S. 52C-7-707;
>
> (3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages; and
>
> (4) Of the amount of any alleged arrearages.

N.C. Gen. Stat. § 52C-6-605 (2019) (emphasis added).

¶ 14 Mother does not attempt to argue that her Petition to Register, which was in both form and substance a petition for registration of a child *custody* order under the UCCJEA, was fully compliant with the requirements of North Carolina General Statute § 52C-6-602. Nor was Father provided with the notice required by North Carolina General Statute § 52C-6-605. Mother contends that "a fair examination" of the Petition to Register "under the *Twaddell* substantial compliance standard" supports her argument that she met the requirements of North Carolina General Statute § 52C-6-602 to register the Florida orders as child support orders.

¶ 15 In *Twaddell v. Anderson*, the mother resided in California and sought to enforce a California child support order against the father, who resided in North Carolina. 136 N.C. App. 56, 58, 523 S.E.2d 710, 713 (1999). After a complex procedural history of the mother's efforts to enforce the order in North Carolina through the child support enforcement agency, the father was held in contempt for non-payment, and he challenged the registration of the California order based upon technical deficiencies in the information transmitted from California. *Id*. at 58-59,

523 S.E.2d at 713. The trial court granted his motion to dismiss, and this Court reversed, finding substantial compliance with the requirements for registration of the California order under North Carolina General Statute § 52C-6-602:

> Plaintiff contends she was in substantial compliance with the statute. The provisions in dispute are section 52C-6-602(a)(1), which requires that a registration request include a "letter of transmittal to the tribunal requesting registration and enforcement," and section 52C-6-602(a)(5), which requires that the registration request include the "name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted." The record indicates that plaintiff submitted a "Registration Statement," which contained the case number, date, and county of the California order; the parties to the action and their respective addresses and employers; and the support amount, date of last payment, and total amount of arrears. The Statement was signed by the Records Custodian in California and notarized, then forwarded to the Craven County Clerk of Court. We hold that this material is sufficient to satisfy section 52C-6-602(a)(1). Plaintiff's packet also included the name and address of the California agency to which support payments were to be remitted. Although this information may be found only upon a close reading of plaintiff's submitted material, we hold that plaintiff also substantially complied with section 52C-6-602(a)(5). Accordingly, the trial court erred in finding that plaintiff had not met the registration requirements of UIFSA.

Id. at 60, 523 S.E.2d at 714.

¶ 16 But a "fair examination" of Mother's Petition to Register here reveals that it is both in substance and in form a petition to register a foreign custody order under North Carolina General Statute § 50A-305, not a petition to register a foreign child support order under North Carolina General Statute § 52C-6-602. The requirements of these two statutes differ, and for the orders to be registered under the Uniform Interstate Family Support Act ("UIFSA"), the petition must at least substantially comply with North Carolina General Statute § 52C-6-602. Mother's Petition to Register did not request "registration and enforcement" or

contain "[a] sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage[.]" N.C. Gen. Stat. § 52C-6-602(a)(1), (3). Therefore, the trial court did not err by granting Father's Motion to Dismiss for failing to state a claim upon which relief can be granted.

IV. Subject Matter Jurisdiction

¶ 17 Mother also argues that Father submitted to the jurisdiction of the North Carolina court by filing his own petition to register the 2008 Order and the 2012 Order, which included provisions regarding both child custody and support. She contends Father made a "general appearance" in the action and thus cannot challenge jurisdiction.

¶ 18 Here, Mother presents the issue on appeal as personal jurisdiction over Father regarding child support enforcement. Father is a citizen and resident of Virginia, and Mother does not argue there would be any basis for North Carolina to assert personal jurisdiction over him unless he had submitted to the jurisdiction of the court by a general appearance. If personal jurisdiction were the issue and Father had made a general appearance, Mother would be correct: a general appearance would have waived any objection to personal jurisdiction. *Lynch v. Lynch*, 303 N.C. 367, 373, 279 S.E.2d 840, 845 (1981) (making a general appearance before challenging personal jurisdiction waives the right to challenge personal jurisdiction).

¶ 19 But Father did not make a general appearance, and his actions cannot confer subject matter jurisdiction upon the court. His petition specifically sought to register the orders under the UCCJEA and to modify custody in North Carolina. The trial court has subject matter jurisdiction under the UCCJEA since Mother and the children reside in North Carolina. And Father promptly filed a Motion to Dismiss Mother's Petition to Register, raising his jurisdictional defenses, both personal and subject matter. The issue here is subject matter jurisdiction, which cannot be created by the actions of the parties. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (" 'Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.' Subject matter jurisdiction 'cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial.' " (alterations in original) (citations omitted)).

¶ 20 Mother last cites to *Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (unpublished), which she contends "shoots down the notion of selective subject matter jurisdiction." She argues that because

the Florida orders address both child custody and child support in the same document, North Carolina must have subject matter jurisdiction over the entire matter and cannot have subject matter jurisdiction to enforce or modify just a portion of the order as to child custody. But *Marshall* is inapposite to this case, as it raised no issue of whether the registration of the support order was done properly and no issues regarding enforcement or modification of a child custody order under the UCCJEA. *See Marshall*, 233 N.C. App. 238, 757 S.E.2d 319.

¶ 21 In *Marshall*, the husband and wife had entered into a marital dissolution agreement, which was adopted as a court order in Tennessee. *Id.* at 238, 757 S.E.2d at 321. The husband then engaged in an extended pattern of harassment against the wife and her former romantic partner and her husband which this Court described as "among the most shocking and extreme that the members of this panel have witnessed in the many divorce—related cases they have reviewed." *Id.* at 238, 757 S.E.2d at 323. The wife obtained domestic violence protective orders against the husband in North Carolina and registered the Tennessee order in North Carolina under UIFSA, and with no objection from the husband, it was registered pursuant to North Carolina General Statute § 52C-6-601, 606 (2013). *Marshall*, 233 N.C. App. 238, 757 S.E.2d at 322.

¶ 22 Here, the issue is whether Mother's Petition to Register the three Florida orders under UIFSA was proper; this case presents no issue of modification or enforcement of the Florida orders, just registration. In addition, *Marshall* did not address any issues of child custody or child support; the support obligations the wife sought to enforce involved "monetary support" the husband was ordered to pay to the wife under the properly registered Tennessee order. *Id.* at 238, 757 S.E.2d at 324-25.

¶ 23 Mother's argument focuses on two sentences, taken out of context, from *Marshall*:

> Defendant cites no authority for the startling proposition that a court might have subject matter jurisdiction over certain paragraphs and provisions of a foreign support order which has been properly registered and confirmed under UIFSA, but lack jurisdiction over other paragraphs and provisions. Nothing in UIFSA even suggests that a properly registered and confirmed foreign support order may only be enforced *in part* by our State's district courts.

Id. at 238, 757 S.E.2d at 324.

¶ 24 In *Marshall*, the Court had already noted that the Tennessee order had been properly registered under North Carolina General Statute § 52C-6-606 when the husband failed to contest registration. *Id*. at 238, 757 S.E.2d at 324. In context, the Court was noting that North Carolina had jurisdiction to enforce all of the "monetary support" provisions of the foreign support order after it was properly registered. *Id*. at 238, 757 S.E.2d at 324. There was no issue in *Marshall* involving registration or modification of a child custody order.

¶ 25 Here, Mother's arguments overlook the essential differences in registration of foreign orders under the UCCJEA and UIFSA. For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. *See* N.C. Gen. Stat. § 50A-305. For purposes of child support modification and enforcement, the focus is on the residence of the obligor, since the obligee who is seeking enforcement normally registers the order in the state of the obligor's residence so the court will have personal jurisdiction over the obligor. *See* N.C. Gen. Stat. § 52C-6-611 (2019). The Comments to North Carolina General Statute § 52C-6-611 specifically address this relationship between the UCCJEA and the UIFSA:

> **UIFSA Relationship to UCCJEA**. Jurisdiction for modification of child support under subsections (a)(1) and (a)(2) is distinct from modification of custody under the federal Parental Kidnapping Prevention Act (PKPA), 42 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) §§ 201-202. These acts provide that the court of exclusive, continuing jurisdiction may "decline jurisdiction." Declining jurisdiction, thereby creating a potential vacuum, is not authorized under UIFSA. Once a controlling child-support order is established under UIFSA, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article.
>
> UIFSA and UCCJEA seek a world in which there is but one order at a time for child support and custody and visitation. Both have similar restrictions on the ability of a tribunal to modify the existing order. The major difference between the two acts is that

> the basic jurisdictional nexus of each is founded on different considerations. UIFSA has its focus on the personal jurisdiction necessary to bind the obligor to payment of a child-support order. UCCJEA places its focus on the factual circumstances of the child, primarily the "home state" of the child; personal jurisdiction to bind a party to the custody decree is not required. An example of the disparate consequences of this difference is the fact that a return to the decree state does not reestablish continuing, exclusive jurisdiction under the UCCJEA. *See* UCCJEA § 202. Under similar facts UIFSA grants the issuing tribunal continuing, exclusive jurisdiction to modify its child-support order if, at the time the proceeding is filed, the issuing tribunal "is the residence" of one of the individual parties or the child. *See* Section 205.

N.C. Gen. Stat. § 52C-6-611 Official Comment.

¶ 26 Here, Mother's Petition to Register the three Florida orders was in both form and substance a petition for registration under the UCCJEA. Even if we assume Mother also sought registration of the orders under UIFSA, the Petition to Register did not substantially comply with the requirements of North Carolina General Statute § 52C-6-602, and Father promptly filed a Motion to Dismiss with respect to claims under UIFSA. The trial court correctly concluded that Mother's Petition to Register the orders under UIFSA for purposes of child support modification or enforcement must be dismissed under North Carolina General Statute § 52C-6-602 and Rules 12(b)(1) for lack of subject matter jurisdiction. *See In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) ("Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982))).

V. Conclusion

¶ 27 Because Mother's Petition to Register was in substance and in form a petition to register a foreign custody order under North Carolina General Statute § 50A-305, not a petition to register a foreign child support order, the trial court did not err by granting Father's Motion to Dismiss as to child support for failing to state a claim upon which relief

can be granted and for lack of subject matter jurisdiction. N.C. R. Civ. P. 12(b)(1), (6). However, the trial court noted the dismissal of Mother's Petition to Register was without prejudice, and this opinion does not impair her right to file a new petition for registration and enforcement of the Florida child support orders in the appropriate jurisdiction.

AFFIRMED.

Judges INMAN and COLLINS concur.

MATTIE HICKS AND BARBARA SIGLER, PLAINTIFFS
v.
KMD INVESTMENT SOLUTIONS, LLC, WENDY'S REAL ESTATE SOLUTIONS, LLC, AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

KMD INVESTMENT SOLUTIONS, LLC, THIRD-PARTY PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD-PARTY DEFENDANT

No. COA20-71

Filed 2 March 2021

Negligence—breach—constructive notice—dangerous condition—roads

In a negligence action against the Department of Transportation (NCDOT) arising from an automobile accident caused by black ice from runoff out of nearby burst pipes, plaintiffs presented sufficient evidence that NCDOT breached its duty to properly maintain a lateral drainage ditch—which had become completely filled with dirt and debris—to submit the issue to the jury. Plaintiff's evidence tended to show that the ditch had been filled beyond fifty percent, in violation of NCDOT guidelines, for at least six months before the automobile accident and that NCDOT would have discovered the defective condition if it had exercised due care.

Appeal by Third-Party Defendant from Judgment entered 13 August 2019 and order entered 26 August 2019 by Judge Cy A. Grant, Sr., in Halifax County Superior Court. Heard in the Court of Appeals 20 October 2020.

Sanford Thompson, P.L.L.C., by Sanford W. Thompson, IV, and Perry, Perry & Perry, P.A., by Robert T. Perry and Alexander S. Perry, for plaintiffs-appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for third-party defendant-appellant.

MURPHY, Judge.

¶ 1 In this negligence case, in the light most favorable to Plaintiffs, there was sufficient circumstantial evidence to show the North Carolina Department of Transportation ("NCDOT") had constructive notice of a defective condition and failed to exercise due diligence to discover and remedy the defective condition, and thus breached its duty to maintain Highway 56 prior to the accident at issue. Accordingly, the trial court did not err by denying NCDOT's motions for directed verdict and judgment notwithstanding the verdict ("JNOV").

BACKGROUND

¶ 2 On the night of 8 January 2014, Barbara Sigler was driving, with Mattie Hicks (collectively "Plaintiffs") as her passenger, on Highway 56, a two-lane highway. The temperature was below freezing and there had been no precipitation that day. As Plaintiffs drove through a curve, another driver, Candice Morgan, approaching in the other lane hit black ice and spun out of control into Plaintiffs, causing them significant injuries.

¶ 3 The lack of precipitation that day prompted responding emergency services to investigate the source of the frozen water. Uphill from the highway, it was discovered the pipes of a nearby well had burst, resulting in water running off the property into a lateral ditch[1] adjacent to a road off Highway 56. One section of the ditch had become filled in with dirt and debris, such that this spot was flat with the surrounding land rather than below the surrounding land. Instead of running freely through this ditch and avoiding the road, the water ran downhill into the ditch, reached the filled in spot, and was pushed out onto the road. This water eventually flowed downhill, as it does, onto Highway 56, where it froze and ultimately formed the black ice that caused the accident in question.

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1. "Lateral ditches are trough-shaped channels oriented parallel to the roadway. Located along the roadside and in the medians, these ditches are constructed to collect and disperse surface water in a controlled manner. . . . [A] lateral ditch would be like the ditch [at issue in this case.]"

¶ 4 Following the accident, Plaintiffs sued KMD Investment Solutions, LLC ("KMD"), the property owners of the land where the well is located. KMD in turn sued NCDOT as a third-party defendant, after which Plaintiffs joined NCDOT in their primary suit and filed a claim directly against NCDOT. At trial, the following testimony was presented regarding the visibility of the filled lateral ditch and the time it would have taken to fill in:

¶ 5 Plaintiffs presented the testimony of Edward Shane Mitchell, a volunteer fireman who responded to the scene of the accident. His testimony was presented through a videotaped deposition that was to be given "the same consideration and [was] to be judged as to credibility and weight and otherwise considered by [the jury], . . . as if the witness were present and gave from the witness stand the same answers as were given by the witness when the deposition was taken." Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] Well I think you testified that you observed that there was what you called a flat spot in the ditch that goes along the north side of Highway 56.
>
> [MITCHELL:] Right.
>
> [PLAINTIFFS:] And when you say "flat spot," you mean that the ditch was filled in so it wasn't – it wasn't deep and it didn't have the slopes you would expect?
>
> [MITCHELL:] Right.
>
> [PLAINTIFFS:] And that was something you could observe just by looking at it, right?
>
> [MITCHELL:] Well, that night, yes.
>
> [PLAINTIFFS:] And – and during the day you could see if the ditch didn't have the – the "V" shape and it – it was filled up in the bottom; you could see that, couldn't you?
>
> [MITCHELL:] You – are you referring to as me just riding by there, looking, or –
>
> [PLAINTIFFS:] Well, if you had walked down the shoulder of that road, you could have seen if it wasn't raining that there was – that the ditch was filled in partway, couldn't you?

> [MITCHELL:] Someone could. I wouldn't say that I would.
>
> . . .
>
> [PLAINTIFFS:] Someone who was looking at the condition of that ditch would have been able to see that it was filled in; is that right?
>
> [MITCHELL:] I would suppose so.

¶ 6 Plaintiffs also called Jonathan Tyndall, who worked for NCDOT as County Maintenance Engineer in Franklin County, meaning he was "responsible for all of the maintenance and some construction on all state-maintained roads in that county" at the time of the accident. On direct examination, Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] And you testified before that when you went out there, that you believed that the DOT ditch, the lateral ditch, was in your words substandard when you examined it right after this happened, didn't you?
>
> [TYNDALL:] It was at a point where it needed to be noted for maintenance.

¶ 7 Later, Plaintiffs called Vernon Hicks, who was a combat engineer in the Marine Corps and at the time of the accident worked for NCDOT in the Bridge Management Unit. On direct examination, Plaintiffs elicited the following testimony:

> [HICKS:] . . . . And so I looked down the road and walked down the ditchbank, and there's a flat spot in there. I guess it's maybe 50 or 100 feet or something like that down the road from the driveway. And I am trying to figure out how did the water get to this point where the sand was, down the road down there, looking at it from a drainage point of view, you know. Anyway --
>
> [PLAINTIFFS:] Let me ask you this. You said you saw a flat spot in the ditch?
>
> [HICKS:] Yes.
>
> [PLAINTIFFS:] The ditch that is parallel to Highway 56?
>
> [HICKS:] Yes, sir, on the north side of the road.

> [PLAINTIFFS:] Now, was the flat spot that you saw in the ditch, was that flat spot clearly visible?
>
> [HICKS:] Yes.
>
> [PLAINTIFFS:] Did you have to be a trained engineer in order to see a flat spot?
>
> [HICKS:] I don't think so, no, sir.

¶ 8 Plaintiffs also called Matt Sams, a civil engineer working for Accident Research Specialists, who testified as an expert in the field of forensic engineering, which "look[s] at the cause, nature, and effect of something that has gone wrong" in the areas of "transportation, roadways, hydrology, stormwater runoff[,] . . . buildings, bridges, structures, things of that nature, [and] also water treatment plants and things like that." On direct examination, Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] Does this filling up of the ditch take place over a period of time?
>
> [SAMS:] Sure.
>
> [PLAINTIFFS:] Why is that?
>
> [SAMS:] It just -- you know, one clipping, one trip with the mower may not be enough to really, you know, put a significant amount of debris in there. But several trips over the years certainly do. If there is some soil erosion or something like that, that takes time as well.

¶ 9 KMD called Howard Rigsby, an engineer at a forensic engineering firm, to testify as an expert "in the fields of hydrology, drainage engineering, and accident reconstruction." On cross-examination, Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] And it takes a while for that to happen, doesn't it?
>
> . . .
>
> [RIGSBY:] If you're talking about erosion, yes, that takes a while to fill in this kind of ditch.
>
> [PLAINTIFFS:] It takes a lot of grass clippings and a lot of dirt coming off the slopes to fill in a ditch, doesn't it?

> [RIGSBY:] Yes.
>
> [PLAINTIFFS:] And that would happen over a long period of time, wouldn't it?
>
> [RIGSBY:] Yes.
>
> [PLAINTIFFS:] And if somebody would look at it, they would know that it was filled in, wouldn't they?
>
> [RIGSBY:] Yes.
>
> . . .
>
> [PLAINTIFFS:] Mr. Rigsby, in your opinion, for a ditch to completely fill up, like a ditch that has got 45 degree angles and two feet deep like the ditches out here, do you think it would take a period of years for that to fill up through natural erosion?
>
> [RIGSBY:] I would say over a year. I am from the mountains of North Carolina, so they can fill up pretty quick up there. But here in Franklinton, that flat topography, I would think over a year.

¶ 10 After Plaintiffs rested, NCDOT made a motion for directed verdict. The trial court reserved its ruling on the motion for directed verdict and NCDOT renewed its motion at the close of all evidence, which was denied. The jury found only NCDOT liable for negligence. Following entry of judgment, NCDOT made a motion for judgment notwithstanding the verdict, which the trial court denied.

¶ 11 NCDOT appeals the trial court's denial of its motions for directed verdict and judgment notwithstanding the verdict.[2] Specifically, NCDOT contends Plaintiffs failed to prove each essential element of their negligence claim by failing to adequately prove breach based upon a lack of actual or constructive notice of the dangerous condition. NCDOT challenges no other element of negligence.

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2. Plaintiffs attempt to cross-appeal for the first time in their appellee brief, contending the trial court erred in denying statutory interest on the compensatory damages NCDOT was ordered to pay. However, they did not file a notice of appeal and did not file a cross-appeal. We lack jurisdiction over this issue and dismiss it. *See Bd. of Dirs. of Queens Towers Homeowners' Ass'n, Inc. v. Rosenstadt*, 214 N.C. App. 162, 168-69, 714 S.E.2d 765, 770 (2011).

ANALYSIS

¶ 12 "On appeal the standard of review for a [judgment notwithstanding the verdict] is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied. . . . Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo.*

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 322-23, 595 S.E.2d 759, 761 (2004) (citations omitted). "Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion by [a] defendant for a directed verdict." *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 259, 181 S.E.2d 173, 176 (1971); *Bruegge v. Mastertemp, Inc.*, 83 N.C. App. 508, 510, 350 S.E.2d 918, 919 (1986). "To hold that evidence that a defendant *could have been* negligent is sufficient to go to a jury, in the absence of evidence, direct or circumstantial, that such a defendant *actually was* negligent, is to allow the jury to indulge in speculation and guess work." *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 444, 186 S.E.2d 198, 203 (1972).

¶ 13 "It is seldom appropriate to direct a verdict in a negligence action." *Stanfield v. Tilghman*, 342 N.C. 389, 394, 464 S.E.2d 294, 297 (1995).

> In order for [a] plaintiff to survive a motion for a directed verdict or a JNOV, he must first show a *prima facie* case of negligence. . . . Therefore, [the] plaintiff must establish that (1) [the] defendant owed [the] plaintiff a duty of care; (2) [the] defendant's actions or failure to act breached that duty; (3) [the] defendant's breach was the actual and proximate

> cause of [the] plaintiff's injury; and (4) [the] plaintiff suffered damages as a result of such breach.

Smith v. Wal-Mart Stores, Inc., 128 N.C. App. 282, 286, 495 S.E.2d 149, 152 (1998) (internal citations omitted). Since NCDOT only challenges the denial of its motions for directed verdict and judgment notwithstanding the verdict based on insufficient evidence of breach, we do not address any other element. N.C. R. App. P. 28 (2021) ("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.").

> Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street or sidewalk and the injury: he must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travelers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care.

Smith v. Hickory, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960).

> [N]otice may be either actual, which brings the knowledge of a fact directly home to the party, or constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.

Phillips ex rel. Bates v. N.C. Dep't of Transp., 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009) (quoting *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56 (2004)). "Constructive knowledge of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000). Our Supreme Court has held:

> On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing, etc.

Fitzgerald v. City of Concord, 140 N.C. 110, 52 S.E. 309, 309-10 (1905) (holding the trial court erred in granting a nonsuit because it was for the jury to determine if there was constructive notice where the evidence showed that a culvert on a road with a 16 to 18 inch hole in it had been in this condition for several weeks).

¶ 14 NCDOT contends it did not breach its duty under a theory of constructive notice because it exercised proper diligence and there was no evidence of how long the condition existed.[3] We disagree. Here, there was more than a scintilla of evidence to support finding NCDOT breached its duty. There was circumstantial evidence, viewed in the light most favorable to the Plaintiffs, from which the jury could infer the ditch had been filled in for enough time that the condition would have been discovered had NCDOT exercised due diligence.

¶ 15 "In general, evidence of a defendant violating its own voluntary safety standards constitutes some evidence of negligence." *Thompson*, 138 N.C. App. at 656, 547 S.E.2d at 51. Here, according to NCDOT's internal guidelines, maintenance was required when ditches became 50% filled in to ensure they could effectively collect and disperse surface water. Further, the purpose and policy of NCDOT, including in Franklin County, was to prioritize safety. As a result, these guidelines were effectively safety guidelines for the roads of North Carolina, and violation of these guidelines constituted some evidence of breach of duty. Plaintiffs presented more than a scintilla of evidence of a violation of these guidelines, and therefore some evidence of breach, as there were multiple witnesses who testified to seeing the ditch completely filled in shortly after the accident.

¶ 16 There was also circumstantial evidence, viewed in the light most favorable to Plaintiffs, from which the finder of fact could infer the dan-

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3. While issues related to actual notice and creation of the condition have been raised by the parties, we do not address these issues and express no opinion as to them because the trial court rightly denied NCDOT's motions for directed verdict and judgment notwithstanding the verdict on the theory of constructive notice.

gerous condition existed for some time, satisfying constructive notice, including evidence showing it would take "over a year" for "a ditch that has got 45 degree angles and two feet deep like the ditch [in question], . . . to fill up through natural erosion," and the ditch was completely filled in requiring maintenance at the time of the accident. In the light most favorable to the Plaintiffs, this evidence shows the ditch took longer than a year to completely fill in, and it would have been at least halfway filled in for at least six months.[4] Read together with NCDOT's guidelines requiring it to note any ditch more than 50% filled in for maintenance, and viewed in the light most favorable to Plaintiffs, this evidence shows the ditch was in violation of NCDOT guidelines for at least six months. Since the inquiry into whether constructive notice has been established by the time period a deficient condition has existed is a fact sensitive inquiry for the jury, the six month frame here was sufficient to satisfy the Plaintiffs' burden on a motion for directed verdict and was properly submitted to the jury.

¶ 17 Additionally, the evidence, viewed in the light most favorable to the Plaintiffs, showed NCDOT had at least six months to discover the ditch filling-in beyond 50%, which was conspicuous at the time it was completely filled in,[5] through its employees or contractors mowing the area, its employees inspecting roads in the county, and its employees driving the county outside of work, all of whom had a duty or expectation to report such a problem according to their supervisor. The alleged failure to discover the deficiency in this ditch over the course of those six months constitutes more than a scintilla of evidence NCDOT did not exercise due diligence.

¶ 18 Altogether, as set out above, there was more than a scintilla of evidence NCDOT breached its duty by failing to maintain the completely

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4. The jury could reasonably infer it would take at least six months for the ditch to become 50% filled in from the expert testimony that it would take over one year for the ditch to become 100% filled in. *See Maxwell*, 164 N.C. App. at 322, 595 S.E.2d at 761 ("When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence.").

5. We note that although there is no testimony indicating the process of the ditch filling in would have been conspicuous, if the completely filled in ditch was conspicuous, viewing the evidence in the light most favorable to the Plaintiffs and giving them every reasonable inference, the process of the ditch going from 50% filled in to completely filled in was conspicuous. *See Maxwell*, 164 N.C. App. at 322, 595 S.E.2d at 761 ("When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence.").

filled ditch, which had been at least half filled, in violation of NCDOT guidelines, for at least six months, and, had NCDOT exercised due diligence, it would have discovered the "clearly visible" deficient ditch through its review of Highway 56 and the surrounding areas.

¶ 19 Furthermore, the cases on which NCDOT relies to assert otherwise are not controlling here. The cases cited focus on the length of time required to show constructive notice in cases regarding defective sidewalks, in which we found three and four years was not sufficient to establish constructive notice. *See Desmond v. City of Charlotte*, 142 N.C. App. 590, 544 S.E.2d 269 (2001) (relating to a 0.5 inch elevation difference between sidewalk concrete slabs for 1-2 years prior to the incident, and at the time the difference was 1.6 inches); *Willis*, 137 N.C. App. 762, 529 S.E.2d 691 (2000) (relating to a 1.25 inch elevation difference between sidewalk concrete slabs). In the specific circumstance of these cases, the defect was minor and difficult to observe. However, here, there was evidence from multiple witnesses showing that the defect in the ditch was "clearly visible"; after "[taking] a look at [the road with the ditch]" the ditch "was at a point where it needed to be noted for maintenance"; and "[the filled in ditch] was something you could observe just by looking at it[.]" Thus, this case is distinct from *Willis* and *Desmond*.

CONCLUSION

¶ 20 There was more than a scintilla of evidence to support the jury finding NCDOT had constructive notice of the deficient condition and breached its duty. Viewing the evidence in the light most favorable to the Plaintiffs, the filling in of the ditch beyond 50%, in violation of NCDOT guidelines, would have been conspicuous for at least six months prior to Plaintiffs' accident. NCDOT's motions for directed verdict and judgment notwithstanding the verdict were properly denied.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

IN RE J.S.G.

[276 N.C. App. 89, 2021-NCCOA-40]

IN THE MATTER OF J.S.G.

No. COA20-82

Filed 2 March 2021

Drugs—indictment—delivery of a controlled substance—sufficiency—"believed/told to be Adderall"

A juvenile petition failed to properly allege the crime of delivering a controlled substance under N.C.G.S. § 90-95(a)(1) where it did not sufficiently allege the "controlled substance" element of the crime by describing delivery of "1 orange pill believed/told to be Adderall."

Appeal by defendant from orders entered 14 August 2019 by Judge Marion M. Boone and 6 September 2019 by Judge Thomas B. Langan in District Court, Surry County. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah G. Zambon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Juvenile appeals adjudication and disposition orders adjudicating him delinquent and ordering him to 12 months of probation. Where the juvenile petition alleged that the juvenile had delivered a "pill believed/told to be Adderall," the petition failed to identify the pill as a controlled substance under North Carolina General Statute § 90-95(a)(1). The juvenile petition was therefore insufficient to confer jurisdiction to the district court, and we vacate the orders.

I. Background

¶ 2 The State's evidence tended to show that on 8 February 2019, Doug,[1] a middle school student, was acting "different than normal" at school: "He was very jittery, legs shaking, very talkative, out of his seat." Doug's teacher called the school resource officer ("SRO") who questioned him about whether he had taken anything. Doug stated that another middle

1. Pseudonyms are used.

school student, Kevin, had given him Adderall, and he "had beg[u]n to be nervous about what he had done to his body." Doug went home.[2]

¶ 3 Kevin was called into the principal's office. The principal asked Kevin if he had given Doug anything. Kevin said he gave him ibuprofen because Doug had been "bugging him" about giving him some Adderall – Kevin has a prescription for Adderall to address his diagnosis of ADHD – so he "handed him a ibuprofen, and said here, here's you an Adderall." Kevin described the pill as an orange ibuprofen.

¶ 4 On 10 April 2019, a juvenile petition was filed alleging Kevin was delinquent and charging him with possession of a controlled substance with intent to deliver under North Carolina General Statute § 90-95(a)(1). The petition stated that Kevin had delivered "1 pill[,]" namely "1 orange pill believed/told to be Adderall[.]" During Kevin's hearing his attorney made a motion to dismiss, one of the basis was that "the petition is defective, and therefore this matter needs to be dismissed." Kevin's motion to dismiss was denied.

¶ 5 On 14 August 2019, Kevin was adjudicated delinquent for possession with intent to manufacture, sale, or deliver a controlled substance under North Carolina General Statute § 90-95(a)(1). On 6 September 2019, a juvenile level 1 disposition order was entered, and Kevin was placed on 12 months of probation, ordered to attend multiple treatment programs, and to perform community service. Kevin appeals.

II. Juvenile Petition

¶ 6 Kevin contends that "the trial court lacked subject matter jurisdiction where the petition failed to adequately allege a crime when it described delivery of '1 orange pill believed/told to be Adderall.' " (Original in all caps.) "In a juvenile delinquency action, the juvenile petition serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal."

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2. No medical evidence was offered indicating whether Doug's "different" behavior was due to taking Adderall, his own nervousness about what he may have taken, or some other cause.

State v. Mayo, 256 N.C. App. 298, 300, 807 S.E.2d 654, 656 (2017) (citation and quotation marks omitted).

¶ 7 When reviewing a juvenile delinquency petition,

> it is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time. Therefore, we review the juvenile's argument on this issue to determine if the juvenile petition was in fact fatally defective.
>
> . . . When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court. Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue.
>
> Although an indictment must give a defendant notice of every element of the crime charged, the indictment need not track the precise language of the statute. An indictment which avers facts which constitute every element of an offense does not have to be couched in the language of the statute. An indictment need not even state every element of a charge so long as it states facts supporting every element of the crime charged. North Carolina General Statutes, section 15A–924(a)(5) (2005) requires that a criminal pleading set forth a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

S.R.S., 180 N.C. App. at 153, 636 S.E.2d at 279-80 (citation and quotation marks omitted).

¶ 8 Kevin's juvenile delinquency petition alleged the offense as possession of a controlled substance with intent to manufacture, sell, or deliver under North Carolina § 90-95(a)(1): "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) *the substance must be a controlled substance*; (3) there must be intent to sell or distribute the controlled substance."

State v. Carr, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001); *see* N.C. Gen. Stat. § 90-95(a)(1) (2019) (emphasis added).[3]

¶ 9 We find Kevin's argument well-reasoned, and thus repeat it here:

> From the day this incident occurred, [the SRO] and the State have not known whether the pill given to [Doug] was Adderall or merely ibuprofen. This lack of knowledge is illustrated by the way it chose to word the petition: equivocally. According to the petition, the pill may have been Adderall, or it may have been ibuprofen as [Kevin] told [the SRO] and [principal]. Although this allegation is accurate – [the SRO] could only say what [Doug] was told or believed – the petition fails to charge a crime because it both (1) does not allege the controlled substance element and (2) appears to charge two separate crimes.[4] Juveniles, like adults have "the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense." *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). That did not happen here. Accordingly, [Kevin's] adjudication and disposition orders must be vacated.

¶ 10 The State counters by noting that neither the exact language of the charging statute nor any other magic words are required in a juvenile petition and that "whether the pill was Adderall is an evidentiary issue for the trial court to decide[.]" But the State fails to address Kevin's actual argument – since the indictment stated only that the substance was "believed" to be Adderall, the State failed to allege an essential element of the crime. *See generally Carr*, 145 N.C. App. at 341, 549 S.E.2d at 901; *see* N.C. Gen. Stat. § 90-95(a)(1). Although a "controlled substance may be identified an official name, common or usual name, chemical name, or trade name[,]" the indictment must identify it as a controlled substance, since "the identity of the controlled substance is an essential element of the crime of possession of a controlled substance with the intent to

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3. North Carolina General Statute § 90-95 has since been amended; the amendment is not relevant to this case. *See* N.C. Gen. Stat. § 90-95 (2020).

4. Kevin argues along with violation of North Carolina General Statute § 90-95(a)(1) the petition "appears to charge" under North Carolina General Statute § "90-95(a)(2), sale or delivery of a counterfeit controlled substance[.]"

sell or deliver." *State v. Stith*, 246 N.C. App. 714, 717, 787 S.E.2d 40, 43 (2016) (citation, quotation marks, brackets and footnote omitted), *aff'd per curiam*, 369 N.C. 516, 796 S.E.2d 784 (2017).

¶ 11 The State fails to direct us to any case law indicating that an indictment is sufficient if it identifies a controlled substance based upon what someone "believed" it was or was "told" it was. No one other than Kevin and Doug saw the pill. While distribution of a controlled substance in a school is a serious problem, the law does not allow a juvenile petition to be based upon conjecture regarding the actual substance distributed. While the State contends the petition "alleges that the Juvenile delivered the substance[;]" it actually does not. The indictment alleges only "that the Juvenile delivered" what someone *believed* and what the State was *told* was a controlled substance.

¶ 12 The State compares this case to *S.R.S.*, where, according to the State, "an indictment was found to be sufficient for communicating threats when . . . 'the totality of the circumstances demonstrate that the juvenile had notice of the precise statutory provision as well as the precise conduct that was alleged to be a violation[.]' " In *S.R.S.*, the juvenile challenged the petition as fatality defective as it alleged he threatened "to injur[e] the person *and* property" of another whereas the specific threat alleged to did not refer to property. *S.R.S.*, 180 N.C. App. at 155, 636 S.E.2d at 281 (emphasis in original). However, *S.R.S.*, is inapposite to the challenge here. *S.R.S.* would be analogous only had that petition alleged the State "believed" or was "told" the juvenile made a threat but not that he actually made a threat. In other words, if the State had included language which indicated the entire threat, regardless of the specifics, may not have even happened. *See generally id.* In addition, threats are quite different from controlled substances. The identification of the controlled substance is a crucial element of the crime of distribution of a controlled substance, and the crime charged depends upon the exact controlled substance involved. *See State v. Ward*, 364 N.C. 133, 143, 694 S.E.2d 738, 744 (2010) ("First and foremost is the obvious point that throughout the lists of Schedule I through VI controlled substances found in sections 90–89 through 90–94, care is taken to provide very technical and specific chemical designations for the materials referenced therein. These scientific definitions imply the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in N.C.G.S. § 90–95 are imposed." (citation, quotation marks, and brackets omitted)). Ultimately, this indictment fails to "set forth a plain and concise factual statement . . . with sufficient precision clearly to apprise the defendant . . . of the conduct

which is the subject of the accusation" as it is unclear whether a controlled substance was involved at all. *Id.* at 153, 636 S.E.2d at 280. Accordingly, we vacate Kevin's adjudication and disposition orders.

¶ 13 We also note that Kevin made other arguments on appeal which we need not address since we are vacating the orders. Some of the additional arguments on appeal are related to the evidence of the identification of the pill. For example, Kevin raised arguments regarding the denial his of motion to dismiss based on the sufficiency of the evidence and the admission of lay testimony from the SRO regarding identification of the pill. We note that the SRO never saw the pill, so his lay testimony of visual identification was based only upon Doug's description of the pill he took. This testimony would not be competent evidence to identify the controlled substance, as the Supreme Court has determined that expert witness testimony is required to establish that a pill is in fact a controlled substance because this evidence "must be based on a scientifically valid chemical analysis and not mere visual inspection." *Ward*, 364 N.C. at 142, 694 S.E.2d at 744 (footnote omitted).

> The *Ward* and *Llamas-Hernandez* decisions result in two general rules. First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. Second, testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible.

State v. Carter, 255 N.C. App. 104, 107–08, 803 S.E.2d 464, 466–67 (2017) (citations omitted).

III. Conclusion

¶ 14 Because the juvenile petition failed to properly allege the crime of delivering a controlled substance, we vacate the adjudication and disposition orders.

VACATED.

Judges DIETZ and ZACHARY concur.

PORTERS NECK LTD., LLC v. PORTERS NECK COUNTRY CLUB, INC.

[276 N.C. App. 95, 2021-NCCOA-41]

PORTERS NECK LIMITED, LLC, Plaintiff
v.
PORTERS NECK COUNTRY CLUB, INC., Defendant

No. COA19-537

Filed 2 March 2021

1. Appeal and Error—interlocutory orders and appeals—sanctions—attorney fees—substantial sum immediately payable

An interlocutory order for sanctions requiring defendant to pay more than $48,000 in attorney fees to plaintiff affected a substantial right because the sum was significant and due immediately, so interlocutory review was appropriate.

2. Discovery—sanctions—Rule 37—conclusion supported by unchallenged findings—no abuse of discretion

Defendant failed to show that the trial court abused its discretion by granting plaintiff's Civil Procedure Rule 37 motion for sanctions where the trial court's unchallenged findings supported the conclusion that defendant violated the court's discovery order.

3. Attorney Fees—sufficiency of findings—customary fee for like work—counsel's affidavit

Where the trial court's order granting attorney fees as a sanction for defendant's discovery violations was not supported by evidence showing the "customary fee for like work" by others in the legal market—rather, the only evidence on the matter was the conclusory affidavit of plaintiff's counsel—the order was vacated with respect to the amount of attorney fees awarded and remanded for further proceedings.

Appeal by defendant from order entered 11 December 2018 by Judge Andrew T. Heath in New Hanover County Superior Court. Heard in the Court of Appeals 10 February 2021.

Randolph M. James, P.C., by Randolph M. James and Kyle Martin, and Wall Babcock LLP, by Kelly A. Cameron for plaintiff-appellee.

Gordon Rees Scully Mansukhani, LLP, by Robin K. Vinson and Thomas B. Quinn, pro hac vice, and Ward and Smith, P.A., by Alexander C. Dale, for defendant-appellants.

TYSON, Judge.

¶ 1 Porters Neck Country Club, Inc. ("Defendant") appeals from order of the trial court awarding attorney's fees. We affirm in part, vacate in part, and remand.

I. Background

¶ 2 Defendant was formed on 24 June 1991 to operate Porters Neck Country Club near Wilmington. Porters Neck Limited, LLC ("Plaintiff"), successor-in-interest to Porters Neck Limited Partnership, was formed on 4 October 1991 to own, develop, and sell real property located within the Porters Neck Plantation residential community. Plaintiff is owned by Porters Neck Company, Inc. Plaintiff and Defendant entered into a Subscription Agreement on 6 September 1991. The Subscription Agreement provided for the transfer of management and control of the Defendant entity from Plaintiff to Defendant's shareholders and members upon the occurrence of stated terms and conditions.

¶ 3 Plaintiff developed the country club and maintained control of Defendant until 12 March 2004, when all parties entered the Porters Neck Country Club Turnover Agreement ("Turnover Agreement"). The Turnover Agreement conveyed ownership of the club to Defendant's shareholders and control thereof was transferred to its membership, provided minimum sale prices for various categories of memberships, were maintained and Defendant made payments from sales of memberships to Plaintiff.

¶ 4 On 26 October 2005, Plaintiff and Defendant entered into a Memorandum of Understanding ("MOU"), which increased membership fees and payments to Plaintiff from sales of memberships. Plaintiff alleged the increases in amounts payable to Defendant under the MOU have expired, but the membership rate increase had not.

¶ 5 On 7 September 2007, Plaintiff and Defendant entered into an Amendment to the Turnover Agreement ("Amendment") that temporally permitted the sale of memberships at prices below those required in the Turnover Agreement. The Amendment also contained a proportional decrease in the payments due Plaintiff from the sale of the memberships. Plaintiff alleged this agreement has expired.

¶ 6 Plaintiff alleged Defendant continued to sell memberships at the reduced prices and making the reduced payments to Plaintiff under the expired Amendment. Plaintiff further alleged they have not received any payments from Defendant since 13 August 2014.

¶ 7 Plaintiff filed an action alleging breach of contract, unfair and deceptive trade practices, and tortious interference with contract, and sought an accounting, an injunction against continued breach, and asserted punitive damages on 4 August 2014. Plaintiff and Defendant have been involved in discovery since then. By Order Dismissing Appeal filed 6 December 2017, Plaintiff's only remaining claim is for breach of contract.

¶ 8 During discovery, Plaintiff filed a motion to compel discovery of email correspondence and meeting minutes. The trial court granted Plaintiff's motion to compel in part on 30 November 2016. Defendant did not file an appeal nor request for the denied motion to be calendared. On 12 December 2016, Defendant filed a motion for reconsideration pursuant to North Carolina Rule of Civil Procedure 59, which was denied at hearing. *See* N.C. Gen. Stat. § 1A-1, Rule 59 (2019).

¶ 9 Plaintiff's counsel sent Defendant's counsel a letter outlining alleged discovery deficiencies and its non-compliance on 12 April 2018 and moved for sanctions on 9 May 2018.

¶ 10 The parties and the trial court held a status conference, wherein Plaintiff's counsel brought the court's attention to the ongoing discovery disputes, and alleged Defendant was not in compliance with the 30 November 2016 order to compel. Defendant's counsel represented to the trial court the discovery Defendant had produced and asserted Plaintiff had accepted the documents.

¶ 11 The parties reconvened for trial on 30 July 2018, the trial court held pretrial hearings on motions *in limine* and Plaintiff's motion to compel. During this hearing, while the jury pool waited in the courthouse, Defendant produced approximately 200 pages designated as "Club's Response to Developer's Verified Motion." The response was dated 11 June 2018, but that date was crossed out and the date 30 July 2018 was handwritten over it. The certificate of service was asserted service by hand or by first class mail to Plaintiff on 11 June 2018. The trial court released the jury pool and continued the case to allow Plaintiff time to review the documents.

¶ 12 On 8 October 2018, the trial court granted Plaintiff's motion for sanctions pursuant to North Carolina Rules of Civil Procedure 11 and 37 for Defendant's failure to comply with the 30 November 2016 production order. *See* N.C. Gen. Stat. § 1A-1, Rules 11 & 37 (2019). The trial court ordered Defendant to pay the reasonable costs and expenses, including attorney's fees, related to its failure to comply and for the existing delay.

¶ 13 The trial court did not set the amount of fees and expenses at the time and required additional evidence to determine the amount due. On 5 November 2018, Defendant filed a notice of appeal of the order.

¶ 14 On 8 November 2018, the trial court heard arguments and awarded Plaintiff $15,120.50 in attorneys' fees and expenses under Rule 37 and $33,570.00 under Rule 11 on 28 December 2018. Defendant filed another appeal on 2 January 2019. On 30 September 2020, Plaintiff filed a motion to dismiss both of Defendant's appeals to this Court, which was referred to this panel for review by order entered 3 November 2020.

II. Jurisdiction

A. Interlocutory Order and Appeal

¶ 15 **[1]** Based upon Plaintiff's referred motion to dismiss, we first address whether Defendant's appeal is properly before this Court. Defendant concedes its appeal is interlocutory and asserts the trial court was divested of jurisdiction based on its 5 November 2018 notice of appeal.

¶ 16 "Where a party appeals from a *non*appealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case." *RPR & Associates, Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002) (citations omitted).

¶ 17 By ordered entered 19 February 2019, our Court dismissed Defendant's appeal of the initial 8 October 2018 order as interlocutory. "[A]n order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment. *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988) (citations omitted).

¶ 18 The trial court retained jurisdiction to enter the 28 December 2018 sanctions order.

B. Substantial Right

¶ 19 Defendant further contends its appeal affects a substantial right. Our Supreme Court has defined "[a]n interlocutory order [as] 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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted).

¶ 20 This Court has added: "As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 188 (2011) (citations omitted). "Appeals from interlocutory orders are only available in exceptional circumstances." *Id.* (citation and internal quotation marks omitted). The reason for "[t]he rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citation omitted).

¶ 21 "No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citations and quotation marks omitted). "Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Id.* at 642, 321 S.E.2d at 250.

Turning to the order before us, generally "[t]he order granting attorney 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." *Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989).

C. Sanctions

¶ 22 An order for sanctions may be immediately appealed if it affects a substantial right under N.C. Gen. Stat. §§ 1-277 or 7A-27(b)(3)(a) (2019). A substantial right is invoked when the sanction ordered is a substantial sum and is immediately payable. *See Estate of Redden ex rel. Morely v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006) ("The Order appealed affects a substantial right of [the] Defendant . . . by ordering her 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 and N.C. Gen. Stat. § 7A-27(d) [2005]." (citations omitted)), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007); N.C. Gen. Stat. § 7A-27(b).

¶ 23 The trial court ordered Defendant to immediately pay attorneys fees as sanctions to Plaintiff totaling in excess of $48,000. Defendant has sufficiently established the order affects a substantial right and that interlocutory review is appropriate. Plaintiff's motion to dismiss Defendant's appeal is denied.

¶ 24 Additionally, Defendant has also filed a conditional petition for writ of certiorari requesting we review not only the 28 December 2018 sanctions order but also the 30 November 2016 order compelling production and the 8 October 2018 order, which found Defendant in violation of the 30 November 2016 order. As we have determined Defendant has shown a substantial right to immediately appeal the 28 December 2018 order, we dismiss that part of the petition as moot. As Defendant raises no arguments in briefing to this Court challenging the two prior orders, we deny Defendant's petition seeking review of those two orders. *See* N.C. R. App. P. 28(a). Defendant's conditional petition for writ of certiorari is dismissed as moot in part and denied in part.

III. Issue

¶ 25 Defendant argues the trial court erred in awarding sanctions pursuant to North Carolina Rules of Civil Procedure 11 and 37. N.C. Gen. Stat. § 1A-1, Rules 11 and 37.

IV. Rule 37 Sanctions

¶ 26 **[2]** In this appeal, as noted above, Defendant does not raise arguments challenging either the 30 November 2016 order compelling production or the 8 October 2018 order in which the trial court made the initial determination to impose sanctions. Rather, in this appeal, Defendant argues the trial court erred in awarding $15,120.50 in attorney fees pursuant to North Carolina Rule of Civil Procedure 37 in the 28 December 2018 order.

A. Standard of Review

¶ 27 The imposition of sanctions under North Carolina Rule of Civil Procedure 37 for a party failing to comply with discovery requests and the trial court's decisions "is a matter within the sound discretion of the trial court and cannot be overturned on appeal absent a showing of abuse of discretion." *Burns v. Kingdom Impact Glob. Ministries, Inc.*, 251 N.C. App. 724, 729, 797 S.E.2d 21, 25 (2017) (citing *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992)).

¶ 28 "An abuse of discretion may arise if there is no record evidence which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *Butler v. Speedway Motorsports, Inc.*, 173 N.C. App. 254, 264, 618 S.E.2d 796, 803 (2005) (citations omitted).

B. Analysis

¶ 29 North Carolina Rule of Civil Procedure 37(b)(2) provides:

> **Sanctions by Court in Which Action is Pending**. —If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2019).

¶ 30 "[A] broad discretion must be given to the trial judge with regard to sanctions." *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citations and internal quotation marks omitted). This Court further stated, "[a] trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is among those expressly authorized by statute and there is no specific evidence of injustice." *Id.* at 417, 681 S.E.2d at 795 (citations and internal quotation marks omitted).

¶ 31 On appellate review, "where the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision." *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911, *aff'd per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006).

¶ 32 The trial court made the following unchallenged findings of fact in its 8 October 2018 sanctions order:

1. During the course of this matter, discovery disputes arose between the parties. After multiple hearings and conference calls regarding those disputes, [the trial court] entered an Order dated 26 November 2016 and entered 30 November 2016[.]

. . .

14. On 12 April 2018, counsel for Plaintiff corresponded with counsel for Defendant outlining ongoing discovery issues and Defendant's non-compliance with [the trial court's] Order.

15. On 17 April 2018, counsel for Plaintiff again corresponded with counsel for Defendant outlining discovery issues, Defendant's non-compliance with the [the trial court's] Order, and a sense of urgency given the upcoming trial date.

16. On 9 May 2018, Plaintiff filed their Motion to Compel alleging that [Defendant] had failed to comply with [the trial court's] November 2016 Order, among other things.

. . .

19. During the 24 July 2018 status conference, Counsel for Plaintiff directed the Court's attention to the ongoing discovery disputes, Plaintiff's Motion to Compel, and contended that the Defendant was not in compliance with [the trial court]'s Order because Defendant had failed to produce items the Order compelled them to produce.

20. During the 24 July 2018 status conference, Counsel for Defendant took an opposite position and represented to the court that Defendant had produced, and Plaintiff had accepted, the items that Plaintiff contended Defendant had failed to produce. Defendant further represented to the Court that they would be prepared for trial as scheduled. Specifically, Counsel for Defendant stated, "I take issue with these discovery issues. I'm going to hand up to you when we have that hearing, the [d]ate-stamped number where the documents that they claim we haven't produced to them, I've got the [d]ate-stamped number

> where they accepted it, they just don't know they had it or they haven't looked. And so it's not flippant that I haven't gone out of my way to educate people on that, I don't need to I don't believe. So when we convene next week, I would hope that those issues might be able to get resolved before Monday, that would be good. But if not, I guess we tee that up and then a jury would come in probably Tuesday afternoon or Wednesday, something like that.
>
> . . .
>
> 24. Contrary to counsel for Defendant's statements to the Court on 24 July 2018 that Defendant would provide [d]ate-stamped copies showing Plaintiff's receipt of all documents, the responsive pleading included a section entitled "Documents Subject to Motion for Reconsideration" which outlined the Defendant's basis for refusing to produce[.]
>
> . . .
>
> 26. The undersigned finds that the certificate of service for Defendant's responsive pleading was originally dated June 11, 2018 (the previously scheduled trial date), but over the top of the June 11 date is written July 30, 2018 (amending the certificate of service to reflect the most recent trial date). The undersigned finds that Defendant purposefully delayed tendering responsive documents and the responsive pleading such that it would cause surprise and delay. The Court finds that this tactic did cause surprise and did delay the trial in this matter.

¶ 33 The trial court further found the 26 November 2016 order remained valid, Defendant continues to willfully withhold the documents despite being compelled, and Defendant had the ability to comply with the order. Defendant does not challenge these findings, which are binding upon appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 34 The trial court's findings of fact support the conclusion that Defendant continued to violate the 30 November 2016 discovery order. Defendant has failed to show the trial court abused its discretion by granting Plaintiff's motion for sanctions. That portion of the trial court's order is affirmed.

V. Rule 37 Award of Attorney's Fees

¶ 35 **[3]** Defendant further argues the trial court lacked evidence to award fees and costs. North Carolina follows the "American Rule" with regards to awards of attorney's fees against an opposing party. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 23-25, 776 S.E.2d 699, 704-05 (2015). Applying the "American Rule", our Supreme Court held each litigant is required to pay its own attorney's fees, unless a statute or agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972).

¶ 36 Over thirty years ago, this Court held: "Rule 37(a)(4) requires the award or expenses to be reasonable, [and] the record must contain findings of fact to support the award of any expenses, including attorney's fees. The findings should be consistent with the purpose of the subsection, which is not to punish the noncomplying party, but to reimburse the successful movant for his expenses." *Benfield*, 89 N.C. App. at 422, 366 S.E.2d at 504 (citations omitted).

¶ 37 The following year after deciding *Benfield*, this Court listed the required findings, "in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989).

¶ 38 The trial court found in its order awarding attorney's fees:

> 4. Based on the submissions of the parties, Plaintiff's counsel's stated billable hourly rates are reasonable and are in keeping with the usual and customary fees charged by other attorneys of similar experience, skills and practice areas in the New Hanover County legal community.
>
> 5. Based on the submissions of the parties as well as the time expended by the Court during the court's consideration of Plaintiff's motion to compel, [trial court]'s Order and Plaintiff's motion for sanctions, the court finds that the time and labor expended and expense incurred by Plaintiff addressing Defendant's deficient discovery and the necessary interventions of this Court were reasonable and necessary to prosecute Plaintiff's claims.

> 6. After reviewing the submissions of the parties, the court finds that the amount of $15,120.5 . . . reflects the amount of the reasonable expenses incurred, including reasonable attorney' (sic) fees because of the Defendant's sanctionable conduct under Rule 37 as set forth in the Court's 8 October 2018 Order.

¶ 39 The trial court found that counsel's rates were set forth in an affidavit; those rates were comparable and reasonable for the work done by others in the legal market; the subject matter of the case, and the experience of the attorneys; the specific work done by counsel was reasonable and necessary; and the costs incurred by Plaintiffs were reasonable and necessary. Defendant challenges and argues these findings are not supported by evidence in the record because the court relied only upon Plaintiff's counsel's self-serving affidavits and conclusory statements.

¶ 40 In *WFC Lynwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 935, 817 S.E.2d 437, 444 (2018), this Court vacated and remanded an attorney's fee award based on an affidavit that offered no statement on comparable rates in the field of practice and did not offer comparable rates of attorney's fees at the hearing.

¶ 41 Here, the affidavit does not state a comparable rate by other attorneys in the area with similar skills for like work, and it contains a conclusory assertion: "The rates charged by our lawyers and staff are customary rates and are reasonable and ordinary for professionals of similar skill and experience practicing in North Carolina's state courts, and are the same rates charged to other clients of the firm for similar services."

¶ 42 Plaintiff submitted insufficient evidence of a comparable fee rate to the trial court to show "the customary fee for like work" by others in the legal market to support a finding on that point, and to award attorney's fees. The trial court erred by making a finding with respect to "the customary fee for like work" absent evidence to support such a finding. *See id.*

¶ 43 We vacate the order with respect to the amount awarded and remand to the trial court. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

VI. Rule 11 Attorney's Fees

¶ 44 Defendant asserts the trial court abused its discretion when it awarded sanctions pursuant to North Carolina Rule of Civil Procedure 11. In light of this Court's holding to vacate with respect to the amount awarded and remand for further proceedings and findings, the trial court's award of attorney's fees pursuant to North Carolina Rule of Civil Procedure 11 is also vacated and remanded.

VII. Conclusion

¶ 45 Defendants interlocutory appeal is properly before us on the award and amount of sanctions. We affirm the trial court's conclusion to award attorney fees for Defendant's discovery violations. We vacate the trial court's finding of "the customary fee for like work" absent comparable evidence of fees charged by others in the legal market with similar skills and experience for like work to support such a finding. We vacate the sanctions order with respect to the amounts awarded pursuant to North Carolina Rules of Civil Procedure 11 and 37 and remand to the trial court for further hearing. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
ANTHONY CAZAL ARNETT

No. COA20-324

Filed 2 March 2021

1. Assault—with a deadly weapon inflicting serious injury—general intent crime—voluntary intoxication defense unavailable

Voluntary intoxication, a defense only for specific intent crimes, could not serve as a defense to assault with a deadly weapon inflicting serious injury, a general intent crime.

2. Constitutional Law—concession of guilt—to element of crime—Harbison inquiry—reliance upon unavailable defense

There was no error in defendant's prosecution for assault with a deadly weapon inflicting serious injury (AWDWISI) where, after

ruling that voluntary intoxication was not available as a defense to AWDWISI because it was a general intent crime, the trial court thereafter allowed defense counsel to admit to the physical act of the offense while denying defendant's intent to commit the offense based on his intoxication. The trial court fulfilled the requirements of *State v. Harbison*, 315 N.C. 175 (1985), by personally inquiring of defendant twice—after denying the voluntary intoxication defense—to ensure that he understood and agreed with his trial counsel's strategy.

3. Constitutional Law—effective assistance of counsel—admission of guilt to element of crime—intoxication defense pursued but unavailable—trial strategy

Defendant failed to show ineffective assistance of counsel where trial counsel admitted to defendant's commission of the physical act of assault with a deadly weapon inflicting serious injury (AWDWISI) while denying defendant's intent to commit the offense based on his intoxication—even though the trial court had ruled that voluntary intoxication was not available as a defense to AWDWISI because it was a general intent crime. The record showed a deliberate trial strategy in the face of overwhelming and uncontradicted evidence of defendant's guilt, and defendant consented to trial counsel's strategy and testified that he committed the assault against the victim.

Appeal by defendant from judgment entered 19 September 2019 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara M. Van Pala, for the State.

Leslie Rawls for defendant-appellant.

TYSON, Judge.

¶ 1 Anthony Cazal Arnett ("Defendant") appeals from judgments entered after a jury returned verdicts finding him guilty of assault with a deadly weapon inflicting serious injury ("AWDWISI") with two aggravating factors and guilty of attaining habitual felon status. We find no error.

I. Background

¶ 2 Defendant was married to Karen Arnett, the complaining witness in this matter, for about four years at the time of trial. A few months prior

to the events underlying these charges, Mrs. Arnett came home from work on 21 November 2018 and found Defendant at home, drinking. He accused her of cheating on him.

¶ 3 They got into Defendant's car and drove to the grocery store. As they drove, Defendant struck Mrs. Arnett and took her cellphone. When they arrived at the store, Defendant threatened to "stomp her" if she began "showing out." Mrs. Arnett went inside the store and asked the manager to call law enforcement. Defendant was charged in the incident, and a court date was set for 23 January 2019.

¶ 4 Two days prior to trial on 21 January 2019, Mrs. Arnett arrived home from work around 3:00 p.m. Defendant was already home and had started drinking around 2:30 p.m. Defendant was drinking twenty-five-ounce High Gravity Category Five Hurricane beers. The beers are a malt liquor with a content of 8.1 percent alcohol. Defendant had ingested three beers prior to his wife arriving home. Defendant and Mrs. Arnett drove to the grocery store to purchase food and more beer. Defendant had consumed another beer by the time they returned home from the grocery store.

¶ 5 During dinner, Defendant drank yet another beer and started another. Defendant then went to a neighbor's home for marijuana. The neighbor offered Defendant Xanax instead, so Defendant took eight Xanax bars. He ingested two of them, returned home and sat down to finish his dinner.

¶ 6 Mrs. Arnett testified Defendant's demeanor had changed when he returned home. Mrs. Arnett believed Defendant had "done something else back there besides drinking the alcohol." Defendant stood in their bedroom and threw a beer can. Mrs. Arnett telephoned her mother and remained on the phone so Defendant would not "put his hands on [her]."

¶ 7 A few minutes later, as Mrs. Arnett sat on the bed, Defendant came back into the bedroom and began assaulting her. He slammed her face against the wall. "[H]e took his fist with the rings on and hit me [] in the eye and busted my eye." Next, "he got the knife with the little hook on it and he sat down on top of me and he brought it to my throat . . . And then he took it to my chin and cut my chin."

¶ 8 Defendant told Mrs. Arnett that she was not going to make it to court on January 23. He got a butcher knife from the kitchen and threatened to cut her eyes. When Mrs. Arnett put up her hands in defense, Defendant cut her arm and thumb. Defendant also punched her repeatedly.

¶ 9 When Mrs. Arnett got up to go into the bathroom, he kicked her legs and said he would break them so she could not go to court. Defendant cut her head and stabbed her in the side. Mrs. Arnett testified that Defendant repeatedly punched her in the face "so nobody else would look at me." Defendant hit Mrs. Arnett in the back of the head with a CO2 air gun. Around 3:30 a.m., Defendant went to sleep.

¶ 10 Mrs. Arnett woke up in pain around 7:20 a.m. and asked Defendant to take her to the hospital. She offered to say whatever he wanted. He drove her to the Haywood Regional Medical Center emergency room.

¶ 11 Mrs. Arnett told the hospital staff she had fought with three women at the Dollar General store. The nurse responded the hospital was required to call law enforcement officers. Mrs. Arnett agreed.

¶ 12 Haywood County Sheriff's deputies Ken Stiles and Randy Jenkins responded to the hospital's call. Deputy Jenkins took Defendant into a separate room. Deputy Stiles then asked Mrs. Arnett what happened. She described what Defendant had done to her. Deputy Stiles smelled alcohol on Defendant, but he was not slurring his words nor stumbling while he was walking.

¶ 13 Defendant was arrested for violating the pretrial release conditions imposed from his November 2018 arrest. Upon searching him, deputies found Mrs. Arnett's cellphone, a wallet, and a hook blade pocketknife with fresh blood on it. Deputy Stoller transported Defendant to jail.

¶ 14 Mrs. Arnett's head and cheek were swollen. Both of Mrs. Arnett's eyes were black and blue. She suffered lacerations across her forehead and on her chin. She was bruised, and her hands and arms contained cuts. Her nose was broken, and she had a stab wound on her abdomen. She had a deep cut in the tendon between her thumb and index finger, which required surgery. She remained hospitalized until 24 January 2019. As a result of her injuries, Mrs. Arnett cannot grasp well with her hand, which affects her ability to work.

¶ 15 Officers secured and executed a search warrant at the Arnetts' home. They found and collected multiple bloody items from the bedroom and bathroom. In a kitchen drawer, they found a bloody knife.

A. Proceedings in the Trial Court

¶ 16 Defendant was indicted on charges of AWDWISI and attaining habitual felon status. The State gave notice of its intent to prove multiple aggravating factors related to the assault charge.

¶ 17 Defendant's trial counsel filed a Notice of Voluntary Intoxication Defense stating he would "show [Defendant] could not form the specific intent necessary for the crimes charged." The State submitted a memorandum of law in opposition and argued AWDWISI is not a specific intent crime and Defendant's voluntary intoxication is not a valid defense.

¶ 18 The trial court ruled AWDWISI was a general intent crime and the asserted defense of voluntary intoxication was not available to Defendant.

> [T]he Court having heard from counsel, would determine that in this particular offense, more specifically [AWDWISI], which is not the offense of intent to kill, this is a general intent crime, there is no specific intent element . . . for the charge for which the State is proceeding today, the voluntary intoxication is not available to the defendant and as such, the Court will abide by, comply with, and follow prior North Carolina precedent and not allow the defense of voluntary intoxication.

¶ 19 Defendant was tried by jury on 16 September 2019. The substantive offense of assault and habitual felon status trials were bifurcated.

¶ 20 Defendant's attorney stated he would admit an element of the physical act of the offense, but not Defendant's guilt because he lacked intent. Defendant told the court he understood his attorney would admit an element of the offense. Defendant further affirmed he had discussed this strategy with his attorney and agreed with this argument.

¶ 21 The trial court inquired of Defendant and his counsel as follows:

> THE COURT: [I]f you're admitting that the defendant's guilty of the offense, then we have to make a *Harbison* inquiry. . . you need to talk to your client and let me know if you're admitting that you're guilty or if you are simply admitting to some elements of the crime but denying that he's guilty.
>
> [TRIAL COUNSEL]: Given the jury instructions, Your Honor, and the fact that the jury instructions state that to find the defendant guilty, he must have intentionally assaulted and inflicted serious injury, my interpretation of that is that he is not admitting guilt, just some elements. And I have discussed that with him.
>
> THE COURT: Okay. Mr. Arnett, you understand that [Defense Counsel] is going to admit that you

committed some of the elements of the crime for which you stand accused, that being [AWDWISI]?

THE DEFENDANT: Yes, sir.

THE COURT: And have you discussed that with [Defense Counsel]?

THE DEFENDANT: Yes, sir.

THE COURT: And are you in agreement with that strategy?

THE [DEFENDANT]: Yes, sir.

THE COURT: And you also understand that while he may admit to some elements, he will not be admitting that you are, in fact, guilty of that offense?

THE [DEFENDANT]: Yes, sir.

THE COURT: And you are an (sic) agreement with that?

THE [DEFENDANT]: Yes, sir.

¶ 22 Defense counsel focused much of his cross-examination of Mrs. Arnett and the investigating officers on proving elements of voluntary intoxication.

¶ 23 Defendant testified in his defense. Trial counsel's direct examination primarily focused on Defendant's consumption of intoxicants, including Xanax, during the afternoon and night of the assaults. Defendant testified that he blacked out and did not remember his actions. Defendant maintained, throughout direct and cross examinations, that his last memory is a few moments after taking the Xanax and he did not remember the later events of that night.

¶ 24 Defendant's trial counsel made an offer of proof from Dr. Andrew Ewens, an expert in toxicology and pharmacology. Dr. Ewens had reviewed and evaluated the effects of alcohol and Xanax on Defendant's actions. In Dr. Ewens' opinion, Defendant's actions were consistent with alcohol intoxication and paradoxical effects of Xanax, which could have prevented Defendant from being in control of his actions the night of the crimes.

¶ 25 After hearing from Dr. Ewens, the trial court declined to change its ruling to exclude the defense of voluntary intoxication and declined to give the jury charge on the defense of voluntary intoxication.

¶ 26 Prior to closing arguments, the trial court again inquired of Defendant and his counsel in reference to his admissions under *Harbison*:

> THE COURT: Okay. [Defense Counsel], do you plan on making any admissions of guilt pursuant to *North Carolina versus Harbison* in closing?
>
> [DEFENSE COUNSEL]: Just as a I previously stated, Your Honor, that Mr. Arnett does not deny the actual physical act; however, does deny per the jury instructions that he acted intentionally as to even the overt act itself, not just the harm related.
>
> THE COURT: Okay. And Mr. Arnett, as we discussed earlier, you understand [Defense Counsel] would be admitting that the assault occurred, he's just denying that you were guilty of it because you did not intend for it to occur. Is that correct?
>
> THE DEFENDANT: That's correct, sir.
>
> THE COURT: And you're in agreement with that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay.

B. Verdicts and Sentence

¶ 27 The jury convicted Defendant of AWDWISI and found two aggravating factors existed beyond a reasonable doubt. Following the habitual felon trial, the jury found Defendant guilty of being a habitual felon.

¶ 28 At sentencing, the trial court found aggravating factors outweighed mitigating factors. Defendant was sentenced in the aggravated range to an active term of 120-156 months in prison. Defendant timely filed written notice of appeal.

II. Jurisdiction

¶ 29 Defendant's right to appeal arises from the final judgments entered. N.C. Gen. Stat. §§ 7A–27(b)(1), 15A–1444(a) (2019).

III. Issues

¶ 30 The issues before this Court are whether: (1) the trial court correctly ruled Defendant's defense of voluntary intoxication did not apply to his assault charge; (2) the trial court's *Harbison* inquiries were ad-

equate; and, (3) Defendant's counsel's concession denied him effective assistance of counsel.

IV. Voluntary Intoxication Defense

¶ 31 **[1]** The Supreme Court of the United States explained the difference between the general intent crimes and specific intent crimes:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

Carter v. United States, 530 U.S. 255, 268, 147 L.Ed.2d 203, 215-16 (2000) (internal citations omitted).

¶ 32 Voluntary intoxication is a defense only to a crime that requires a showing of specific intent. *State v. Harvell*, 334 N.C. 356, 368, 432 S.E.2d 125, 132 (1993), (citing *State v. Jones* 300 N.C. 363, 365, 266 S.E.2d 586, 586 (1980)). Trial counsel admitted the assault but argued to the jury that Defendant had consumed so much alcohol and Xanax, he could not intentionally do anything and did not know what he was doing.

¶ 33 AWDWISI is not a specific intent crime. *State v. Woods*, 126 N.C. App. 581, 587, 486 S.E.2d 255, 258 (1997). Voluntary intoxication was never a legal defense available to Defendant.

V. *Harbison* Inquiry

A. Standard of Review

> Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. We [] hold that when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

State v. McAllister, 375 N.C. 455, 463, 847 S.E.2d 711, 716 (2020) (alterations, citations, and internal quotations omitted) (emphasis supplied).

B. *Harbison*

¶ 34 **[2]** Defendant argues the trial court erred by failing to make an adequate inquiry under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

> A defendant's right to plead not guilty has been carefully guarded by the courts. When a defendant enters a plea of not guilty, he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt.
>
> . . . .
>
> A plea decision must be made exclusively by the defendant. A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury. Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences.

Id. at 180, 337 S.E.2d at 507 (internal citations, quotation marks and alterations omitted). Defendant proffers several cases to support his argument that a *Harbison* violation occurred.

1. *State v. Foreman*

¶ 35 The issue in *Foreman* was whether the defendant "received ineffective assistance of counsel when his trial counsel conceded [the [d]efendant's guilt to AWDWISI without his knowing and voluntary consent." *State v. Foreman*, 270 N.C. App. 784, 785, 842 S.E.2d 184, 185 (2020). In *Foreman*, defendant's counsel introduced a "*Harbison* Acknowledgement" prior to opening statements. *Id.* The sworn statement was signed by the defendant and his trial counsel, and stated:

> [I], hereby give my informed consent to my lawyer(s) to tell the jury at my trial that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury. I understand that:
>
> 1. I have a right to plead not guilty and have a jury trial on all of the issues in my case.

> 2. I can concede my guilt on some offenses or some lesser offense than what I am charged with if I desire to for whatever reason.
>
> 3. My lawyer has explained to me, and I understand that I do not have to concede my guilt on any charge or lesser offense.
>
> 4. My decision to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury is made freely, voluntarily and understandingly by me after being fully appraised of the consequences of such admission.
>
> 5. I specifically authorize my attorney to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury.

¶ 36 The trial court found the defendant had "been advised of his attorney's intention to admit his guilt to [AWDWISI]." *Id.* at 787, 842 S.E.2d at 187.

¶ 37 The jury found the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and felonious breaking and entering. *Id.* The defendant appealed "alleging he was denied effective assistance of counsel because his concession of guilt to AWDWISI was not knowing or voluntary." *Id.*

¶ 38 This Court held:

> Defendant's consent to his concession of guilt for AWDWISI was knowing and voluntary. Defendant confirmed that he understood the ramifications of conceding guilt to AWDWISI and that he had the right to plead not guilty. Defendant's counsel filed the *Harbison* Acknowledgment in which Defendant expressly gave his trial counsel permission to concede guilt to AWDWISI after "being fully appraised of the consequences of such admission." In this case, the facts show that Defendant knew his counsel was going to concede guilt to AWDWISI, and the trial court properly ensured that Defendant was aware of the ramifications of such a concession.

Id. at 789–90, 842 S.E.2d at 188.

¶ 39 Here, Defendant was present for two separate *Harbison* inquiries, one at the beginning and one at the end of trial. He was addressed personally by the trial court both times and confirmed he understood and consented to his counsel's actions prior to any purported admission by his counsel.

¶ 40 Defendant heard the trial court's ruling that voluntary intoxication would not be allowed as a defense to his general intent crime. Trial counsel told the court he had discussed this admission of physical acts with his client. The court asked Defendant if he understood his attorney would be admitting some elements of the offense after the trial court had denied the voluntary intoxication defense.

> [DEFENSE COUNSEL]: -- [I]f you look at the jury instructions, Your Honor, they do state intentionally. Expert witness or not, voluntary intoxication defense or not, we still intend to present that defense to the jury.
>
> THE COURT: You can certainly elicit testimony and Mr. Arnett can certainly testify in the manner he deems appropriate. And [we're] just not going to submit as a substantive defense to the jury of involuntary intoxication.

¶ 41 Defendant was given an oral explanation of trial counsel's strategy to admit one element of the crime knowing his voluntary intoxication would not suffice as a defense. Defendant was directly addressed by the trial court to confirm his understanding and agreement to his counsel's plans and strategy. The *Harbison* inquiries as well as the conversation leading up to them are adequate to show Defendant was thoroughly advised and knowingly consented to his attorney's admission to the jury. *Foreman* does not compel a different result under these facts. *Id.*

2. *State v. Fisher*

¶ 42 As the trial court correctly noted, defense counsel can admit an element of a charge without triggering a *Harbison* violation. Our Supreme Court stated: "Although counsel stated there was malice, he did not admit guilt, as he told the jury that they could find the defendant not guilty." *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986).

¶ 43 Defense counsel in *Fisher* stated to the jury:

> You heard [the defendant] testify, *there was malice there*[,] and then another possible verdict is going to say[, "]Do you find him guilty of voluntary

> manslaughter[?"] Voluntary manslaughter is the killing of a human being without malice and without premeditation. It's a killing. And it also has not guilty, remember that too.

Id. (emphasis supplied).

¶ 44 Our Supreme Court held counsel's admission in *Fisher* was "factually distinguishable from [the violation in] *Harbison* in that the defendant's counsel never clearly admitted guilt." *Id.* Rather, defense counsel "stated there was malice [and] . . . told the jury that they could find the defendant not guilty." *Id.*

¶ 45 Like the defendant in *Fisher*, Defendant's counsel conceded Defendant had committed an element of the crime. Trial counsel told the court he planned to admit an element of the offense, but not all of the elements. When asked to clarify, trial counsel said he would not deny Defendant's physical acts but would deny the assault was intentional based on Defendant's not remembering his actions due to voluntary intoxication.

¶ 46 Here, trial counsel admitted an element of the assault charge, rather than admitting guilt to the charge. *Id.* The holding in *Fisher* does not support a reversal in this case.

3. *State v. McAllister*

¶ 47 Our Supreme Court stated in *McAllister*, "we consider whether *Harbison* error exists when defense counsel impliedly—rather than expressly—admits the defendant's guilt to a charged offense. [It is] our determination that the rationale underlying *Harbison* applies equally in such circumstances." *Id.* at 456, 847 S.E.2d at 712.

¶ 48 In *McAllister*, the trial court asked defense counsel if they had a *Harbison* issue prior to opening statements. *Id.* at 459, 847 S.E.2d at 714. The exchange between defense counsel and the court follows:

> THE COURT: Are you expecting to make any [*Harbison*] comments in your opening with regard to admissions?
>
> [DEFENSE COUNSEL]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against—
>
> THE COURT: Well, can you get more specific than that. Because I want to make sure your client

> understands that the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.
>
> [DEFENSE COUNSEL]: Not in opening, I can stipulate to that.

Id. No discussion related to *Harbison* took place throughout the remainder of the trial. *Id.* In defense counsel's closing argument, he made these statements to the jury:

> You heard [the defendant] admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives.

Id. at 461, 847 S.E.2d at 715. "[T]he jury returned a verdict finding defendant guilty of assault on a female and not guilty of all other charged offenses." *Id.*

¶ 49 On appeal, our Supreme Court reasoned, "The only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge." *Id.* at 474, 847 S.E.2d at 723. Further, the *Harbison* issue was never mentioned again throughout the remainder of the trial, and thus the *Harbison* inquiry in *McAllister* was inadequate. *Id.*

¶ 50 Here, Defendant did not deny committing the physical acts toward his wife on direct testimony, and trial counsel stated he was not denying the acts occurred. Unlike the defendant in *McAllister*, the trial court, defense counsel, and Defendant engaged in multiple separate and extensive colloquies, prior to trial and again prior to closing arguments, to address Defendant and his counsel's intent to admit Defendant's physical acts, but not his intent prior to the admission.

¶ 51 Trial counsel stated, "I do have some written [*Harbison*] forms necessary for [Defendant] to sign." Defendant agreed to the admissions prior to trial and to opening and closing statements. Trial counsel did not specifically admit Defendant's guilt to the crime charged. The holding in *McAllister* does not support error, prejudice, or reversal under these facts. *Id.*

VI. Ineffective Assistance of Counsel

A. Standard of Review

¶ 52 **[3]** As noted, *Harbison* errors may also exist when "defense counsel impliedly—rather than expressly—admits the defendant's guilt to a charged offense." *Id.* at 456, 847 S.E.2d at 712.

> Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. We [] hold that when counsel *to the surprise of his client admits his client's guilt*, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

Id. at 463, 847 S.E.2d at 716 (emphasis supplied) (alterations, citations, and internal quotations omitted).

B. Analysis

¶ 53 Here, there was no surprise to Defendant of defense counsel's admissions. Defendant testified to the acts which occurred and sought to excuse his culpability based upon his voluntary intoxication. The timing, nature, extent, cause and motive for Mrs. Arnett's injuries was never in dispute. A bloody knife with a hooked blade was recovered from Defendant's person at the hospital. A bloody butcher knife was found in the kitchen drawer at the Arnetts' home.

¶ 54 The trial court correctly ruled Defendant's proffered voluntary intoxication to mitigate or excuse Defendant's actions was not available as a defense to the assaults, which requires only proof of a general intent. Defendant testified, was cross examined, and clearly consented to trial counsel's acknowledgement of Defendant's actions against his wife to the jury during closing argument. The record shows a deliberate, knowing, and consented to trial strategy in the face of overwhelming and uncontradicted evidence of Defendant's guilt. Defendant has failed to show his trial counsel's performance and conduct was deficient. Defendant's argument is without merit and overruled.

VII. Conclusion

¶ 55 Defendant argues he could not knowingly and understandingly consent to counsel's admitting the assault. Defendant further argues the

trial court's *Harbison* inquiry was inadequate to confirm Defendant understood and knew he was agreeing for counsel admit the charged offense and present an invalid defense.

¶ 56 The trial court personally inquired of Defendant on two occasions to ensure he understood and agreed with this strategy after the court had denied the involuntary intoxication defense and to so instruct the jury. The *Harbison* inquiry adequately established Defendant fully understood his counsel was admitting an element of the charge.

¶ 57 Defendant did not receive ineffective assistance of counsel when his trial counsel admitted an element of the charged offense with Defendant's prior knowledge and consent. Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
EMUNTA CARPENTER

No. COA19-1006

Filed 2 March 2021

Sexual Offenses—first-degree forcible sexual offense—jury instructions—lesser-included offense—no contradictory evidence

In defendant's trial for first-degree forcible sexual offense, arising from defendant forcing the victim to perform fellatio on him while his cousin watched and waited to rape her, the trial court did not err by denying defendant's request for a jury instruction on the lesser-included offense of second-degree forcible sexual offense. The State's evidence supported all the elements of the first-degree offense, and defendant failed on appeal to show that any contradictory evidence was presented as to the element of defendant being aided and abetted by another person where his cousin knew of defendant's unlawful purposes and helped to facilitate the crime, with no evidence supporting the notion that the cousin was merely a bystander.

Appeal by defendant from judgment entered 5 February 2019 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason P. Caccamo, for the State.

Glover & Petersen, P.A., by James R. Glover, for the defendant.

TYSON, Judge.

I. Background

¶ 1 D.C. and Emunta Carpenter ("Defendant") were involved in a romantic relationship. They are the parents of a child, who was five years old when these events occurred on 17 January 2017. That day, Defendant became angry about contacts he had found on D.C.'s cellphone. While walking to D.C.'s car, Defendant inquired whether D.C. had engaged in intimate relationships while he was an inmate in prison for a year. She told Defendant she had. Once seated in D.C.'s car, Defendant's anger quickly devolved into abuse and violence.

¶ 2 Defendant punched D.C. twice as she sat in the driver's seat. He berated her about her sexual relationships while he was imprisoned. The physical violence escalated as Defendant repeatedly hit her. D.C. testified Defendant "got so mad he just start (sic) beating on me and telling me I'm going to get flipped . . . and I'm going to have sex with him and his cousin."

¶ 3 D.C. told Defendant she "wasn't going to do it," refusing to participate in sexual acts with both Defendant and his cousin, Tafari Battle ("Battle"). When D.C. told Defendant no, he continued to hit her. D.C. testified Defendant, "told me to take him to his cousin's house . . . when I told him no, he picked up some grip pliers in my car and raised them up at me as if he was going to hit me." D.C. stated Defendant said, "on 8 Trey you going to get flipped." She continued, "[w]hen he said 8 Trey I knew he was serious because that's his gang and when he say that he will do it."

¶ 4 Defendant forced D.C. to drive to Battle's house. Upon arrival, Defendant walked past one cousin, Kwon, and into Battle's home. Shortly thereafter, Defendant and Battle emerged from the house. D.C. attempted to drive away, but Defendant jumped back into the car, leaving Battle behind. D.C. and Defendant drove around for a few moments. D.C. testified, "I asked him like if I do this what is he going to get out of

it. He was like it's for [Battle]." D.C. testified that she tried to speed in hopes of drawing attention from a nearby police station.

¶ 5 D.C. and Defendant pulled her car back into Battle's driveway. While Defendant was out of the car retrieving Battle, D.C. began recording the events on a cellphone she had secreted inside her bra. This recording of the entire crime was admitted into evidence and played for the jury.

¶ 6 As Defendant and Battle approached the car again, both men were laughing and smiling. Battle got into the backseat of the car and D.C. was instructed to drive to Defendant's sister's house while being threatened with the grip pliers. Upon arrival, Defendant instructed Battle to go to the shed behind the house. D.C. testified that she tried slamming the car doors loudly in hopes of garnering attention from a passerby. Defendant threatened to beat D.C. further if she did not move to the shed.

¶ 7 Battle was already in the shed waiting when D.C. entered with Defendant. Defendant demanded D.C. perform oral sex on him while Battle watched in close proximity. Defendant told Battle to get ready to have sex with D.C., because D.C. "can't" perform oral sex on Battle. Battle manipulated himself to get his penis erect. Defendant asked Battle if he was ready, and Battle said yes.

¶ 8 Defendant demanded D.C. bend over so Battle could have sex with her. When she refused, he beat her further with his hands, feet, and the pliers. After beating her, Defendant again forced D.C. to perform oral sex on him.

¶ 9 Battle and Defendant made D.C. stand up and together they forcibly removed her shorts. As they removed her shorts, she kept objecting and saying no. "I was begging [Battle] not to do it. I was looking at [Battle] crying while [Defendant] kept beating me up." Battle raped D.C. as she was bent over a chair in the shed.

¶ 10 D.C. moved her body so that she could no longer be penetrated by Battle and this action enraged Defendant. He cursed her and started to beat, choke, kick and spit on her. Battle told her she might as well get it over with.

¶ 11 After beating D.C., Defendant demanded, for the third time, she perform oral sex on him. When D.C. did not perform the act in the manner Defendant preferred, he resumed hitting her. Defendant told Battle to "get out right quick" as Defendant continued to hit D.C. After Battle re-entered the shed, Defendant's beating became so violent, D.C. testified she thought she was going to die.

¶ 12 In desperation, D.C. told Defendant if he gave her the pliers, she would let Battle have sex with her. When D.C. received the pliers, she threw them out the window, further enraging Defendant and causing him to throw her around the shed and continue to hit her. Battle watched as D.C. cried out for his assistance. He stood by and watched Defendant's actions.

¶ 13 As Defendant held D.C.'s hair and assaulted her, she tried to escape. D.C. pulled away, leaving a clump of hair in Defendant's hand, and ran to her car. Battle made no attempt to stop her. D.C. drove to her mother's house and went to the police station to report the crimes.

¶ 14 Defendant was indicted on 17 July 2017 for: (1) first-degree kidnapping; (2) first-degree forcible rape; and (3) first-degree forcible sex offense. The trial court dismissed the charge of first-degree forcible rape.

¶ 15 The jury returned verdicts finding Defendant guilty of first-degree kidnapping and first-degree sex offense. Defendant was sentenced to imprisonment for 317-441 months on the charge of first-degree sex offense and to a consecutive term of imprisonment for 96-172 months on the charge of first-degree kidnapping. Defendant gave notice of appeal in open court following entry of the judgments and commitments.

II. Jurisdiction

¶ 16 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 17 The issue before this Court is whether the trial court should have given a jury instruction for the lesser included offense of second-degree forcible sex offense.

IV. Standard of Review

¶ 18 Our Supreme Court stated: "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973).

¶ 19 Applying this standard, our Supreme Court has held, "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense

and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *State v. Smith*, 351 N.C. 251, 267–68, 524 S.E.2d 28, 40 (2000) (citation omitted). If there is "no evidence giving rise to a reasonable inference to dispute the State's contention," the trial court is not obligated to give a lesser included instruction. *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 127 (1982).

¶ 20 When determining whether the evidence is sufficient for instruction on a lesser included offense, the evidence must be viewed in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994). It is reversible error for a trial court to fail to submit lesser included offenses to the crime charged that are supported by the evidence. *State v. Lytton*, 319 N.C. 422, 426-27, 355 S.E.2d 485, 487 (1987). Preserved challenges to jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

V. Analysis

A. First-Degree Forcible Sex Offense

¶ 21 Defendant was indicted for first-degree forcible sex offense in violation of N.C. Gen. Stat. § 14-27.26(a)(3) (2019). The elements of this offense are: (1) engaging in a sex act [fellatio] with another person, (2) by force and against the will of the other person; and (3) while being aided and abetted by one or more other persons [Battle]. Proof of the first two elements, engaging in a sex act with another person by force and against that person's will is sufficient to establish guilt of second-degree sex offense in violation of N.C. Gen. Stat. § 14-27.27(a) (2019).

B. Aid or Abet

¶ 22 Defendant argues the evidence of element (a)(3): aided or abetted by one or more persons supports the instruction on the lesser-included offense. The trial court instructed the jury on this element of first-degree forcible sex offense:

> "[F]ourth, that defendant was aided or abetted by one or more other persons. A defendant would be aided or abetted by another person if that person was present at the time the sexual offense was committed *and knowingly aided the defendant to commit the crime.* (emphasis supplied).

¶ 23 Mere presence is not enough to meet the burden of aid or abet:

> A person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission; to be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission.

State v. Goode, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citations omitted). "[A] person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator." *McKinnon*, 306 N.C. at 298, 293 S.E.2d at 125.

1. Knowledge

¶ 24 "The aiding element requires some conduct by the accomplice that results in the accomplice becoming involved in the commission of a crime. The typical way in which a party becomes involved in the commission of a crime is through the assistance, promotion, encouragement, or instigation of criminal action". *State v. Bowman*, 188 N.C. App. 635, 648, 656 S.E.2d 638, 648 (2008) (internal quotations omitted). This Court explained that the element of abetting requires "a criminal state of mind-*specifically, it requires that the accomplice has both knowledge of the perpetrator's unlawful purpose to commit a crime, and the intent to facilitate the perpetrator's unlawful purpose.*" *Id.* (emphasis original).

¶ 25 The State argues no contradictory evidence exists to the aiding or abetting elements. It asserts D.C.'s testimony and the audio recording provide clear and unequivocal evidence of Battle's actions before and during the kidnapping and sexual assaults committed by Defendant. Defendant told D.C. she was going to have sex with him and his cousin. Evidence tends to show Defendant has a specific plan to include Battle. Defendant told D.C. again that she was going to engage in a "flip" while they were in Battle's driveway. Testimony tends to show Defendant used "flip" to mean D.C. would engage in sexual acts with Defendant and somebody else at the same time.

¶ 26 Battle was not merely present, but was recruited by Defendant to assist in the sexual assaults of D.C. Battle willingly accompanied and rode with Defendant and D.C., who had been and was being beaten and crying, to Defendant's sister's house. Defendant told D.C. this "flip"

was for Battle. Battle, following instructions from Defendant, waited while Defendant forced D.C. to enter the shed. Defendant forced D.C., by threat of being beaten with pliers, to perform oral sex on him three times in the shed while Battle was present. Battle was present and heard Defendant tell D.C. to "let his cousin get his nut" and that D.C. "was going to suck his d**k and f**k his cousin."

¶ 27 Evidence tends to show Battle helped Defendant to restrain and remove D.C.'s shorts, and Battle stated to D.C. she "might as well get it over with." A reasonable jury could find "it" implies communicating what submission was being expected of D.C. and "get it over with" implies "aid[ing] or actively encourag[ing]" his cousin to sexually assault D.C. as Defendant interchangeably requested oral sex and then demanded D.C. comply with Battle's rape attempts.

¶ 28 Battle was not a passive bystander. Battle assisted, promoted, and encouraged Defendant in the sexual offense. Evidence tends to show Battle knew of Defendant's unlawful purpose and helped to facilitate the crimes. Battle was a willing participant in the numerous sexual offenses committed against D.C.

2. Relation to Perpetrator

> The communication or intent to aid does not have to be shown by express words of the defendant but may be *inferred* from his actions and from his *relation to the actual perpetrators.* Furthermore, when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.

Goode, 350 N.C. at 260, 512 S.E.2d at 422. (emphasis supplied).

¶ 29 Battle and Defendant are cousins. Defendant told D.C. the "flip" was for Battle. As Defendant and Battle approached the car, both of them were smiling and laughing. Battle cooperated with Defendant's orders and waited in the shed. During the forced oral sex, Defendant instructed Battle to get his penis erect so that Battle could rape D.C. Defendant beat D.C. while Battle was exposed and watched, before forcing her to perform oral sex on him a second time. Defendant stopped forcing D.C. to perform oral sex and worked with Battle to forcibly remove D.C.'s shorts and to bend her over the chair.

¶ 30 After Battle raped D.C., and after D.C. had moved her body to try to stop the rape, Defendant beat her. Battle told D.C. she might as well

get "it" over with. Evidence tends to show "it" was the "flip" or sexual acts with multiple people Defendant and Battle had planned. Defendant again forced D.C. to perform oral sex on himself. The relationship between Defendant and Battle was known and clear.

¶ 31 Battle was a close familial relation to Defendant. D.C. knew of this relationship. The evidence tends to show Battle had a motive in the sexual assault in that he was going to have an opportunity to rape D.C. while Defendant was present and assisting. Finally, his words show that he played an active role in counseling and encouraging Defendant to complete their crimes.

3. Atmosphere to Subvert the Will of the Victim

¶ 32 "By joining defendant in unclothing and immobilizing [the victim], while performing a series of overt acts that created an atmosphere to subvert the will of [the victim], others are deemed to have contributed to the commission of the crime." *State v. Dick*, 370 N.C. 305, 312, 807 S.E.2d 545, 549 (2017).

¶ 33 The joint actions of Defendant and Battle in removing D.C.'s shorts, physically moving her about the shed, refusing to respond as she pleaded for help and resisted, and uttering words that encouraged D.C. to submit. Battle's words and actions created an atmosphere to subvert the will of D.C. *Id.*

4. Aid or Abet Reversals

¶ 34 Battle's aiding or abetting Defendant in the sexual assault distinguishes this case from those where courts found a person's mere presence did not amount to counseling or encouraging the commission of a crime. *See State v. Ikard*, 71 N.C. App. 283, 321 S.E.2d 535 (1984) (holding defendant was present but had no knowledge that the crime was to be committed and did not know others were armed); *State v. Gaines*, 260 N.C. 228, 132 S.E.2d 485 (1963) (holding the defendant had no knowledge of the crime and only ran with the defendant after he was discovered); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (holding the defendant's uncontradicted testimony that he "didn't do nuthin," and that he was "thrown" on the victim is not enough to be deemed aiding or abetting).

¶ 35 No evidence rebuts D.C.'s clear testimony and the audio recording of the crimes as they occurred. The recording of the assaults, D.C.'s contemporaneous written account, and her testimony all show Battle was aiding or abetting Defendant's crimes against D.C.

¶ 36 Defendant argues the jury may not have believed all of D.C.'s testimony. Defendant is not entitled to an instruction on a lesser-included offense by merely asserting jury could possibly believe some, but not all, of the State's evidence. *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). The jury also heard the contemporaneous cellphone recording of the beatings and assaults as they occurred.

VI. Conclusion

¶ 37 The State's evidence tends to show each element of the offenses charged to support submission to the jury. No contradictory evidence was presented in relation to the third element in question to justify an instruction on a lesser-included offense. No evidence tends to show Battle was merely a bystander. Battle knowingly aided, abetted, encouraged, and participated with Defendant in his sexual assaults of D.C.

¶ 38 The trial court did not err in denying Defendant's motion for an instruction on a lesser-included offense. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
CHARLIE JAMES HARRIS, III, DEFENDANT

No. COA19-617

Filed 2 March 2021

Evidence—husband and wife as witnesses—in criminal actions—communications made during assault—not confidential marital communications

In a prosecution for defendant's attempted murder of his wife, the trial court did not err by compelling the wife to testify as to statements that defendant made while he was stabbing her with a knife and while she was attempting to escape. Under N.C.G.S. § 8-57, these statements—including defendant's demands for sex, confessions of suicidal thoughts, and admissions of guilt—were not confidential marital communications because they were made

during the assault and not induced by the affection, confidence, and loyalty borne out of the marital relationship. Even assuming error, defendant could not demonstrate prejudice where the wife's testimony as to defendant's actions and the evidence of her injuries were before the jury.

Appeal by defendant from judgment entered 1 March 2018 by Judge Marvin K. Blount III in Superior Court, Pitt County. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Special Counsel to the Chief Deputy Attorney General, Shannon J. Cassell, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals judgments convicting him of first degree attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. Under North Carolina General Statute § 8-57, defendant's wife was "both competent and compellable to" testify against defendant as this is "a prosecution for assaulting or communicating a threat to the other spouse[.]" Defendant's wife's testimony regarding his statements to her while he was attacking her with a knife and while she was attempting to escape were not "prompted by the affection, confidence, and loyalty engendered by such relationship," so these statements were not "confidential communication[s.]" The trial court did not err in compelling wife to testify as to the statements' defendant made and in not striking her testimony. N.C. Gen. Stat. § 8-57 (2015); *State v. Rollins*, 363 N.C. 232, 237, 675 S.E.2d 334, 337 (2009) (citations and quotation marks omitted). We conclude there was no error.

I. Background

¶ 2 On the first day of defendant's jury trial, defendant's wife, Leah,[1] testified that on 30 July 2016, she and defendant got into an argument, and when she began walking upstairs defendant stabbed her multiple times in her back, arms, leg, stomach, face, and neck. Leah further testified that defendant stopped stabbing her after he cut himself, and he began taking off her pants; when she asked what he was doing he responded, "I want to have sex, this could be my last time having sex."

1. A pseudonym is used.

Leah testified she told defendant she would have sex with him if he put the knife down, but she did not want to have sex, rather she "just wanted to go to the hospital[,]" and she only agreed so defendant would "put the knife down."

¶ 3 Defendant had sex with Leah and requested her to do certain things, but she was in pain and "really couldn't move." At some point, Leah gained control of the knife, and she testified defendant told her "it's over for him now and he knows the police is coming and he just wanted me to let the knife go so he could kill hisself[.]" Leah begged for water, and defendant asked her "all of these questions," and then took her phone into another room. Leah ran out of the house, still without her pants and screaming, and drove to a Kangaroo store "around the corner" for help. Leah required trauma surgery for her wounds from the stabbing, and she remained in the hospital approximately a week. During the first day of trial, when all of this testimony was presented, defendant did not object to Leah's testimony about defendant's statements.

¶ 4 On the second day of defendant's trial, Leah informed the trial court she did not want "to testify against [her] husband." Defense counsel argued Leah was attempting to assert marital privilege, and he would "move to strike all of her testimony from yesterday." The State countered that marital privilege was not applicable if the defendant was being prosecuted for a felony he had committed against his wife. After much discussion and research, the trial court denied defendant's motion to strike and informed Leah

> you have a duty in this case to testify and that based on the Court's understanding of the statute, that you can be compelled to testify in this case and you have been subpoenaed in this case by the State to testify and that you have a duty and an obligation to answer all questions proposed of you or proposed to you in a truthful manner. And if you refuse to answer those questions, ma'am, you may be held and will be held in contempt of court[.[2]]

¶ 5 The jury found defendant guilty of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court entered judgments. Defendant appeals.

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2. Leah countered that she was not certain she was competent because she had "depression and posttraumatic stress disorder." Counsel was appointed to represent Leah, and her counsel did not deem her to have any issues with competency as a witness. Leah's competency as a witness is not at issue on appeal.

II. Confidential Marital Communications

¶ 6 Defendant's only argument on appeal is that "the trial court committed reversible error under N.C. Gen. Stat. § 8-57(c) when it allowed into evidence privileged marital communications that the State compelled defendant's spouse to reveal pursuant to a subpoena." (Original in all caps.) Whether a statement is "a privileged confidential communication" as defined by North Carolina General Statute § 8-57 "is a question of law" which this Court reviews *de novo*. *State v. Matsoake*, 243 N.C. App. 651, 656, 777 S.E.2d 810, 813 (2015). Further, "[a]lleged 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 (citation omitted), *stay dissolved*, *writ of supersedeas denied*, *and disc. review denied*, 372 N.C. 705, 830 S.E.2d 827 (2019).

¶ 7 Defendant's argument focuses on limited portions of Leah's testimony he contends are "privileged and confidential marital communications[.] . . . Specifically, these communications were: (1) requests to have sex . . .; (2) confessions of suicidal thoughts . . .; and (3) admissions by defendant of guilt to crimes against his wife[.]" Defendant does not challenge her testimony describing defendant's actions, including stabbing her repeatedly.

¶ 8 North Carolina General Statute § 8-57 provides,

> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
>
> . . . .
>
> (2) In a prosecution for assaulting or communicating a threat to the other spouse;
>
> . . . .
>
> (c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

N.C. Gen. Stat. § 8-57.

> To assess whether the conversations between defendant and his wife were in fact protected by subsection 8–57(c), our analysis turns on whether there was a confidential communication between defendant and his wife in the DOC facilities. When defining a confidential communication in the context of the marital communications privilege, this Court has asked *whether the communication was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.*

Rollins, 363 N.C. at 237, 675 S.E.2d at 337 (emphasis added) (citation, quotation marks and ellipses omitted).

¶ 9 The State contends that defendant failed to object to the statements at issue on appeal, and thus the issue is not preserved. Defendant contends his argument under North Carolina General Statute § 8-57 is preserved for appellate review even without a contemporaneous objection to the testimony. Defendant also made a motion to strike Leah's testimony, and the trial court heard extensive argument on the issues and ruled on the motion. But even if we assume *arguendo* that defendant's motion to strike Leah's testimony properly preserved his argument for appeal, the portions of testimony he challenges here were not confidential communications.

¶ 10 The State also contends that North Carolina General Statute § 8-57 is not applicable because Leah's testimony of defendant's statements were not "confidential communication" under the statute. Defendant counters in his reply brief he "has *only* challenged *confidential communications* pursuant to N. C. Gen. Stat.§ 8-57(c)," and thus "the State's attempt to rely on an exception to the N.C. Gen. Stat. § 8-57(b) rule is misplaced." (emphasis added). In defendant's reply brief he relies on *Biggs v. Biggs*, 253 N.C. 10, 16, 116 S.E.2d 178, 183 (1960), wherein the Supreme Court stated, "It is true that an act of intercourse between husband and wife is a confidential communication[;]" but defendant takes this sentence entirely out of context to create his argument.

¶ 11 The issue in *Biggs* was: "Where, in an action by a husband for divorce on the ground of adultery, the wife pleads condonation and testifies that the husband had intercourse after agreeing to forgive her and that she is pregnant as a result of the intercourse, is it error to permit the husband to deny the intercourse?" *Id.* at 14, 116 S.E.2d at 181. Based upon *Biggs*, a civil case under North Carolina General

Statute § 8-56 as it was written in 1960, *see id.*, 253 N.C. 10, 116 S.E.2d 178, defendant contends that "our North Carolina Supreme Court has recognized that communications about marital sex between spouses are confidential communications and N.C. Gen. Stat. § 8-57([c]) states, without exception, that no spouse 'shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.' " Defendant argues any statement related to sexual intercourse between spouses is a "confidential communication" which the trial court cannot compel "in any event[.]"

¶ 12 We first note that only one of the statements challenged by defendant was about sex; the other statements were regarding suicidal thoughts and admission of guilt to his crimes. Further, defendant's *Biggs* argument, applicable only to the statement regarding sex, entirely ignores North Carolina General Statute § 8-57 (b)(2) which specifically provides that a spouse of a defendant "shall be both competent and compellable to testify" "[i]n a prosecution for assaulting or communicating a threat to the other spouse[.]" N.C. Gen. Stat. § 8-57(b)(2). A prosecution for attempted murder of a spouse and assault with a deadly weapon with intent to kill inflicting serious injury upon a spouse *is* "a prosecution for assaulting" the other spouse. *Id.*

¶ 13 Beyond the statements regarding sex, defendant also cites to criminal cases decided under North Carolina General Statute § 8-57 in support of his argument, but these cases are inapposite as the other spouse is not the victim in those cases, the very issue at the heart of North Carolina General Statute § 8-57(b)(2). *See*, *e.g.*, *Rollins*, 363 N.C. 232, 675 S.E.2d 334 (determining that spousal privilege under North Carolina General Statute § 8-57 "does not extend to communications occurring in the public visiting areas of the North Carolina Department of Correction (DOC) facilities because a reasonable expectation of privacy does not exist in such areas"); *State v. Holmes*, 101 N.C. App. 229, 398 S.E.2d 873 (1990), *aff'd*, 330 N.C. 826, 412 S.E.2d 660 (1992) (determining spousal privilege under North Carolina General Statute § 8-57 did apply when the defendant-husband told his wife he planned to kill someone else).

¶ 14 Ultimately,

> [w]hile recognizing that the cases and statutes pertinent to this issue have not been models of clarity, our Supreme Court has interpreted section 8–57 to mean that a spouse[] shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a

> confidential communication between the marriage partners made during the duration of their marriage[.] This interpretation:
>
> > allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving confidential communications with the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice.
>
> To fall within the purview of this privilege, the communication must have been made confidentially between wife and husband during the marriage. Accordingly, the determination of whether a communication is confidential within the meaning of the statute depends on whether the communication was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. With these rules in mind, we now turn to the facts of the case at bar.

State v. Hammonds, 141 N.C. App. 152, 169–70, 541 S.E.2d 166, 179 (2000) (citations and quotation marks omitted), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001).

¶ 15 As applied here, defendant's statements demanding sex from his wife after having repeatedly stabbed her and while still wielding a knife were not "prompted by *the affection*, *confidence*, *and loyalty engendered by such relationship*." N.C. Gen. Stat. § 8-57(c) (emphasis added). Further, defendant's statements of suicidal thoughts and concern about arrest for the crime defendant was in the process of committing against his wife cannot be said to spring from "affection, confidence, and loyalty" borne out of marital relations. *Id.* Defendant was not confessing to his wife about a prior crime against someone else or confiding in her about his plans of a future crime but instead speaking about the violent act he was currently committing – assaulting Leah while still wielding a weapon as she begged for water, attempted to escape from defendant, and desperately needed medical attention due to wounds inflicted by defendant – and his concerns about the possible repercussions. Although North Carolina General Statute § 8-57(c) could theoretically apply to

a defendant's statements made during the commission of a crime, in this situation, defendant's lack of "affection, confidence, and loyalty" in making these statements could not be clearer. *Id.*

¶ 16 Defendant has also failed to demonstrate prejudice from the admission of these portions of Leah's testimony. Even if we agreed with defendant that his statements were somehow prompted by "affection, confidence, and loyalty" based on the marital relationship, exclusion of these limited portions of Leah's testimony would not affect the outcome of the case. Leah's testimony regarding what defendant *did* to her and the evidence of her injuries was far more important than what defendant *said* while he was stabbing or assaulting her. *Id.*; *see generally State v. Godley*, 140 N.C. App. 15, 26, 535 S.E.2d 566, 574–75 (2000) ("The erroneous admission of evidence requires a new trial only when the error is prejudicial. To show prejudicial error, a defendant has the burden of showing that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred." (citations and quotation marks omitted)). This argument is overruled.

III. Conclusion

¶ 17 For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges ARROWOOD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
EDWIN GUILLERMO PERDOMO

No. COA20-243

Filed 2 March 2021

1. Evidence—indecent liberties—credibility of child victim—vouching—medical opinion

No error, much less plain error, occurred in a trial for taking indecent liberties with a child by the admission of testimony from the doctor who examined the victim who stated that the victim's statements to a social worker were "consistent with" sexual abuse. The testimony did not constitute improper vouching of the victim's credibility in the absence of physical evidence because it did not consist of a definitive diagnosis of abuse, but presented an opinion based on medical expertise.

2. Appeal and Error—preservation of issues—closing courtroom to public—constitutional argument

Where defendant failed to present a constitutional argument to the trial court that its decision to close the courtroom to the public before a verdict was rendered violated defendant's right to have a public trial (for taking indecent liberties with a child), the Court of Appeals declined to invoke Appellate Rule 2 to review the matter on appeal. The trial court's actions appeared to be within its statutory and inherent authority to control the orderliness of courtroom proceedings.

3. Constitutional Law—effective assistance of counsel—prejudice analysis—burden not met

In a trial for taking indecent liberties with a child, defendant could not demonstrate that he was prejudiced by his counsel's allegedly deficient performance where, given the evidence against defendant, there was no reasonable probability that, but for the errors, a different result would have been reached.

Appeal by defendant from judgment entered 5 August 2019 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 13 January 2021.

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

Warren D. Hynson for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Edwin Guillermo Perdomo appeals from the judgment entered upon a jury's verdict finding him guilty of taking indecent liberties with a child. After careful review, we discern no prejudicial error in the judgment entered upon Defendant's conviction.

Background

¶ 2 In October 2013, Cesar Perdomo moved from Honduras to Johnston County, North Carolina, with his wife and eight-year-old daughter, A.P.[1] They lived with Cesar's brother, Defendant, for approximately seven months until they moved into their own home nearby. Cesar, Defendant, and their sister were close, and their families would often visit and travel together.

¶ 3 In September 2017, 13-year-old A.P. told a friend, her soccer coach, the school social worker, and the school principal that Defendant was behaving in a sexually inappropriate manner toward her. On 27 September 2017, school personnel called A.P.'s mother and asked her to come to the school. In a meeting with the principal and two other school personnel, A.P.'s mother learned that A.P. had told the school social worker that Defendant had "touched her."

¶ 4 That day, school officials also notified the Johnston County Department of Social Services ("DSS") about A.P.'s allegations. On 28 September 2017, a DSS social worker began investigating. DSS scheduled a Child Medical Evaluation ("CME"). The Selma Police Department also became involved on 28 September 2017, after A.P. evinced an intent to harm herself. Dr. Beth Harold of the Child Abuse and Neglect Medical Evaluation Clinic ("CANMEC") conducted A.P.'s CME on 16 November 2017, and Detective Johnathan Solomon then initiated his criminal investigation of A.P.'s allegations.

¶ 5 On 6 August 2018, a Johnston County grand jury returned a true bill of indictment charging Defendant with statutory rape of a person 15 years of age or younger and taking indecent liberties with a child. On 29 July 2019, the case came on for trial before the Honorable Keith O. Gregory in Johnston County Superior Court.

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1. Initials are used to protect the identity of the juvenile.

¶ 6 On 5 August 2019, the jury returned its verdicts, finding Defendant guilty of taking indecent liberties with a child, but not guilty of statutory rape. The trial court sentenced Defendant to a term of 16 to 29 months in the custody of the North Carolina Division of Adult Correction. The trial court also ordered Defendant to register as a sex offender for a period of 30 years upon his release from prison, and prohibited any contact by Defendant with A.P. for the remainder of Defendant's life. Defendant gave oral notice of appeal in open court.

Discussion

¶ 7 On appeal, Defendant contends that (1) the trial court committed plain error by permitting the State's expert to vouch for A.P.'s credibility; (2) the trial court committed structural error by closing the courtroom and locking the doors during delivery of the jury instructions; and (3) Defendant received ineffective assistance of counsel at trial.

I.

¶ 8 **[1]** Defendant first argues that the trial court committed plain error by permitting the State's expert, Dr. Harold, to vouch for A.P.'s credibility by impermissibly testifying that A.P.'s medical history "was consistent with child sexual abuse" and that her "physical exam would be consistent with a child who had disclosed child sexual abuse." For the reasons that follow, we disagree.

A. Standard of Review

¶ 9 "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). Because Defendant's counsel failed to object to the challenged portions of Dr. Harold's trial testimony,

> we review his challenge on appeal for plain error. To establish plain error defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty. A fundamental error is one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Warden, 376 N.C. 503, 506, 852 S.E.2d 184, 187 (2020) (citations and internal quotation marks omitted).

B. Analysis

¶ 10 "It is well settled that expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Frady*, 228 N.C. App. 682, 685, 747 S.E.2d 164, 167 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). In cases involving the alleged sexual abuse of a child,

> the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (per curiam) (citations omitted). "This rule permits the introduction of expert testimony only when the testimony is based on the special expertise of the expert, who because of his or her expertise is in a better position to have an opinion on the subject than is the trier of fact." *Warden*, 376 N.C. at 506–07, 852 S.E.2d at 187–88 (citation and internal quotation marks omitted).

¶ 11 Defendant specifically challenges two portions of Dr. Harold's testimony from the State's case-in-chief:

> Q. Would you say, Doctor, that [A.P.]'s disclosure or medical history to [the social worker] was that -- would you say that that was consistent with child sexual abuse?
>
> A. This child gave [the social worker] a history that was *consistent with* child sexual abuse.
>
> . . . .
>
> Q. So even despite her disclosure of penile penetration, this physical exam is consistent and not inconsistent with that disclosure; is that right?
>
> A. This physical exam would be *consistent with* a child who had *disclosed* child sexual abuse.

(Emphases added).

¶ 12 Defendant challenges two aspects of this testimony: Dr. Harold's use of the phrase "consistent with" and her use of the word "disclosed." Defendant cites dicta from a recent opinion of this Court to essentially argue that, in the absence of physical evidence of abuse, Dr. Harold's use of the phrase "consistent with" amounted to vouching per se. *See State v. Davis*, 265 N.C. App. 512, 517, 828 S.E.2d 570, 574, *disc. review denied*, 372 N.C. 709, 830 S.E.2d 839 (2019) ("While it is impermissible for an expert to offer an opinion that a lack of physical evidence *is consistent with* sexual abuse, it may [be] permissible for the State to offer expert testimony that the lack of physical evidence *does not necessarily rule out* that sexual abuse may have occurred."). Similarly, Defendant cites a recent line of our jurisprudence that wrestled with whether the use of the word "disclose" or its variants amounted to vouching. *See*, *e.g.*, *State v. Betts*, 267 N.C. App. 272, 281, 833 S.E.2d 41, 47 (2019) ("There is nothing about the use of the term 'disclose', standing alone, that conveys believability or credibility."), *appeal pending based on dissent*, 376 N.C. 549, 850 S.E.2d 348 (2020).

¶ 13 However, we need not address such word- or phrase-specific arguments, as our Supreme Court has explained that "[w]hether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry. Different fact patterns may yield different results." *State v. Chandler*, 364 N.C. 313, 318–19, 697 S.E.2d 327, 331 (2010) (citation omitted). For expert testimony to amount to vouching for a witness's credibility, that expert testimony must present "a definitive diagnosis of sexual abuse" in the absence of "supporting physical evidence of the abuse." *Id.* at 319, 697 S.E.2d at 331. Viewed in full context, it is clear that the specific challenged words and phrases from Dr. Harold's testimony did not present "a definitive diagnosis of sexual abuse." *See id.*

¶ 14 Immediately prior to the prosecutor's question that prompted Dr. Harold's first challenged answer, Dr. Harold explained:

> [Y]ou cannot tell from a medical exam whether a child has been sexually abused or not. The most important aspect of a child medical evaluation for a child who is undergoing a sexual abuse evaluation is the medical history that that child gives to whomever they give the history to. In this case, the history was provided to [the social worker].

¶ 15 This led directly to the first exchange that Defendant now challenges:

> Q. Would you say, Doctor, that [A.P.]'s disclosure or medical history to [the social worker] was that -- would you say that that was consistent with child sexual abuse?
>
> A. This child gave [the social worker] a history that was *consistent with* child sexual abuse.

(Emphasis added).

¶ 16 The prosecutor then invited Dr. Harold to "talk about [the] medical exam in this particular case." Dr. Harold thoroughly detailed her procedure for the exam and her findings, which led to the following exchange, including the second portion of testimony that Defendant challenges on appeal:

> Q. So there were no physical findings in this particular case?
>
> A. No physical findings.
>
> Q. Did that surprise you?
>
> A. Absolutely not.
>
> Q. Okay. For the same reasons you just testified here before?
>
> A. Yes, sir.
>
> Q. So even despite her disclosure of penile penetration, this physical exam is consistent and not inconsistent with that disclosure; is that right?
>
> A. This physical exam would be consistent with a child who had disclosed child sexual abuse.
>
> Q. Did that conclude your examination of her?
>
> A. Yes.

¶ 17 Our review of the full testimony, in proper context and beyond the isolated excerpts that Defendant challenges on appeal, reveals that Dr. Harold's statements were "based on [her] special expertise [as an] expert, who because of . . . her expertise [was] in a better position to have an opinion on the subject than" the jury. *Warden*, 376 N.C. at 506–07, 852 S.E.2d at 187–88 (citation and internal quotation marks omitted). Rather than vouching for A.P.'s credibility, as Defendant claims, Dr. Harold appropriately provided the jury with an opinion, based on her expertise,

that a lack of physical findings of sexual abuse does not generally correlate with an absence of sexual abuse.

¶ 18 Indeed, our courts have repeatedly held that a properly qualified expert may "testify concerning the symptoms and characteristics of sexually abused children and . . . state [the expert's] opinion[ ] that the symptoms exhibited by the victim were *consistent with* sexual or physical abuse." *State v. Kennedy*, 320 N.C. 20, 31–32, 357 S.E.2d 359, 366 (1987) (emphasis added); *accord State v. Aguallo*, 322 N.C. 818, 822–23, 370 S.E.2d 676, 678 (1988); *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). Our Supreme Court has explained that this is "a proper topic for expert opinion" as it "could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366.

¶ 19 In *Warden*, where "there was no physical evidence that [the child] was sexually abused, it was error to permit the DSS investigator to testify that sexual abuse had *in fact* occurred." 376 N.C. at 507, 852 S.E.2d at 188. By contrast, Dr. Harold's testimony, in its full context, is clearly distinct from offering an opinion that the child in question *has* or *has not* been abused, or *is* or *is not* credible—issues that are properly decided by the jury. *See, e.g.*, *State v. Worley*, 268 N.C. App. 300, 304, 836 S.E.2d 278, 282 (2019), *disc. review denied*, 375 N.C. 287, 846 S.E.2d 285 (2020).

¶ 20 Based on our courts' longstanding jurisprudence on this issue, and in light of our Supreme Court's recent decision in *Warden*, we discern no error, let alone plain error, in the trial court's admission of Dr. Harold's expert testimony. Defendant's argument is overruled.

II.

¶ 21 **[2]** Defendant next argues that, by "closing . . . the courtroom immediately prior to the jury charge[,]" the trial court committed structural error and "violated [his] constitutional right to a public trial[.]" However, he concedes that his counsel did not object to this procedure. Accordingly, Defendant requests that we invoke Appellate Rule 2 to review this purported constitutional error. We decline to do so. *See State v. Dean*, 196 N.C. App. 180, 188, 674 S.E.2d 453, 459 ("Defendant never presented any constitutional arguments to the trial court, and we will not address such arguments for the first time on appeal."), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009); *see also State v. Register*, 206 N.C. App. 629, 634, 698 S.E.2d 464, 469 (2010).

¶ 22 However, even assuming, *arguendo*, that this issue is properly before us, Defendant has not shown that the trial court's conduct in this case amounted to a closure of the courtroom in the constitutional sense. Before the jury instructions, and without objection from either Defendant or the prosecutor, the trial court stated:

> I'm going to do the jury instructions now, but I don't want people in and out of the courtroom while I'm doing that. So people on the State side, if they want to come in now, they can come in now. If they don't, fine. Same for the defense because I don't want people in and out. I think the sheriff is going to lock the doors. If people on the defense side, if they want to come in, they can come in, but after that, Sheriff, if you will close the courtroom.
>
> [COURTROOM CLOSED]

The court also instructed those assembled in the courtroom: "Once again, there's no outbursts. Please leave now if that's the issue. And there's no in and out. Make sure your cell phones are turned off or on vibrate." The trial court's actions in this case would appear to be squarely within its statutory and inherent authority to control the courtroom.

¶ 23 A trial court judge has the inherent authority to "remove any person other than a defendant from the courtroom when that person's conduct disrupts the conduct of the trial." *Dean*, 196 N.C. App. at 189, 674 S.E.2d at 460; *see also* N.C. Gen. Stat. § 15A-1033 (2019). The trial court may also "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a).

¶ 24 Further, our courts have repeatedly upheld a trial court's imposition of reasonable limitations of movement in and out of the courtroom where such limits are established to minimize jury distractions. In *Dean*, "we conclude[d] that the removal of the spectators [did] not entitle [the d]efendant to a new trial" where "jurors were aware that [a co-defendant] was present in the courtroom" and the trial court knew "that jurors were concerned for their safety[,] . . . that jurors during the first trial were intimidated and afraid, and that at least some of those feelings were engendered by the presence and conduct of people in the gallery." 196 N.C. App. at 190, 674 S.E.2d at 460. In *Register*, "[t]he trial court chose to exclude everyone," except the mother of the 13-year-old victim testifying against the defendant, because "the trial court was very

concerned about the potential for outbursts or inappropriate reactions by supporters of both [the] defendant and the alleged victim, and the court in fact admonished family members at the start of the trial to control their reactions." 206 N.C. App. at 635, 698 S.E.2d at 469. And in *State v. Clark*, the trial court "warned [spectators] that if they wished to leave the courtroom, they should do so immediately, for they would not be allowed to do so after closing arguments began, barring an emergency." 324 N.C. 146, 167, 377 S.E.2d 54, 66 (1989).

¶ 25 The trial court appears to have acted within its statutory and inherent authority to control the courtroom. Thus, we decline to invoke Rule 2 and dismiss Defendant's constitutional argument as unpreserved.

III.

¶ 26 **[3]** Lastly, Defendant argues that he was prejudiced at trial by ineffective assistance of counsel. After careful review, we disagree.

¶ 27 "A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel." *State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017). In order to demonstrate ineffective assistance of counsel,

> a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant 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.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

¶ 28 Our Supreme Court has held that "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether

counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

¶ 29 In the case at bar, Defendant argues that his counsel "failed in multiple instances to object to plainly impermissible testimony by numerous State's witnesses vouching for A.P., or otherwise consented to such inadmissible evidence, when there could be no reasonable strategic basis for doing so." Defendant specifically lists four purported errors, including counsel's failure to object to Dr. Harold's testimony that we addressed in section I of this opinion, which testimony, as previously discussed, was not error. The second alleged error is defense counsel's consent to the amendment of one of the State's exhibits to read "CANMEC concludes the examination results are *consistent with* sexual abuse." (Emphasis added). Again, as explained in section I regarding Dr. Harold's testimony, there was no error in the use of the phrase "consistent with." Accordingly, with regard to these two alleged errors, Defendant cannot "show that his counsel's performance was deficient[.]" *Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

¶ 30 Defendant's remaining arguments concern defense counsel's failure to object to allegedly inadmissible hearsay, and counsel's consent to the admission of an audio recording of an interview with one of A.P.'s teachers. We need not analyze whether these were "unprofessional errors," as Defendant has not shown—given the remaining unchallenged evidence as well as the challenged evidence that we have held was not erroneously admitted—that either of these alleged errors give rise to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Accordingly, Defendant's arguments are overruled.

Conclusion

¶ 31 For the foregoing reasons, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges DIETZ and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 MARCH 2021)

CALLAHAN v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-46 No. 20-269	Chowan (19CVS73)	Dismissed
COUNTS v. COUNTS 2021-NCCOA-47 No. 20-12	Onslow (15CVD3631)	Affirmed
DAVIS v. DAVIS 2021-NCCOA-48 No. 20-303	Orange (18CVD1096)	DISMISSED IN PART; AFFIRMED AS MODIFIED IN PART; VACATED IN PART
FISH v. FISH 2021-NCCOA-37 No. 20-203	Catawba (18CVD357)	Affirmed
GUPTON v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-49 No. 20-357	Office of Admin. Hearings (17OSP08648)	Dismissed
IN RE N.T. 2021-NCCOA-50 No. 20-247	Edgecombe (18JA51) (18JA52)	Vacated and Remanded
INROCK DRILLING SYS., INC. v. CMP TECHS., INC. 2021-NCCOA-51 No. 20-167	Harnett (18CVS2392)	Vacated and Remanded
PFOUTS v. N.C. DIV. OF EMP. SEC. 2021-NCCOA-52 No. 20-75	Wake (19CVS9911)	Affirmed
STATE v. HAYES 2021-NCCOA-53 No. 20-275	New Hanover (16CRS58709-10) (16CRS58725)	No Error
STATE v. JOHNSON 2021-NCCOA-54 No. 20-110	Wake (16CRS206998-99) (16CRS207001)	No Error
STATE v. MOORE 2021-NCCOA-55 No. 20-85	Union (16CRS51411)	No Error

STATE v. OWEN 2021-NCCOA-56 No. 20-210	Henderson (18CRS723-725)	No Error
STATE v. RHYNES 2021-NCCOA-57 No. 19-386	Forsyth (18CRS367)	No Error
STATE v. ROLLINSON 2021-NCCOA-58 No. 20-42	Iredell (17CRS50078-80) (18CRS2840)	VACATED AND REMANDED FOR NEW SENTENCING HEARING
STATE v. SAULPAUGH 2021-NCCOA-59 No. 20-301	Durham (18CRS1110)	Affirmed; Remanded for correction of clerical error.
STATE v. WEST 2021-NCCOA-60 No. 20-57	Forsyth (16CRS1033) (16CRS61367-68)	Affirmed

ALEXANDER v. ALEXANDER

[276 N.C. App. 148, 2021-NCCOA-61]

AMY H. ALEXANDER, Plaintiff
v.
EDWARD D. ALEXANDER, Defendant
v.
CHARLES ALEXANDER and CLARIA ALEXANDER, Intervenor-Defendants

No. COA19-391

Filed 16 March 2021

1. Child Visitation—grandparents—constitutional authority—as applied—violation of mother's parental rights

Although the trial court had statutory authority to award visitation rights to the paternal grandparents of plaintiff-mother's child where the grandparents had initiated their visitation claim prior to the father's death, the trial court lacked constitutional authority to do so in this case. The trial court unconstitutionally failed to give deference to the mother's determination of whom her child may associate with, and, even assuming the grandparents were entitled to some visitation, the trial court was unconstitutionally generous in granting visitation every other Christmas and Thanksgiving and every other weekend.

2. Attorney Fees—sufficiency of findings—award less than incurred expenses

In a child visitation case, the portion of the trial court's order awarding attorney fees was vacated and remanded where the trial court failed to make a finding explaining why it awarded substantially less than the mother's incurred litigation expenses.

Appeal by Plaintiff from orders entered 17 February 2017, 8 May 2017, 6 July 2017, 29 November 2017, and 30 April 2018 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 18 March 2020.

Jonathan McGirt for Plaintiff-Appellant.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, and Parker Bryan Family Law, by Amy L. Britt, for Intervenor-Defendant-Appellees.

DILLON, Judge.

¶ 1 Plaintiff appeals from various orders culminating in a Permanent Order Granting Grandparent Visitation to Intervenor-Defendants and Awarding Attorney's Fees to Plaintiff.

I. Background

¶ 2 This matter concerns the custody of the child (the "Child") who was born to Plaintiff Amy H. Alexander ("Mother") and Defendant Edward D. Alexander ("Father"). Father is now deceased; therefore, his custody claim has abated. The remaining dispute is between Mother and Father's parents, Intervenor-Defendants Charles and Claria Alexander ("Grandparents"), and concerns whether Grandparents should enjoy visitation rights with the Child of their deceased son.

¶ 3 Mother and Father were married in 2006. Their Child was born in 2009. In 2014, when the Child was five years of age, Mother and Father divorced. They entered a consent order (the "2014 Consent Order") agreeing to joint custody.

¶ 4 Two years later, in 2016, Father developed cancer. As Father's condition worsened, he moved in with Grandparents. The Child lived with Grandparents (and Father) during Father's custody periods.

¶ 5 In 2017, Father moved to modify his 2014 Consent Order with Mother. Grandparents then moved to intervene and for permanent visitation rights. In February 2017, the trial court allowed Grandparents to intervene but put off consideration of their motion for visitation rights.

¶ 6 Three months later, in May 2017, as Father's condition grew more dire, the trial court entered an order which essentially granted Grandparents some temporary rights regarding the care of the Child. Specifically, the trial court ordered that the status quo be maintained until such time that it ruled on Father's motion to modify the 2014 Consent Order and Grandparents' motion for visitation rights.

¶ 7 On 8 June 2017, Father died. The trial court dismissed Father's motion to modify the 2014 Consent Order due to mootness. By its terms, the "status quo" order remained in effect. Mother, though, sought an order to have Grandparents' temporary rights terminated as she was now the Child's sole parent.

¶ 8 In 2018, after a hearing on the matter, the trial court entered its permanent order (the "2018 Permanent Order"). In the 2018 Permanent Order, the trial court awarded Mother primary physical and sole legal custody of the Child but granted Grandparents permanent, extensive

visitation rights. The trial court also awarded Mother *some* of the attorney's fees that she had incurred. Mother appealed.

II. Analysis

¶ 9 Mother makes two arguments on appeal, which we address in turn.

A. Grandparent Visitation

¶ 10 **[1]** Mother argues that the trial court had no statutory authority to award Grandparents visitation rights once Father had died and she became the Child's sole parent. Alternatively, Mother argues that any statute which authorizes a court to grant grandparents visitation rights is unconstitutional as applied to her in this case because the granting of visitation rights to Grandparents violates her constitutional rights to raise her Child as she sees fit.

¶ 11 Indeed, grandparents do not have a *constitutional* right nor rights under our common law to seek visitation as against the rights of a custodial parent(s). *See*, *e.g.*, *Montgomery v. Montgomery*, 136 N.C. App. 435, 436, 524 S.E.2d 360, 361 (2000). Our General Assembly, though, has *by statute* authorized the granting of visitation rights for grandparents in certain instances.

¶ 12 Before considering Mother's constitutional arguments, we first address whether the trial court exceeded its *statutory* authority to award Grandparents visitation rights in this case.

B. Grandparent Visitation - Statutory Authority

¶ 13 The trial court granted Grandparents visitation rights based on Section 50-13.2(b1) and Section 50-13.5(j) of our General Statutes. N.C. Gen. Stat. §§ 50-13.2(b1), 13.5(j) (2017).

¶ 14 Section 50-13.2(b1) provides that a trial court may include in a custody order terms "provid[ing] visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." Section 50-13.5(j) provides that after a custody determination has been made, grandparents may seek visitation rights where there has been a showing of changed circumstances.

¶ 15 The seminal case from our Supreme Court on grandparent visitation rights is *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995). In that case, the Court held that the rights granted to grandparents in Sections 50-13.2(b1) and 50-13.5(j) "do not include that of *initiating suit* against parents whose family is intact and where no custody proceeding is ongoing." *Id.* at 635, 461 S.E.2d at 750 (emphasis added).

¶ 16 Following *McIntyre*, our Court has repeatedly held that grandparents only have statutory standing to sue for visitation (where custodial parents are involved) when "the custody of a child [is] 'in issue' or 'being litigated' " by the parents. *Adams v. Langdon*, 264 N.C. App. 251, 257, 826 S.E.2d 236, 240 (2019) (quoting *Smith v. Barbour*, 195 N.C. App. 244, 251, 671 S.E.2d 578, 584 (2009)).

¶ 17 Here, Grandparents did seek to intervene and be granted visitation rights while custody between Father and Mother was being litigated: they filed their motion just after Father filed his motion to modify the original 2014 Consent Order. And it was while Father's motion was still pending that the trial court allowed Grandparents' motion to intervene. Accordingly, based on our jurisprudence, since the custody of the Child was "in issue" and "being litigated" by the parents, the trial court had the statutory authority to allow Grandparents to intervene.

¶ 18 Mother contends, though, that the trial court lost any authority it otherwise might have had to grant the intervening Grandparents visitation rights once Father died, since *at that point* there was no longer a custody dispute between her and Father. Indeed, an underlying custody dispute between parents abates upon the death of one of them. *See*, *e.g.*, *McDuffie v. Mitchell*, 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002) ("Upon the death of the mother in the instant case, the ongoing case between the mother and father ended.").

¶ 19 We note that our Supreme Court's decision in *McIntyre* does not definitively resolve this issue, as the grandparents in that case initially filed their claim at a time when there was "no [ongoing] custody proceeding" between the children's parents and the "family was intact." *McIntyre*, 341 N.C. at 629, 461 S.E.2d at 746. And to reiterate, the Court merely held that our statutes do not allow grandparents the right of "*initiating suit* against parents whose family is intact and where no custody proceeding is ongoing." *Id.* at 635, 461 S.E.2d at 750 (emphasis added).

¶ 20 Our Court, though, has addressed the issue on a number of occasions since *McIntyre*. For instance, two years ago, our Court summarized many of our other cases to explain that where grandparents have intervened or at least have been made *de facto* parties while the parents are disputing custody of a child, a resolution or abatement of the parents' custody dispute does not cut off the grandparents' statutory right to have their claim for visitation rights heard:

> [T]his Court has recognized where one parent dies in the midst of a custody action, but before the grandparent seeks to intervene, there was no ongoing custody

> action in which the grandparent could intervene, nor could the grandparent initiate a separate action. . . .
>
> However, once grandparents have become parties to a custody proceeding—whether as formal parties or as *de facto* parties—then the court has the ability to award or modify visitation even if no ongoing custody dispute exists between the parents at the time. This is because once a grandparent intervenes in a case, they are as much a party to the action as the original parties are and have rights equally as broad. Once an intervenor becomes a party, he should be *a party for all purposes*. Thus, there, the trial court retained jurisdiction over a pending grandparental visitation claim even where the parents resolved their own custody claims via consent order.

Adams, 264 N.C. App. at 257-58, 826 S.E.2d at 240 (emphasis in original) (internal quotation marks and citations omitted).

¶ 21 In 2004, nine years after *McIntyre*, our Court considered another case involving the rights of grandparents to seek expanded visitation rights against a mother of their grandchild after their son (the child's father) had died. *Sloan v. Sloan*, 164 N.C. App. 190, 595 S.E.2d 228 (2004). In *Sloan*, the paternal grandparents were granted certain temporary visitation rights while the parents were engaged in a custody dispute, even though the grandparents had never formally intervened. *Id.* at 191, 595 S.E.2d at 229. After the father of the child unexpectedly died, the grandparents sought to intervene formally and to protect their visitation rights. *Id.* at 192, 595 S.E.2d at 230. Our Court held that since the grandparents had already been awarded visitation rights while there was an active custody dispute between the parents, the trial court retained jurisdiction after the father died to allow the grandparents to formally intervene and to grant the grandparents even greater visitation rights. *Id.* at 196-97, 595 S.E.2d at 232.

¶ 22 Therefore, we conclude that, based on our jurisprudence, Grandparents had statutory standing to seek permanent visitation rights, notwithstanding that Father had died, as they had been allowed to intervene during a time when custody between Father and Mother was in dispute.[1]

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1. We note Mother's argument that the trial court lacked authority to enter its "status quo" order shortly before Father's death which granted Grandparents temporary visitation rights. However, whether Grandparents were properly granted temporary rights prior to

C. Grandparent Visitation - Constitutional Authority

¶ 23 Having determined that the trial court had *statutory* authority to award visitation rights to Grandparents, we must consider Mother's challenge that the 2018 Permanent Order violates her *constitutional* right to raise her Child as she sees fit.

¶ 24 We first consider Grandparents' contention that Mother has failed to preserve her constitutional argument. We hold that Mother has preserved this argument: Mother made constitutional arguments when the trial court considered Grandparents' Motion to Intervene, at a hearing which culminated in the entry of the 2018 Permanent Order, and in her appellate brief. We note that Mother primarily makes a "facial" attack on the grandparent visitation statutes, an argument we find unconvincing. For instance, clearly Grandparents may be awarded visitation against the will of the parents without violating the parents' constitutional rights where the parents have been deemed unfit or otherwise have acted inconsistently with their constitutional rights as a parent. *See*, *e.g.*, *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003). Notwithstanding, we turn to address whether these statutes are unconstitutional "as-applied" to Mother.[2]

¶ 25 The United States Supreme Court has long recognized the constitutional right of parents to "make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing several prior decisions). Likewise, our Supreme Court has recognized that "parents have a paramount right to custody, care and nurture of their children" and that this paramount right "includes the right to determine with whom their children shall associate[.]" *McIntyre*, 341 N.C. at 631, 461 S.E.2d at 748 (internal quotation marks omitted). *See also*

Father's death has no bearing on our analysis regarding whether the trial court had authority to enter its subsequent 2018 Permanent Order after Father's death: Grandparents were made parties and had asserted claims for visitation rights prior to Father's death. Under our case law, it was not necessary for the trial court to have granted Grandparents rights before Father's death in order to have authority to grant Grandparents rights after his death. All that was necessary was that Grandparents had initiated their claim for visitation prior to Father's death at a time when Father and Mother were litigating custody.

2. *See Yee v. Escondido*, 503 U.S. 519, 534-35 (1992) (internal citations omitted) ("[P]arties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim -- that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.").

Petersen v. Rogers, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994) (recognizing "the paramount right of parents to custody, care, and nurture of their children").

¶ 26 However, the paramount right of parents is "not absolute." *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997). For instance, the United States Supreme Court has recognized that the State "[a]cting to guard the general interest in [a child's] well being[,] may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Our Supreme Court has recognized that the State may strip parents of their constitutional rights to raise their children in certain situations;[3] the State can "establish minimum educational requirements and standards for this education[;]"[4] and the State may require children to undergo certain medical treatments, as the constitutionally-protected paramount right of parents to custody, care, and control of their children does not extend to neglecting the welfare of their children.[5]

¶ 27 While our Supreme Court has stated that custodial parents have a paramount right to determine with whom their children associate, that Court has also determined that the State may grant visitation rights to third parties, such as grandparents, against the wishes of custodial parents in some situations. *McIntyre*, 341 N.C. at 631, 461 S.E.2d at 748.

¶ 28 And in the *Troxel* case, the seminal case from the United States Supreme Court on grandparent visitation statutes, the majority[6] of justices on that high Court (in separate opinions) refused to hold that such statutes are *facially* unconstitutional:

---

3. *In re Clark*, 303 N.C. 592, 607, 281 S.E.2d 47, 57 (1981) (holding that our statutes providing for the termination of parental rights in certain situations do not "contravene[] the Constitutions of the United States [or] the State of North Carolina").

4. *Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985).

5. *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905 (internal quotation marks omitted).

6. The plurality opinion was signed onto by four justices. Justice Stevens wrote a dissenting opinion recognizing the right to provide for grandparent visitation, writing that "it would be constitutionally permissible for a court to award some visitation of a child to a [] previous caregiver [in some circumstances]." *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting). Justice Kennedy wrote a dissenting opinion recognizing this power as well, writing that there does not need to be any finding that the child has been harmed by her decision to justify granting visitation rights. *Id.* at 94 (Kennedy, J., dissenting).

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best elaborated with care.

Troxel, 530 U.S. at 73 (plurality opinion) (internal quotation marks omitted) (refusing to hold that the Washington State grandparent visitation statute was *facially* unconstitutional). The Court recognized that all 50 states have provided grandparent visitation rights by statute. *Id.* at 73 n.1.

¶ 29 In *Troxel*, the Court held that a grandparent visitation statute was unconstitutional as applied where the trial court granted grandparents visitation rights based on the court's own determination that said visitation was in the best interest of the child, without giving "any material weight" to the wishes of "a fit custodial parent[.]" *Id.* at 72.

¶ 30 While the Court in *Troxel* did not set forth definitive rules regarding when the grant of visitation for grandparents against the wishes of the custodial parent would be constitutionally permissible, the Justices did give some hints. For instance, the plurality opinion suggests that a trial court may consider granting grandparents visitation rights only after giving special weight to the parent's determination whether such visitation would be in the child's best interest:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren.
>
> [However,] the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.
>
> And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, *the court must accord at least some special weight to the parent's own determination.*

Id. at 70 (emphasis added) (paragraph breaks supplied). The plurality recognizes a presumption that the fit parent makes decisions that are in the best interests of her child and cannot be overturned merely because

a judge believes that a different decision would have been better. *Id.* at 68. Further, the plurality suggests that any visitation order should not adversely "interfere with the parent-child relationship." *Id.* at 70.

¶ 31 Applying the principles set forth in *Troxel*, we conclude that the 2018 Permanent Order is unconstitutional in two main ways.

¶ 32 First, the trial court failed to give deference to Mother's determination regarding with whom her Child may associate. It is not clear from the record whether Mother wishes that her Child have *no* relationship with Grandparents or to what extent of a relationship she has deemed appropriate. The trial court needs to make findings in this regard. And the court must *presume* that the Mother's determination is correct. This is not to say that the presumption cannot be constitutionally overcome. For instance, there is evidence that the Child has formed a significant bond with Grandparents.

¶ 33 Second, even assuming Grandparents are entitled to an order providing visitation rights, the extent of visitation granted in the 2018 Permanent Order is unconstitutionally generous, as it impermissibly interferes with the parent-child relationship between Mother and her Child.[7] For instance, the trial court's grant of visitation every other Christmas and Thanksgiving is unconstitutional. Mother, as the Child's sole custodial parent, has the right to determine with whom her Child spends these major holidays and should not be deprived of any right to spend these holidays with her Child. Also, the grant of visitation every other weekend is too extensive. Mother, as the Child's sole custodial parent, has the right to direct how her Child spends a large majority of the weekends.

¶ 34 We, therefore, vacate the visitation provisions in the 2018 Permanent Order. On remand, the trial court shall apply the appropriate legal standard as set forth in *Troxel* and other binding authority, recognizing the paramount right of Mother to decide with whom her Child may associate. We make no determination as to whether there is evidence from which findings could be made to overcome Mother's paramount right to justify granting Grandparents visitation rights.

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7. While "in certain contexts 'custody' and 'visitation' are synonymous[,] . . . it is clear that in the context of grandparents' rights to visitation, the two words do not mean the same thing." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749. The trial court erred by awarding Mother primary physical custody instead of sole physical custody, and erred by essentially awarding Grandparents secondary custody instead of visitation.

D. Attorney's Fees

¶ 35 **[2]** Mother also argues that the trial court abused its discretion in awarding her only part of the attorney's fees she has expended.

¶ 36 Our Supreme Court directs that "the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) (emphasis in original).

¶ 37 "If the court elects to award attorney's fees, it must also enter findings to support the amount awarded." *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000). These findings of fact must include "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney[] based on competent evidence." *Id.* at 378, 528 S.E.2d at 73.

¶ 38 Here, although the trial court concluded that Mother's $45,753.00 in attorney's fees was reasonable, it ultimately awarded $14,548.50. The court included a finding of fact as to the time expended on the case, skill required, customary fee, and experience of the attorney:

> 54. As of December 15, 2017, Plaintiff had incurred litigation expenses in the amount of $45,753.00. Plaintiff's attorney or members of her staff billed in excess of 231 hours in this matter. Plaintiff's attorney charges $275.00 per hour for her in-court time and $250.00 per hour for in-office time and her associates charge $225.00 per hour for in-court time and $200.00 per hour for in-office time. Plaintiff's paralegals time is billed at $110.00 per hour. These rates and fees are reasonable for Plaintiff's attorneys' experience.

The trial court provided several findings in support of its award of attorney's fees to Mother but did not provide a finding explaining its decision to award substantially less than Mother's incurred litigation expenses. We conclude that without such an explanation, the order is insufficient for our review. Therefore, we vacate this portion of the 2018 Permanent Order and remand for additional findings.

VACATED AND REMANDED.

Judges COLLINS and GRIFFIN concur.

CAROLINE-A-CONTRACTING, LLC, PLAINTIFF
v.
J. SCOTT CAMPBELL CONSTRUCTION COMPANY, INC., DEFENDANT

No. COA20-60

Filed 16 March 2021

Construction Claims—collateral source rule—subcontractors—independent contractor—failed construction of retaining wall

The collateral source rule applied to prevent plaintiff subcontractor, who was found liable in tort for damages it caused on a construction project, from receiving a credit for payments that another subcontractor made to defendant general contractor for damages he caused on the same project. The other subcontractor, who hired plaintiff as an independent subcontractor to reconstruct a retaining wall that he had unsuccessfully attempted to construct for defendant general contractor, was not plaintiff subcontractor's agent and had no obligation to defendant (beyond his duties under his contract with defendant) to rectify damages caused by plaintiff's negligence.

Appeal by Plaintiff from judgment entered 14 June 2019 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 27 January 2021.

McAngus Goudelock & Courie, PLLC, by John E. Spainhour and Lucienne H. Peoples, for Plaintiff-Appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton and Martin E. Moore, for Defendant-Appellee.

INMAN, Judge.

¶ 1 Caroline-A-Contracting, LLC ("CAC"), a subcontractor found liable in tort for damages it caused on a construction project, appeals from the trial court's judgment applying the collateral source rule to deny a credit for payments made to the general contractor, J. Scott Campbell Construction Company ("Campbell"), by another subcontractor. After careful review, we affirm.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 In early 2015, Campbell contracted to build a house in Maggie Valley, North Carolina. As part of the project, Campbell hired Ariel Mendoza

("Mr. Mendoza") of Mendoza Masonry and Landscaping to construct a boulder retaining wall to support a vehicle turnaround area. The wall collapsed twice during construction because its water drainage system failed and its foundation was compromised after significant rains. To remove his own damaged work, stabilize the slope, and erect the wall anew, Mr. Mendoza contracted with CAC. Mr. Mendoza and CAC were the only parties to the written contract, but the contract committed CAC to the "[c]ompletion of the work and satisfaction of [Campbell] and [home-owner]."

¶ 3 While CAC was reconstructing the boulder wall, Campbell determined that the new construction was a failure[1] and ordered CAC to immediately stop work and remove its equipment and employees from the site. Campbell then hired a replacement contractor, Tim Burress ("Mr. Burress"), to raze the existing construction and rebuild the wall, at a cost of $106,000. Campbell and Mr. Mendoza each refused to pay CAC.

¶ 4 On 15 March 2015, CAC filed separate lawsuits against Campbell and Mr. Mendoza.

¶ 5 CAC's lawsuit against Mr. Mendoza for breach of contract alleged CAC had incurred $20,000 in damages. Mr. Mendoza filed an answer and counterclaim alleging that CAC's work was defective, was not supervised by an engineer as required by the contract, and caused damages to Mr. Mendoza exceeding $50,000.

¶ 6 CAC's separate lawsuit against Campbell sought to recover damages for breach of contract in the amount of $30,000 and, in the alternative, damages of $35,000 in *quantum meruit*. Campbell denied the existence of a contract with CAC as well as the basis for the *quantum meruit* claim. Campbell also asserted a counterclaim of negligence for damages as a result of CAC's work. In response to the counterclaim, CAC raised a defense requesting a credit or offset against any amounts paid by another source to Campbell for the damages Campbell claimed against CAC.

¶ 7 While both actions were pending, CAC learned that Mr. Mendoza had paid money to Campbell related to damages caused by the defective retaining wall.

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1. At trial, Campbell testified that CAC had not correctly compacted the site to prevent saturation and to stabilize the area for construction of the wall: "You could take a piece of rebar with your hand and sink it out of sight. It looked like a pond. There was so much water standing there. . . . It was just unacceptable work. . . . Everything about that job was questionable."

¶ 8 In the lawsuit against Campbell, CAC moved for summary judgment, arguing that Campbell was not entitled to recover from CAC money damages that had already been paid by Mr. Mendoza. In response, Campbell argued that the collateral source rule should exclude evidence of such payments because Mr. Mendoza was an independent party. The trial court denied CAC's motion for summary judgment in September 2018.

¶ 9 Three months later, in December 2018, CAC and Mr. Mendoza dismissed with prejudice their claims against each other. The terms of the dismissal are not reflected in the record on appeal.

¶ 10 Following the dismissal of its action against Mr. Mendoza and two months before trial of the action from which the appeal arises, CAC filed a motion for a credit of at least $90,000 in the event of an adverse verdict on Campbell's counterclaim, based on payments Campbell had received from Mr. Mendoza. Campbell filed a motion to exclude evidence of these payments. The trial court granted Campbell's motion based on the collateral source rule and because such evidence "might confuse the jury or diminish any award based on the evidence." The trial court allowed CAC to proffer evidence pre-trial on its motion for credit and decided that if a verdict was returned adverse to CAC, "the court will hear arguments that the award should be reduced or credited by payments from [Mr.] Mendoza."[2]

¶ 11 The case came on for trial in May 2019. The jury determined that CAC did not have a contract with Campbell, but it awarded $5,000 to CAC in *quantum meruit* for its supplies and efforts to remediate the site. The jury also found that Campbell had been damaged by CAC's negligence in construction and awarded Campbell $41,678.09 plus interest in damages.

¶ 12 After trial, CAC renewed its motion for credit based on Mr. Mendoza's prior payments to Campbell. The trial court denied CAC's motion in an order that restated the jury verdict and found, in relevant part:

> 28. . . . [Mr. Mendoza] paid [Campbell] $105,000 for costs attributable to the repair of the wall.
>
> . . . .

2. By the time of trial, Mr. Mendoza had paid a total of $147,500 to repair damage related to the wall—$105,000 to Campbell and $42,500 to the replacement contractor, Mr. Burress.

> 32. [T]he payments made by [Mr. Mendoza] to [Campbell] were not the result of any type of insurance coverage that [Campbell] had purchased.
>
> . . . .
>
> 38. The gravamen of this case turns on the status of [Mr.] Mendoza. The evidence is uncontroverted that [Mr.] Mendoza is independent of the Plaintiff, Caroline-A-Contracting, LLC. [Mr.] Mendoza is not an employee or agent of [CAC]. [Mr.] Mendoza was not a party to this lawsuit.
>
> 39. . . . [T]he work performed by [CAC] independent of [Mr. Mendoza] was determined to be negligent and damages were awarded to Campbell Construction.
>
> . . . .
>
> 42. Under the unique facts of this case . . . the payments made by [Mr.] Mendoza constitute payments made from an independent, collateral source.

The trial court denied CAC's motion for a credit, concluding:

> 2. [Mr.] Mendoza is a source independent of [CAC].
>
> 3. The collateral source rule applies in this case and as such its application bars the tortfeasor [CAC] from reducing its own liability for damages by any amount of compensation the injured party [Campbell] received from an independent source.
>
> 4. Based upon the collateral source rule [CAC] is not entitled to a credit for payments made by [Mr.] Mendoza to [Campbell].

CAC filed written notice of appeal on 10 July 2019.

II. ANALYSIS

¶ 13 On appeal, we are bound by the facts found by the trial court if they are supported by the evidence, *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980), and we review a trial court's conclusions of law *de novo*, *Hairston v. Harward*, 371 N.C. 647, 656, 821 S.E.2d 384, 391 (2018).

¶ 14 The sole issue on appeal is whether the trial court erred by treating the payments from Mr. Mendoza as a collateral source, and consequent-

ly denying a credit to CAC. Whether the collateral source rule applies to payments made by a source independent of the negligent actor to an injured party in the context of a construction dispute appears to be an issue of first impression in North Carolina.[3]

A. Collateral Source Rule Precedent

¶ 15 The collateral source rule provides that a "tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." *Katy v. Capriola*, 226 N.C. App. 470, 482, 742 S.E.2d 247, 256 (2013) (citations and quotation marks omitted). The collateral source rule "is punitive in nature, and is intended to prevent the tortfeasor from a windfall when a portion of plaintiff's damages have been paid by a collateral source." *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 639, 627 S.E.2d 249, 257 (2006).

¶ 16 Our Supreme Court "has not clearly enunciated the factors that should be taken into account in determining whether a payment source is or is not collateral to a defendant," but the "defining characteristic of a collateral source is its *independence from the tortfeasor*." *Hairston*, 371 N.C. at 658-60, 821 S.E.2d at 392-93 (citing *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981)) (emphasis added). The most explicit definition of "collateral source" was provided only by way of examples listed a half century ago: "[A] plaintiff's recovery will not be reduced by the fact that . . . expenses were paid by some source collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by the plaintiff's employer, or by an insurance company." *Young v. Balt. & Ohio R.R.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966) (citation and quotation marks omitted); *see also Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987); *Hairston*, 371 N.C. at 657, 821 S.E.2d at 391.

¶ 17 The collateral source rule is an exception to the general common-law principle that there should be only one recovery for one injury. *See Holland v. S. Pub. Utils. Co.*, 208 N.C. 289, 292, 180 S.E.2d 592, 593 (1935) ("All of the authorities are to the effect that, where there are joint

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3. We note that just last year, in *Crescent University City Venture, LLC v. Trussway Manufacturing, Inc.*, our Supreme Court unanimously held that a commercial property owner could not recover for economic loss by asserting a tort claim against a subcontracted manufacturer of building materials with whom the property owner had no contract. 376 N.C. 54, 55, 852 S.E.2d 98, 99 (Dec. 18, 2020). In this appeal, CAC challenges only the amount of damages awarded to Campbell on a counterclaim for negligence. CAC does not challenge the validity of Campbell's tort claim. So the economic loss rule applied in *Crescent* is not before us.

tort-feasors, there can be but one recovery for the same injury or damage, and that settlement with one of the tort-feasors releases the others. . . ."). This Court has extended *Holland*'s "one satisfaction" principle to breach of contract cases. *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 357, 570 S.E.2d 510, 519 (2002) ("In a breach of contract action, a defendant is entitled to produce evidence of payment of compensation by a third party to a plaintiff for damages resulting from a similar claim regarding the same subject matter.").

¶ 18 CAC relies on *Holland*'s holding to suggest that "any amount paid by anybody . . . should be held for a credit on the total recovery in any action for the same injury or damage." *Holland*, 208 N.C. at 292, 180 S.E.2d at 593. But, in *Hairston v. Harward*, our Supreme Court emphasized that "the continued viability of the collateral source rule clearly indicates that . . . *Holland* cannot be properly understood as meaning that 'any amount paid by anybody' that benefits plaintiff or covers costs that plaintiff incurred as the result of a compensable injury must be credited against the judgment amount." *Hairston*, 371 N.C. at 659, 821 S.E.2d at 392. Though "gratuitous payments made against the judgment would also have to be credited against the judgment amount," *id.* at 659 n.6, 821 S.E.2d at 392 n.6, such payments, as in this case, are nonetheless subject to the same independent, third-party inquiry.

¶ 19 Other state appellate courts have applied the collateral source rule to claims for negligent construction resulting in injury to real property. *See, e.g.*, *New Found. Baptist Church v. Davis*, 186 S.E.2d 247, 248-49 (S.C. 1972) (denying a defendant found liable for negligent construction a credit for repairs completed by the church trustee); *Hurd v. Nelson*, 714 P.2d 767, 768, 770-71 (Wyo. 1986) (holding that volunteer labor from church congregants to remodel a home and construct a shop and storage building constituted a collateral source, so the defendant could not receive a credit against a judgment for breach of his divorce settlement); *Shaffer v. Debbas*, 21 Cal. Rptr. 2d 110, 113 (Cal. App. 4th 1993) (holding homeowner's settlement with the property insurer was a collateral source and did not offset damages owed by defendant builders in defective construction case). As in North Carolina, the collateral source rule in these states is governed entirely by common law, because these states' legislatures have not defined the collateral source rule by statute.[4] Other states have done so. *See, e.g.*, Fla. Stat. § 768.76(2)(a) (2020)

4. And, like North Carolina, all three jurisdictions—South Carolina, Wyoming, and California (along with several other states)—apply the collateral source rule to gratuitous payments or services in the same manner as they do insurance payments.

(limiting collateral sources to four categories: federal social security benefits; "health, sickness, or income disability insurance" and automobile accident insurance; any contract or agreement to reimburse for health care services; and an employer continuation plan that pays wages during a period of disability).

B. Applying the Collateral Source Rule

¶ 20 Here, to decide whether the collateral source rule applies, we must consider Mr. Mendoza's role in the residential construction project and his relationship to tortfeasor CAC. After his own attempt to build the retaining wall failed, Mr. Mendoza hired CAC to re-erect it; Campbell was not a party to the contract between Mr. Mendoza and CAC. Other than contracting with CAC, Mr. Mendoza had no further involvement with the reconstruction of the wall. Mr. Mendoza was not CAC's agent or employee.

¶ 21 Campbell's counterclaim against CAC sought recovery on a theory of negligence, not breach of contract. Campbell admitted that it ordered CAC from the property "as a result of its negligent and dangerous work causing damage to the surrounding work and real property." Campbell alleged that Mr. Mendoza entered into a contract with CAC without Campbell's knowledge, and that by engaging in the work, CAC "owed a duty to [Campbell] to perform its [w]ork in such a manner as not to interfere with, damage, or hinder . . . the [p]roject" and "not to damage real or personal property at the [p]roject." Campbell's counterclaim was for damage CAC caused to *both* the project *and* the real property.

¶ 22 Mr. Mendoza's payments to Campbell for his failure to fulfill his obligations were entirely independent of CAC's negligence and do not relieve CAC from its own distinct liability to Campbell for damage caused at the site. *See Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991) ("Generally, one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work.") (citation omitted); *see also Copeland v. Amward Homes of N.C., Inc.*, 269 N.C. App. 143, 147, 837 S.E.2d 903, 906 (2020), *cert. granted*, 851 S.E.2d 360 (N.C. 2020) (mem.) ("The legal responsibility for the safe performance of that work rests entirely on the independent contractor.") (citation omitted). Because CAC was an independent subcontractor, Mr. Mendoza had no obligation beyond his own contractual duties to Campbell to rectify damages caused by CAC's negligence. Mr. Mendoza's payments to Campbell, thus, constitute payments made from a collateral source.

¶ 23 CAC compares this case to another construction contract case in which the collateral source rule did not apply. In *RPR & Associates, Inc.*, a construction contractor claimed it had incurred expenses as a result of a delay by "the State of North Carolina *through* its *agent* architect" for a project on a college campus. 153 N.C. App. at 357, 570 S.E.2d at 519 (emphasis added). The plaintiff had already sued the architect for breach of contract because of the same delay in construction and obtained payment of $200,000 in settlement. *Id.*, 570 S.E.2d at 520. When the plaintiff then sued the State, our Court decided that "defendant was entitled to a reduction of damages for monies plaintiff received for identical injuries resulting from an identical delay." *Id.* (citing *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 134, 141-42, 468 S.E.2d 69, 74-75 (1996)).

¶ 24 Here, by contrast, Campbell did not sue Mr. Mendoza or allege that Mr. Mendoza was an agent of CAC. CAC pursued a separate action against Mr. Mendoza arising from the wall reconstruction project. CAC and Mr. Mendoza then dismissed their claims against each other with prejudice.

¶ 25 In addition, unlike the work of the architect in *RPR & Associates, Inc.*, CAC's work on the retaining wall in this case was entirely separate from Mr. Mendoza's work, causing injury and delay distinct from Mr. Mendoza's own deficient work and failure to perform under its agreement with Campbell. As established above, Mr. Mendoza was not CAC's agent. CAC therefore is not entitled to a credit for Mr. Mendoza's payments to Campbell.

¶ 26 CAC bemoans that Campbell will recover doubly for the same injury. To the extent Mr. Mendoza's payments and the damages awarded overlap, our prior decisions have established that in this situation, the injured party—Campbell, not the tortfeasor—CAC, should reap any such windfall. *See Wilson*, 176 N.C. App. at 639, 627 S.E.2d at 257. Thus, we conclude the collateral source rule applies in this case and bars CAC from reducing its liability by the amount of compensation Campbell received from Mr. Mendoza.

III. CONCLUSION

¶ 27 For the foregoing reasons, we hold that the collateral source rule applies to Mr. Mendoza's payments to Campbell in this case, barring CAC from reducing its own liability by any amount of compensation Campbell received from an independent source. Therefore, we find no error and affirm the judgment of the trial court.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

ERIE INSURANCE EXCHANGE, PLAINTIFF
v.
EDWARD R. SMITH; ARCHIE N. SMITH, A MINOR; EMILY A. TOBIAS, AS ADMINISTRATOR OF THE ESTATE OF JOHN PINTO, JR., DECEASED; VALLEY AUTO WORLD, INC.; UNIVERSAL UNDERWRITERS INSURANCE COMPANY; VW CREDIT LEASING, LTD.; AND DOE INSURANCE COMPANIES 1-3; DEFENDANTS

No. COA20-246

Filed 16 March 2021

1. Motor Vehicles—determination of insurance—financing not yet obtained—N.C.G.S. § 20-75.1—conditional delivery

Where the purchaser of a car had not yet obtained final approval of financing before taking possession of the car and getting into an accident, the vehicle was covered by the dealer's insurance because the sales transaction was a conditional sale and delivery under N.C.G.S. § 20-75.1.

2. Insurance—conditional sale of vehicle—N.C.G.S. § 20-75.1—dealer's insurer responsible for primary coverage

In a case involving the determination of insurance coverage of a newly purchased vehicle that was involved in an accident the day of purchase, where the trial court properly determined that N.C.G.S. § 20-75.1 applied to the vehicle transaction because it involved a conditional sale and delivery, the court did not err by determining that the dealer's insurer was responsible for primary coverage.

3. Insurance—coverage by operation of law—liability coverage—minimum statutory limits—terms of policy

Where, by operation of N.C.G.S. § 20-75.1, a dealer's insurer was required to cover a car that was involved in an accident during a conditional-delivery period, but the terms of the insurance contract only required coverage in accordance with minimum statutory limits, the trial court erred by ordering the insurer to provide coverage up to $500,000.00, rather than the statutory limit of $30,000.00 per person.

4. Insurance—coverage by operation of law—umbrella liability coverage—terms of policy

Where, by operation of N.C.G.S. § 20-75.1, a dealer's insurer was required to cover a car that was involved in an accident during a conditional-delivery period, the trial court erred by ordering the insurer to provide umbrella liability coverage, because neither

the personal nor the commercial umbrella provisions in the contract applied in these circumstances.

5. Appeal and Error—appellate jurisdiction—no cross appeal—no notice of appeal

In a case involving the determination of insurance coverage of a newly purchased vehicle that was involved in an accident the day of purchase, an argument by the purchaser's insurer that the trial court erred by making the insurer responsible for excess liability coverage was dismissed where the insurer did not file a notice of appeal or cross appeal. The argument did not constitute an alternative basis in law for supporting the court's order but should have been preserved separately.

Appeal by Defendant Universal Underwriters Insurance Company from Order entered 17 January 2020, by Judge James M. Webb in Hoke County Superior Court. Heard in the Court of Appeals 12 January 2021.

Martineau King PLLC, by Lee M. Thomas and Elizabeth A. Martineau, for plaintiff-appellee Erie Insurance Exchange.

Van Camp, Meacham & Meacham, PLLC, by Thomas M. Van Camp, for defendant-appellees the Smiths.

Gallivan, White & Boyd, P.A., by James M. Dedman and Tyler L. Martin, for defendant-appellant Universal Underwriters Insurance Company.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 This appeal involves a Declaratory Judgment action filed consistent with N.C. Gen. Stat. § 1-283 *et seq.*, to establish the respective obligations, if any, of Erie Insurance Exchange (Erie) and Universal Underwriters Insurance Company (Universal) to provide insurance coverage for liability arising from a 2016 car accident. Specifically, Universal appeals from an Order entered 17 January 2020, granting in part Erie's Motion for Summary Judgment, denying Universal's cross Motion for Summary Judgment, and entering a Declaratory Judgment adjudicating:

¶ 2 1. Universal was obligated to provide liability insurance coverage with limits of $500,000.00, umbrella liability coverage with limits of

$10,000,000.00, and that the aggregate coverage of $10,500,000.00 was the primary insurance coverage for the liability arising from the 2016 accident; and

¶ 3 2. Erie was obligated to provide excess liability insurance coverage with limits in the amount of $100,000.00 per person and $300,000.00 per accident.

¶ 4 The factual background giving rise to the present case is set forth in this Court's earlier opinion in *Smith v. USAA Cas. Ins. Co.*, 261 N.C. App. 40, 819 S.E.2d 210 (2018), involving a separate but related action arising from the same underlying facts.

> On the morning of Saturday, 30 April 2016, Pinto went to [Valley Auto World (Valley)] for the purpose of trading in his 2004 Saturn and purchasing another vehicle. He ultimately decided to purchase the Beetle that had been traded in by Copes. Despite the fact that [Valley] did not actually own the vehicle, [Valley] sales representatives and Pinto nevertheless agreed upon a purchase price of $14,500 for the Beetle with a trade-in value of $2,000 for the Saturn. Because Pinto did not put any money down, a credit application was prepared and submitted by [Valley] to VW Credit for $12,500, the full amount necessary to fund the purchase.
>
> At 12:05 p.m., while Pinto remained on the [Valley] premises, [Valley] received a fax from VW Credit containing VW Credit's approval of $11,990 in financing for Pinto's purchase of the Beetle. As a result, a $510 gap remained between the amount of financing approved by VW Credit and the total purchase price of the vehicle that had been agreed upon by Pinto and [Valley]. Despite this shortfall, Gary Carrington, the business manager of [Valley], believed that he would ultimately be able to secure the full financing amount by resubmitting Pinto's credit application to VW Credit the following Monday. For this reason, Carrington proceeded to assist Pinto in completing the necessary paperwork memorializing the sale.
>
> Among the various documents executed by Pinto and [Valley] on 30 April 2016 was a Conditional Delivery Agreement ("CDA"). The CDA stated, in

> pertinent part, as follows: DEALER'S obligations to sell the SUBJECT VEHICLE to PURCHASER and execute and deliver the manufacturer's certificate of origin or certificate of title to SUBJECT VEHICLE are expressly conditioned on FINANCE SOURCE'S approval of PURCHASER'S application for credit as submitted AND dealer being paid in full by FINANCE SOURCE.
>
> Upon signing the documents provided to him by Carrington, Pinto drove the Beetle off the [Valley] lot that afternoon. Later that evening, Pinto was driving the Beetle when he was involved in a head-on collision (the "30 April Accident") with another vehicle being driven by Edward Smith. Smith's son, Archie, was a passenger in his vehicle. Pinto was killed in the collision, and both Edward Smith and Archie Smith were seriously injured.
>
> Unaware of Pinto's death, Carrington resubmitted his credit application to VW Credit on 2 May 2016. At 4:40 p.m. that day, VW Credit faxed [Valley] its approval for the full $12,500 that [Valley] had requested. The following day, [Valley] paid off the balance owed to VW Credit under Copes' lease. On 9 May 2016, VW Credit executed a reassignment of title to [Valley]. [Valley], in turn, transferred title to Pinto on 23 May 2016.

Id. at 42-43, 819 S.E.2d at 612 (footnote and quotation marks omitted).

¶ 5 After the accident, the Smiths filed a Complaint alleging a Negligence action against Pinto's Estate and a Declaratory Judgment action seeking to establish, in part, the respective obligations of Erie and Universal to provide insurance coverage. *Id.* at 43, 819 S.E.2d at 612. Erie brought a crossclaim for Declaratory Judgment in that action. *Id.* In that case, the trial court also entered Summary Judgment concluding Universal was obligated to provide aggregate primary insurance coverage of up to $10,500,000.00 and Erie's policy provided excess coverage. *Id.* at 44, 819 S.E.2d at 613. On appeal, this Court vacated that order and remanded that case for additional proceedings after concluding there was a failure to join necessary parties precluding entry of a Declaratory Judgment. *Id.* at 49-50, 819 S.E.2d at 616-17. On remand, the trial court entered a Consent Order severing the Smiths' Negligence action from the

Declaratory Judgment action and permitting Erie to re-plead its claim for Declaratory Judgment. *Id.*

¶ 6 As a result, on 19 November 2018, Erie, who issued the auto insurance policy to Pinto covering his 2004 Saturn, initiated this action by filing a Complaint for Declaratory Judgment "seeking a determination [by the trial court] concerning its rights and obligations under a policy of insurance issued by it[.]" Universal, as the insurer for Valley, the dealer that sold the Beetle to Pinto, filed its Answer to Erie's Complaint on 30 January 2019, in which it also asserted counterclaims against Erie and sought Declaratory Judgment. On 21 October 2019, both Erie and Universal filed cross Motions for Summary Judgment seeking a determination of the application of N.C. Gen. Stat. § 20-75.1 addressing the conditional delivery of vehicles by a dealer to a purchaser and the obligations of a dealer to provide liability insurance in conditional delivery transactions.

¶ 7 After hearing arguments from the parties on 13 December 2019, the trial court entered its Order on 17 January 2020, ultimately granting Erie's Motion for Summary Judgment in part, denying Universal's Motion for Summary Judgment, and entering Judgment against Universal and Erie. The trial court determined "all necessary parties to this dispute have been joined and provided the opportunity to be heard in this matter." Then, the trial court concluded the transaction between Pinto and Valley, as the dealer, was a conditional sale and delivery and "Pinto was operating a covered vehicle with permission, [and] he became an insured under the terms of the Dealer's policy[ ]" and, therefore, N.C. Gen. Stat. § 20-75.1 applied. As it related to the policies' respective coverage, the trial court ordered:

> 2. With respect to the 30 April 2016 accident, Universal's policy issued to Dealer provides to Estate liability coverage of $500,000.00 and umbrella liability coverage of $10,000,000.00. This aggregate coverage of $10,500,000.00 is primary.
>
> 3. Erie's policy issued to Pinto provides to Estate excess liability coverage in the amount of $100,000.00 per person and $300,000.00 per accident, collectible only after Universal's aggregate policy limits of $10,500,000.00 have been exhausted.

¶ 8 Universal filed Notice of Appeal from the trial court's Order on 29 January 2020. The trial court's Order, which fully and conclusively

establishes the rights and responsibilities of the parties in a Declaratory Judgment, operates as a final judgment. *See* N.C. Gen. Stat. § 1-283 (2019). Thus, this Court has jurisdiction to review Universal's appeal as a final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1). In addition, without taking a cross appeal, Erie purports to challenge the trial court's ruling it is obligated to provide excess insurance coverage for the accident.

Issues

¶ 9 The dispositive issues in this appeal are: (I) whether Valley's sale and delivery of the Beetle to Pinto was a conditional delivery under N.C. Gen. Stat. § 20-75.1 such that Universal, as the dealer's insurer, was obligated to provide insurance coverage at the time of the accident; and if so, (II) whether such insurance coverage by Universal operated as the primary or excess insurance coverage; (III) what coverage limits are applicable under Universal's liability insurance policy with the dealer; (IV) whether Universal is obligated to provide additional coverage for the accident under its umbrella insurance policy covering the dealer; and (V) whether this Court has appellate jurisdiction to review Erie's separate challenge to the trial court's Order concluding Erie is obligated to provide excess insurance coverage for liability arising from the accident.

Standard of Review

¶ 10 We review a trial court's grant of summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). We also review questions of statutory interpretation and a "lower court's interpretation of an insurance policy's language[,]" de novo. *Satorre v. New Hanover Cnty. Bd. of Comm'rs*, 165 N.C. App. 173, 176, 598 S.E.2d 142, 144 (2004); *JVC Enters., LLC v. City of Concord*, 269 N.C. App. 13, 16, 837 S.E.2d 206, 209 (2019) ("The *de novo* standard also applies to questions of statutory interpretation." (citation omitted)).

Analysis

I. Conditional Delivery

¶ 11 **[1]** As a threshold matter, Universal contends the trial court erred in determining N.C. Gen. Stat. § 20-75.1, which governs the conditional delivery of motor vehicles, applied to the transaction in the present case. N.C. Gen. Stat. §20-75.1 (2019). Universal argues its coverage never extended to Pinto as the Beetle's purchaser because "Pinto had 'obtained' financing prior to the sale and delivery of the [Beetle] and that [Valley] did not consider the sale of the [Beetle] at issue to be a 'conditional' sale."

¶ 12 Section 20-75.1 was enacted in 1993 as a part of North Carolina's Motor Vehicle Act "to clarify the law relating to the conditional delivery of motor vehicles and to provide for insurance coverage for vehicles added to existing policies on nonbusiness days." 1993 N.C. Sess. Laws 328 (N.C. 1993). In relevant part, Section 20-75.1 provides:

> Liability, collision, and comprehensive insurance on a vehicle sold and delivered conditioned on the purchaser obtaining financing for the purchaser of the vehicle shall be covered by the dealer's insurance policy until such financing is finally approved and execution of the manufacturer's certificate of origin or execution of the certificate of title. Upon final approval and execution of the manufacturer's certificate of origin or the certificate of title, and upon the purchaser having liability insurance on another vehicle, the delivered vehicle shall be covered by the purchaser's insurance policy beginning at the time of final financial approval and execution of the manufacturer's certificate of origin or the certificate of title.

N.C. Gen. Stat. § 20-75.1.

¶ 13 In its Order denying Universal's Motion for Summary Judgment, the trial court concluded "the transaction between [Pinto] and [Valley] involved a conditional sale and delivery of the 2013 Volkswagen Beetle automobile at issue, and North Carolina's 'Conditional [D]elivery of [M]otor [V]ehicles' statute applies to the transaction." Conducting a de novo review of the Record, we agree with the trial court and conclude Universal's argument asserting Pinto had already obtained financing is inconsistent with both the plain language of the statute and this Court's precedent. *See Hester v. Hubert Vester Ford, Inc.*, 239 N.C. App. 22, 27, 767 S.E.2d 129, 134 (2015) ("[T]ransferring auto insurance to a consumer's policy is only supposed to occur once financing is finalized and the consumer has taken title to the vehicle." (citing N.C. Gen. Stat. § 20-75.1)).

¶ 14 Here, undisputed evidence in the Record reflects Pinto did not fully obtain financing "finally approved" before he left Valley in the Beetle on Saturday 30 April 2016. N.C. Gen. Stat. § 20-75.1. Pinto visited Valley to look for a newer car and settled on the 2013 Beetle at a purchase price of $14,500.00. Pinto traded in his 2004 Saturn for a $2,000.00 credit.[1]

1. At that time, Pinto did not provide Valley with the Saturn's title and executed a "We Owe Form" identifying he owed Valley the title to the trade-in vehicle.

To cover the remainder of the balance, Pinto applied for financing through VW Credit in the amount of $12,500.00. Prior to his departure on 30 April, Pinto's application was approved for financing in the amount of $11,990.00, leaving a balance due of $510.00. Pinto signed the CDA on 30 April 2016, which provided, "[Valley's] obligations to sell the [Beetle] to [Pinto] and execute and deliver the manufacturer's certificate of origin or certificate of title to [the Beetle] are expressly conditioned on FINANCE SOURCE'S approval of [Pinto's] application for credit *as submitted* AND dealer being paid in full . . . ."[2] (emphasis added). It was not until the following Monday, 2 May 2016, that Valley resubmitted Pinto's credit application and Pinto was approved, *as submitted*, for the full balance of $12,500.00. Therefore, at the earliest, Pinto "obtained financing" for the Beetle on 2 May 2016.[3]

¶ 15 Universal's assertion that Valley's employees considered the financing to be final despite the $510.00 balance is not conclusive. N.C. Gen. Stat. § 20-75.1 is clear: "[I]nsurance on a vehicle sold and delivered conditioned on the purchaser *obtaining financing* for the purchaser of the vehicle shall be covered by the dealer's insurance policy until such financing is finally approved and execution of the manufacturer's certificate of origin or execution of the certificate of title." N.C. Gen. Stat. § 20-75.1 (emphasis added). "[W]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning[.]" *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000) (citations and quotation marks omitted).

¶ 16 Valley delivered the Beetle to Pinto conditioned on Pinto's obtaining approval of the full financing, as verified in the CDA, in order to pay Valley the purchase price in full. At the earliest, such financing was obtained on 2 May 2016, when VW Credit approved Pinto's application for the full amount—two days after the accident giving rise to the present case—and, at the latest, on 23 May 2016, when Pinto was transferred title to the Beetle from the North Carolina Department of Motor Vehicles.

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2. On appeal, Universal argues the CDA is merely a formality because Valley requires all customers execute one regardless of financing status. That may well be the case in many, if not most, instances. However, it does not alter the specific facts of this case in which the delivery was, in fact, "expressly conditioned" on the approval of the full financing, which approval had not been obtained at the time of delivery.

3. Because we conclude on the Record that Pinto could not have "obtained" financing prior to 2 May 2016, when his credit application was approved in full, we do not address the issues surrounding the transfer of title, which ultimately did not happen until 23 May 2016.

Thus, at the time of the accident on 30 April 2016, Pinto was operating a conditionally delivered vehicle required to be insured by the dealer under N.C. Gen. Stat. § 20-75.1. Therefore, at the time of the accident, the Beetle was a covered vehicle under Valley's insurance policy issued by Universal. Consequently, the trial court properly granted Summary Judgment on this question, and the trial court's Order in this regard is affirmed.

II. Primary Coverage

¶ 17 **[2]** Universal contends, in the event Section 20-75.1 applies, the trial court erred in determining its coverage is primary because Section 20-75.1 "does not resolve the issue of priority of coverage." We conclude the trial court correctly determined Universal's coverage is primary.

¶ 18 Here, it is undisputed Valley was the dealer and Universal is Valley's insurer. As discussed above, Section 20-75.1 compels "the vehicle *shall be covered by the dealer's insurance policy*" and as such, Universal's policy issued to Valley in the present case applies. N.C. Gen. Stat. § 20-75.1 (emphasis added). Although Universal's policy provides, "[w]hen there is other insurance applicable, WE will pay only the amount required to comply with such minimum limits after such other insurance has been exhausted[,]" Section 20-75.1 expressly states, "the purchaser of the vehicle shall be covered by the *dealer's* insurance policy" where a vehicle is "sold and delivered conditioned on the purchaser obtaining financing[.]" *Id.* Universal points to no other insurance policy issued to or covering the dealer in this case under Section 20-75.1. Because Section 20-75.1 applies to the underlying transaction and requires liability coverage by Universal as Valley's insurer, we also conclude Universal's coverage is primary. The trial court's Order in this regard is affirmed.

III. Minimum Limits

¶ 19 **[3]** Next, Universal contends it is only required to provide liability insurance coverage in this case in compliance with the minimum statutory limits of North Carolina law. In its Order, the trial court determined Universal's policy provides "liability coverage of $500,000.00 and umbrella liability coverage of $10,000,000.00." Although Section 20-75.1 extends Universal's coverage to Pinto, it only provides Pinto "shall be covered by the dealer's insurance policy"; to discern the extent of Universal's coverage, we must examine the terms of Universal's insurance policy. *Nationwide Mut. Ins. Co. v. Massey*, 82 N.C. App. 448, 450, 346 S.E.2d 268, 270 (1986) ("To the extent coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract.").

¶ 20 Universal argues Pinto is insured only up to the minimum limits as required by North Carolina Law—$30,000.00 per person or $60,000.00 per accident—because Pinto is a permissive user by operation of law and not a named policyholder. *See* N.C. Gen. Stat. § 20-279.21(b)(2) (2019). Universal's policy contains two provisions Universal concedes are "potentially applicable": Coverage Part 500 (Garage Liability) or Coverage Part 830 (Basic Auto Liability). The Smiths argue Garage Liability does not apply under the circumstances because the injury was not the result of an "AUTO HAZARD" or "GARAGE OPERATION" as defined within the provision. However, regardless of whether Pinto would be covered under Garage Liability, the express language of Universal's Basic Auto Liability provision does apply to provide coverage to Pinto.

¶ 21 Basic Auto Liability, Coverage Part 830, provides as follows:

> *Who Is An Insured*
>
> A. With respect to INJURY and COVERED POLLUTION DAMAGES:
>
> . . . .
>
> 4. any other person or organization required by law to be an INSURED while using an OWNED AUTO or TEMPORARY SUBSTITUTE AUTO within the scope of YOUR permission, unless it is being loaded or unloaded. . . .
>
> . . . .
>
> *The Most We Will Pay*
>
> A. Injury and Covered Pollution Damages
>
> 1. Regardless of the number of INSUREDS or AUTOS insured or premiums charged by this coverage part, . . . the most WE will pay is the applicable limit shown in the declarations for any one OCCURRENCE.
>
> However, with respect to parts A.3 and A.4 of the Who Is An Insured condition for:
>
> a. any CONTRACT DRIVER; or
>
> b. any other person or organization required by law to be an INSURED while using an OWNED AUTO or TEMPORARY

> SUBSTITUTE AUTO within the scope of YOUR permission,
>
> the most WE will pay is that portion of such limits required to comply with the minimum limits provision law in the jurisdiction where the OCCURRENCE took place. When there is other insurance applicable, WE will pay only the amount required to comply with such minimum limits after such other insurance has been exhausted.

The policy further defines an "OWNED AUTO" as "an AUTO YOU own or LEASE and is scheduled in the declarations, and any AUTO YOU purchase or lease as its replacement during the Coverage Part period."

¶ 22 Thus, Pinto, was a "person . . . required by law to be an INSURED while using an OWNED AUTO . . . within the scope of YOUR permission[,]" covered under part A.4 of Universal's Basic Auto Liability policy.[4] However, as Universal correctly notes, its policy expressly limits payments for individuals covered by operation of law to "that portion of such limits required to comply with the minimum limits provision law in the jurisdiction where the OCCURRENCE took place."

¶ 23 The Smiths' argument Section 20-75.1 entitled them to the full policy limits of the liability coverage is unpersuasive. As this Court previously emphasized, "[t]o the extent coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract." *Nationwide Mut. Ins. Co.*, 82 N.C. App. at 450, 346 S.E.2d at 270.

¶ 24 Accordingly, the express terms of Universal's "insurance contract" only required Universal to insure Pinto in accordance with the minimum limits provisions of North Carolina law during the conditional-delivery

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4. The Smiths argue because the Beetle was transferred to Valley for sale, it is not an "OWNED AUTO." Indeed, as this Court noted in *Smith*, "VW Credit remained the title owner of the [Beetle]." *Smith*, 261 N.C. App. at 42, 819 S.E.2d at 612. However, this issue is not of significant consequence. Regardless of whether the Beetle was an "OWNED AUTO" under Universal's policy, Universal is still required by operation of law to insure Pinto because Universal is the *insurer of the Dealer*. N.C. Gen. Stat. § 20-75.1 ("the purchaser of the vehicle shall be covered by the dealer's insurance policy"). Such insurance, moreover, would be required to meet the minimum limits of North Carolina law. Therefore, whether Valley was the title owner of the Beetle at the time of the sale is not material. Valley was the *Dealer*.

period under N.C. Gen. Stat. § 20-75.1. The limits, therefore, are those provided in Section 20-279.21—"thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($ 60,000) because of bodily injury to or death of two or more persons in any one accident[.]" N.C. Gen. Stat. § 20-279.21 (2019). Thus, the trial court erred in ruling the $500,000.00 Universal policy limits applied in this case. Therefore, we vacate the portion of the trial court's Order as to the amount of Universal's liability coverage and remand this matter to the trial court to enter a judgment reflecting that the Universal liability policy provides coverage up to the applicable minimum statutory limits as provided in N.C. Gen. Stat. § 20-279.21.

IV. Umbrella Coverage

¶ 25 **[4]** Universal also contends the trial court erred in determining it was required to provide additional umbrella coverage of $10,000,000.00 for liability arising from the accident in this case under its policy issued to Valley. Universal's policy contains two provisions outlining its umbrella coverage: Coverage Part 970 (Personal Umbrella) and Coverage Part 980 (Commercial Umbrella). Personal Umbrella limits "*Who Is An Insured*" to: "A. YOU; B. If a resident of YOUR household: 1. YOUR spouse; 2. a relative or ward of YOURS; 3. any other person under the age of 21 in the care of any of the foregoing." Meanwhile Commercial Umbrella limits "*Who Is An Insured*" to:

> 1. YOU; . . .
>
> 2. YOUR directors, executive officers or stockholders.
>
> . . . .
>
> 5. any other person or organization:
>
> a. named in the UNDERLYING INSURANCE (provided to the Named Insured of this coverage part);
>
> b. granted INSURED status under:
>
> (1) Parts A.5 or A.6 of the Who Is An Insured condition in Coverage Part 500 - Garage; or
>
> (2) Parts A.7 or A.8 of the Who Is An Insured condition in Coverage Part 660 - General Liability;

¶ 26 Here, it is evident from the plain language of the policy the Personal Umbrella coverage is inapplicable to the claims asserted. Moreover, Pinto would only have been covered under the Commercial Umbrella coverage provisions if he was either a named insured in the underlying policy or granted insured status under respective Coverage Parts listed above. Pinto was not a named insured in the underlying policy. Pinto was insured by operation of law pursuant to Basic Auto Liability Coverage Part 830 subsection A.4, and not under the provisions granting insured status listed in the Commercial Umbrella policy coverage. Thus, neither Universal's Personal Umbrella nor Commercial Umbrella coverage provisions provide an avenue for Pinto to be insured under the umbrella coverage. Accordingly, the trial court erred when it determined Pinto was entitled to "umbrella liability coverage of $10,000,000.00." The portion of the trial court's Order determining Pinto was entitled to umbrella coverage is reversed, and this matter is remanded to the trial court to enter a judgment reflecting the Universal umbrella policy issued to Valley is not applicable in this case.

V. Erie's Challenge to the Trial Court's Order

¶ 27 **[5]** In its Appellee's Brief, Erie contends the trial court erred in concluding Erie's auto insurance policy issued to Pinto provided "excess liability coverage in the amount of $100,000.00 per person and $300,000.00 per accident, collectible only after Universal's aggregate policy limits of $10,500,000.00 have been exhausted." Erie argues the trial court erred when it denied Erie's Motion for Summary Judgment asserting Erie's policy was not implicated at all. Erie concedes it did not file a Notice of Appeal or Cross Appeal from the trial court's Order in compliance with Rule 3 of the North Carolina Rules of Appellate Procedure; however, Erie contends its argument constitutes an "alternative basis in law" supporting the trial court's Order under N.C. R. App. P. 28(c) to which no separate notice of appeal was required by Erie as an appellee.

¶ 28 North Carolina Rule of Appellate Procedure 28(c) provides: "Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 28(c) (2021). However, "the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal." *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002).

¶ 29 Here, Erie's argument is directed at the trial court's conclusion Erie's policy provided Pinto excess liability coverage. This is not an alternative basis in law for supporting entry of the Order; Erie's argument is that "an altogether different kind of [order] should have been entered"—an order granting their motion for summary judgment in full. *Id.* Thus, "this alleged error should have been separately preserved and made the basis of a separate cross-appeal." *Bd. of Dirs. of Queens Towers Homeowners' Assoc. v. Rosenstadt*, 214 N.C. App. 162, 168, 714 S.E.2d 765, 770 (2011) (citation omitted). Therefore, because Erie did not notice its appeal from the trial court's Order as required by Rule 3, this Court does not have jurisdiction under Rule 28(c) over Erie's arguments. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure."). In the absence of jurisdiction to review Erie's argument, we dismiss Erie's arguments; the trial court's Order adjudicating Erie's obligation to provide insurance coverage for liability arising from the accident in this case must be left undisturbed.

Conclusion

¶ 30 Accordingly, the trial court's Order concluding that Section 20-75.1 applies to the conditional delivery of the Beetle, and therefore that the Universal liability insurance policy issued to Valley is the primarily applicable insurance policy in this case is affirmed. The portion of the trial court's Order concluding Universal's policy provided liability insurance up to the amount of $500,000.00 is vacated and this matter remanded for the trial court to enter Judgment reflecting the Universal liability policy provides coverage for the accident in this case only up to the minimum statutory limits provided in N.C. Gen. Stat. § 20-279.21.

¶ 31 The trial court's conclusion the Universal policy issued to Valley provides umbrella coverage in the amount of $10,000,000.00 is reversed and this matter remanded to the trial court to enter judgment reflecting the Universal umbrella policy does not provide coverage in this case. In the absence of a valid cross appeal, Erie's argument is dismissed and the trial court's Order concluding Erie is obligated to provide excess coverage upon the exhaustion of the applicable coverage limits under Universal's policy in this case is affirmed.

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

Judges TYSON and MURPHY concur.

IN RE J.C.-B.

[276 N.C. App. 180, 2021-NCCOA-65]

IN THE MATTER OF J.C.-B.

No. COA20-458

Filed 16 March 2021

1. Child Abuse, Dependency, and Neglect—custody awarded to grandmother—no finding parent was unfit

After a child was adjudicated neglected and dependent, the trial court erred in awarding custody to the child's maternal grandmother without first finding that the child's mother was unfit or had acted inconsistently with her constitutionally protected parental rights. Further, although the child had been placed with the grandmother for a lengthy period of time, the trial court did not address whether the grandmother understood the legal significance of the custodial placement.

2. Child Abuse, Dependency, and Neglect—permanent plan—ceasing reunification efforts—statutory requirements

In a matter involving a neglected and dependent child, the trial court erred by ordering the department of social services (DSS) to cease reunification efforts with respondent-mother without making the necessary statutory findings pursuant to N.C.G.S. § 7B-906.2 regarding the reasonableness of DSS's efforts or whether reunification efforts would be unsuccessful or inconsistent with the child's health, safety, and need for a permanent home. Further, there was no evidence from which these findings could be made, where respondent was actively participating in her case plan, she had maintained stable employment and housing, and DSS had established no steps or timelines to reunify respondent with her son.

3. Child Visitation—neglect and dependency—mother's visitation—discretion of child's therapist—no consideration of child's wishes

In a matter involving a neglected and dependent child, the trial court erred by denying any contact between respondent-mother and her son without knowing or considering the wishes of the son, who was in his mid-teens when the permanency planning review hearing took place. Although the guardian ad litem failed to communicate the child's wishes to the court, instead relying on a statement from the child's therapist recommending no physical contact between respondent and her son, the information before the court at the hearing was outdated by six months to a year, and the child's age should have prompted additional questions or action from the court.

IN RE J.C.-B.

[276 N.C. App. 180, 2021-NCCOA-65]

Appeal by respondent from order entered 16 March 2020 by Judge Ericka Y. James in Wayne County District Court. Heard in the Court of Appeals 24 February 2021.

E.B. Borden Parker for petitioner-appellee Greene County Department of Social Services and White & Allen P.A., by Delaina Davis Boyd, for custodian (joint brief).

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant.

Poyner & Spruill, LLP, by John Michael Durnovich and Christopher S. Dwight, for Guardian ad Litem.

TYSON, Judge.

¶ 1 Respondent-mother appeals from a trial court order awarding custody of her son, Jacob, to his maternal grandmother ("Grandmother"), and eliminating visitation and reunification with Jacob from her permanent plan. *See* N.C. R. App. P. 42(b)(1),(b)(4) (permitting the use of pseudonyms to protect the identity of the child). We vacate and remand.

I. Background

¶ 2 Respondent-mother attempted suicide and was involuntarily committed. Respondent-mother was discharged after spending a week in the hospital. Wayne County Department of Social Services ("DSS") alleged her son, Jacob, who was thirteen-years-old at that time, to be neglected and dependent. DSS petitioned for nonsecure custody, and Jacob was placed with his maternal grandmother on 26 April 2017.

¶ 3 DSS maintained Jacob's placement with Grandmother after Respondent-mother's discharge. Jacob was adjudicated neglected and dependent on 31 August 2017. After the disposition hearing, legal custody was continued with DSS and Jacob's placement was continued with Grandmother.

¶ 4 The permanent plan was set as reunification with Respondent-mother. Reunification remained the sole permanent plan at the 8 February 2018 review hearing. A permanency planning hearing was scheduled for April, 2018.

¶ 5 At the 5 April 2018 permanency planning hearing, permanent custody of Jacob was awarded to Grandmother and reunification efforts with Respondent-mother were ceased. The juvenile court's jurisdiction

over Jacob was converted to a civil custody action by order filed 7 June 2018. Respondent-mother appealed the order and soon thereafter moved to Texas.

¶ 6 This Court unanimously vacated the 7 June 2018 order in its entirety and remanded by opinion filed on 26 March 2019. This Court held:

> [T]he trial court must conduct a hearing before entering a permanency planning order. This Court has held that the language of the statute requires live testimony at the hearing; the court cannot rely solely on "the written reports of DSS and the guardian ad litem, prior court orders, and oral arguments by the attorneys involved in the case." *In re D.Y.*, 202 N.C. App. 140, 143, 688 S.E.2d 91, 93 (2010). Accordingly, we vacate the trial court's permanency planning order and the corresponding order terminating juvenile court jurisdiction, and we remand this case for further proceedings.

In re J.C.-B. I, 264 N.C. App. 667, 828 S.E.2d 676, 2019 WL 2528342 at *1 (2019) (unpublished). The mandate issued on 15 April 2019.

¶ 7 While her appeal was pending, Respondent-mother initiated an email exchange with Jacob in February 2019. They conversed, and she cautioned him to avoid using drugs, smoking, drinking, and having sex. The mother and son took turns initiating and communicating through emails throughout 2019.

¶ 8 Dr. Kulikanda Chengappa ("Dr. Chengappa"), Jacob's psychiatrist, recommended that Jacob have "no physical contact with his biological mother at this time due to his unstable mental condition" on 11 July 2019. Five days later, DSS filed a motion for review and sought to eliminate Respondent-mother's parental rights to visit and contact Jacob. When the guardian *ad litem* ("GAL") visited Jacob on 24 July 2019, he reported that Jacob was "very relaxed[,]" and "doing well" at Grandmother's home. The GAL failed to report to the court Jacob's express wishes regarding maintaining visitation and contact with his mother. The GAL recommended only for the therapist's advice to be followed.

¶ 9 The hearing on DSS' motion was held 1 August 2019. The trial court ordered Jacob and Respondent-mother to have no further contact, the order was filed and entered 27 August 2019.

¶ 10 Respondent-mother had emailed a birthday greeting to Jacob's two email addresses in late August 2019. On 24 October 2019, Jacob emailed

Respondent-mother from his school account stating, "im (sic) going to make a new email so we can talk with out they seeing it they cant (sic) stop me from talking to my own mom[.]" They exchanged several emails that day. Respondent-mother also sent a Christmas message to both of Jacob's email accounts.

¶ 11 DSS prepared a reunification assessment on 2 January 2020. It stated "[s]trengths for the mother are employment, housing and use of community services." It stated needs as "mental health issues of [Jacob] and [Respondent-mother]." Joseph Brown ("Mr. Brown"), a new therapist, reported that Jacob was "a very emotionally intelligent young man" who "struggle[d] with a lot of anxiety" on 6 January 2020. Mr. Brown recommended that Jacob "be allowed to decide when he is ready to pursue a relationship with his mother rather than being required."

¶ 12 The trial court's hearing upon remand from this Court was not held until 30 January 2020, *over 10 months after* this Court's opinion in the prior appeal. In the order, reunification was eliminated from the permanent plan. The trial court found Respondent-mother had mental health issues which prevent her from parenting. The court also found Respondent-mother was under order to have no contact with [Jacob], but the two had exchanged many emails. Custody of Jacob was granted to Grandmother, and Respondent-mother was forbidden from any contact with Jacob "until recommended by the juvenile's therapist." Respondent-mother again appeals.

II. Jurisdiction

¶ 13 Jurisdiction is proper pursuant to N. C. Gen. Stat. § 7B-1001(a) (2019).

III. Issues

A. Did the trial court err when it failed to make findings regarding Respondent-mother's constitutionally protected parental status and failed to verify the custodian's understanding of legal custody?

B. Did the trial court err in eliminating reunification from the permanent plan when Respondent-mother's case plan compliance and progress show that continued reunification efforts were likely to be successful and would promote health, safety and permanence for Jacob?

C. Did the trial court err when it left contact and visitation in the discretion of the therapist without considering Jacob's and Respondent-mother's wishes?

IV. Standard of Review

¶ 14 Prior to depriving parents of their natural and constitutionally protected rights of care, custody, and control over their minor child, "[a] trial court must determine by clear and convincing evidence that a parent's conduct is inconsistent with his or her protected status." *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016) (internal quotation marks omitted).

> The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters. Our inquiry as a reviewing court is whether the evidence presented is such that a factfinder applying that evidentiary standard could reasonably find the fact in question.

In re A.C., 247 N.C. App. 528, 533, 786 S.E.2d 728, 733–34 (2016) (alterations, citations, and internal quotation marks omitted).

¶ 15 The determination of parental unfitness or whether parental conduct is inconsistent with the parents' constitutionally protected status is reviewed *de novo*. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018). Under *de novo* review, the appellate court "considers the matter anew and freely substitutes judgment for that of the lower tribunal." *Id.* (alterations, citations and internal quotations omitted).

¶ 16 This Court "reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *Id.*

V. Analysis

A. Respondent-Mother's Appeal

1. Fitness

¶ 17 **[1]** Respondent-mother argues that the trial court erred when it failed to make findings regarding her constitutionally protected parental status and failed to verify the custodian's understanding of legal custody. This Court recently and unanimously held:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. A natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status. . . . To apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.

Id. at 250, 811 S.E.2d at 731–32 (alterations, citations, and internal quotations omitted).

¶ 18 If the trial court fails to find the parent unfit or to have acted inconsistently with her constitutionally protected status, by clear and convincing evidence, a permanent custody award to a non-parent must be vacated. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009).

a. DSS' and Grandmother's arguments

¶ 19 DSS and Grandmother concede the trial court did not find nor use the word "unfit," in its conclusion, but argue the order provided ample findings which may support "unfitness." DSS and Grandmother argue the trial court found that Jacob and Respondent-mother had lived in a car for a few days in an adjudicatory order filed on 6 September 2017.

¶ 20 At that time, the court also found Jacob occasionally forgot his keys, was locked out of his home and neighbors would give him water. The court further found Respondent-mother drove erratically, ran off the road, threw up and this had scared Jacob and found Respondent-mother attempted suicide because she had a "rotten" relationship with her girlfriend. The court identified Jacob has lived with Grandmother as his custodian since his mother's suicide attempt and found Jacob is afraid of Respondent-mother and wants her to be nicer.

¶ 21 DSS points out Jacob was diagnosed with post-traumatic stress disorder ("PTSD") and Respondent-mother has been treated in mental hospitals on more than one occasion, including once after a former girl-

friend had committed suicide. DSS highlights Respondent-mother has cursed, made inappropriate comments to, and threatened to kill Jacob.

¶ 22 DSS and Grandmother rely on the order filed on 16 March 2020 wherein the trial court found: Respondent-mother testified she was receiving counseling and medication in Texas, but none of her counselors have filed a report or responded when a drug screen was requested. They assert Respondent-mother has significant mental health issues that prevent her from being a good parent. Respondent-mother is under order to have no contact with Jacob, but she has emailed with him. The court again found Jacob lives with Grandmother, is stable and meets the diagnostic criteria of PTSD and ADHD.

¶ 23 Finally, DSS and Grandmother argue Respondent-mother moved to Texas in 2018, rather than working the case plan in North Carolina. DSS and Grandmother further assert it is not in Jacob's best interest to have any contact with Respondent-mother unless the therapist recommends it.

b. Respondent-Mother's Arguments

¶ 24 Respondent-mother argues Jacob was removed from her custody in 2017 when she was involuntarily committed due to an episode of mental illness which required inpatient treatment. At that time, Jacob was thirteen years old. No evidence tends to show Respondent-mother has suffered another episode, which required acute care or hospitalization. DSS had consistently reported that she was engaged in the services prescribed for reunification and was making steady progress.

¶ 25 Respondent-mother sought and received treatment for her mental health, and testified she was still engaged with treatment at the time of the order pending appeal. She visited Jacob when provided opportunities by the trial court and those visits went well. Respondent-mother's counselor reported in April 2018 that she found "no barriers preventing [Respondent-mother] from parenting her child." Jacob is now seventeen years old.

¶ 26 Communicating with a child is not evidence to support a finding of unfitness or conduct inconsistent with a parent's constitutional rights. *Sides v. Ikner*, 222 N.C. App. 538, 549, 730 S.E.2d 844, 851 (2012) (examining the mother's "intentions and conduct" to determine if she "reasonably engaged" in the child's care under the circumstances).

¶ 27 Respondent-mother sought legal process to file a motion for contempt when Grandmother did not allow her to visit with Jacob. She answered Jacob's emails, as any caring parent would. She flew from Texas

to North Carolina to attend counseling appointments and to see and visit with Jacob, even though she had been denied any access to her son by the Grandmother. She complied with the plan's requirements and goals DSS and the courts had placed upon her.

¶ 28 Respondent-mother resumed teaching third grade in the fall of 2017. No clear and convincing evidence or finding supports a conclusion of unfitness or engaging in conduct inconsistent with her parental rights. The trial court erred in awarding custody to Grandmother without evidence or findings to conclude Respondent-mother was unfit or had acted inconsistently with her constitutionally protected parental rights. The court's order is again erroneous and must be vacated. *In re B.G.*, 197 N.C. App. at 574, 677 S.E.2d at 552; *see In re J.C.-B. I*, 2019 WL 2528342 at *1.

2. Findings the Custodian Understands Legal Custody

¶ 29 Respondent-mother argues the trial court failed to address Grandmother's understanding of the legal significance of becoming Jacob's custodian. When the trial court appoints a permanent custodian for a juvenile in a neglect and dependency case, "the court shall verify that the person receiving custody . . . understands the legal significance of the placement." N.C. Gen. Stat. § 7B-906.1(j) (2019). A permanent plan of custody order which does not contain the required verification must be vacated and remanded. *In re P.A.*, 241 N.C. App. 53, 65, 772 S.E.2d 240, 248 (2015). *But see In re J.E.*, *B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007) (affirming guardianship order without specific verification findings).

¶ 30 DSS argues if the trial court erred by failing to verify such failure, such error is not prejudicial pursuant to N.C. Gen. Stat. § 7B-906.1(j), stating, "[t]he fact that the prospective custodian or guardian has provided stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." The trial court found on more than one occasion that Grandmother had been the caregiver for Jacob under DSS' placement since 26 April 2017. When Respondent-mother filed her brief for this appeal, Jacob had lived with Grandmother for more than 39 consecutive months, far exceeding the six consecutive months in the statute. Respondent-mother filed a motion for contempt after Grandmother refused to allow her to visit with Jacob.

¶ 31 Under N.C. Gen. Stat. § 7B-906.1, if a "custodian or guardian has provided stable placement for the juvenile for at least six consecu-

tive months is evidence that the person has adequate resources," but such evidence does not *per se* compel a conclusion that the "person receiving custody . . . understands the legal significance of the placement." N.C. Gen. Stat. § 7B-906.1(j). During continuing months at a time, Respondent-mother was not allowed to communicate with or to visit her child.

¶ 32 DSS and the trial court unexplainedly delayed re-convening the hearing *for over ten months* after Respondent-mother's previous successful appeal, and then only to violate her constitutionally protected parental rights yet again. *In re D.A.*, 258 N.C. App. at 250, 811 S.E. 2d at 731-32; *see In re J.C.-B. I*, 2019 WL 2528342 at *1.

B. Compliance with Reunification Efforts

¶ 33 **[2]** This Court reviews the order to cease reunification:

> [to] consider whether the trial court's order contains the necessary statutory findings to cease reunification efforts. Under our statutes: "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). Here, the trial court failed to make findings under N.C. Gen. Stat. § 7B-901(c) (2017). The court could only cease reunification efforts after finding that those efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

Id. at 253, 811 S.E.2d at 733–34.

1. Statutory Requirements

¶ 34 Specific evidentiary findings must show:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.

> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019).

¶ 35 The court shall not cease reunification efforts without supported findings and conclusions those efforts would be unsuccessful or inconsistent with Jacob's health or safety. *In re D.A.*, 258 N.C. App at 253, 811 S.E.2d at 733-34. Neither the trial court's 16 March 2020 order nor DSS' evaluation provide evidence to support findings specifically addressing any of the statutory factors of section 7B-906.2(d).

¶ 36 The court's findings included: Jacob's therapist's belief he needs to remain with Grandmother; Respondent-mother testified she was receiving counseling, but did not file a report and has not provided a signed release to her counselors; Respondent-mother is taking four medications for headaches, mood and anxiety; she has significant mental health issues and emailed her son in violation of a court order; and Jacob stated he is now "bigger and stronger" than his mother. These findings, even if true, do not support a conclusion to eliminate reunification under the statute. N.C. Gen. Stat. § 7B-906.2(d). The trial court's order does not state adequate findings to support its conclusion to cease reunification efforts. *Id.*

2. Futile Efforts

¶ 37 DSS and Grandmother argue, "[t]he language of Section 7B-906.2(b) seems plainly to provide that a trial court, in any permanency planning hearing, can omit reunification as a concurrent plan if it determines that reunification efforts are either futile or contrary to the juvenile's well-being." *In re M.T.-L.Y.*, 265 N.C. App. 454, 462, 829 S.E. 2d 496, 502 (2019). DSS argues Respondent-mother failed to visit Jacob for more than a year, moved to Texas, and failed to file regarding visitation with Jacob until after DSS' motion to suspend her visitation had been granted on 1 August 2019. Finally, DSS argues Respondent-mother has not provided evidence of her mental health counseling in Texas.

¶ 38 The transcript and record show DSS' witnesses answered "yes" to questions of whether Respondent-mother was "actively participating in or cooperating with the plan, DSS, and the guardian ad litem[.]" DSS' witnesses also answered "yes" to the question of whether Respondent-mother "remain[ed] available to the court, DSS, and the guardian ad litem[.]" DSS' witnesses further answered "no" to the question of whether Respondent-mother was "acting in a manner inconsistent with the health or safety of the juvenile[.]"

¶ 39 No evidence tends to show Respondent-mother was abusing prescription medications, having mental health breakdowns, or was involved in unhealthy relationships for nearly three years after Jacob was removed from her care. Her limited communications and visits with Jacob were described as appropriate, warm, and affirming.

¶ 40 The social worker further testified Respondent-mother had maintained stable employment as a third grade teacher and housing. Respondent-mother testified she regularly attended therapy and medication management appointments and named her physicians. There were no positive tests for illegal substances.

¶ 41 A finding and conclusion that reunification efforts would be unsuccessful or inconsistent with Jacob's health, safety and need for a permanent home is unsupported by clear and convincing evidence and does not meet the mandatory requirements of N.C. Gen. Stat.§ 7B-906.2(b).

3. Reasonable Efforts

¶ 42 "[A]t each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county department of social services were reasonable." N.C. Gen. Stat. § 7B-906.2(c) (2019). For DSS' reunification efforts to be "reasonable" under the Juvenile Code, they are statutorily required to be "diligent." N.C. Gen. Stat. § 7B-101(18) (2019).

¶ 43 Regarding DSS' "reasonable efforts" at reunification with Respondent-mother, the trial court found DSS had:

> a. Maintained contact with and visits with the juvenile in the home of the grandmother;
>
> b. Collateral contacts with the therapist, the In Home Program, and reviewed ECU Neurology reports;
>
> . . . .
>
> d. Contact with the mother.
>
> e. Permanency Planning reviews;
>
> f. Completed strengths and needs assessment and a reunification assessment and determined that the risk to the juvenile if returned to the mother remains high due to a poor relationship between the juvenile and the mother.

¶ 44 DSS' contacts with Jacob in the relative placement were to determine whether Jacob was being cared for in that placement. Their actions were not aimed at reunifying him with his mother. The collateral contacts were similarly aimed at monitoring Jacob's well-being where he was, not to achieve the goal of reunification. Contact with Respondent-mother, reviews, and assessments are undoubtedly an important part of monitoring progress towards reunification Nothing in the record indicates concrete action steps or that timelines were established from the contacts, reviews, and assessments, to reunify Jacob with Respondent-mother.

¶ 45 DSS made no "diligent" or substantial efforts towards reunification in the more than 10 months between this Court's decision in *In re J.C.-B. I* in March 2019 and the hearing in January 2020. DSS never requested its social services counterpart in Texas to assess Respondent-mother's home in Texas, even after reunification was reinstated as the permanent plan with this Court's mandate in April 2019. Three months after this Court vacated the prior unlawful order eliminating reunification, DSS successfully moved the trial court in July 2019 to completely cut off all of Respondent-mother's contact with Jacob, even so far as not letting her answer his emails. The record does not show the statutorily required efforts by DSS to support reunification were "diligent" and reasonable. N.C. Gen. Stat.§ 7B-101(18). These statutorily required efforts were arguably non-existent. *See id.*

C. Visitation at Discretion of Jacob's Therapist

¶ 46 **[3]** To deny visitation, the trial court must make material findings sufficient enough to support and conclude a parent has forfeited her right to visitation or by findings the parent-child contact is not in the child's best interest. *See In re Custody of Stancil*, 10 N.C. App. 545, 548, 179 S.E.2d 844, 848 (1971). Fifty years ago, this Court stated:

> When the custody of a child is awarded by the court, it is the exercise of a judicial function. In like manner, when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child . . . 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.

Id. at 552, 179 S.E.2d at 849. Ten years ago, this Court re-stated and re-affirmed, "the trial court must set the parameters of visitation[,]" and should not leave visitation in the discretion of another person, including a "treatment team" or therapist. *In re D.M.*, 211 N.C. App. 382, 388, 712 S.E.2d 355, 358 (2011).

¶ 47 At each permanency planning hearing, the trial court must consider information from the GAL and from the juvenile. N.C. Gen. Stat. § 7B-906.1(c) (2019). This statutory provision is consistent with long-standing case law holding a trial court has a duty both to ascertain and consider the child's preference in custody determinations. *Mintz v. Mintz*, 64 N.C. App. 338, 341, 307 S.E.2d 391, 394 (1983).

¶ 48 The trial court is not required to abide by a child's express wishes, but the child's wishes are part of the totality of circumstances the trial court must consider, and consider those wishes more particularly as a child approaches majority. *See Bost v. Van Nortwick*, 117 N.C. App. 1, 9, 449 S.E.2d 911, 916 (1994).

¶ 49 One of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court. *See* N.C. Gen. Stat. § 7B-601(a) (2019). Jacob's wishes as an older teen were never sought nor conveyed to the trial court.

1. Statutory Violations

¶ 50 When an appellant argues the trial court failed to follow a statutory mandate, the error is preserved, and the issue is a question of law and reviewed *de novo*. *See In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019). Specifically, violation of N.C. Gen. Stat. § 7B-601, the statute listing the GAL's duties, or N.C. Gen. Stat. § 7B-906.1(c), the statute listing the evidence to support requirements at a permanency planning hearing, requires reversal and remand for a new hearing. *In re R.A.H.*, 171 N.C. App. 427, 432, 614 S.E.2d 382, 385 (2005).

2. Jacob's Wishes

¶ 51 Jacob was sixteen years old at the time of the permanency placement hearing under appeal. He was old enough to petition for emancipation, and well past the age when a juvenile's wishes regarding his own placement and associations must be considered. N.C. Gen. Stat. § 7B-3500 (2019).

¶ 52 The only recent indication in the record of Jacob's wishes came from an email he sent his mother on 24 October 2019 stating, "im [sic]

going to make a new email so we can talk with out they [sic] seeing it they cant stop me from talking to my own mom[.]" Jacob's express wishes are missing from the only GAL report in July 2019 prepared after this Court's remand, and six months before the January hearing. The GAL did not communicate Jacob's wishes to the court and apparently simply deferred to the therapist's opinion.

¶ 53 The GAL presented letters from service providers, including two that were identical to previous letters except for the date. One of those letters, from Dr. Paul Brar in October 2018, was based on examinations in September 2017 and August 2018. It stated, "[i]n my professional opinion in the best interest of Jacob he should not be allowed to have visitation even contact with the mother."

¶ 54 The GAL presented two letters from Timothy Hunt ("Mr. Hunt"). Mr. Hunt, a therapist hired by Grandmother, provided identical letters except one was dated 1 December 2018 and the other was dated 14 July 2019. Mr. Hunt's assessment was based upon observations he made from October 2017 to May 2018. Mr. Hunt recommended that Jacob's "contact with his mother [be] limited to when [Jacob] would like to make contact with her. . . I would ask the court that [Jacob] be allowed to decide when he would like to pursue a relationship with his mother rather than being required."

¶ 55 The GAL presented a letter, written by Dr. Chengappa on 11 July 2019, which referred to treatment "since 2012." Dr. Chengappa recommended "[i]t is my professional opinion that [Jacob] should have no physical contact with his biological mother at this time due to his unstable mental condition."

¶ 56 The only rationale the therapists' letters supply is in Mr. Hunt's letter, "[Jacob] is sensitive and struggles with anxiety . . . mother's behaviors are erratic and cause him a lot of internal conflict." No statements support an order to forbid visitations or contact between Jacob and his mother.

¶ 57 Further, the information provided by the GAL was several months old by the time of the January 2020 hearing. The information from both Mr. Hunt and Dr. Brar was over a year old. Dr. Chengappa's information was more than six months old.

¶ 58 The most current information, a letter from Jacob's current therapist, Mr. Brown, which was attached to the DSS report, recommended that Jacob "be allowed to decide when he is ready to pursue a relationship with his mother."

¶ 59 The therapists' opinions are divided on whether Jacob should be reunited or be allowed visitation with his mother, but the most recent recommendation is to allow Jacob to decide. The record also shows Jacob's expressed desire and efforts to maintain contact with his mother, which was not communicated to the court by the GAL. Why Jacob was not called and permitted to testify is suspiciously missing from the record. Jacob is now seventeen years old, eligible for emancipation and his opinion carries great weight. *See* N.C. Gen. Stat. § 7B-3500.

VI. Conclusion

¶ 60 Our Supreme Court held, "this Court has enunciated the fundamental principle that absent a finding parents, (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citation and quotation marks omitted).

¶ 61 The trial court erred by granting custody to Grandmother in derogation of Respondent-mother's constitutional rights as a parent without finding her to be unfit or engaged in conduct inconsistent with her parental rights. The trial court also erred by eliminating reunification with Respondent-mother without making proper findings of fact after multiple reports and testimony from DSS' witnesses affirming Respondent-mother's compliance with the plan.

¶ 62 Finally, the court erred when it made contact between Jacob and his mother contingent on the therapist's recommendation without knowing and considering Jacob's wishes. *In re D.M.*, 211 N.C. App. at 388, 712 S.E.2d at 358 (the trial court must set the parameters of visitation[,] and should not leave visitation in the discretion of another person, including a "treatment team" or therapist.).

¶ 63 For these reasons, the order is vacated and again remanded with instructions for immediate entry of an order consistent with this Court's opinion as contained herein. This mandate shall be effective upon filing. *It is so ordered.*

VACATED AND REMANDED.

Judges COLLINS and WOOD concur.

IN RE R.P.

[276 N.C. App. 195, 2021-NCCOA-66]

IN THE MATTER OF R.P., X.P.

No. COA20-311

Filed 16 March 2021

1. Child Abuse, Dependency, and Neglect—orders—signed by judge who did not preside over hearing—nullity

In a child abuse and neglect matter in which respondent-parents stipulated to the underlying facts but no other evidence was presented, adjudication and disposition orders signed by the chief district court judge after the presiding judge resigned were a nullity. Where the presiding judge did not articulate findings of fact, enter conclusions of law, and render an order, the chief district court judge could not sign written orders as merely a ministerial function.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—stipulations—not valid for questions of law

In an abuse and neglect matter in which respondent-parents' stipulations were the only evidence presented, stipulations that the children were abused and neglected were invalid because those involved questions of law to be resolved by the trial court.

Appeal by respondents from order entered 14 February 2020 by Judge Robert Martelle in Rutherford County District Court. Heard in the Court of Appeals 24 February 2021.

King Law Offices PLLC, by Brian W. King and Thomas Morris, for petitioner-appellee Rutherford County Department of Social Services.

Miller and Audino LLP, by Jeffrey L. Miller, for respondent-appellant mother.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant father.

Fox Rothschild LLP, by Kip D. Nelson, for Guardian ad Litem.

TYSON, Judge.

¶ 1 Respondents mother and father appeal the adjudication and initial disposition order adjudicating their minor child, X.P. ("Xavier") as abused

and neglected. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). Respondent-father also appeals the trial court's adjudication of R.P. ("Rorie") as abused and neglected. We vacate the orders and remand for a new adjudication and disposition hearing.

I. Background

¶ 2 Respondent-mother gave birth to Xavier, while in the bathtub at her parents' home in July 2018. Xavier and Respondent-mother tested positive for amphetamines and benzodiazepine after Xavier's birth. Respondent-mother had failed to obtain prenatal care prior to the birth. The Rutherford County Department of Social Services ("DSS") became involved with the family two days after Xavier's birth.

¶ 3 DSS scheduled a child and family team ("CFT") meeting and drug testing for Respondents, their twelve-year-old child, Rorie, and Xavier for 28 August 2018. Both Respondent-mother and Xavier tested positive for methamphetamine. Respondent-mother and Xavier attended the CFT meeting and agreed to a safety plan. Respondent-father failed to attend or to bring Rorie to be drug tested.

¶ 4 The safety plan included the family moving into the juveniles' paternal grandfather's home. On 13 September 2018, when DSS arrived at the grandfather's home for the next scheduled CFT meeting, the family had moved back into their own home. Rorie told DSS she had observed both of her parents use methamphetamine in the home and she did not feel safe being around them. Rorie was tested the next day and was negative for drugs.

¶ 5 DSS filed its original juvenile petitions on 13 September 2018, alleging Rorie was neglected and Xavier was abused and neglected. DSS filed amended petitions with the same allegations on 16 October 2018. The juveniles were placed into DSS' custody. After initially being in foster care, Rorie was placed in the home of her paternal grandfather and Xavier resided in a kinship placement.

¶ 6 Respondents acquiesced to an out-of-home services agreement on 21 September 2018. Both parents agreed to complete mental health and drug assessments and comply with any recommended treatment. Respondents denied drug usage and did not complete any drug assessments.

¶ 7 Respondent-mother tested positive for methamphetamine on 25 September 2018 and again on 25 October 2018. Respondent-father provided his first drug screen on 25 October 2018, which was positive for methamphetamine and amphetamines. On 4 January 2019,

Respondent-mother tested positive for oxycodone, methamphetamine, and amphetamines. Respondent-father tested positive for methamphetamine and amphetamines on that same date.

¶ 8 The adjudication hearing was held 22 January 2019. All parties and their attorneys were present before Judge C. Randy Pool. The parties stipulated to thirteen statements of fact. The stipulations were introduced as Exhibit A and DSS offered no other evidence at adjudication. The stipulations included the results of the drug tests administered through the pendency of the case, that Xavier was abused and neglected, and that Rorie was neglected.

¶ 9 Judge Pool indicated "based on the stipulations [he] would make findings of fact consistent with those in the stipulation on Exhibit A, would -- based on that stipulation -- enter the adjudications of neglect [of both juveniles] and abuse [of Xavier]."

¶ 10 At the disposition stage of the hearing, the court received DSS' court reports and those of the guardian *ad litem* ("GAL"). The recommended permanent plan was reunification. Judge Pool listed several conditions to be included in the order and asked for DSS' attorney to draft the order. The matter was to be set for review in three months.

¶ 11 The adjudication and disposition orders were not signed until 14 February 2020. Judge Pool had resigned prior to that date, and the order was signed by the chief district court judge, Judge Robert Martelle. Respondents timely appealed. Respondent-mother noted her appeal only to the order regarding Xavier.

II. Jurisdiction

¶ 12 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2019).

III. Standards of Review

¶ 13 This Court reviews a trial court's adjudication of a child as a neglected or abused juvenile to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

¶ 14 "The standard of review of the dispositional stage is whether the trial court abused its discretion." *In re D.R.B.*, 182 N.C. App. 733, 735, 643

S.E.2d 77, 79 (2007). An abuse of discretion occurs when the trial court acts under a misapprehension of the law or its ruling is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

IV. Issues

¶ 15 Respondents assert the adjudication and disposition orders signed by Judge Martelle are void, and argue in the alternative, that their stipulations are insufficient, standing alone, to support an adjudication of abuse or neglect. Respondents further assert the trial court erred in relying solely upon written reports and attorney arguments at the disposition stage.

V. Analysis

A. Ministerial Action

¶ 16 **[1]** We take judicial notice that Judge Pool resigned from the bench and left the orders unsigned. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019) (court may take judicial notice of fact not subject to reasonable dispute). North Carolina Rule of Civil Procedure 63 allows the chief district court judge to sign orders upon the resignation of a district court judge.

> If by reason of death, sickness or other disability, *resignation*, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C. Gen. Stat. § 1A-1, Rule 63 (2019) (emphasis supplied).

¶ 17 Respondents argue Rule 63 does not anticipate the chief district court judge's signing an adjudication order after the judge who presided at the hearing and heard the evidence resigned without entry of the orders. Respondents rely upon this Court's holding that the function of a substituted judge is "ministerial rather than judicial." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984).

¶ 18 In *Whisnant*, Judge Tate had conducted a hearing on a motion to terminate the respondent's parental rights on 20 October 1983. *Id.* at 440, 322 S.E.2d at 435. Judge Tate stated insufficient evidence supported neglect, but evidence existed to find nonpayment of support and "he believed the best interest of the child would be served by termination of parental rights." *Id.* Judge Tate directed the GAL attorney to prepare the order. *Id.* The resulting adjudication and disposition orders listed Judge Crotty had heard the matter and they were signed by Judge Crotty on 28 December 1983. *Id.* This Court held "Judge Crotty was without authority to sign the order terminating respondent's parental rights and the order he signed [was] a nullity." *Id.* at 441, 322 S.E.2d at 435.

¶ 19 Respondents, relying upon *Whisnant*, assert the judge presiding at the hearing is the only one who hears all the evidence, passes upon the credibility of the witnesses, and discerns the weight to be applied to the testimony and the inferences to be drawn therefrom to adjudicate the issues. Respondents also argue Judge Pool, not Judge Martelle, is the one who received their stipulation in open court on the day of the hearing.

¶ 20 DSS and the GAL argue Judge Pool presided over the hearing and articulated both his findings of fact and the basis of his decision, stating he "would make findings of fact consistent with those in the stipulation on Exhibit A." Judge Pool indicated he "would - based on that stipulation - enter the adjudication of neglect and abuse . . . as is admitted to." DSS and the GAL assert that because of the stipulation all that was left for Judge Martelle was to sign the order as a ministerial act.

¶ 21 Our Juvenile Code allows for stipulations by the parties to be received into evidence at adjudication. N.C. Gen. Stat. § 7B-807(a) (2019). The statute provides "[a] record of specific stipulated adjudicatory facts shall be made by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them." *Id.* The statute requires the trial court shall make and state the same findings "that the allegations in the petition have been proven by clear and convincing evidence" as is required where live testimony is presented. *Id.*

¶ 22 Here, the parties stipulated to the facts underlying the adjudication. This stipulation was written and signed by all parties. It is unquestioned that the parties were lawfully able to stipulate to the adjudicatory facts in this matter. Such stipulations of underlying facts could properly have been included as part of the final judgment.

¶ 23 However, nothing in the record or transcript shows Judge Pool ever made or rendered the final findings of fact and conclusions of law in the unfiled and unsigned orders. He merely stated he would enter the adjudication "as is admitted to." Since the record on appeal shows only a stipulation without any adjudication of the facts and conclusions of law, or rendering of the order, any action by Judge Martelle to cause the later prepared and unsigned draft order to be entered was not solely a ministerial duty. *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 24 Further, the statutorily required disposition hearing requires the presiding judge consider competent evidence "necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. § 7B-901 (2019). Judge Martelle's signing of the disposition orders cannot be considered simply a ministerial act.

¶ 25 At the 22 January 2019 hearing, Judge Pool stated he "would make findings consistent with the stipulations consistent with the reports presented by the guardian ad litem and by the department of social services." The court stated, "reasonable efforts [had] been made by the agency" and that it would be "in the best interest of the children to remain in DSS custody." The court ordered Respondents to comply with their out-of-home services agreements. These four findings are included in the written orders.

¶ 26 All other purported findings and conclusions included in the order signed by Judge Martelle are not reflected in any stipulations or oral statements of Judge Pool. The written disposition portion of the order went beyond the oral recitations of Judge Pool.

¶ 27 Rendering and entering judgment was more than a ministerial task. Judge Martelle was without authority to sign the adjudication and disposition orders and the orders are a "nullity." *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 28 DSS asserts voiding Judge Martelle's order would be an improper extension of our Supreme Court of North Carolina's recent holding in *In re C.M.C.*, 373 N.C. 24, 28, 832 S.E.2d 681, 684 (2019). DSS argues the reasoning in *C.M.C.* is only applicable to termination of parental rights hearings and orders and not to the initial adjudication of the juveniles. DSS' argument is unpersuasive and erroneous.

¶ 29 In *C.M.C.*, our Supreme Court held a termination of parental rights order signed by a different judge than the judge who presided over the termination hearing was a nullity. *Id.* The Court specifically adopted the reasoning of this Court's decisions in *In re Whisnant*, 71 N.C. App. at 442, 322 S.E.2d at 435 and *In re Savage*, 163 N.C. App. 195, 198, 592 S.E.2d 610, 611 (2004). The Supreme Court concluded the appropriateness of nullifying the orders stems "from the fact that N.C.G.S. § 1A-1, Rule 52 requires a judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions of law arising on the facts found, and (3) enter judgment accordingly." *In re C.M.C.*, 373 N.C. at 28, 832 S.E.2d at 684 (internal citation and quotation marks omitted). The Court further recognized the appropriateness of their result by noting N.C. Gen. Stat. § 1A-1, Rule 58 provides that "a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk of court." *Id.* (citation omitted).

¶ 30 Contrary to DSS' assertion, our Supreme Court relied upon our rules of civil procedure, not upon some perceived distinction between the gravity of a hearing on a juvenile petition versus a hearing on a motion to terminate parental rights. *See id.* Here, Judge Pool did not recite, render, nor sign the order. His unsigned order is not a valid judgment from where Judge Pool presided over the adjudication hearing, and Judge Martelle's ministerial signature thereon cannot cure the judgment. *See In re C.M.C.*, 373 N.C. at 28, 832 S.E.2d at 684.

B. Stipulated Conclusions of Law

¶ 31 **[2]** Our conclusion to vacate is also supported by other precedent. "It is well established that stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *In re R.L.G.*, 260 N.C. App. 70, 76, 816 S.E.2d 914, 919 (2018) (citation and internal quotation marks omitted).

¶ 32 In the present case, the parties' stipulation includes "the Respondent parents stipulate and admit that [Xavier] is an abused and neglected juvenile" and that Rorie is "a neglected juvenile." Chapter 7B and our case law clearly require the trial court's legal conclusion that a child is abused or neglected be based upon DSS' presentment and admission of clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2019).

¶ 33 Here, the parties did not agree to the trial court entering a "consent adjudication order" pursuant to N.C. Gen. Stat. § 7B-801(b1) (2019) (allowing consent order to be entered where all parties consent, the juveniles are represented by counsel and the court makes sufficient findings of fact).

¶ 34 DSS concedes Respondents' stipulation that they believed their children to be neglected and abused is not binding on a court as a legal conclusion. *See In re R.L.G.*, 260 N.C. App. at 76, 816 S.E.2d at 919.

¶ 35 The juvenile petition filed alleges Xavier was abused in that Respondents "inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means." *See* N.C. Gen. Stat. § 7B-101(1) (2019). The petition alleges Xavier was neglected in that the Respondents did "not provide proper care, supervision, or discipline" and "lives in an environment injurious to the juvenile's welfare." *See* N.C. Gen. Stat. § 7B-101(15) (2019). DSS' petition alleged the same statutory prongs of neglect concerning Rorie.

¶ 36 According to the trial court's finding of fact in *In re R.L.G.*, the respondent had admitted the juvenile was neglected because she did not ensure that the juvenile attended school regularly. *In re R.L.G.*, 260 N.C. App. at 76, 816 S.E.2d at 918. This Court recognized "the determination of whether a juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) is a conclusion of law." *Id.* at 76, 816 S.E.2d at 918-19. Such "[d]etermination that a child is not receiving proper care, supervision, or discipline, requires the exercise of judgment by the trial court." *Id.* This Court held the respondent's admission that the juvenile was a neglected juvenile "was ineffective to support the trial court's adjudication of neglect." *Id.*

¶ 37 The formulation of this conclusion requires the hearing judge to consider the properly admitted evidence, determine the weight and burden on DSS, and reconcile the nexus, if any, between the stipulated facts, and to adjudicate whether the child is neglected or abused. "The trial court's findings must consist of more than a recitation of the allegations contained in the juvenile petition. The trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law." *In re K.P.*, 249 N.C. App. 620, 624, 790 S.E.2d 744, 747 (2016) (alterations and internal quotation marks omitted) (citation omitted).

¶ 38 Judge Pool would have been unable to simply rest alone upon a stipulated conclusion. It is equally clear Judge Martelle cannot, in the name of a ministerial act, do what Judge Pool himself could not do. *See id.* Judge Martelle was not present at the hearing and on the basis of the order alone could not adjudicate Rorie and Xavier as neglected and abused as a conclusion of law, in a ministerial act.

¶ 39 DSS asserts there exists a distinction between accepting a stipulation as a legal conclusion at an initial adjudication and disposition

hearing versus accepting one at a termination of parental rights hearing. DSS argues the trial court's action requires us to apply a lower standard, since it does not involve termination of parental rights or a substantial deprivation of Respondents' ability to see their children. DSS asserts another judge signing off on an order after conduct of this hearing on allegations of abuse and neglect and determining the appropriate initial disposition is a ministerial task.

¶ 40 This assertion is not supported by the statute or our case law. The case of *In re R.L.G.*, an appeal of the initial adjudication hearing, was held upon DSS' petition alleging the juvenile was neglected. The disposition order in that case ordered DSS to pursue the goal of reunification. *In re R.L.G.*, 260 N.C. App. at 73, 816 S.E.2d at 916.

¶ 41 In the case of *In re L.G.I.*, 227 N.C. App. 512, 515, 742 S.E.2d 832, 835 (2013), the respondent had entered into a stipulation of certain facts during the adjudication phase of the hearing. On appeal, this Court reviewed whether the adjudication order was a valid consent adjudication order, and no additional evidence showing neglect needed to be presented beyond the parties' agreed upon facts. The respondent asserted, and this Court agreed, that her stipulation did not convert the trial court's order into a consent adjudication order. *Id.* at 515, 742 S.E.2d at 835.

¶ 42 This Court affirmed the trial court's adjudication because additional medical record evidence in the record supported the respondent-mother's prenatal drug exposure, even without respondent-mother's stipulation. *Id.* at 516, 742 S.E.2d at 835.

¶ 43 No other evidence beyond the parties' stipulation was presented at the adjudication hearing. Judge Pool was required to make findings of fact, adjudicated and state conclusions of law arising on those facts, and enter judgment accordingly. The parties did not and could not have stipulated to the final conclusion in this matter.

¶ 44 Respondent-father also points out the written order also concludes Rorie "is adjudicated to be an abused and neglected juvenile." "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805. The underlying petition only alleged neglect. The box alleging "abuse" on the petition was not checked. The parties stipulated Rorie is neglected "[a]s a result of the frequent use of illegal controlled substances." No evidence was offered at the adjudication hearing and no findings of fact in the order support a conclusion that Rorie was abused.

¶ 45 We categorically reject DSS' argument that Judge Martelle's rendering of Rorie as abused in the absence of such allegation in the petition was within his discretion or is, at worst, nonprejudicial or harmless error. Presuming Judge Pool had signed the order, this conclusion is erroneous. No clear and convincing evidence supports a conclusion Rorie was abused and that portion of the adjudication is vacated. *Id.*; *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365; *see also In re D.C.*, 183 N.C. App. 344, 349, 644 S.E.2d 640, 643 (2007) (holding where DSS did not click the box or allege neglect in its petition, the trial court erred by entering an order adjudicating the juvenile to be a neglected juvenile"). That conclusion is vacated.

C. Disposition

¶ 46 Respondents also argue the trial court abused its discretion in rendering its disposition without sufficient credible and competent evidence to support its findings. DSS and the GAL respond that the initial disposition hearings are informal and there is no requirement that the order be supported by live testimony, just competent evidence. Both DSS and the GAL presented court reports to Judge Pool at the disposition stage. Because we hold the adjudication orders signed by Judge Martelle are "a nullity," it is unnecessary to reach the merits of these arguments. *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

VI. Conclusion

¶ 47 Notwithstanding the parties entered into specific stipulation of facts that Rorie was neglected and that Xavier was abused and neglected, Judge Pool did not adjudicate the evidence, enter conclusions of law, and render an order. The chief district court judge could not properly sign the later written adjudication and disposition orders as merely a ministerial duty. The orders are vacated and the case is remanded for a new hearing. *It is so ordered.*

VACATED AND REMANDED.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
YUL BANNERMAN

No. COA20-495

Filed 16 March 2021

Constitutional Law—right to counsel—waiver—statutory inquiry—desire to prevent delay

There was no error in the trial court's acceptance of a criminal defendant's waiver of his right to counsel where the trial court conducted a thorough inquiry pursuant to N.C.G.S. § 15A-1412 to ensure that the waiver was knowing, intelligent, and voluntary. Defendant's motivation for his waiver of counsel—to prevent his trial from being delayed by two months—did not prevent his waiver from being voluntary.

Appeal by Defendant from judgment entered 18 December 2019 by Judge Richard K. Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for the State-Appellee.

Michael Spivey for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgment entered upon jury verdicts of guilty of conspiracy to commit common law robbery, common law robbery, and being a habitual felon. Defendant contends that the trial court erred by accepting his waiver of counsel because it was not the result of a voluntary exercise of his free will. For the reasons stated below, we discern no error.

I. Procedural Background

¶ 2 On 20 February 2019, Defendant was arrested on charges of conspiracy to commit armed robbery. Attorney Jordan Duhe was assigned on 22 February 2019 to represent Defendant. Defendant was subsequently indicted for conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and being a habitual felon.

¶ 3 On 19 May 2019, Defendant requested new counsel, and Ms. Duhe filed a motion to withdraw alleging a breakdown in communication and a conflict of interest. This motion was granted and Attorney Merrit Wagoner was appointed on 3 June 2019 to represent Defendant.

¶ 4 On 10 October 2019, Mr. Wagoner filed a motion to withdraw, alleging Defendant had asked him to withdraw and had threatened to file grievances against him with the North Carolina State Bar. At the 22 October 2019 hearing on the motion, Defendant expressed a desire to represent himself and signed a written waiver of counsel. At a hearing on 10 December 2019, Defendant was appointed standby counsel.

¶ 5 A jury trial was held on 16-18 December 2019. Defendant was ultimately convicted of common law robbery and conspiracy to commit common law robbery, was found to be a habitual felon, and was sentenced to a prison term of 96 to 128 months. Defendant timely entered oral notice of appeal.

II. Discussion

¶ 6 Defendant's sole argument on appeal is that the trial court erred by accepting his waiver of counsel because the waiver was not the result of a voluntary exercise of his free will, but rather was the result of his belief that it was his only choice to avoid delaying his trial.

¶ 7 We review *de novo* a trial court's determination that a defendant has waived the right to counsel. *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020). A criminal defendant's right to counsel during a criminal proceeding is protected by both the federal and state constitutions. *See* U.S. Const. amend. VI; N.C. Const. art. I § 19, 23. Although a defendant has a constitutional right to representation during a criminal proceeding, he may elect to waive that right and instead proceed *pro se*. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

¶ 8 Any waiver of the right to counsel and concomitant election to represent himself must be expressed "clearly and unequivocally." *State v. Thomas* 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (citation omitted). "Upon receiving this clear request, the trial court is required to ensure that the waiver is knowing, intelligent, and voluntary." *Simpkins*, 373 N.C. at 534, 838 S.E.2d at 445 (citing *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476). The trial court can ensure a waiver is knowing, intelligent, and voluntary by fulfilling the mandate of N.C. Gen. Stat. § 15A-1242, which requires the trial court to conduct a "thorough inquiry" and to be satisfied that "(1) the defendant was clearly advised of the right to counsel, including the right to assignment of counsel; (2) the defendant '[u]nderstands and appreciates the consequences' of proceeding

without counsel; and (3) the defendant understands what is happening in the proceeding as well as 'the range of permissible punishments.' " *Simpkins*, 373 N.C. at 534, 838 S.E.2d at 445 (2020) (citing N.C. Gen. Stat. § 15A-1242).

¶ 9 For the reasons stated below, we conclude that Defendant clearly and unequivocally expressed his desire to waive counsel and represent himself, and that he made this decision knowingly, intelligently, and voluntarily.

¶ 10 On 22 October 2019, the trial court heard Defendant's second appointed attorney's motion to withdraw. After granting the motion and announcing that it would appoint Attorney Paul Mediratta to represent Defendant, the Assistant District Attorney (ADA) stated to the court,

> [W]ith . . . Mr. Wagoner's getting out of the case today, I hope that [Defendant] understands that this case will no longer be heard in December. . . . [W]e had this case set for December 16th. This is his doing, and we're going to have to put this case on the February 24th, 2020 trial calendar to get Mr. Mediratta a chance . . . to get into the case[.]

The trial court responded, "Okay." The following colloquy then took place:

> THE DEFENDANT: Excuse me, Your Honor. I withdraw for an attorney if we can have this date of December the 16th. I withdraw, and I will represent myself if I can have a date in court.
>
> THE COURT: I can hear you, but can we get that --
>
> THE DEFENDANT: I would withdraw counsel if I could have my date in court.
>
> THE COURT: You want to represent yourself on that?
>
> THE DEFENDANT: If we don't keep the December 16th date. I got some motions I need to be heard on.

¶ 11 Defendant proceeded to argue that the State was withholding exculpatory evidence. The trial court explained to Defendant, "that's not why we're in here right now," and again asked Defendant if he wanted to represent himself. Defendant responded, "Yes, I'm ready. I'll represent myself." Defendant signed a waiver of counsel form, waiving his right to assigned counsel. The trial remained set for 16 December 2019.

¶ 12 Defendant was brought back into court on 10 December 2019 to address his letter to the court requesting a "co-counselor" for trial. At the outset of the hearing, the trial court asked Defendant, "You want to represent yourself; is that correct? Do you intend to represent yourself?" Defendant responded, "Yes."

¶ 13 After some discussion about Defendant's desire to see some videos he thought were in the State's possession, the ADA explained to the trial court about Defendant's statements at the October hearing that he wanted to represent himself and the ADA "ask[ed] that the Court maybe go over some of those responsibilities, that he be made fully aware of what it would mean to represent himself if the Court is willing to do that."

¶ 14 The trial court then addressed Defendant, "Mr. Bannerman, I do need to ask you some questions about representing yourself. . . . [T]he questions I'm asking you right now about regarding your representing yourself. I have to ask you a series of questions." Defendant responded, "Okay." Through questioning, the trial court confirmed that Defendant was able to hear and understand him and was not under the influence of alcohol, drugs, or any other substances. The trial court discerned that Defendant was 51 years old, got his GED in 1987, and could read and write at an "A level." The following inquiry then took place:

> THE COURT: Do you understand that you have the right to have an attorney represent you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand you may ask for an attorney to be appointed to represent you -
>
> THE DEFENDANT: Yes.
>
> THE COURT: -- if you cannot afford to hire one?
>
> THE DEFENDANT: Yes.

¶ 15 The trial court informed Defendant he would be required to follow the same rules of evidence and procedure if he represented himself, the nature of the charges against Defendant, and his potential punishment. The trial court engaged in the following colloquy with Defendant:

> THE COURT: All right. Do you now waive your right to have counsel, or have an attorney represent you at your trial?
>
> THE DEFENDANT: That's going to move the date back, Your Honor.

> THE COURT: No, it's not going to move the date. I'm asking you, do you want an attorney?
>
> THE DEFENDANT: Yeah, I wanted a co-counsel.

¶ 16 At this point, the trial court told Defendant that he could not have co-counsel and that if the trial court appointed an attorney, it would be as standby counsel. The trial court explained that standby counsel is not co-counsel and that standby counsel "will not be sitting at the table beside you. You will be sitting at that table by yourself." Defendant responded, "Okay." The trial court further explained that standby counsel "will only be to assist you on some issues that you might have but not in the presence of the judge or in the presence of the jury." Defendant responded, "Okay. That's understandable. Yes." The following exchange then took place:

> THE COURT: So that's for standby counsel. I'm now talking about a regular attorney. You're waiving your right to have an attorney represent you at trial?
>
> THE DEFENDANT: Yes. I don't want my court date pushed back. I don't want the court date pushed back.
>
> THE COURT: All right. I understand that. So you're giving up that right, to have an attorney?
>
> THE DEFENDANT: Yes. You said I'm allowed to have standby, right?
>
> THE COURT: I haven't gotten there yet.
>
> THE DEFENDANT: All right. I'll waive that if I could have a standby, if you don't mind, for some legal issues.

¶ 17 The trial court accepted Defendant's waiver of counsel and appointed standby counsel.

¶ 18 These exchanges show that on several occasions, Defendant clearly and unequivocally stated his desire to waive counsel and represent himself. *State v. Paterson*, 208 N.C. App. 654, 663, 703 S.E.2d 755, 761 (2010) (determining that the trial court's multiple colloquies with defendant and defendant's "repeated assertion" that he wanted to represent himself demonstrated defendant's clear and unequivocal desire to represent himself). Moreover, the questions asked by the trial court mirrored the fourteen-question checklist published by the University of North Carolina School of Government, which "illustrate[s] the sort of 'thorough inquiry' envisioned by the General Assembly when

[N.C. Gen. Stat. § 15A-1242] was enacted[.]" *State v. Moore*, 362 N.C. 319, 327-28, 661 S.E.2d 722, 727 (2008). The trial court's thorough inquiry and Defendant's answers showed that Defendant's waiver was made knowingly, intelligently, and voluntarily.

¶ 19 Defendant does not contend that he did not clearly and unequivocally waive his right to counsel or that the trial court failed to conduct an adequate inquiry under N.C. Gen. Stat. § 15A-1242. Instead, citing *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986), and *State v. Pena*, 257 N.C. App. 195, 809 S.E.2d 1 (2017), Defendant contends that his decision to waive counsel was not the voluntary exercise of his free will because it was the result of his belief that it was his only choice to avoid delaying his trial from December to February. *Bullock* and *Pena* are distinguishable.

¶ 20 In *Bullock*, the trial court allowed defendant's privately retained counsel to withdraw, at defendant's request, six days before his trial date but informed defendant he would not receive a continuance. *Bullock*, 316 N.C. at 182-83, 340 S.E.2d at 107. On the day of his trial, defendant informed the court he had been unable to retain counsel, but the trial court told defendant "[t]he case will be for trial" and defendant proceeded to be tried without counsel. *Id.* at 184, 340 S.E.2d at 108. The Supreme Court ultimately held that defendant "acquiesced to trial without counsel because he had no other choice." *Id.* at 185, 340 S.E.2d at 108.

¶ 21 Likewise, in *Pena*, the trial court denied defendant's request for a different court-appointed attorney and denied defendant's request for additional time to retain a private attorney. *Pena*, 257 N.C. App. at 197-98, 809 S.E.2d at 3-4. Defendant was forced to choose between his original court-appointed counsel and representing himself, and he ultimately decided to represent himself. *Id.* at 203, 809 S.E.2d at 6. This Court determined that defendant did not "outright request" to represent himself but instead chose to do so when faced with no other option other than continuing with his court-appointed counsel. *Id.*

¶ 22 Unlike in *Bullock* and *Pena* where the trial court was unwilling to allow defendants more time to secure attorneys and, thus, defendants had no option but to represent themselves at trial, the trial court in this case had just announced that it would appoint Defendant his third attorney. At that point, Defendant voluntarily waived counsel to accommodate *his own desire* to keep a December trial date. His understanding, either correct or incorrect, that his trial could be delayed until February if he accepted the appointment of the third attorney did not make his choice to waive counsel involuntary. His motivation simply explains

why he chose to voluntarily waive counsel and proceed *pro se* with standby counsel.

III. Conclusion

¶ 23 Defendant clearly and unequivocally expressed his desire to waive his right to counsel and the trial court conducted a thorough inquiry, in compliance with N.C. Gen. Stat. § 15A-1412, to ensure this waiver was knowing, intelligent, and voluntary. Accordingly, we discern no error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY

No. COA18-895-2

Filed 16 March 2021

1. Homicide—first-degree murder—prosecutor's arguments—mischaracterized on appeal

In an appeal from defendant's conviction for first-degree murder, the Court of Appeals rejected defendant's argument that the trial court erroneously allowed the State to make improper statements of law during its closing argument. Defendant mischaracterized the State's statements as pertaining to the habitation defense when the statements actually pertained to self-defense.

2. Appeal and Error—preservation of issues—jury instructions—active participation by defense counsel

The Court of Appeals declined to consider—even under plain error review—defendant's argument regarding the trial court's jury instructions in his trial for first-degree murder where defense counsel did not object to and in fact actively participated in the formulation of the instructions.

3. Homicide—first-degree murder—lying in wait—jury instructions—defendant in his garage

In a murder trial, the trial court did not err by instructing the jury on the theory of lying in wait where defendant stationed himself

in his garage with a shotgun, concealed and waiting, before shooting the victim through the garage window.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 23 February 2018 by Judge Michael J. O'Foghludha in Wake County Superior Court. Originally heard in the Court of Appeals 13 February 2019, and opinion filed 7 May 2019 reversing and remanding for new trial, *State v. Copley*, 265 N.C. App. 254, 828 S.E.2d 35 (2019). Reversed and remanded to the Court of Appeals by opinion of the North Carolina Supreme Court filed 3 April 2020, 374 N.C. 224, 839 S.E.2d 726 (2020), for consideration of defendant's remaining arguments on appeal.

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

Massengale & Ozer, *by Marilyn G. Ozer*, *for defendant.*

ARROWOOD, Judge.

I. Appellate History

¶ 1 On appeal, this Court, over a dissent, vacated defendant's convictions and remanded for retrial by reason that the State inappropriately discussed the race of defendant and the victim in his closing argument. *State v. Copley*, 265 N.C. App. 254, 257, 828 S.E.2d 35, 37-38 (2019). The Court did not reach defendant's remaining issues on appeal. Based upon the dissent, *id.* at 269-79, 828 S.E.2d at 45-50 (Arrowood, J., dissenting), the State appealed to the Supreme Court of North Carolina. Finding no prejudicial error in the prosecutor's closing argument with respect to race, our Supreme Court reversed and remanded for this Court to consider defendant's remaining arguments. *State v. Copley*, 374 N.C. 224, 232, 839 S.E.2d 726, 731 (2020). Upon consideration of defendant's remaining arguments on remand, we find defendant received a fair trial free from error.

II. Background

¶ 2 On 22 August 2016, a Wake County Grand Jury indicted defendant on one count of first-degree murder. The matter came on for trial on 12 February 2018 in Wake County Superior Court, the Honorable Michael J. O'Foghludha presiding. The State's evidence tended to show the following.

¶ 3 On 6 August 2016, Jalen Lewis ("Mr. Lewis") hosted a party at his parents' home, two or three houses down from defendant's house. Three of his guests, Kourey Thomas ("Mr. Thomas" or "victim"), David Walker ("Mr. Walker"), and Chris Malone ("Mr. Malone") arrived at the party in Mr. Walker's car around midnight, and parked on the street. As the party progressed, a group of approximately twenty people showed up that Mr. Lewis and his friends did not know. After about ten minutes, the group was asked to leave. The group agreed, and walked towards their cars, congregating near the curb in front of defendant's house to discuss where to go next.

¶ 4 Defendant, who was inside his home, became disturbed by the group's noise. He yelled out an upstairs window, "[y]ou guys keep it the f*** down; I'm trying to sleep in here." He then called 911, telling the operator he was "locked and loaded" and going to secure the neighborhood. Defendant also stated, "I'm going to kill him." The operator attempted to obtain more information from defendant, but the phone call was terminated.

¶ 5 Meanwhile, a law enforcement officer conducted a traffic stop nearby, causing the lights of his police cruiser to reflect down the street. Mr. Thomas, Mr. Walker, and Mr. Malone saw the lights and became worried about the presence of law enforcement because Mr. Thomas had a marijuana grinder on his person.

¶ 6 The three men decided to leave the party due to the police presence. Mr. Thomas left the party first. He ran from Mr. Lewis' house, cutting across the yard, towards Mr. Walker's car. Before he could reach the car, he was shot by defendant, who fired without warning, from his dark, closed garage. EMS arrived and took Mr. Thomas to the hospital, where he died as a result of the gunshot.

¶ 7 Deputy Barry Carroll of the Wake County Sheriff's Office ("Deputy Carroll"), one of the first investigators on the scene, approached defendant's house after observing broken glass in defendant's driveway and a broken window in the garage. He shined a light through a window, and saw defendant step through a door from the house into the garage. Deputy Carroll asked defendant if he had shot someone. Defendant admitted to shooting Mr. Thomas. Deputy Carroll requested defendant open the front door. Defendant complied and showed Deputy Carroll the shotgun he used to shoot the victim.

¶ 8 At the close of the State's evidence, defendant moved to dismiss the case. The trial court denied the motion. Defendant presented evidence tending to show as follows.

¶ 9 Defendant argued with his wife on the morning of 6 August 2016, and then spent the day drinking, sleeping, and "just hanging out in the garage." After going to sleep that evening, he woke and saw the group leaving Mr. Lewis' party. Irritated at the noise the group made, he yelled, "[y]ou guys keep it the f*** down; I'm trying to sleep in here" out the window. Members of the group yelled back, " 'Shut the f*** up; f*** you; go inside, white boy,' things of that nature." He saw "firearms in the crowd[,]" and two individuals "lifted their shirts up" to flash their weapons. He testified that he called 911 at his wife's request. When he called 911, he thought it was his son and his son's friends outside, and stated that the "him" he referred to killing while on the call was his son. After ending the call with 911, he grabbed his shotgun and loaded five rounds.

¶ 10 When he discovered his son was not part of the group outside, he told his son to get a rifle and go upstairs for safety. He again yelled at the group outside, instructing them to leave the premises and informing them that he had a gun. Defendant claimed Mr. Thomas then began to walk towards defendant's house and to reach for a gun, so he shot him.

¶ 11 At the close of defendant's evidence, he renewed his motion to dismiss, which the trial court denied. On 22 February 2018, the jury found defendant guilty of first-degree murder by premeditation and deliberation and by lying in wait. The trial court sentenced defendant to life without parole. Defendant timely noted his appeal.

III. Discussion

¶ 12 In his remaining arguments, defendant contends: (1) the trial court erred by allowing the State to make improper statements of law during its closing argument concerning the aggressor doctrine and defense of habitation; (2) the trial court plainly erred by instructing the jury that the defense of habitation was not available if defendant was the aggressor; and (3) the trial court erred by instructing the jury on the theory of first-degree murder by lying in wait. Addressing each in turn, we find no error.

A. Closing Argument

¶ 13 **[1]** Defendant first argues the trial court violated his constitutional rights when it failed to intervene when the State argued incorrect law concerning the aggressor doctrine of self-defense and defense of habitation in its closing argument. We disagree.

¶ 14 Because defendant failed to object on this basis at trial, we review the allegedly improper closing arguments for

> whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

¶ 15 First, defendant contends the State erred when it told the jury defendant could be found to be the aggressor if he left the second floor of his house and went downstairs to the garage because this argument is contrary to *State v. Kuhns*, 260 N.C. App. 281, 817 S.E.2d 828 (2018) and grossly prejudicial.

¶ 16 Defendant does not quote the language he refers to as egregious, and only provides a citation to a page in the transcript where the prosecutor discusses the aggressor doctrine. Upon review of the transcript, it is clear the references to the aggressor by the prosecutor in this portion of the transcript arose in the context of self-defense, *not the habitation defense*:

> And I'm going to talk more about some of the things that he told you later, but what I want to get to is this excused killing by *self-defense*, okay?
>
> . . . .
>
> He doesn't have to retreat from his home, but if you're upstairs and somebody makes a show of force at you, it's not retreating to stay upstairs. It's, in fact, the opposite of that, right? But if you take your loaded shotgun and go down to the garage and if you buy him at his word, which I don't know that you can, you are not retreating. You are being aggressive. You're continuing your aggressive nature in that case.

(Emphasis added). Therefore, defendant's argument that the trial court erred by failing to intervene when the State misstated the law on the *habitation defense* is without merit.

¶ 17 Second, defendant argues the State incorrectly added exceptions to the habitation defense that our statutes only permit as exceptions to self-defense. Defendant maintains the State committed this error in the following portion of its argument:

> You can consider the size, age, strength of defendant as compared to the victim. . . . You've got somebody who's standing at this point in a yard and you've got somebody on a second floor window. How much danger is he to him at that point? Especially at that point, he's not even saying they're pointing a gun at him. All they've done is this – (indicating) – if you buy him at his word.
>
> . . . .
>
> Reputation for violence, if any, of the victim, you didn't hear that he was a violent guy. You didn't hear that he was a gangbanger. All you heard is that he was actually the opposite of that, right?

We disagree. As with defendant's first argument, this portion of the transcript refers to self-defense, not the habitation defense. Defendant's argument is without merit.

B. Instruction on Defense of Habitation

¶ 18 **[2]** Next, defendant argues the trial court plainly erred by instructing the jury that the defense of habitation was not an available justification if defendant was the aggressor. Defendant alleges plain error because he did not object on this basis at trial. N.C. R. App. P. 10(a)(2), (a)(4) (2019). We decline to reach this assignment of error.

¶ 19 During the charge conference, the trial court stated that it would give N.C. Pattern Jury Instruction 308.80, defense of habitation. The trial court added it would include footnote four on aggression, which provides the defense is not available to one who provokes the use of force against himself, unless the person provoked responded with more serious force. Defense counsel did not object to the requested further instructions on the "aggressor" doctrine, but asked the trial court: "[I]f the jury is going to be given instruction on provocation, that they be informed on the law of initial aggression which is intended and designed to calculate this inspiring a fight." Defendant's request was honored by the trial court giving N.C. Pattern Jury Instruction 206.10.

¶ 20 In *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), our Supreme Court held:

> Counsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 570, 508 S.E.2d at 275 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)).

¶ 21 Defendant's trial counsel's requests and active participation in the formulation of the instructions during the charge conference waives any right he would have to have the instructions reviewed even under a plain error analysis. Thus, we decline to reach this issue.

C. Lying in Wait

¶ 22 **[3]** Finally, defendant argues the trial court committed reversible error by instructing the jury on the theory of lying in wait because the evidence did not support the instruction. We disagree.

¶ 23 "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted). However, if "a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Thompson*, 328 N.C. 477, 489, 402 S.E.2d 386, 392 (1991).

¶ 24 Our Supreme Court defines "first-degree murder perpetrated by means of lying in wait" as "a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990) (citations and internal quotation marks omitted). The perpetrator must intentionally assault "the victim, proximately causing the victim's death." *State v. Grullon*, 240 N.C. App. 55, 60, 770 S.E.2d 379, 383 (2015) (citation and internal quotation marks omitted).

¶ 25 Defendant argues the evidence does not support an instruction on first-degree murder by lying in wait because the evidence did not show he laid in wait to shoot a victim, but, rather, it shows he armed himself to protect his house from intruders until police arrived to disperse the individuals gathered in front of his house. We disagree.

¶ 26 The State put forth sufficient evidence to support an instruction on lying in wait, even assuming *arguendo* that defendant offered evidence supporting his conflicting theory on defense of habitation. The State's evidence shows defendant concealed himself in his darkened garage with a shotgun, equipped with a suppression device. Defendant shot the victim, firing the shotgun through the garage's window. The shot bewildered bystanders because it was unclear what happened, and defendant had not warned the crowd before firing his weapon.

¶ 27 This evidence supports the lying in wait instruction because it tends to show defendant stationed himself, concealed and waiting, to shoot the victim, and this action proximately caused the victim's death. Accordingly, we hold the trial court did not err when it instructed the jury on murder by lying in wait.

IV. Conclusion

¶ 28 For the forgoing reasons, we find no error.

NO ERROR.

Chief Judge STROUD concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

¶ 29 Defendant was inside his home with his wife and children inside. He was alarmed after midnight by a rowdy and armed crowd which had gathered in front of his home. He raised his window to tell the crowd to quiet down and leave. Some of the crowd members responded by yelling profanity, racial slurs, and by displaying weapons. Defendant called 911 to report and request for law enforcement to disperse the crowd. A police officer was nearby with their vehicle's lights flashing. No officers responded immediately. Defendant armed himself with a shotgun and went downstairs to locate his son, who he believed may be outside the house. Defendant found his son in the converted garage that is part of the home. Defendant told his son to go upstairs for safety and to arm himself.

¶ 30 Defendant saw an individual in his yard coming toward his home armed with a gun. Defendant fired one shot from his shotgun through the window of his garage, striking the intruder.

¶ 31 When officers arrived and observed broken glass, he opened the door and admitted to firing the shotgun. Defendant gave the shotgun to the officers. Defendant never concealed himself, never left the interior of his home, other than shouting for the intruder to leave, had no prior interaction or altercation with the intruder, and expressed no animus toward the intruder. This evidence must be viewed in the light most favorable to Defendant and for him to be given the benefit of every inference. Defendant objected to and specifically preserved this error of submitting the theory of lying in wait for the intruder to the jury, as a basis to convict him for first-degree murder under these facts.

¶ 32 Defendant was convicted of first-degree murder under two distinct theories of premeditation and deliberation and by lying in wait. The majority's opinion fails to follow North Carolina's statutory provisions and unbroken precedents to analyze Defendant's murder conviction for lying in wait. Defendant's conviction under lying in wait is erroneous, prejudicial, and is properly vacated. I respectfully dissent.

I. Jury Instructions

¶ 33 During the charge conference, the following exchange took place between Defendant's counsel and the trial court:

> [DEFENSE COUNSEL]: Your Honor, just to clear up the record, I would say that it is very appreciative the work Your Honor has done in order to come up with that compromise, and that is not lost on us. For the record, we are objecting to the lying in wait instruction going to the jury. That's all I need to be heard about.
>
> THE COURT: Yes absolutely. And that's noted, and you-all know how to preserve it.

¶ 34 The majority's opinion states the prosecutor's references to the aggressor arose in the portion of transcript of self-defense; however, the cited portions of the transcript refer to "prevent a forcible entry into the defendant's home" and "he doesn't have to retreat from his home." This artificial delineation ignores our Court's many precedents concerning the special status of an inhabitant within the curtilage of and inside his home. *See State v. McCombs*, 297 N.C. 151, 157, 253 S.E.2d 906, 910 (1979) (usual rules of common law self-defense apply inside the home, except that the occupant does not have a duty to retreat).

¶ 35 Our Supreme Court recently held where the trial court failed to pro-

vide a required instruction, the error "is preserved for appellate review without further request or objection." *State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018). In *Lee*, the trial court failed to give a requested pattern jury instruction on stand your ground, when the defendant had properly entered evidence to support the defense. *Id.* at 673, 811 S.E.2d at 565.

¶ 36 Our Supreme Court has held:

> [A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

State v. Ross, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (citation omitted). Defendant's objection is persevered and is properly before us.

II. Lying in Wait

A. Preservation of Error

¶ 37 Defendant argues the trial court erred by instructing the jury on him lying in wait to commit first-degree murder. As noted above, Defense counsel properly preserved this issue for appellate review:

> [DEFENSE COUNSEL]: For the record, we are objecting to the lying in wait instruction going to the jury. That's all I need to be heard about.
>
> The COURT: Yes absolutely. And that's noted, and you-all know how to preserve it.

¶ 38 The undisputed evidence shows Defendant was located inside of his residence with his family after being alarmed by an armed and noisy crowd after midnight for the entire time during the events leading to the shooting:

> When [Defendant] discovered his son was inside the garage and not part of the group outside, he told his son to go upstairs for safety and to get a rifle. He again yelled at the group outside, instructing them to leave the premises and informing them that he was armed. Defendant claimed [the intruder] began running towards Defendant's house and pulled out a gun. Defendant fired one shot from his shotgun towards [the intruder] through the window of his garage.

State v. Copley, 265 N.C. App. 254, 257, 828 S.E.2d 35, 37-38 (2019), *rev'd and remanded*, 374 N.C. 224, 839 S.E.2d 726 (2020).

¶ 39 During the trial court's instruction for the theories of first-degree murder, the jury was instructed on lying in wait as follows:

> The [D]efendant has also been charged with first degree murder perpetrated while lying in wait. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant lay in wait for the victim; that is, waited and watched for the victim in ambush for a private attack on him. Second, that he intentionally assaulted the victim. And, third that the [D]efendant's act was a proximate cause of the victim's death.

¶ 40 The natural and common law since ancient times, and our State's statutes and unbroken precedents, have recognized an individual's fundamental and absolute right to protect and defend themselves, their family, and their home with deadly force from individuals who are armed and violent.

> [T]here exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce themselves to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice too – and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself, by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill. When, therefore, an inquiry passes beyond the mere question of the weapon and starts to consider the motive, a man who has used arms in

> self-defense is not regarded as having carried them with a homicidal aim.

Marcus Tuillius Cicero, *Selected Political Speeches*, trans. Michael Grant (New York: Penguin, 1969), p. 222.

¶ 41 Our Supreme Court confirmed: "The principle that *one does not have to retreat* regardless of the nature of the assault upon him *when he is in his own home* and acting *in defense of himself, his family and his habitation* is firmly embedded in our law." *McCombs*, 297 N.C. at 156, 253 S.E.2d at 910 (emphasis supplied) (citations omitted); *see* N.C. Gen. Stat. § 14-51.2(b) (2019).

B. *State v. Coley*

¶ 42 Our Supreme Court recently further examined and unanimously upheld a similar assertion of defense of one's habitation in *State v. Coley*, 375 N.C. 156, 159-60, 846 S.E.2d 455, 457-58 (2020):

> The jury charge is one of the most critical parts of a criminal trial. It is the duty of the trial court to instruct on all substantial features of a case raised by the evidence. This Court has consistently held that where competent evidence of self-defense is presented at trial, *the defendant is entitled to an instruction on this defense*, as it is a substantial and essential feature of the case, and *the trial judge must give the instruction even absent any specific request by the defendant*. When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case. In determining whether a defendant has presented competent evidence sufficient *to support a self-defense instruction*, *we take the evidence as true and consider it in the light most favorable to the defendant*. Once a showing is made that the defendant has presented such competent evidence, *the court must charge* on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. *A defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction*, which includes the relevant *stand-your-ground provision*.

Id. (emphasis original and supplied) (citations, alterations, and internal quotation marks omitted).

¶ 43 Defendant's proper and preserved objection to the submission of and the jury instruction on lying in wait shows the trial court erroneously failed to include the correlation and preemption of Defendant's common law and statutory rights to defense of self, family, and habitation to this submission and instruction. No evidence tends to show Defendant was lying in wait, luring, or secreting himself, other than remaining inside of his home under threats by an armed crowd. He repeatedly told them to leave and sought assistance from law enforcement. Defendant's evidence and the inferences therefrom must be submitted, instructed, and considered most favorably to him.

C. Statutory Self-Defense, Defense of Others and Habitation

¶ 44 N.C. Gen. Stat. § 14-51.3(a) provides:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies*:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

N.C. Gen. Stat. § 14-51.3(a) (2019) (emphasis supplied).

¶ 45 When a defendant is inside his own home and under armed assault, N.C. Gen. Stat. § 14-51.2 provides:

> (b) The lawful occupant of a home, motor vehicle, or workplace 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.

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.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

> (1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.
>
> (2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.
>
> (3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.
>
> (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself

> or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.
>
> (d) A person who unlawfully and by force enters or *attempts to enter a person's home*, motor vehicle, or workplace *is presumed to be doing so with the intent to commit an unlawful act involving force or violence.*
>
> (e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (f) *A lawful occupant within his or her home*, motor vehicle, or workplace *does not have a duty to retreat* from an intruder in the circumstances described in this section.
>
> (g) This section is *not intended to repeal or limit any other defense* that may exist under the common law.

N.C. Gen. Stat. § 14-51.2 (2019) (emphasis supplied).

¶ 46 Our Supreme Court has also held: "Where there is evidence that defendant acted in self-defense, *the court must charge* on this aspect even though there is contradictory evidence by the State or discrepancies in

defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (emphasis supplied) (citations omitted).

D. State's Assertion of Lying in Wait

¶ 47 To warrant an instruction and support a conviction for first-degree murder under the theory of lying in wait, precedents mandate the trial court instruct the jury that the State carries the burden to disprove Defendant's assertion of self-defense, defense of others, and defense of his habitation. *See* N.C.P.I. - - Crim. 308.45A, 308.80 (2017). Also, the jury must be instructed that the evidence and inferences thereon must be reviewed in the light most favorable to Defendant to determine whether Defendant's defense of his self, home, or family did not fall under one of the exceptions articulated in N.C. Gen. Stat. § 14-51.2(c).

¶ 48 Our Supreme Court further held in *Coley*:

> [p]resuming [that] a conflict in the evidence exists . . . it is to be resolved by the jury, *properly instructed*, it is appropriately within the purview of the jury to resolve any conflicts in the evidence presented at trial and to render verdicts upon being *properly instructed* by the trial court based upon the evidence which competently and sufficiently supported the submission of such instructions to the jury for collective consideration.

Coley, 375 N.C. at 163, 846 S.E.2d at 460 (alterations in original) (emphasis supplied) (citations and internal quotation marks omitted).

¶ 49 In this case, as in *Coley*, the trial court improperly submitted and failed to instruct the jury on this requirement despite Defendant's express requests and preserved objections. Undisputed evidence shows Defendant was located inside of his home with his family during the entire time and sequence of events, during which he testified an armed intruder was running in his yard toward his home.

¶ 50 He called 911 to report the activities of and threats from a large belligerent and armed group massed outside his home after midnight and to request law enforcement to respond. After the 911 call, Defendant testified he left his bedroom and went downstairs to determine if his teenage son was outside. Defendant found his son was safe inside the home downstairs and sent him upstairs to greater safety. Any assertion that his prior words, behavior, or actions made him the aggressor while inside his own home is fallacious. Even if so, Defendant was entitled to

proper jury instructions, which the trial court failed to provide to his prejudice. *Id.*

¶ 51 The majority's opinion asserts the State put forth sufficient evidence to support an instruction on lying in wait. What evidence? That Defendant was inside of his home and protecting his family with a shotgun, while facing an armed intruder after midnight with no response from his 911 call? The State was required to disprove Defendant's claims beyond a reasonable doubt of self-defense prior to the jury reaching Defendant's claims of lying in wait. N.C.P.I. - - Crim. 308.45A, 308.80 (2017). The critical error by the trial court is the lying in wait submission and instruction, even if supported by the State's evidence, is not independent of Defendant's rights to mandatory and complete instructions on his preemptive rights. Defendant clearly preserved his preeminent right to defend himself, his family, and their habitation against the actions of an armed intruder.

¶ 52 All the evidence and inferences thereon must be viewed in the light most favorable to Defendant by the jury properly instructed on the law and the State's burdens. *See Dooley*, 285 N.C. at 163, 203 S.E.2d at 818. "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense. . . , courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). Defendant carried no burden once competent evidence of self-defense, defense of others and habitation was admitted. A notion to rely solely upon the sufficiency of the State's evidence is erroneous and directly contrary to our binding precedents.

¶ 53 The trial court's failures denied Defendant of the most fundamental rights to protect and defend himself, his family, and their home. The majority's opinion lacks any analysis of the State's burdens, Defendant's preemptive rights, and the prejudice he has suffered in their denial.

¶ 54 In *State v. Bridges*, 178 N.C. 733, 738, 101 S.E.2d 29, 32 (1919), officers were lawfully serving an arrest warrant. The defendant secreted himself and waited outside and behind a corner to fire upon the officers. *Id.* at 739, 101 S.E.2d at 32 ("[A]nd you further find that the witness, . . . , after going to the house, intentionally and purposely pointed his pistol at the defendant Bridges, and that Bridges, under these circumstances, apprehended and had reasonable grounds to apprehend either that he was in danger of great bodily harm, or in danger of the loss of his life, you will then find that he had a legal right to use such force as was necessary, or apparently necessary, to repel the assault of . . . and protect himself, and

the necessity of dong so was real or apparent . . ., viewing all the facts and circumstances as they reasonably appeared to Bridges at the time the shot was fired."). Lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979).

¶ 55 No testimony showed Defendant had any prior association, connection, or animus towards the neighbors across the street or to the armed and unruly crowd that gathered in front of his home and threatened him. After being startled by a threatening situation, with a massed, armed crowd at the edge of the yard, who displayed weapons and shouted racial epithets, Defendant called 911, retrieved his shotgun and walked downstairs to his garage to search for his teenage son.

¶ 56 The jury's instructions on lying in wait did not require the State to disprove nor require the jury to consider and rectify Defendant's rights to self-defense, defense of his family, and his habitation in the light most favorable to Defendant or to place the burden on the State to overcome Defendant's defenses and presumptions. *See id.* This preserved error of submitting lying in wait without proper instructions was prejudicial to Defendant as a basis to support his conviction.

E. *State v. Stephens*

¶ 57 This Court, with two members of this panel, recently examined self-defense in *State v. Stephens*, 275 N.C. App. 890, 899-900, 853 S.E.2d 488, 496 (2020). The jury was improperly instructed on an individual's right to self-defense. The jury in *Stephens* was not allowed to rectify the defendant's rights to self-defense when there was a dispute over whether he was the first aggressor. *Id.* at 893, 488 S.E.2d at 492. The defendant, in *Stephens*, lawfully carried a weapon as he entered someone's property, whose owners had released a dog that had killed his child's pet. *Id.* Defendant put on facts, which viewed in the light most favorable to him, asserted the property owner illegally retrieved a weapon and repeatedly fired that weapon at him, hitting him and his clothing. *Id.*

¶ 58 Here, the State asserted Defendant had acted with aggression by arming himself inside his own home with his family present in the face of armed threats outside. This notion is contrary to our unbroken binding precedent. Our State has long held a defendant who armed himself in anticipation of a fight, and failed to avoid the fight, was not the aggressor. *State v. Tann*, 57 N.C. App. 527, 531, 291 S.E.2d 824, 827 (1982).

¶ 59 To support a murder conviction under the theory of lying in wait, the jury must be instructed, find, and conclude the evidence, when viewed

in the light most favorable to Defendant, fell under one of the exceptions articulated in N.C. Gen. Stat. § 14-51.2 (c). However, despite Defendant's preserved request and objection, and trial court's clear and express duty to instruct on all the evidence and the State's burden, the trial court failed to instruct the jury on these requirements. The jury was instructed over Defendant's express objections on a theory that did not allow them to consider the evidence in the light most favorable to Defendant.

¶ 60 The jury failed to rectify Defendant's presumptive rights to self-defense, defense of others, and defense of his habitation under N.C. Gen. Stat. §§ 14-51.3(a) and 14-51.2 while he was located inside of his home with his family from beginning to end. No evidence tends to show Defendant hid, lured the intruder, set a trap, nor did anything to support a conviction under a theory of lying in wait, while he was within his own home with his family with a shotgun. Defendant told the crowd he was armed and to leave his yard. Defendant testified the television was on and the room was lit. No evidence shows Defendant had "concealed himself in his darkened garage." Even if true, neither has any relevance to Defendant's claim of and entitlement to proper instructions on self-defense, defense of others, and habitation. Defendant's conviction is preserved error, prejudicial, and must be vacated.

III. Conclusion

¶ 61 Defendant's challenge to the trial court's instruction on lying in wait was expressly preserved. The trial court's decision to submit lying in wait as a basis to support a conviction of first-degree murder while Defendant was wholly inside his home with his family as an armed intruder was approaching their home is erroneous. The jury instructions the trial court provided were prejudicial to vacate the lying in wait to support his conviction of first-degree murder. The trial court's judgment on that ground is error, is prejudicial to Defendant, and is properly vacated. Nothing precludes or prejudices Defendant's rights to seek an ineffective assistance of counsel claim for his trial counsel's requests and active participation in the formulation of the jury instructions regarding premeditation and deliberation and defenses thereto during the charge conference, and counsel's failure to preserve any such prejudicial error for appellate review. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
RONALD JASON GIBSON

No. COA20-219

Filed 16 March 2021

1. Motor Vehicles—felony hit and run—sufficiency of the evidence—fatal crash on highway

In a prosecution for felony hit and run, the State presented sufficient evidence, even though circumstantial, from which the jury could infer that defendant, who drove a van with an open trailer behind it and made sudden driving maneuvers while yelling and gesturing at two motorcyclists which led to one motorcycle crashing, knew or reasonably should have known that his vehicle was involved in an accident that resulted in serious injury or death.

2. Criminal Law—jury instructions—flight—after felony hit and run—not element of offense—evidentiary support

In a trial for felony hit and run, the trial court did not err by instructing the jury it could consider defendant's flight after an accident on a highway as evidence of defendant's guilt. Flight was not an essential element of felony hit and run, and there was evidence to support the instruction where defendant, after his sudden driving maneuvers caused a motorcycle to crash, sped away at over 100 miles an hour and took steps to conceal his involvement in the crash.

Appeal by Defendant from judgments entered 12 August 2019 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State-Appellee.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Ronald Jason Gibson appeals from judgments entered upon jury verdicts of guilty of two counts of felony hit and run and one count of reckless driving. Defendant argues that the trial court erred by

(1) failing to dismiss the two counts of felony hit and run for insufficient evidence and (2) instructing the jury on flight. We discern no error.

I. Procedural History

¶ 2 Defendant was indicted on two counts of felony hit and run, one count of aggressive driving, one count of reckless driving, and attaining habitual felon status. Defendant was tried by a jury and convicted of both counts of felony hit and run and one count of reckless driving; he was acquitted of a second count of reckless driving, which was submitted to the jury as a lesser-included offense of aggressive driving. Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant as a prior record level II offender to two consecutive prison sentences of 83 to 112 months. Defendant timely gave oral notice of appeal in open court.

II. Factual Background

¶ 3 The State's evidence tended to show the following: On Thursday, 1 June 2017 at around 3:30 pm, William Sumrell was driving his motorcycle on I-40 with his fiancée, Sarah Bell, in the seat behind him. They were traveling with their friend Glenn Alphin, who was driving his own motorcycle. Sumrell was able to communicate by in-helmet intercom with Bell and by CB radio with Alphin. Sumrell and Alphin were in regular contact, coordinating their lane changes and other driving safety measures. It was a hot, sunny day.

¶ 4 West of Winston-Salem, I-40 was reduced to one lane because of road construction, causing traffic on I-40 to be "real backed up." Once Sumrell and Alphin got through the congested construction area, they returned to a normal highway speed of about 70 miles per hour. Sumrell was about four car lengths ahead of Alphin. Sumrell testified that they were riding in a staggered configuration, with Sumrell closer to the center of the highway and Alphin closer to the edge, "[i]n case . . . I have to slam on brakes or something, he has a way to get out of the way. Has an exit out, so he's not running up under me."

¶ 5 Sumrell and Alphin agreed to pass a "semi"–an eighteen wheeled tractor-trailer truck–which was travelling in the right lane of the two westbound lanes. After they had passed the semi but before they could pull back into the right lane, a black car moved up fast behind them. They remained in the left lane as the black car switched to the right lane in front of the semi and moved on.

¶ 6 As they again were about to move back into the right lane, a white van, driven by Defendant, towing an open-topped U-Haul trailer pulled

up quickly behind them. Defendant's van and trailer then cut into the right lane, in front of the semi and beside Alphin. Sumrell testified,

> I could see in my mirror the driver's hand was all outside the car or the vehicle doing something. And I asked [Alphin], I said, "what in the world?" And he said, "this guy come by me flipping me a bird and shouting." I said, "okay."
>
> So, the next thing I know, here comes the van beside me. And he did the same thing to me, hanging out the window, and shouting, and flipping me off, flipping [Bell] off, and spitting at us.

¶ 7 As Defendant moved past Sumrell, Alphin moved into the right lane, behind Defendant's trailer and in front of the semi. Sumrell testified that as he prepared to move into the right lane once Defendant had moved far enough ahead, Defendant "come across my lane about mid-way and slammed on the brakes." When Defendant's van and trailer cut in front of Sumrell, "[i]t was real close, so it was less than ten feet." Sumrell saw Defendant in the driver's side mirror of the van, "looking in the mirror, looking at me laughing." Sumrell expounded that Defendant

> come about halfway across in the middle of the lane. It doesn't slow down coming across the lane, and then slammed on brakes. I put on my brakes to stop or slow down to try to avoid and get on over, when his brake lights went off and came right back on again.

¶ 8 At this point, Sumrell was riding at about 70 miles per hour. Sumrell further testified,

> After [Defendant] first came across and hit the brakes, I hollered for [Bell] to hang on. And we had got slowed down enough to almost miss him, the brakes went off and came back on again, which caused my tire to hit the back of the trailer, which caused us to turn, and cause us to wreck.

Sumrell clarified that although he could not be sure there was contact between his motorcycle and the trailer, he "believe[d] that there actually was[,]" that he "remember[ed] a sudden thud, and hit, and then the bike went down."

¶ 9 Sumrell came to a stop on his stomach in the right lane of I-40. Although he was able to roll over to avoid getting hit by the semi that

he had passed, he was not able to get up due to his injuries. Sumrell had road rash on both arms, abrasions on his back, shoulder, foot, and knees, and one arm had flesh rubbed off of it almost to the bone. He had a broken wrist and toe. He had surgery on his hand, wrist, thumb, and finger, and the injuries required the insertion of a plate, pins, and screws. He was hospitalized for a week and attended physical therapy for two to three months thereafter. While in the trauma center, Sumrell was told that Bell had died in the crash. Sumrell was treated for mental health issues as result of the loss of his fiancée.

¶ 10 Alphin testified that he and Sumrell were driving their motorcycles in a staggered formation, meaning "the person in front of you is on the left. And the person in the back is on the right. You try to give about two to three seconds between each one, so that if something does happen, you have some time to react and you're not crowding." After passing the semi, Alphin told Sumrell to get over. He then told him to stop as the black car came up behind them, cut over to the right lane, and then passed them.

¶ 11 Alphin then saw Defendant "hanging outside the window, flipping me off, coming up at high rate of speed behind me." Defendant "cut me off between me and the eighteen-wheeler. I don't know how close he came to the eighteen-wheeler, but I think it was pretty close." When Defendant got beside Alphin, "he's got his head out the window, he's hollering at me, he's giving me the finger. I turned my radio wide open. I did not say anything to him at all. I just said, '[Sumrell], let this guy go on by . . . he's crazy. Let him go.' " "When he got up beside [Sumrell] and [Bell], he poked his head out. He's got his hand out the window giving him the finger, hollering at him."

¶ 12 Alphin started moving over to the right lane when he saw Defendant's van and trailer "cut hard to the left." Alphin thought the trailer was going to hit Sumrell's motorcycle at that point because "it was that close." Then Defendant "hit the brakes." Alphin testified, "I was running about sixty-five, seventy. And I almost passed them –- . . . I came right up -- when he hit the brakes, I had to hit mine . . . and I saw the brake lights." When Defendant hit the brakes, Sumrell hit his brakes to keep from hitting the U-Haul trailer. Alphin saw Bell fly off the side of the motorcycle and Sumrell going down with the motorcycle.

¶ 13 When Alphin looked up after the crash, Defendant's "van had come to a slow speed. . . . All of a sudden, the van takes off at a high rate of speed." Alphin saw the semi and other cars stopping behind him, so he pursued Defendant to get his license plate number. Defendant continued

on I-40 with Alphin following on his motorcycle. Defendant "was going in-and-out of traffic at high rates of speed. We got over a hundred miles an hour."

¶ 14 Once Alphin caught up to Defendant, Defendant "[l]ooks at me, he smiles, takes his hand off the wheel, he gives me the finger." Defendant then swerved his van and trailer into Alphin's lane twice. Alphin took out his pistol and shot Defendant's tire to keep Defendant from swerving the van at him again.

¶ 15 Alphin called 911 and gave the license plate number of Defendant's van and trailer to the Highway Patrol. Alphin continued to follow Defendant onto I-77, intending to keep Defendant in sight until he was apprehended. But Alphin was advised by the highway patrol officer on the line to turn around and return to the scene of the accident, which he did.

¶ 16 At the time of the crash, Timothy Snook was driving west on I-40 behind the semi. He was about to pass the semi when the motorcycles driven by Sumrell and Alphin passed him in the left lane. He was again about to pass the semi when Defendant, in the white van with the trailer, passed on his left. Defendant's trailer was weaving badly. Snook described the trailer as "open" and not high enough to obstruct vision from the van. He initially stayed behind the semi for fear that he might be hit by the van's weaving trailer.

¶ 17 After passing Snook, Defendant's van also passed the semi and moved into the right lane in front of the semi. Snook then moved into the left lane directly behind the motorcycles to pass the semi. Snook saw that, as Defendant's van passed the motorcyclists on their right, Defendant leaned out of the driver's side window and made the rude gesture at the motorcyclists. In doing so, he stuck his entire arm out of the window. He also stuck his face out of the window and Snook could see his mouth moving, although he could not hear what Defendant was saying. The motorcyclists did not gesture back at Defendant.

¶ 18 Snook saw Defendant's van suddenly swerve left in front of the motorcyclists and saw the van's brake lights come on. Snook saw smoke from the tires of Sumrell's motorcycle due to its brakes being applied. Snook testified that "[t]here was no distance" between Defendant's trailer and Sumrell's motorcycle, and that "[t]here was no choice for that motorcycle." Snook saw Sumrell and Bell go "flying and flipping," and land on the highway. Sumrell's motorcycle went flying in pieces off to the shoulder of the highway and up an embankment. Snook saw Defendant's van speed up, and Alphin's motorcycle giving chase.

¶ 19 Dwayne Haskins was the driver of the semi. Haskins recalled the motorcycles and then the van and trailer passing him, and the motorcycle making contact with the van's trailer, causing both people on the motorcycle to fall onto the roadway. Electronic logs automatically recorded by his semi showed that at the time of the crash, Haskins applied his air brakes and stopped in seven seconds from a speed of 65 miles per hour. While he was braking, Haskins was able to pull his truck off the right edge of I-40 into the emergency lane to avoid hitting the motorcyclists lying in the roadway. The electronic logs showed that Haskins applied his air brakes at 3:57 pm EST.

¶ 20 After stopping his truck, Haskins approached both Sumrell and Bell. Sumrell was able to speak but Bell, who was bleeding from her nose and mouth, was non-responsive. Her breathing was "raspy." Haskins, a former EMT, had someone call 911, and he monitored Bell's breathing until EMS arrived. Bell died within minutes of being taken to the emergency room. Haskins talked to the police officers at the scene and gave them a written statement which reflected that Sumrell's motorcycle and Defendant's trailer had made contact.

¶ 21 Records from Defendant's cellular telephone provider showed that at 3:58:38 p.m., a call was made from Defendant's phone to 911; the call lasted 8 seconds. Defendant's phone then made another call to another number that lasted 10 minutes. The 911 records show the operator answered the call from Defendant's phone and stayed on the line 54 seconds but received no information.

¶ 22 At 4:15 p.m., Defendant pulled into the Towlin Mill One Stop, located at the second exit on I-77 north of I-40. One Stop sells gasoline and groceries, has a restaurant, and rents U-Haul trailers. Defendant, his dog, the van, and the trailer appeared on a video camera at One Stop; the van clearly had a flat tire.

¶ 23 Rick Dowdle, a part-time contractor for U-Haul, was at One Stop when Defendant arrived. When Dowdle asked Defendant what had happened to the tire, Defendant replied that the tire had blown out on I-40. After being told that no one at One Stop could change his tire, Defendant called AAA.

¶ 24 Chris Pritchard, who worked for a towing company that contracts with AAA, was called to One Stop to change Defendant's tire. While talking with Defendant, Defendant asked Pritchard how far it was to Stony Point, and how he could get there without going on the interstate highway.

¶ 25 After changing the tire, Pritchard called his wife and learned of the crash involving the motorcycle on I-40. After seeing a description of the van on social media, and believing he had just changed the tire of a vehicle involved in the fatal crash, Pritchard called law enforcement and provided them with the license tag number of the van. The investigating law enforcement officer got Defendant's name from AAA. Law enforcement was unable to locate Defendant at an address associated with his telephone number, although they found a box on the porch at that address that had been delivered with Defendant's name on it.

¶ 26 On 2 June 2017, law enforcement was contacted by Defendant's attorney. Upon speaking with the attorney, they were told that Defendant's van was at an address in Banner Elk. Officers went to that address and located the van, but not Defendant. Defendant turned himself in to law enforcement on 3 June. The U-Haul trailer had been returned to the U-Haul company.

III. Discussion

A. Sufficient Evidence

¶ 27 **[1]** Defendant first argues that the trial court erred by denying Defendant's motion to dismiss the two charges of felony hit and run, because the State failed to present substantial evidence that Defendant knew, or reasonably should have known, a wreck happened and someone was killed or seriously injured. We disagree.

¶ 28 To survive a motion to dismiss for insufficient evidence, the State is required to present substantial evidence of "(1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense." *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citation omitted). "Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (quotation marks and citations omitted). In reviewing a trial court's denial of a motion to dismiss, we consider the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citation omitted). "If the evidence presented is circumstantial, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (quotation marks and citations omitted). "Circumstantial evidence may . . . support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted).

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

¶ 29 Pursuant to N.C. Gen. Stat. § 20-166(a), "[t]he driver of any vehicle who knows or reasonably should know: (1) [t]hat the vehicle which he or she is operating is involved in a crash; and (2) [t]hat the crash has resulted in serious bodily injury . . . or death to any person; shall immediately stop [their] vehicle at the scene of the crash" and "remain" until authorized to leave, with a willful violation of this requirement punishable as a Class F felony. N.C. Gen. Stat. § 20-166(a) (2019). " 'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4 (2019).

¶ 30 The evidence presented at trial, although circumstantial, was sufficient to persuade a rational juror to accept a conclusion that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. Taken in the light most favorable to the State, the evidence tends to show the following: Defendant was driving a white van towing a U-Haul trailer that was "open" and not high enough to obstruct vision from the van. When Defendant passed Snook, Defendant's trailer was weaving badly so Snook stayed behind the semi because he feared he might be hit by Defendant's weaving trailer. Defendant moved into the right lane, squeezing between Alphin's rear tire and the front of the semi. When Defendant passed Alphin, Defendant made a rude gesture out the window as he went by. Similarly, when Defendant passed Sumrell and Bell, Defendant was hanging out of his window, yelling and spitting at Sumrell and Bell, and making obscene gestures in their direction.

¶ 31 As Defendant pulled ahead of Sumrell and Bell, Defendant abruptly swerved into their lane, directly in front of Sumrell and Bell, and "slammed on his brakes." Sumrell "saw [Defendant] in the [driver's side] mirror" of the van, "looking in the mirror, looking at me laughing." Defendant's van and trailer quickly reduced speed directly in front of Sumrell and Bell, forcing Sumrell to apply his brakes so hard that the friction between the pavement and the rubber of the motorcycle's tires generated black smoke.

¶ 32 Sumrell was able to slow down almost enough to miss the trailer, but Defendant released the brakes and then hit them again. This caused

Sumrell's tire to hit the back of the U-Haul or caused his motorcycle to lay down. During Sumrell's attempt to avoid the U-Haul, Bell was thrown from the back of the motorcycle, then Sumrell hit the pavement and slid across the interstate into the right lane. His motorcycle ended up on or beyond the shoulder of the right west-bound lane of I-40.

¶ 33 Immediately after the crash, Defendant's van slowed down. Then, all of a sudden, it took off at a high rate of speed. Approximately one minute after the crash, Defendant called 911 but then did not leave any information. Defendant continued on I-40, cutting in and out of traffic at speeds of up to and above 100 miles per hour, with Alphin following on his motorcycle. When Alphin caught up to Defendant, Defendant again made a rude gesture at Alphin and swerved his van and trailer into Alphin's lane twice. Alphin took out his pistol and shot Defendant's tire to keep Defendant from swerving at him again. When Defendant exited the highway to get his tire fixed, he did not mention to either Dowdle or Pritchard how his tire became flat, and he asked Pritchard for directions to Stony Point without traveling on the highway.

¶ 34 From this evidence the jury could reasonably infer the following: Defendant intentionally swerved his van and trailer directly in front of Sumrell and Bell, while they were on a motorcycle traveling at a speed of 70 miles per hour on the highway; Defendant intentionally "slammed" on his brakes, released them, and then hit them a second time; Defendant was able to maneuver in and out of traffic and, thus, knew where his van and trailer were positioned relative to other vehicles on the road, including Sumrell's motorcycle and Haskin's semi; Defendant was able to see what was going on behind his van and trailer; Defendant caused Sumrell to brake hard to try and avoid the U-Haul; Defendant caused Sumrell's motorcycle to hit the U-Haul or lose control because of the sudden need to brake; Sumrell and Bell flew off the motorcycle and onto the highway in 70-mile-per-hour traffic; Sumrell sustained serious injuries requiring hospitalization, surgery, and continued therapy as a result of the crash; Bell died from injuries sustained as a result of the crash; Defendant slowed down immediately after the crash because he was aware the crash occurred; Defendant then suddenly sped away from the scene of the crash, weaving in and out of traffic at speeds up to and over 100 miles per hour, to avoid getting caught; and Defendant continued to try and avoid detection by not disclosing the cause of his flat tire and trying to avoid going back on the highway. The evidence was sufficient to persuade a rational juror to accept a conclusion that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result.

¶ 35 Defendant's challenge to the sufficiency of the evidence essentially rests upon his contention that the evidence could have shown that Defendant could not have seen behind his van and trailer or that there may not have been contact between Sumrell's motorcycle and Defendant's trailer. Thus, Defendant argues, there was insufficient evidence that Defendant knew or reasonably should have known that the vehicle he was operating was involved in a crash or that the crash has resulted in serious bodily injury.

¶ 36 As Defendant acknowledges, however, contact is not required by our statutes in order for an accident to occur. *See* N.C. Gen. Stat. § 20-4.01 (4c) (2019) (A "crash" is defined as "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous.") Moreover, it is well settled that the weight and credibility to be afforded the evidence is a matter for determination by the jury rather than a reviewing court. *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999). Furthermore, even if Defendant could not have seen behind the trailer and even if there was no contact between the motorcycle's front tire and the U-Haul, the circumstantial evidence was nonetheless sufficient to persuade a rational juror to accept a conclusion that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. Defendant's challenge to the sufficiency of the evidence to support his conviction lacks merit. Accordingly, the trial court did not err by denying Defendant's motion to dismiss the charges.

B. Jury Instruction

¶ 37 **[2]** Defendant next argues that the trial court erred by giving the following jury instruction on flight, in accordance with N.C.P.I.—Crim. 104.35:

> The State contends (and the defendant denies) that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of the circumstance is not sufficient, in itself, to establish defendant's guilt.

Defendant argues that allowing the jury to consider flight as evidence of Defendant's consciousness of guilt is inappropriate in the context of a hit and run charge under N.C. Gen. Stat. § 20-166(a), because "leaving

the scene of the offense, which could be considered flight under the challenged instruction, is an essential element of felony hit and run."

¶ 38 We review the trial court's decision to instruct a jury on flight de novo. *State v. Davis*, 226 N.C. App. 96, 98, 738 S.E.2d 417, 419 (2013).

¶ 39 "[A]n instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Blakeney*, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (quotation marks and citations omitted). "Flight is defined as leaving the scene of the crime and taking steps to avoid apprehension." *State v. Bagley*, 183 N.C. App. 514, 520, 644 S.E.2d 615, 620 (2007) (quotation marks and citation omitted). Accordingly, "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citation omitted). Furthermore, "an action that was not part of [a d]efendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Hope*, 189 N.C. App. 309, 319, 657 S.E.2d 909, 915 (2008) (quotation marks and citation omitted).

¶ 40 First, we disagree with Defendant's assertion that flight is an essential element of felony hit and run under N.C. Gen. Stat. § 20-166(a). According to section 20-166(a), "[t]he driver of any vehicle who knows or reasonably should know: (1) [t]hat the vehicle which he or she is operating is involved in a crash; and (2) [t]hat the crash has resulted in serious bodily injury . . . or death to any person; shall immediately stop his or her vehicle at the scene of the crash" and "remain" until authorized to leave, with a willful violation of this requirement punishable as a Class F felony. N.C. Gen. Stat. § 20-166(a). Accordingly, to establish this offense, the State must show the following: (1) Defendant was driving a vehicle; (2) Defendant knew or reasonably should have known that the vehicle was involved in a crash; (3) Defendant knew or reasonably should have known that the crash resulted in serious bodily injury to or the death of another; (4) Defendant did not immediately stop his vehicle at the scene of the crash; and (5) Defendant's failure to stop was willful. *Id.* In contrast to "flight" in the legal sense, the driver's motive for failing to immediately stop at the crash scene is immaterial. Indeed, a hit and run occurs even if the departing driver is completely without fault in the collision and not subject to "apprehension." *See State v. Smith*, 264 N.C. 575, 577, 142 S.E.2d 149, 151 (1965) ("Absence of fault on the part of the driver is not a defense to the charge of failure to stop."). As to this point of law, Defendant's argument is overruled.

¶ 41 Next, to the extent that Defendant argues that the evidence did not support a flight instruction, we also disagree. Immediately after the crash, Defendant slowed down momentarily and then sped up. He sped away from the crash at over 100 miles per hour, weaving in and out of traffic. Although he dialed 911 and remained on the line for 8 seconds, he failed to speak to the 911 operator. While attempting to get his tire fixed, he avoided a direct question about what had happened to his tire by stating only that it had blown out on I-40. He then asked for directions to Stony Point that did not require traveling on the interstate highway. These facts constitute sufficient "steps to avoid apprehension" to support an instruction on flight. *Cf. State v. Harvell*, 236 N.C. App. 404, 412, 762 S.E.2d 659, 664-65 (2014) (discerning no error in giving flight instruction where the defendant ran from the house he had broken into and was discovered fifteen minutes later on a nearby "dirt road that was . . . 'not a road that people use for traffic' "). Defendant's conduct went well beyond a mere "fail[ure] to immediately stop at the scene of the crash," as required for the offense of hit and run. *Braswell*, 222 N.C. App. at 182, 729 S.E.2d at 702. Accordingly, the trial court did not err by instructing the jury on flight.

IV. Conclusion

¶ 42 The trial court did not err by denying Defendant's motion to dismiss the charges of felony hit and run as the State presented sufficient evidence that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. The trial court did not err by instructing the jury on flight as flight is not an essential element of felony hit and run and the evidence supported a flight instruction.

NO ERROR.

Judges INMAN and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
MICHAEL MAYO MACKE

No. COA20-293

Filed 16 March 2021

1. Search and Seizure—vehicle checkpoint—programmatic purpose—reasonableness of procedures

In a driving while impaired case, the trial court properly denied defendant's motion to suppress after finding, based on sufficient evidence, that the vehicle checkpoint at which defendant was determined impaired, served a valid programmatic purpose—to check for valid driver's licenses and evidence of impairment—and that the procedures used to carry out the checkpoint were reasonable.

2. Constitutional Law—right to travel—vehicle checkpoint—N.C.G.S. § 20-16.3A

In a driving while impaired case, a vehicle checkpoint conducted pursuant to N.C.G.S. § 20-16.3A did not violate defendant's constitutional right to freely travel where the checkpoint was established for a valid public safety reason—to check for legitimate driver's licenses and evidence of impairment.

3. Constitutional Law—equal protection—vehicle checkpoint—N.C.G.S. § 20-16.3A

In a driving while impaired case in which defendant was stopped at a vehicle checkpoint, the statute authorizing the checkpoint, N.C.G.S. § 20-16.3A, did not preclude defendant from raising an equal protection challenge, but nonetheless defendant's right to equal protection of the laws was not violated.

Appeal by defendant from judgment entered 3 December 2019 by Judge William A. Wood II in Macon County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Grace, Tisdale & Clifton, P.A., by Michael A. Grace, for defendant-appellant.

TYSON, Judge.

¶ 1 Michael Mayo Macke ("Defendant") appeals from a judgment entered upon his guilty plea. We affirm.

I. Background

¶ 2 Troopers from the North Carolina State Highway Patrol ("NCSHP") conducted a checkpoint on "Depot Street" in Macon County, on the evening of 26 August 2016, as a part of a statewide initiative of high-profile traffic monitoring. Officers selected this location on "Depot Street" because of good visibility and sufficient room for vehicles to safely pull off the road.

¶ 3 The troopers stopped every vehicle that approached to request a driver's license and to observe for signs of impairment. The troopers conducted the checkpoint from 11:10 p.m. to 1:30 a.m. Troopers followed the procedures set forth on the NCSHP Checking Station Authorization Form.

¶ 4 Around 11:42 p.m., a black Cadillac SUV driven by Defendant approached the checkpoint. Trooper Jonathan Gibbs approached the vehicle to ask Defendant for his driver's license. As Defendant was looking for his driver's license another car pulled behind Defendant's car. Trooper Gibbs asked Defendant to pull over to the side of the road to continue looking.

¶ 5 After pulling over, Defendant provided his driver's license. Trooper Gibbs noticed "an odor of alcohol coming from [Defendant]'s breath and could see that he had red glassy eyes." Trooper Gibbs asked Defendant if he had any alcohol to drink and Defendant responded, "he had a few about five hours ago." Trooper Gibbs then asked Defendant to step out of his vehicle and go to the front right passenger's side of the vehicle.

¶ 6 When Defendant exited the vehicle, he was unsteady on his feet and used the vehicle to support himself as he was walking around the vehicle. While performing the Walking and Turn test, he missed placing his heel-to-toe four times and used his arms to balance one time on the way out; he performed the turn inconsistent with instructions; and, upon the return, he missed placing his heel-to-toe three times, stepped off the line one time, and took ten steps instead of the nine steps as instructed.

¶ 7 While performing the One Leg Stand Test, Defendant was unable "to keep his foot up longer than three seconds, swayed left and right while balancing, used both arms for balance, and was hopping." Defendant was unable to touch the tip of his nose with the tip of his finger in the

Finger to Nose test. Finally, while performing the Romberg Balance Test, Defendant swayed back and forth two or more inches and estimated 49 seconds instead of 30 seconds as instructed.

¶ 8 Trooper Gibbs reported while Defendant was in the patrol car being transported to jail, Defendant stated he had about $2,000 in cash on him and offered it to Trooper Gibbs if the officer would let him go. Defendant submitted to the Intox EC/IR II intoximeter, which registered a blood alcohol reading of .10.

¶ 9 Defendant was indicted for offering a bribe and driving while impaired on 14 May 2018. Defendant filed a motion to suppress evidence from the checkpoint, arguing the checkpoint violated his Fourth Amendment rights and NCSHP departmental guidelines. Defendant also argued N.C. Gen. Stat. § 20-16 (2019) was facially invalid and violated the "fundamental right to travel"; violated "Defendant's Constitutional right to equal protection of the laws pursuant to the Privileges or Immunities Clause and the Equal Protection Clause, which are guaranteed by the Fourteenth Amendment to the United States Constitution" on 28 October 2019.

¶ 10 Defendant also filed a motion to dismiss based upon vindictive prosecution on 18 November 2019. The trial court denied both motions. The trial court noted Defendant's objections to the motion to suppress. Defendant pleaded guilty to driving while impaired. The charge of offering a bribe was dismissed. Defendant was sentenced to a term of 120 days in custody, which was suspended. He was placed on 18 months of unsupervised probation. Defendant's driver's license was revoked and he was ordered to pay costs, fees, and fines totaling $1,085.00. Defendant appeals the preserved denial of his motion to suppress.

II. Jurisdiction

¶ 11 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-979(b) (2019).

III. Issues

¶ 12 Defendant argues: (1) the creation and operation of the checkpoint was not a valid exercise of the State's police power; (2) N.C. Gen. Stat. § 20-16.3A violates the fundamental right to travel pursuant to the Privileges or Immunities Clause; (3) N.C. Gen. Stat. § 20-16.3A violates the Equal Protection Clause; and, (4) in light of the unconstitutionality of N.C. Gen. Stat. § 20-16.3A the trial court erred in denying his motion to suppress.

IV. Standard of Review

¶ 13 Our Supreme Court has held:

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

V. Programmatic Purpose

¶ 14 **[1]** Defendant contends the checkpoint did not serve a valid programmatic purpose, was an invalid exercise of the State's police power, and constituted an unreasonable search in violation of Defendant's rights under the Fourth and Fourteenth Amendments. U.S. Const. amend. IV & XIV.

¶ 15 The Supreme Court of the United States, the North Carolina Supreme Court, and this Court have held the Fourth Amendment's reasonableness standard for a search or seizure is to be based upon either consent or individualized suspicion. *See Terry v. Ohio*, 392 U.S. 1, 20-21, 20 L. Ed. 2d 889, 905-06 (1968); *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012); *State v. Veazey*, 191 N.C. App. 181, 184, 662 S.E.2d 683, 686 (2008). The Supreme Court of the United States has recognized an exception to this requirement for roadside checkpoints without consent or an individualized suspicion, provided the purpose of the checkpoint is legitimate and the procedures surrounding the checkpoint are reasonable. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62, 49 L. Ed. 2d 1116, 1130-31 (1976).

¶ 16 Our Court has held: "a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers." *Veazey*, 191 N.C. App. at 185, 662 S.E.2d at 686. To evaluate the legitimacy of a checkpoint, a two-part inquiry is required.

¶ 17 "First, the court must determine the primary programmatic purpose of the checkpoint." *Id.* The checkpoint must be aimed at addressing a "specific highway safety threat" and not for general crime control. "[C]heckpoints primarily aimed at addressing immediate highway safety threats can justify the intrusions on drivers' Fourth Amendment privacy interests occasioned by suspicionless stops." *Id.* If the police have a general crime control aim, an individualized suspicion must exist. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42, 148 L. Ed. 2d 333, 343-44 (2000) (checkpoint with a primary purpose of finding illegal narcotics held unconstitutional)). The Supreme Court of the United States stated valid "specific highway safety threats" to support legitimate checkpoints include finding intoxicated drivers, checking for valid driver's licenses, and verifying vehicle registrations. *Michigan State Police v. Sitz*, 496 U.S. 444, 455, 110 L. Ed. 2d 412, 423 (1990); *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 673-74 (1979).

¶ 18 "Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, that does not mean the stop is automatically, or even presumptively, constitutional. It simply means that the court must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Veazey*, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87 (citation omitted). A court must weigh "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." *Id.* at 186, 662 S.E.2d at 687 (citing *Illinois v. Lidster*, 540 U.S. 419, 427-28, 157 L. Ed. 843, 852-53 (2004)).

¶ 19 The State presented testimony of Troopers Jonathan Gibbs and David Williams at the hearing on the motion to suppress. They testified they and several other officers conducted a traffic checkpoint with the prior approval of their superior officer on the day of the offense. Trooper Williams testified to how the checkpoint was set up, the procedures and duration of the checkpoint, how the stops would be conducted, and why they had changed locations. During the checkpoint, a patrol car had its blue lights active at all times.

¶ 20 Trooper Williams further testified how the checkpoint location changed approximately every thirty minutes to avoid identification of the checkpoint on the mobile direction application Waze. Through Troper Williams' testimony, the State showed the troopers' compliance with the NCSHP policy on traffic checkpoints, and the prior authorization for the checking station. This testimony was admitted into evidence without Defendant's objection.

¶ 21 Based on this and other evidence presented at the hearing, the trial court denied Defendant's motion to suppress. The trial court found the purpose of the checkpoint was "to check each driver for a valid driver's license and evidence of impairment." The trial court concluded: (1) this was a valid and constitutional programmatic purpose; (2) the checkpoint was subject to a detailed plan and not spontaneous; (3) the location and time span were reasonable; (4) the interference with the public was minimal; and, (5) Defendant's rights were not violated by the manner in which the checkpoint was conducted.

¶ 22 Defendant asserts the troopers changing the location of the checkpoint throughout the evening is not a programmatic purpose. However, this change was planned prior to and was contained in the authorization of the plan by Trooper Williams' supervisors. Unlike the facts in *State v. Rose*, 170 N.C. App. 284, 291-97, 612 S.E.2d 336, 341-44 (2005), cited by Defendant, wherein officers admitted there was not an established plan before the checkpoint was set up and narcotics detectives were involved in the operation of the checkpoint, here, the troopers stopped every vehicle that entered the checkpoint, as the plan outlined. No narcotics officers or drug dogs were present on the scene, and no drug test kits were implemented on the scene. Troopers moved to another location based upon a plan after a set duration.

¶ 23 Based upon the troopers' testimony, the trial court properly determined the programmatic purpose of the checkpoint was to check for a valid driver's license and for evidence of impairment. The court further found these purposes were valid programmatic purposes, which were reasonable under the circumstances. The trial court correctly made all requisite findings necessary to support its ultimate conclusion. The trial court did not err in denying Defendant's motion to suppress on the basis of the checkpoint's programmatic purpose. Defendant's argument is overruled.

VI. Right to Travel

¶ 24 **[2]** Defendant argues N.C. Gen. Stat. § 20-16.3A violates the right to travel pursuant to the Privileges or Immunities Clause. U.S. Const. amend. XIV, § 1. Our Supreme Court held: "The police power of the State is broad enough to sustain the promulgation and fair enforcement of laws designed to restore the right of safe travel by temporarily restricting all travel, other than necessary movement reasonably excepted from the prohibition." *State v. Dobbins*, 277 N.C. 484, 499, 178 S.E.2d 449, 458 (1971) (city declaring a state of emergency and imposing a city-wide curfew with specified exceptions for emergencies and necessary travel is a valid exercise of the police power).

¶ 25 The checkpoint at issue was established with the express purpose of finding and deterring traffic violations and impaired drivers, both of which are valid public safety concerns. This authority was established by our General Assembly in N.C. Gen. Stat. § 20-16.3A, which authorizes the creation of traffic checkpoints for such purposes. A traffic checkpoint, with a purpose to discover and deter traffic violations, which does not stop travel altogether and only delays travel for a few moments, does not violate the right to free travel. N.C. Gen. Stat. § 20-16.3A is presumed to be constitutional, and Defendant has failed to show a violation of his constitutional rights. *Id.*

¶ 26 The trial court did not err in holding the checkpoint did not violate Defendant's constitutional right to freely travel and properly denied Defendant's motion to suppress on this basis.

VII. Equal Protection

¶ 27 **[3]** Defendant argues N.C. Gen. Stat. § 20-16.3A is drafted to make it difficult to establish the discriminatory intent required to show a violation of the Equal Protection Clause. U.S. Const. amend. XIV, § 1.

¶ 28 Defendant cites N.C. Gen. Stat. § 20-16.3A(d), which provides: "The placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity. This subsection shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station." N.C. Gen. Stat. § 20-16.3A(d). Defendant asserts N.C. Gen. Stat. § 20-16.3A(d) disallows any and all challenges to equal protection in violation of the Equal Protection Clause. U.S. Const. amend. XIV, § 1.

¶ 29 The previous subsection of the same statute, N.C. Gen. Stat. § 20-16.3A(c), provides: "Law enforcement agencies may conduct any type of checking station or roadblock as long as it is established and operated in accordance with the provisions of the United States Constitution and the Constitution of North Carolina." Contrary to Defendant's assertions, N.C. Gen. Stat. § 20-16.3A(d) allows a defendant to challenge a checkpoint under both the Constitution of the United States and the North Carolina Constitution.

¶ 30 The trial court did not err in holding the checkpoint did not violate Defendant's constitutional right to equal protection of the laws and by denying Defendant's motion to suppress. Defendant's arguments are overruled.

VIII. Constitutionality

¶ 31 Here, as before the trial court, Defendant asserts N.C. Gen. Stat. § 20-16.3A is unconstitutional, the checkpoint was unlawful, and the trial court erred in denying his motions to suppress and dismiss. As we have held the checkpoint had a valid programmatic purpose, the statute did not violate Defendant's right to free travel. The statute did not violate Defendant's rights under the Privileges or Immunities and the Equal Protection Clauses of the Fourteenth Amendment. U.S. Const. amend. XIV, Defendant's argument is dismissed.

IX. Conclusion

¶ 32 The trial court property concluded the checkpoint had a valid programmatic purpose. N.C. Gen. Stat. § 20-16.3A does not violate Defendant's right to free travel nor the Equal Protection Clause. The trial court properly denied Defendant's motion to suppress. The judgment entered upon Defendant's guilty plea is affirmed. *It is so ordered.*

AFFIRMED.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
RODNEY STOKLEY, JR.

No. COA20-177

Filed 16 March 2021

1. Kidnapping—second-degree—removal—not inherent to commission of accompanying robbery

In a trial for offenses arising from a home invasion and armed robbery, the State presented sufficient evidence to support a conviction for second-degree kidnapping where defendant gestured with a gun at the victim to move, they went into another room, and the victim was told to get down on the floor. The movement of the victim occurred before the victim was robbed and was not an essential part of the robbery. Further, the victim's removal exposed him to greater danger by putting him in close proximity when defendant shot the victim's roommate.

2. Kidnapping—second-degree—jury instructions—omission of confinement—basis alleged in indictment

In a trial for offenses arising from a home invasion and armed robbery, the trial court's error in instructing the jury on a theory of second-degree kidnapping that was not alleged in the indictment—whereas defendant was charged with the offense based on confinement, the instructions referred to restraint or removal—did not rise to plain error where there was no reasonable possibility that, absent the error, a different verdict would have been reached, given the substantial evidence against defendant under any theory.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered 30 July 2019 by Judge Wayland J. Sermons, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 12 January 2021.

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

Richard J. Constanza for defendant-appellant.

TYSON, Judge.

¶ 1 Rodney Stokley, Jr. ("Defendant") appeals from judgments entered after a jury returned verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and second-degree kidnapping. Defendant seeks this Court's review of the ruling on his motion to dismiss the charge of second-degree kidnapping, and to award a new trial for unpreserved plain error in the jury instructions. We find no error.

I. Background

¶ 2 Clinton Saunders ("Saunders") was playing video games in his dark bedroom and was wearing noise-canceling headphones on 11 December 2017. Earlier that evening, Damon Williams ("Williams"), Rasheem Williams ("Rasheem") and Rodney Stokley ("Defendant") planned to rob Saunders' roommate, Jordan Baeza ("Baeza"). As Saunders played video games, a tall, unidentified man, later identified as Defendant, came into Saunders' room, brandished a gun, and motioned for him to move. Saunders walked to the living room, "assuming that is where I was supposed to go" with his hands up. Saunders testified, "[h]e told me to get on the ground, so I just laid face down."

¶ 3 Saunders was not tied up or placed in restraints. He recalled two men were inside the house with him at the time. One man was already in the living room, and the other man was behind him, holding a gun. Nothing was taken or removed from Saunders at the time he was taken from his bedroom into the living room or immediately thereafter.

¶ 4 Soon after Saunders had laid onto the floor, Baeza entered the house from the garage and said, "D.J. what the hell?" Defendant was hovering over Saunders, pointing the gun at him, and then pointed the gun at Baeza. Defendant looked at Baeza and said, "What's up, buddy?" and told Baeza to get onto the floor. Saunders testified he heard one of the perpetrators say, "Where is it, where is it[?]" and heard footsteps walking around the house.

¶ 5 Saunders testified he heard Baeza tell the men that Saunders had nothing to do with this and to not hurt him. The perpetrators responded they would not harm Saunders. Initially, Baeza got onto the kitchen floor, but then attempted to escape. As he fled, Defendant shot Baeza in the back.

¶ 6 Saunders heard the gunshot, felt the heat from the discharge, and could "hear blood coming out." Baeza testified Defendant spoke to him after he had shot him. While this was occurring, Baeza told the robbers where he kept his money. Williams began "ransacking" Baeza's room and took his wallet. Someone rifled through Saunders' pockets and took his cellphone. The intruders left the residence. Saunders realized Baeza had been shot and drove him to the hospital, where Baeza underwent several surgeries.

¶ 7 Police officers took initial statements from Baeza and Saunders at the hospital. In a later interview, Baeza told police it was Defendant, who had shot him. Baeza came to this conclusion after looking at Defendant's Facebook social media page. Baeza testified he was "One-hundred percent" sure that Defendant had shot him.

¶ 8 Defendant was arrested on 2 January 2018 and charged with assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, first-degree kidnapping, and second-degree kidnapping.

¶ 9 The Pasquotank County Grand Jury returned true bills of indictment charging Defendant with the offenses listed above on 26 February 2018. The second-degree kidnapping indictment alleged Defendant "unlawfully, willfully, and feloniously did kidnap Clinton Saunders . . . by unlawfully confining him without his consent and for

the purpose of facilitating the commission of a felony, Robbery with a Dangerous Weapon."

¶ 10 Williams entered into a plea bargain with the State. He pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury and was placed on supervised probation for 48 months. One condition of this probation required him to testify for the State at Defendant's trial.

¶ 11 Williams testified his nickname is D.J. and that he had invited Rasheem to join him to "get some money" from Baeza. Rasheem then invited Defendant to join them. Williams knew both of these men prior to this event. He drove Rasheem and Defendant to Baeza's home the night of the robbery. Williams testified he dropped Rasheem and Defendant off prior to entering Baeza's driveway, "[b]ecause we were trying to find a way in" the house to "rob him."

¶ 12 Defense counsel argued both kidnapping charges should be dismissed, contending the victims were not restrained to a degree over that inherent during the underlying robbery. The trial court dismissed the charge of first-degree kidnapping related to Baeza but the trial court denied dismissing the second-degree kidnapping charge related to Saunders.

¶ 13 Defendant testified in his own defense. He denied having any involvement in the kidnapping, robbery and shooting. He asserted he was attending a memorial service for a deceased family member when the robbery and shooting occurred.

¶ 14 The trial court instructed the jury on second-degree kidnapping. The trial court did not instruct the jury on the confinement theory of kidnapping, as was alleged in the indictment. Defense counsel failed to raise an objection to this omission.

¶ 15 The jury found Defendant guilty of second-degree kidnapping, assault with a deadly weapon inflicting serious injury, and robbery with a dangerous weapon. Defense counsel moved to arrest judgment on the conviction for second-degree kidnapping of Saunders, and renewed the arguments previously made. The trial court denied the motion and proceeded to sentencing.

¶ 16 Defendant was sentenced to 29 to 47 months of imprisonment for assault with a deadly weapon inflicting serious injury and 73 to 100 months of imprisonment to run consecutively to the assault sentence for robbery with a dangerous weapon. For second-degree kidnapping, Defendant was sentenced to 29 to 47 months imprisonment, which was suspended, Defendant was placed on supervised probation for 36

months, to commence after he completed the terms of active imprisonment. Defendant entered notice of appeal in open court.

II. Jurisdiction

¶ 17 This Court possesses jurisdiction from an appeal from a final judgment entered in a criminal case following a jury's return of guilty verdicts. N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 18 Defendant argues the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping, after the State failed to show Saunders was subjected to restraint other than what was inherent in the underlying robbery. Defendant also argues, without objection and preservation, the trial court committed plain error when instructing the jury on second-degree kidnapping. He asserts the instructions allowed the jury to return a conviction based on theories other than what was alleged in the indictment.

IV. Second-Degree Kidnapping

A. Standard of Review

¶ 19 "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). In evaluating the sufficiency of the evidence, the reviewing court examines the evidence in the light most favorable to the State, giving the State all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). This Court must determine whether substantial evidence supports each element of the offense and that the defendant committed the offense. *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *disc. review denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). Substantial evidence is defined as evidence a reasonable mind might accept as adequate to form a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

B. Analysis

¶ 20 **[1]** Defendant argues the conviction for second-degree kidnapping should be reversed because none of the actions supporting that offense were separate and apart from the accompanying robbery. Defendant asserts his actions amounted to a mere technical asportation of Saunders, who was not exposed to any greater danger than what occurred during the underlying robbery.

¶ 21 The State acknowledges, "[T]his is a very tangled area of the law. The Courts are all over the place."

> [T]here is consistency in the Courts' opinions where the evidence tended to show that a victim was bound and physically harmed by the robbers during the robbery. Clearly that type of restraint creates the kind of danger and abuse the kidnapping statute was designed to prevent. The case law does not provide a bright line rule for situations where a victim is merely ordered to move to another location while the robbery is taking place, but is not bound or physically harmed.

State v. Payton, 198 N.C. App. 320, 327-28, 679 S.E.2d 502, 506-07 (2009) (internal citations and quotation marks omitted).

¶ 22 Kidnapping in North Carolina is statutorily defined as:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person

> kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(a)-(b) (2019).

1. State v. Fulcher

¶ 23 Our Supreme Court announced the rule concerning prosecutions for kidnapping and other offenses that involve the victim being restrained to some degree in *State v. Fulcher*:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. G. S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. . . . [W]e construe the word "restrain" . . . to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) (Lake, Sr., J.).

¶ 24 "Restraint or removal is inherently an element of some felonies, such as armed robbery." *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998). In cases involving armed robbery, "the restraint, confinement or removal required of the crime of kidnapping, has to be something more than that restraint inherently necessary for the commission of [armed robbery]." *Id.* Consistent with the holding in *Fulcher*, our Supreme Court later added: "To 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." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

2. State v. Boyce

¶ 25 The facts before us are similar to those in *State v. Boyce*, 361 N.C. 670, 651 S.E.2d 879 (2007). In *Boyce*, the defendant forced his way into the victim's house, chased her through her home, and pulled her back into the house by her shirt as she tried to escape. The defendant threat-

ened the victim at gunpoint and only left after she gave him a check for two hundred dollars. Our Supreme Court reiterated, "[w]hen . . . the kidnapping offense is a whole separate transaction, completed before the onset of the accompanying felony, conviction for both crimes is proper." *Id.* at 673, 651 S.E.2d at 881. Because the defendant prevented her escape, "[t]his restraint and removal was a distinct criminal transaction that facilitated the accompanying felony offense and was sufficient to constitute the separate crime of kidnapping under North Carolina law." *Id.* at 674, 651 S.E.2d at 882.

3. State v. Stokes

¶ 26 Our Supreme Court further explored double jeopardy issues in the context of a kidnapping and armed robbery prosecution in *State v. Stokes*, 367 N.C. 474, 756 S.E.2d 32 (2014). The Court noted:

> When we consider whether kidnapping and armed robbery charges may be sustained simultaneously, we look to whether the victim was *exposed to greater danger* than that inherent in the commission of the underlying felony or whether the victim was subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.

Id. at 481, 756 S.E.2d at 37 (emphasis supplied) (citations and quotation marks omitted).

¶ 27 Here, Saunders was restrained and removed at gunpoint from one place to another prior to the shooting and robbery of Baeza. His removal and restraint occurred to further the perpetrators' goal of keeping Saunders and eventually Baeza in one location while they searched for money. Defendant continued to point a gun at Saunders and Baeza until he had shot Baeza and the robbers had finished ransacking the home. After the perpetrators searched the home, they stole Saunders' cellphone and Baeza's wallet, and left Saunders to care for the wounded Baeza. Saunders' asportation from one room to another room in his home occurred against his will at gunpoint, and the perpetrators did not take anything from Saunders at that time.

4. State v. Payton

¶ 28 In *Payton*, the victims were subjected to a home-invasion burglary and armed robbery. 198 N.C. App. at 320, 679 S.E.2d at 502. One victim noticed her jewelry had been disturbed. *Id.* at 321, 679 S.E.2d at 503. The victims exited the bathroom and discovered three perpetrators walking toward them, and one was holding the victim's kaleidoscope. *Id.* The

victims were ordered into a bathroom, and immediately asked where money was kept. *Id.* The victims told the perpetrators they had money in the women's purses downstairs. *Id.* Two robbers went to find their purses, while the third remained outside the bathroom door. *Id.* This Court reversed the defendant's kidnapping convictions, finding the restraint and removal of the victims was "an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself." *Id.* at 328, 679 S.E.2d at 507.

¶ 29 Unlike the victims in *Payton*, Saunders was not immediately robbed when he was restrained and removed from one room to another at gunpoint. While Saunders was on the floor, Defendant continued to hold him at gunpoint, shot Baeza, and then rifled through Saunders' pockets and robbed him of his cellphone. The gunshot was so close, Saunders testified he could feel the heat from the discharge and hear Baeza's blood trickling. Saunders' asportation had already occurred, he was confined, restrained, and his movements were restricted prior to and in a clear break apart from the armed robbery. The removal was distinct from his confinement in the living room, and Saunders was exposed to "greater danger" by the shooting of Baeza which took place prior to the armed robbery of Saunders' cellphone and Baeza's wallet. *Stokes*, 367 N.C. at 481, 756 S.E.2d at 37.

V. Kidnapping: Reversed

¶ 30 "To 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." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

¶ 31 In *Irwin*, the defendant was convicted of first-degree kidnapping after the State's evidence supported a finding an accomplice forced one victim at knifepoint to walk from her position near the cash register to the back of the store. *Id.* During this time, shots were fired at a second victim near the front of the store. The second victim died as a result of his injuries. *Id.* at 97, 282 S.E.2d at 443. The first victim was not touched or further restrained. *Id.* at 103, 282 S.E.2d at 446. Our Supreme Court held the "movement occurred in the main room of the store," and the first victim's "removal to the back of the store was an inherent and integral part of the attempted armed robbery." *Id.* "To accomplish defendant's objective of obtaining drugs it was necessary that [the victim] go to the back of the store to the prescription counter and open the safe." *Id.* Our Supreme Court held the victim's "removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.*

¶ 32 The movement of the victim in *Irwin* was essential to the robbery because the victim was required to open the safe. *Id.* Unlike the case before us, the movement of Saunders was not inherent or essential to complete the robbery.

¶ 33 In *State v. Ripley*, the defendant and accomplices forced a motel clerk to return to the check-in counter while they, at gunpoint, added victims entering the motel by forcing them to lie upon the floor for the duration of the robbery. *State v. Ripley*, 360 N.C. 333, 334-35, 626 S.E.2d 289, 290-91 (2006). Our Supreme Court held "defendant's actions constituted only a mere technical asportation of the victims which was an inherent part of the commission of robbery with a dangerous weapon." *Id.* at 341, 626 S.E.2d at 294 (internal quotations omitted).

¶ 34 The facts in *Ripley* differ from the case before us. The victims in *Ripley*, were held at gunpoint in one room while the perpetrators attempted their robbery. *Id.* In this case, Saunders was alone in his dark bedroom and consumed in playing games with headphones, and Defendant forced him to move through the home into the living room at gunpoint. Saunders was further held at gunpoint while Defendant inquired about the money, shot Baeza, searched the house, and robbed both victims.

¶ 35 In *Ripley*, our Supreme Court recognized a victim exposed to a greater danger may support a separate kidnapping conviction, but that determination was "unnecessary" to its conclusion. *Id.* In contrast, Saunders was exposed to a greater danger by being in close proximity when Baeza was shot.

¶ 36 The trial court correctly denied Defendant's motion to dismiss the second-degree kidnapping charge. We find no error in the Defendant's conviction for second-degree kidnapping in addition to the conviction for robbery with a dangerous weapon.

VI. Plain Error

A. Standard of Review

¶ 37 **[2]** Defense counsel failed to raise an objection to the omission of a jury instruction on "confinement." Because Defendant did not object to the jury instructions, this Court reviews unpreserved instructional errors using the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012). Establishing plain error requires proof that the error was fundamental and had a probable impact on the jury's guilty verdict. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). For plain error to be found, it must be probable, not just possible, that absent

the instructional error, the jury would have returned a different verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Analysis

1. Disjunctive Factors

¶ 38 The second-degree kidnapping indictment alleged Defendant kidnapped Saunders by "unlawfully confining him" for the purpose of committing robbery with a dangerous weapon. The trial court instructed the jury that the Defendant would be guilty of second-degree kidnapping if they concluded:

> First, the defendant unlawfully restrained the person. That is, restricted his freedom of movement or removed a person from one place to another.
>
> Second, that the person did not consent to the restraint or removal. Consent induced by fraud or fear is not consent.
>
> Third, that the defendant removed or restrained that person for the purpose of facilitating his commission of the felony or robbery with a dangerous weapon.
>
> Fourth, that this restraint or removal was a separate and complete act, independent of and apart from the robbery with a dangerous weapon.

¶ 39 The first element of kidnapping requires the State to prove Defendant "confine[d], restrain[ed], or remove[d]" the victim. N.C. Gen. Stat. § 14-39(a). These are discrete legal terms, having different meanings, and are stated disjunctively. "This Court has held that where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both classes, but will apply to cases falling within either of them." *State v. Small*, 201 N.C. App. 331, 341, 689 S.E.2d 444, 450 (2009) (alteration, citations and internal quotation marks omitted). Proof of either "confined," "restrained," or "removed," satisfies the statute.

¶ 40 "As used in [N.C. Gen. Stat. §] 14-39, the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. "The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force,

threat or fraud, without a confinement." *Id.* Our Supreme Court further explains a victim, "by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute." *Id.*

¶ 41 A removal requires some asportation of the victim, although a specific distance or duration is not required. *Id.* at 522, 243 S.E.2d at 351 (citations omitted).

2. Indictment Differing from Jury Instructions

¶ 42 Defendant relies on *State v. Bell* to support his contention the indictment and jury instruction were in error. In *Bell*, the issue before this Court was whether the trial court erred in a jury instruction that differed from the indictment. "The indictment against defendant . . . alleged both confinement and restraint, but did not allege removal." *State v. Bell*, 166 N.C. App. 261, 263, 602 S.E.2d 13, 15 (2004). The trial court instructed the jury "they could convict defendant on the theory of either restraint or removal." *Id.* The jury found the defendant guilty, but the verdict form did not indicate which theory the jury found. *Id.* "Our Supreme Court has held that such a variance between the indictment and the jury charge constitutes error. Whether this error constitutes plain error depends on the nature of the evidence introduced at trial." *Id.* (citations omitted).

¶ 43 In *Bell*, this Court explained this error is highly fact sensitive and based on which theory is misrepresented and what the facts tend to show. *Id.* This Court explains further:

> In *State v. Gainey*, the indictment charged on the theory of removal, but the judge instructed the jury on the theories of restraint and removal. *State v. Gainey*, 355 N.C. 73, 94, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Our Supreme Court held that "[t]he evidence in the case *sub judice* is not highly conflicting," and found there to be no plain error. *Id.* at 94-95, 558 S.E.2d at 477-78.

Id. at 263-64, 602 S.E.2d at 15. In *Bell*, the evidence of how the victim was restrained or removed was highly disputed, and this Court held the instructional error constituted plain error. *Id.* at 265, 602 S.E.3d at 16.

¶ 44 The facts before us are similar to the facts in *Gainey*. Defendant was indicted under one theory and convicted of second-degree kidnapping after the jury received instructions on other theories, rather than just those alleged in the indictment.

¶ 45 The State presented evidence tending to show Saunders' confinement, restraint and removal by Defendant. Defendant illegally entered Saunders' home, entered his bedroom and motioned at gunpoint for Saunders to move from his bedroom to the living room. Defendant followed Saunders to the living room while still holding him under gunpoint. That action alone meets the statutory definition of "confine." *See Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. Defendant stood over Saunders with a gun pointed at him prior to and throughout the duration of the shooting of Baeza and the armed robbery of Saunders. This removal and restraint included all the meanings of confine. *Id.*

¶ 46 Defendant does not show a probability that a reasonable jury would have found Saunders was removed and restrained but was not confined. As noted above, "[t]he term 'restrain' while *broad enough to include a restriction upon freedom of movement by confinement*, connotes also such a restriction, by force, threat or fraud, without a confinement." *Id.* (emphasis supplied).

¶ 47 Substantial evidence supports Defendant's conviction for kidnapping under the theory of confinement, restraint, or removal. The trial court should have properly instructed the jury on confinement, but the failure to instruct on "confinement" under these facts does not rise to the level of plain error. "We cannot conclude that had the trial court instructed the jury that the defendant had to 'confine' the victim to be guilty . . . this would have tilted the scales in favor of defendant." *Gainey*, 355 N.C. at 95, 558 S.E.2d at 478.

¶ 48 It is not probable that absent the instructional error, the jury would have returned a different verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant has failed to show probability of a different result under plain error review in the jury instruction as given to award a new trial. "The evidence shows that defendant confined, restrained and removed the victim . . . there is no reasonable basis for us to conclude that any different combination of the terms 'confine,' 'restrain' or 'remove' . . . would have altered the result." *Gainey*, 355 N.C. at 95, 558 S.E.2d at 478.

VII. Conclusion

¶ 49 The trial court correctly denied Defendant's motion to dismiss the second-degree kidnapping charge. The jury properly concluded beyond a reasonable doubt that Saunders' restraint was separate and distinct from the armed robbery, and that he was exposed to "greater danger" in addition to what occurred during the robbery from his person with a dangerous weapon. *Stokes*, 367 N.C. at 481, 756 S.E.2d at 37.

¶ 50 Defendant has failed to show plain error in the jury instruction to warrant a new trial. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR.

Judge HAMPSON concurs.

Judge MURPHY concurs in result only.

MURPHY, Judge, concurring in result only.

¶ 51 While I arrive at the same result as the Majority in upholding Defendant's convictions for robbery with a dangerous weapon and second-degree kidnapping, I write separately to note my vehement disagreement with the Majority's discussion of removal, restraint, and confinement that it relies on in holding "No Error."[1] *Supra* at ¶ 49-50.

¶ 52 Kidnapping is defined in part as follows:

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

1. Under prior naming practices of this Court, I would have referred to my vote as "dissenting in part, and concurring in the judgment." *See Lippard v. Holleman*, 844 S.E.2d 591, 611 (N.C. App.) (McGee, C.J., *concurring in part, dissenting in part, and concurring in the judgment*), *appeal dismissed*, *disc. rev. denied*, 847 S.E.2d 882 (N.C. 2020). However, through its recent order in *Lippard*, 847 S.E.2d 882 (N.C. 2020), our Supreme Court has made clear that although a judge of this Court is opposed to the reasoning and analysis of a majority opinion, it is not proper to entitle the same as a dissent and such an opinion does not confer an appeal of right in accordance with N.C.G.S. § 7A-30(2). *See* N.C.G.S. § 7A-30 (2019) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: . . . . (2) In which there is a dissent when the Court of Appeals is sitting in a panel of three judges."). To the extent that I misconstrue the Supreme Court's recent order regarding the applicability of N.C.G.S. § 7A-30(2), I dissent.

> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; . . .
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). . . . If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39(a)-(b) (2019) (emphasis added). Under N.C.G.S. § 14-39(a), the State is required to prove a victim was "confine[d], restrain[ed], or remove[d]" by a defendant. As the Majority correctly notes, "[t]hese are discrete legal terms, having different meanings, and are stated disjunctively." *Supra* at ¶ 39. The Majority, however, conflates removal with confinement and restraint throughout its Double Jeopardy analysis and upholds Defendant's punishments for convictions of robbery with a dangerous weapon and second-degree kidnapping. *Supra* at ¶ 25, 31-32, 44-47. Most glaringly, the Majority inappropriately mixes the theory of confinement with the theory of removal in its discussion of *State v. Irwin* and *State v. Boyce*. *Supra* at ¶ 25, 30-32. This analysis is not supported by the statutes, caselaw, dicta, or, most importantly, past analyses of the application of plain error in binding precedent from this Court and our Supreme Court.

¶ 53 The Majority unconvincingly attempts to distinguish this case from *State v. Irwin*, where our Supreme Court held the trial court erred in denying the defendant's motion to dismiss the kidnapping charge. *Supra* at ¶ 30-32; *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981), *not followed as dicta on other grounds*, *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991). In *Irwin*, although the defendant was indicted on kidnapping the victim on the theory of removal and restraint, the Supreme Court only analyzed the facts under the removal theory as it was the only theory provided by the trial court for the jury's consideration. *Id.* at 101, 282 S.E.2d at 445 ("[The] [d]efendant assigns as error the trial court's denial of his motion to dismiss the charge of kidnapping. This assignment has merit. The indictment charges [the] defendant with kidnapping [the victim] by removing her from one place to another and restraining her for the purpose of facilitating an armed robbery. The trial judge instructed the jury on the element of removal only, thus withdrawing the issue of restraint from jury consideration. Our discussion, there-

fore, will be limited to the meaning of the phrase 'remove from one place to another' as used in [N.C.G.S. §] 14-39(a)."). The victim was forced at knifepoint to walk toward the back of the store to obtain drugs from the prescription counter. *Id.* at 103, 282 S.E.2d at 446. "During this time two shots were fired by [the] defendant at the front of the store, causing [his accomplice] to flee. [The victim] was not touched or further restrained. All movement occurred in the main room of the store." *Id.* Our Supreme Court held this removal "was an inherent and integral part of the attempted armed robbery[]" because it was necessary "[t]o accomplish [the] defendant's objective of obtaining drugs . . . ." *Id.*

¶ 54 The Majority holds this case is different from *Irwin* because Defendant's *removal* of Saunders was not necessary to complete the convicted armed robbery, and therefore was not an inherent part of the robbery. *Supra* at ¶ 32. However, the indictment here provides Defendant kidnapped Saunders only by "unlawfully confining him"; whereas, the defendant in *Irwin* was indicted on removal and restraint and convicted on only the theory of removal. Based on the language in the indictment, our focus must remain on whether the circumstances surrounding the victim's confinement, not his removal from the bedroom, was inherent in the convicted armed robbery.

¶ 55 In *State v. Boyce*, the defendant broke into the victim's home, chased her, and prevented the victim's escape by dragging her back into her home before the onset of the robbery with a dangerous weapon. *State v. Boyce*, 361 N.C. 670, 671, 651 S.E.2d 879, 880-81 (2007). The defendant was indicted for kidnapping on the theories of confinement, restraint, and removal. *Id.* at 671-72, 651 S.E.2d at 881. Our Supreme Court held the restraint and removal were separate from the accompanying felony "and was sufficient to constitute the separate crime of kidnapping under North Carolina law." *Id.* at 674, 651 S.E.2d at 882. However, the defendant in *Boyce* was indicted for kidnapping based on confinement, restraint, and removal. *Id.* at 671-72, 651 S.E.2d at 881. Here, we cannot rely on the holding in *Boyce* even if the evidence supports a consideration that Saunders was removed prior to his confinement because Defendant was only indicted on a theory of confinement and therefore confinement is the only appropriate theory to consider for the motion to dismiss.

¶ 56 Later, in its analysis of plain error, the Majority reasons "[t]his removal and restraint included all the meanings of confine." *Supra* at ¶ 45. However, the Majority again strays from the issue before us of whether the jury probably would have returned a different verdict had they been instructed only on confinement. *See State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012). Confinement does not equate to removal.

Removal is a distinct term that differs from restraint and confinement. *See State v. Fulcher*, 294 N.C. 503, 522-23, 243 S.E.2d 338, 351 (1978) (holding removal does not require movement for a substantial distance, and " 'confine' connotes some form of imprisonment within a given area . . . . The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement."). These differences were clearly contemplated by the General Assembly given its use of the different terms to identify theories of kidnapping within N.C.G.S. § 14-39(a). *See State v. Small*, 201 N.C. App. 331, 342, 689 S.E.2d 444, 450 (2009) ("The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute."); *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is well established 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 intended each portion to be given full effect and did not intend any provision to be mere surplusage.").

¶ 57 Equating removal to confinement, as the Majority has, goes against our binding precedent and jurisprudence. In numerous kidnapping cases we, along with our Supreme Court, have engaged in a plain error analysis regarding the theories of kidnapping. *See State v. Tucker*, 317 N.C. 532, 536-37, 346 S.E.2d 417, 420 (1986) (holding plain error where the jury was instructed on restraint, a theory not charged in the indictment); *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001) (holding error, but not plain error, where the trial court failed to instruct on the theory of confinement alleged in the indictment but rather instructed the jury on the theory of removal), *overruled in part on other grounds*, *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006); *State v. Clinding*, 92 N.C. App. 555, 562-63, 374 S.E.2d 891, 895 (1989) (holding no plain error where the indictment alleged removal and confinement but the jury was instructed on restraint); *State v. Smith*, 162 N.C. App. 46, 51-53, 589 S.E.2d 739, 743-744 (2004) (holding plain error where the indictment alleged removal but the trial court instructed the jury on confinement, restraint, or removal). If the Majority was correct, then there would be no difference between confinement, restraint, and removal under N.C.G.S. § 14-39(a), and plain error analysis would be unnecessary when a trial court instructs the jury on a theory not alleged in the indictment. Accordingly, given the Majority's conflation of removal, restraint, and confinement, I cannot concur with its analysis and reasoning.

¶ 58 While I could not disagree more with the Majority's chosen path in reaching the result of no error and no plain error, I also conclude the trial court did not err in denying Defendant's motion to dismiss and erred, but did not commit plain error in instructing the jury on removal and restraint where the indictment only referred to confinement.

¶ 59 The Majority has accurately presented the facts of this case and the standards of review. *Supra* ¶ 2-16, 19, 37. As for Defendant's motion to dismiss, the evidence taken in the light most favorable to the State demonstrates that not only was Saunders the victim of the indicted and convicted armed robbery whereby his pockets were rifled through and his cell phone was taken as the assailants left, he was also a victim of an earlier attempted robbery whereby the assailants confined him on the floor while they attempted to discern the location of Baeza's large sums of money and take the money by force.

¶ 60 There was substantial evidence the armed robbery of Saunders' cell phone was a distinct crime from the earlier attempted armed robbery of Baeza's large sums of money. During this initial attempted armed robbery, Saunders was "confin[ed] . . . without his consent and for the purposes of facilitating the commission of a felony, [r]obbery with a [d]angerous [w]eapon" as indicted. The import of N.C.G.S. § 14-39(a)(2) is that the confinement was done in facilitating any felony and, although the initial attempted armed robbery seeking Baeza's large sums of money was not completed, it may serve as the predicate felony for second-degree kidnapping as indicted. *See State v. Cole*, 199 N.C. App. 151, 160, 681 S.E.2d 423, 429 ("[A] defendant need not be convicted of the underlying felony in order to be convicted of kidnapping."), *disc. rev. denied*, 363 N.C. 658, 686 S.E.2d 679 (2009), *cert. denied*, 368 N.C. 605, 780 S.E.2d 833 (2015). Nothing in the trial court's unchallenged jury instructions limited the jury's consideration of kidnapping to the confinement during the later armed robbery of Saunders' cell phone from his pocket. In the light most favorable to the State, substantial evidence was offered as to the commission of the second-degree kidnapping during a separate attempted armed robbery from the convicted armed robbery. Under these circumstance, Defendant's punishment for convictions of both robbery with a dangerous weapon and second-degree kidnapping under the theory of confinement do not violate Double Jeopardy and the trial court did not err in denying his motion to dismiss.

¶ 61 Turning to Defendant's argument as to plain error, I agree the trial court's instruction was in error and did not accurately track the grand jury's indictment. Our courts have been presented with this issue several times and, in considering whether the error amounts to plain error, we

must first determine whether "the jury probably would have returned a different verdict had the error not occurred." *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327. Here, this issue is complicated by the consideration of confinement and the potential impact on Defendant's right to be free from Double Jeopardy. As discussed above, there was substantial evidence from which the jury could determine Defendant confined Saunders during the first attempted armed robbery of Baeza's money, as well as the subsequent armed robbery of Saunders' cell phone from his pocket. This evidence defeats the proposition "the jury probably would have returned a different verdict" had the trial court properly instructed the jury only on confinement. *Id*. Further, in an attempt to show a probably different verdict had the error not occurred, Defendant argues his alibi testimony demonstrates the State's case was not overwhelming. Defendant's reliance on this evidence is misplaced as the jury rejected his alibi defense when it found him guilty of armed robbery, a conviction not substantively challenged on appeal. The trial court's error does not amount to plain error as the evidence here does not permit us to conclude "the jury probably would have returned a different verdict had the error not occurred." *Id*.

¶ 62 I respectfully concur in the result only.

STATE OF NORTH CAROLINA
v.
DALLAS ROBERT WALTERS

No. COA20-440

Filed 16 March 2021

1. Appeal and Error—preservation of issues—challenges to sufficiency of the evidence—criminal cases

Defendant's act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review. Thus, defendant's motion to dismiss drug trafficking charges based upon a defect in the chain of custody preserved the issue of the insufficiency of the evidence.

2. Drugs—possession—sufficiency of evidence—flight from police—drugs found along flight path

Where police found two bags of heroin on the driver's side of the roadway along the three-to-five-mile route on which defendant

fled in his vehicle but the State failed to present evidence connecting defendant to the heroin, there was insufficient evidence to convict defendant of trafficking heroin by possession and transportation. The scales, baggies, and syringes found inside his vehicle raised only a suspicion of his connection to the heroin.

Appeal by defendant from judgment entered 11 February 2020 by Judge Claire V. Hill in Union County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Slusser, for the State.

Richard Croutharmel for defendant-appellant.

TYSON, Judge.

¶ 1 Dallas Robert Walters ("Defendant") appeals from judgment entered upon a jury's conviction of two counts of trafficking heroin. We reverse the trial court's denial of Defendant's motion to dismiss and remand.

I. Background

¶ 2 Union County Sheriff's deputies were waiting at a shopping center parking lot in Monroe on 12 December 2018. Defendant was known by the officers to be driving while his license was revoked. The officers were present to conduct surveillance on Defendant. The record does not disclose the basis upon which officers were investigating Defendant or how they knew he would be there at that time and place.

¶ 3 The officers waited for a specific black Honda Accord vehicle driven by Defendant. The Honda Accord was not registered to Defendant, but he arrived at the shopping center driving the vehicle with a passenger riding in the front seat. Several officers attempted to stop Defendant's car with their vehicles' lights and sirens activated.

¶ 4 Defendant remained inside the vehicle, weaved around the police cars, and drove away. Detective Gross was located outside of his car with his gun drawn and narrowly avoided being hit by Defendant's car.

¶ 5 Defendant fled from the parking lot onto Highway 37. Officers gave pursuit, which persisted for three to five miles. The vehicles reached speeds of ninety to one hundred miles per hour. Defendant hit the rear of a pickup truck, wrecking the vehicle, and ending the car chase.

¶ 6 After the collision, Defendant's vehicle veered off the highway. Defendant fled from the scene on foot. After a short chase, he was apprehended.

¶ 7 Officers searched Defendant's vehicle and recovered a backpack containing digital scales, syringes, and small plastic bags. Between thirty and forty-five minutes after the chase ended and while Defendant was in custody, officers found two small plastic bags containing a "black tar substance" on the side of the highway roughly one hundred yards from where the car chase had begun in the shopping center parking lot. One plastic bag contained 1.69 grams of heroin, and the other contained 2.97 grams of heroin.

¶ 8 The bags of heroin were found along the route Defendant had taken during the chase on the driver's side of the road, but they were located "completely off of the roadway." None of the officers testified they saw Defendant, or his passenger throw anything from the car.

¶ 9 Defendant made a motion to dismiss the two charges of trafficking heroin at the conclusion of the State's evidence. Defendant argued a defect existed in the chain of custody of the evidence. He moved to dismiss the charges of trafficking by possession and by transportation as they purportedly arose from "the same act."

¶ 10 The jury convicted Defendant of trafficking in heroin by transportation, trafficking in heroin by possession, two counts of assault with a deadly weapon on a government official, eluding arrest with greater than three aggravating factors, and resisting a public officer. Defendant's sentences for trafficking in heroin by transportation and trafficking in heroin by possession were consolidated for judgment. Defendant was sentenced to an active sentence of 70 to 93 months with 39 days credit for pre-trial detention.

¶ 11 Defendant's convictions for two counts of assault with a deadly weapon of a government official, eluding arrest with greater than three aggravating factors, and resisting a public officer were consolidated for judgment. Defendant was sentenced to an active sentence of 25 to 39 months to run consecutive to his sentence for the trafficking convictions. Defendant appealed.

II. Jurisdiction

¶ 12 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Preservation

¶ 13 **[1]** The State argues Defendant failed to preserve the issue for appellate review when he moved to dismiss the charges based upon a defect in the chain of custody, rather than for insufficiency of the evidence.

¶ 14 "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) (emphasis supplied); *see State v. Hamilton*, 351 N.C. 14, 20-21, 519 S.E.2d 514, 519 (1999) (("On appeal, defendant, for the first time, argues testimony was offered for impeachment purposes. Because defendant failed to make this argument at trial, he cannot swap horses between courts in order to get a better mount[.]") (internal quotation marks and alterations omitted) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount.")).

¶ 15 "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C. R. App. P. 10(a)(3).

¶ 16 Our Supreme Court recently held Rule 10(a)(3) does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of evidence. *State v. Golder*, 374 N.C. 238, 245-46, 839 S.E.2d 782, 788 (2020). "Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id.*

¶ 17 The Supreme Court further stated, "under Rule 10(a)(3) and our case law, defendant'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. Based upon our Supreme Court's recent holding in *Golder*, Defendant preserved the argument on appeal. *See id.*

IV. Standard of Review

¶ 18 "We review the trial court's denial of a motion to dismiss *de novo*. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Battle*, 253 N.C. App. 141, 143, 799 S.E.2d 434, 436, *writ denied*, *review denied*, 369 N.C. 756, 799 S.E.2d 872 (2017) (internal citation and quotation marks omitted).

¶ 19 In ruling upon a motion to dismiss for insufficiency of the 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. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. In its analysis, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (internal citation and quotation marks omitted).

¶ 20 "It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue." *Battle*, 253 N.C. App. at 144, 799 S.E.2d at 437 (internal quotations and citations omitted). If the evidence proves "only a suspicion of possession," and fails to show evidence substantial enough to submit the case to the jury, the motion to dismiss must be granted. *State v. Acolatse*, 158 N.C. App. 485, 486, 581 S.E.2d 807, 808 (2003); *see State v. Chavis*, 270 N.C. 306, 306-09, 154 S.E.2d 340, 341-43 (1967).

V. Sufficiency of the Evidence

¶ 21 **[2]** In his sole argument on appeal, Defendant does not challenge the trial court's ruling on his chain of custody argument, which he abandons, but argues the trial court erred by denying his motion to dismiss the charges of trafficking heroin by transportation and possession. Defendant asserts the State presented insufficient evidence tending to show he possessed the two bags of heroin found on the side of the road. We agree.

¶ 22 The offense of trafficking heroin "has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987); *see also* N.C. Gen. Stat. § 90-95(h)(4)(b) (2019).

¶ 23 Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002).

¶ 24 The Supreme Court of North Carolina has held "constructive possession is sufficient" to prove a defendant possessed a controlled substance. *McLaurin*, 320 N.C. at 146, 357 S.E.2d at 638. "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *Acolatse*, 158 N.C. App. at 488, 581 S.E.2d at 810 (internal quotes and citations omitted).

¶ 25 "[U]nless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002). Here, Defendant had no drugs, currency, weapon on his person or in his vehicle, and was not physically present at the site where the drugs were found. The State must demonstrate "other incriminating circumstances" to raise an inference of constructive possession. *Id.*

¶ 26 The State asserts Defendant's flight from the parking lot, the drug paraphernalia found in Defendant's car, and the fact that the drugs were packaged in such a way that is consistent with illegal drug sales is sufficient evidence of circumstances to infer Defendant's constructive possession in the light most favorable to the State.

¶ 27 The State did not lay a foundation for the reason the officers were at the shopping center parking lot observing Defendant and did not in any manner, either from him or his vehicle, connect Defendant to the heroin recovered. Other than the fact that the two bags of heroin were recovered on the side of the roadway along the three-to-five-mile route of the chase, no evidence was presented to connect Defendant to the heroin recovered.

A. *State v. Chavis*

¶ 28 Our Supreme Court held a motion for judgment of nonsuit should have been allowed even where the "evidence raise[d] a strong suspicion as to defendant's guilt[.]" *Chavis*, 270 N.C. at 311, 154 S.E.2d at 344. In *Chavis*, officers observed the defendant wearing a gray felt hat and followed him closely for several blocks. The officers lost sight of the defendant for "two or three seconds" and later searched him. *Id.* at 307, S.E.2d at 342. During the search, the defendant was not wearing a hat nor in possession of any contraband. *Id.* Thirty minutes later, officers found a hat of the same kind the defendant had been observed wearing with marijuana in its crown. *Id.* Our Supreme Court held the State failed to show sufficient evidence of constructive possession to sustain the defendant's conviction. *Id.*

B. *State v. Acolatse*

¶ 29 In *Acolatse*, officers chased the defendant on foot and saw him make a throwing motion toward some bushes. *Acolatse*, 158 N.C. App. at 488, 581 S.E.2d at 810. While the officers failed to find drugs in those bushes, they recovered drugs from a nearby roof, which was located "in a different direction from the bushes." *Id.* at 490, 581 S.E.2d at 811. This Court held that money found on the defendant "in denominations consistent with the sale of controlled substances" and the defendant's throwing motion observed by the officers were not sufficient "other incriminating circumstances" to infer constructive possession to survive a motion to dismiss. *Id.* at 489, 581 S.E.2d at 810.

C. *State v. Henry*

¶ 30 In *State v. Henry*, cited by the State, the police officer observed the suspect with a closed and clinched fist during a traffic stop. *State v. Henry*, 237 N.C. App. 311, 314, 765 S.E.2d 94, 97 (2014). Following a scuffle, the officer found the contraband in an area where the scuffle had taken place. *Id.* at 320, 765 S.E.2d at 101. Our Court held the "close juxtaposition" was sufficient to survive the motion to dismiss. *Id.*

¶ 31 Here, unlike *Henry*, the State failed to show Defendant was ever in such "close juxtaposition" to the recovered heroin. He merely drove by the site where the heroin was found during the three-to-five-mile chase. *Id.*

¶ 32 The State failed to show any evidence concerning the length of time the heroin was on the side of the road or condition of the packaging. The State also failed to show any connection between the heroin and

Defendant, or between the heroin and the items recovered from the search of the Honda Accord.

¶ 33 When the evidence is viewed in the light most favorable to the State, the bags of heroin were found on the driver's side of the road approximately one hundred yards from the area where the car chase started. Inside Defendant's vehicle, officers found scales, baggies, and syringes. Officers did not observe Defendant throw anything from the window while driving during the chase. Defendant was not in control of the area where the drugs were found, and there is no evidence connecting the bags of heroin to Defendant or to the vehicle he was driving. Without further incriminating circumstances to raise an inference of constructive possession, the State has failed to demonstrate substantial evidence that Defendant possessed the controlled substance.

¶ 34 Following *Chavis* and *Acolatse*, and distinguishing *Henry*, we hold the State failed to present substantial evidence of trafficking heroin by possession and transportation to survive a motion to dismiss. The evidence presented was a "mere scintilla," and only raised the suspicion of Defendant's connection to the heroin. *Battle*, 253 N.C. at 144, 799 S.E.2d at 437. The trial court erred in denying Defendant's motion to dismiss.

VI. Conclusion

¶ 35 With the issue preserved for appellate review, and after viewing the evidence in the light most favorable to the State, this evidence is not substantial evidence tending to show Defendant constructively possessed the heroin. The trial court erred by denying Defendant's motion to dismiss the charges of trafficking heroin by transportation and trafficking heroin by possession.

¶ 36 Defendant's convictions for two counts of assault by a deadly weapon on a government official, eluding arrest with greater than three aggravating factors, and resisting a public officer were not appealed. The consolidated judgment and sentence entered thereon remains undisturbed.

¶ 37 The trial court's judgment is reversed on the consolidated charges of trafficking heroin by possession and trafficking heroin by transportation. This matter is remanded to the trial court for entry of an order granting Defendant's motion to dismiss and for any required resentencing. *It is so ordered.*

REVERSED AND REMANDED.

Judges COLLINS and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MARCH 2021)

CRAWFORD v. TOWN OF SUMMERFIELD 2021-NCCOA-73 No. 20-328	Guilford (19CVS5975)	Affirmed
CROSLAND v. PATRICK 2021-NCCOA-74 No. 19-713-2	Mecklenburg (15E2702)	Affirmed
IN RE B.T. 2021-NCCOA-75 No. 20-366	Pitt (18JA62)	Vacated and Remanded
IN RE J.N. 2021-NCCOA-76 No. 20-296	Forsyth (18J56) (18J57)	Vacated and Remanded
IN RE S.O. 2021-NCCOA-77 No. 20-348	Beaufort (18JA4)	Affirmed
NICHOLS v. UNITED PAINTING SERVS. 2021-NCCOA-78 No. 20-443	N.C. Industrial Commission (16-760689)	Affirmed
STATE v. BENNER 2021-NCCOA-79 No. 19-879	Davidson (17CRS50138) (17CRS50165)	NO ERROR IN PART AND DISMISSED IN PART.
STATE v. GREEN 2021-NCCOA-80 No. 20-394	New Hanover (17CRS57366-68)	Dismissed
STATE v. GUERRERO-AVILA 2021-NCCOA-81 No. 20-297	New Hanover (17CRS51521-22)	Affirmed
STATE v. HARRIS 2021-NCCOA-82 No. 19-1124	Durham (16CRS53549-50)	No Error
STATE v. KENNINGTON 2021-NCCOA-83 No. 20-419	Wayne (19CRS50117)	Affirmed

STATE v. MILLER 2021-NCCOA-84 No. 20-225	Forsyth (18CRS52962-63)	No Error.
STATE v. ROBINSON 2021-NCCOA-85 No. 20-429	Onslow (17CRS55741)	No Error
STATE v. SHEPARD 2021-NCCOA-86 No. 19-1012	Carteret (16CRS055856) (17CRS000844)	No plain error
STATE v. WATTS 2021-NCCOA-87 No. 20-158	Columbus (11CRS52181-84)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI GRANTED; NO ERROR.
TAYLOR v. TAYLOR 2021-NCCOA-88 No. 20-426	Randolph (16CVD2533)	Vacated and Remanded.
UNITED CMTY. BANK v. WAKEFIELD MISSIONARY BAPTIST CHURCH 2021-NCCOA-89 No. 20-335	Wake (19CVS9973)	Dismissed

CAROLYN LOUISE GUNN TESTAMENTARY TRUST, BY AND THROUGH CYNTHIA M. ROWLEY, TRUSTEE, PLAINTIFF

v.

CAROLYN ELISE BUMGARDNER, AND EUGENE TISELSKY, DEFENDANTS

No. COA20-308

Filed 6 April 2021

Injunctions—form and scope—sufficiency of detail—interlocutory appeal

In an easement dispute, the trial court's cursory order granting partial summary judgment "with respect to the plaintiff's . . . cause of action for injunctive relief"—without setting forth the reasons for the issuance of the injunction or describing its scope in any detail—was insufficient to constitute a permanent injunction under Civil Procedure Rule 65, and a more detailed order later entered pursuant to Civil Procedure Rule 62(c) could not cure the deficiency. Therefore, the cursory order, which was interlocutory, did not affect a substantial right, and the appeal was dismissed.

Appeal by defendants from orders entered 5 June 2019 by Judge Robert C. Ervin and 9 September 2019 by Judge Nathaniel J. Poovey in Gaston County Superior Court. Heard in the Court of Appeals 26 January 2021.

Stott, Holowell, Palmer & Windham, L.L.P., by Aaron C. Low, for plaintiff-appellee.

Weaver, Bennett & Bland, P.A., by Bo Caudill, for defendants-appellants.

DIETZ, Judge.

¶ 1 Defendants Carolyn Elise Bumgardner and Eugene Tiselsky brought this interlocutory appeal from an order purportedly granting a permanent injunction requiring them to make alterations to their property. The trial court entered that order on a motion for partial summary judgment, stating that the motion "is allowed with respect to the plaintiff's first cause of action for injunctive relief" and ruling that "plaintiff is entitled to judgment as a matter of law with respect to this claim."

¶ 2 As explained below, the language in the challenged order is insufficient to constitute a permanent injunction under Rule 65 of the Rules

of Civil Procedure. Rule 65 requires a permanent injunction order to set forth the reasons for its issuance in specific terms and describe the scope of the injunction in detail. The challenged order does not do so; it is a routine grant of partial summary judgment on a legal claim. We therefore dismiss this appeal for lack of appellate jurisdiction. Defendants may take a new, interlocutory appeal from the permanent injunction order should the trial court ultimately enter one and the terms of that order impact a substantial right justifying an interlocutory appeal.

Facts and Procedural History

¶ 3 This dispute concerns an easement for access to an otherwise landlocked cottage. The underlying facts are not particularly relevant to the issues in this appeal, which concern entry of an order that the parties contend is a permanent injunction.

¶ 4 In the complaint, the Plaintiff, Carolyn Louise Gunn Testamentary Trust, alleged that Defendants Carolyn Elise Bumgardner and Eugene Tiselsky "erected a fence, trees, and shrubbery" that prevented the use and enjoyment of the easement on the property. The Trust sought a permanent injunction compelling removal of "the barriers of a fence, trees, and shrubbery" as well as monetary damages.

¶ 5 On cross-motions for partial summary judgment, the trial court entered partial summary judgment in favor of the Trust, stating that the Trust's motion "is allowed with respect to the plaintiff's first cause of action for injunctive relief and the plaintiff is entitled to judgment as a matter of law with respect to this claim." The trial court's partial summary judgment order did not identify the acts enjoined or contain any other specific terms of injunctive relief; the order simply announced that the Trust was entitled to judgment as a matter of law on that claim. Defendants timely appealed the partial summary judgment order.

¶ 6 The week after filing their notice of appeal, Defendants moved for a stay of the trial court's order under Rule 62 of the Rules of Civil Procedure. The trial court denied that motion and, under the authority of Rule 62(c), entered injunctive relief pending appeal that required Defendants to immediately "remove any and all obstructions from the Plaintiff's use of the easement for regular vehicular traffic, including any and all fences, trees, shrubs, or bushes." Defendants likewise timely appealed that Rule 62(c) order.

Analysis

¶ 7 We begin our analysis by examining our jurisdiction to hear this appeal. "Ordinarily, this Court hears appeals only after entry of a final judg-

ment that leaves nothing further to be done in the trial court." *Vaitovas v. City of Greenville*, 271 N.C. App. 578, 580, 844 S.E.2d 317, 318 (2020). The parties concede that this appeal is interlocutory because there are other claims still pending before the trial court and, thus, more to be done below.

¶ 8 But Defendants contend that this Court has jurisdiction because the challenged order affects a substantial right. *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019). Specifically, Defendants contend that the challenged order imposes a mandatory, permanent injunction requiring them to alter their property by removing fencing, trees, and shrubbery. They cite a long line of cases holding that mandatory injunctions compelling alterations to real property affect a substantial right. *See, e.g.*, *Keener v. Arnold*, 161 N.C. App. 634, 637, 589 S.E.2d 731, 733 (2003).

¶ 9 The flaw in this argument is that there is no permanent injunction in this case—although, to be fair, Defendants acknowledge this point, which is a key reason this appeal exists. Under our Rules of Civil Procedure, a permanent injunction must set forth the reasons for its issuance in specific terms and describe the scope of the injunction in detail:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained . . . .

N.C. R. Civ. P. 65(d).

¶ 10 This Court has emphasized that a purported injunction order that merely references requests for injunctive relief in "some other document is not sufficient to provide a description of the act or acts enjoined or restrained." *Gibson v. Cline*, 28 N.C. App. 657, 659, 222 S.E.2d 478, 479 (1976). For example, in *Wilner v. Cedars of Chapel Hill, LLC*, the plaintiffs' motion for summary judgment requested an injunction to stop defendants' efforts to "enforce certain affirmative covenants." 241 N.C. App. 389, 397, 773 S.E.2d 333, 339 (2015). The trial court granted the motion, stating simply: "Plaintiffs' motion for partial summary judgment is, allowed as to Plaintiffs' First, Third, Eighth and Tenth Claims for Relief as set forth in paragraphs numbered one through five in Plaintiff's motion." *Id.* Citing Rule 65, this Court vacated the order, holding that "the trial court's cursory handling of [the injunction] did not meet the standard of 'reasonable detail' concerning the 'act or acts enjoined or restrained.' " *Id.*

¶ 11 Here, too, the purported permanent injunction is insufficient under Rule 65. The trial court's order was a routine summary judgment ruling, stating only that the Trust's motion for partial summary judgment "is allowed with respect to the plaintiff's first cause of action for injunctive relief and the plaintiff is entitled to judgment as a matter of law with respect to this claim." It is not even clear from the record that the trial court believed the order should function as a permanent injunction; rather, the language chosen by the trial court suggests that the court likely intended to enter a permanent injunction order, detailing the precise scope of the injunction, at some future date. But that never happened because Defendants immediately appealed the partial summary judgment ruling, apparently because the parties could not agree about whether the order had the effect of a permanent injunction.

¶ 12 To be sure, after Defendants appealed, the trial court entered a more detailed order with specific terms of injunctive relief. But that order was one expressly entered under Rule 62(c) as injunctive relief pending appeal. It is not a permanent injunction, but one that lasts only while the underlying appeal of the partial summary judgment ruling is pending. Moreover, a Rule 62(c) injunction pending appeal is appropriate only when "an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction." N.C. R. Civ. P. 62(c). Here, the trial court had not yet entered the underlying permanent injunction. Accordingly, the Rule 62(c) order is likewise insufficient to confer appellate jurisdiction on this Court. We therefore dismiss this appeal for lack of jurisdiction. As noted above, Defendants may take a new, interlocutory appeal from the permanent injunction order should the trial court ultimately enter one and the terms of that order impact a substantial right justifying an interlocutory appeal.

Conclusion

¶ 13 We dismiss the appeal for lack of appellate jurisdiction.

DISMISSED.

Judges ARROWOOD and WOOD concur.

HOVEY v. SAND DOLLAR SHORES HOMEOWNER'S ASS'N, INC.

[276 N.C. App. 281, 2021-NCCOA-91]

ROBERT E. HOVEY AND WIFE, TANYA L. HOVEY, PLAINTIFFS
v.
SAND DOLLAR SHORES HOMEOWNER'S ASSOCIATION, INC., AND THE TOWN OF DUCK, DEFENDANTS

No. COA20-423

Filed 6 April 2021

Easements—by dedication—intent to dedicate to public—ambiguous—walkway to public beach across private property

In a declaratory judgment action filed by two beach town residents against a homeowner's association that maintained an easement along a pedestrian walkway providing access to a public beach across privately owned, oceanfront land, the residents (who did not own any of the land containing the easement) did not meet their burden of showing a right to use the walkway. Specifically, the residents failed to show that the land developers had a clear and unmistakable intent to dedicate the easement to the public where the plat map expressly dedicated "all roads, alleys, walks, parks, and other sites to public or private use as noted;" only "noted" that the streets and roads were dedicated to the public; and showed the walkway but did not "note" whether it was dedicated to public use.

Appeal by Defendant Sand Dollar Shores Homeowner's Association, Inc., from judgment entered 18 February 2020 by Judge L. Lamont Wiggins in Dare County Superior Court. Heard in the Court of Appeals 10 February 2021.

The Wills Law Group, by Gregory E. Wills, for Plaintiffs-Appellees.

Fox Rothschild LLP, by Troy D. Shelton, Elizabeth Brooks Scherer, and Robert H. Edmunds, Jr., for Defendant-Appellant Sand Dollar Shores Homeowner's Association, Inc.

No brief filed by Defendant Town of Duck.

INMAN, Judge.

¶ 1 The Town of Duck is a seaside resort community that provides no public beach access. All oceanfront lots there are privately owned and have been since before Duck was incorporated in 2002. Although members of the public are entitled to walk on the beach, wade in the

ocean, and otherwise use the natural resources abutting the boundaries of these properties, the land between the beach and public streets and highways belongs to private landowners. This appeal arises from a complaint by two Duck residents who do not own oceanfront property and who assert a public right of access to a pedestrian walkway that provides convenient beach access from a public street to members of Sand Dollar Shores Homeowner's Association ("Defendant").

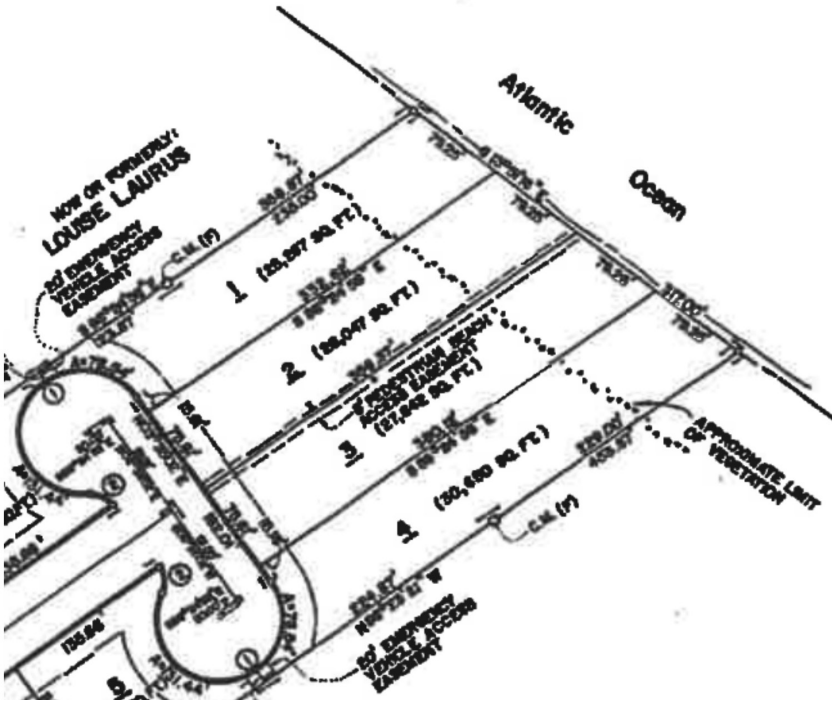
¶ 2 Defendant appeals from a summary judgment order declaring that the walkway maintained by and titled to Defendant has been dedicated to the public. After careful review, we hold the trial court erred in granting summary judgment for Robert and Tanya Hovey ("Plaintiffs"), reverse the trial court's order, and remand with instruction to enter summary judgment for Defendant.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 In 1981, Sand Dollar Shores, Inc., a real estate development company, recorded a plat for the Sand Dollar Shores subdivision with the Dare County Register of Deeds.[1] The subdivision, per the plat map, consists of 42 residential lots along Seabreeze Drive, a road that extends from State Route 1200 and terminates in a double cul-de-sac near the Atlantic Ocean.

¶ 4 In addition to displaying the lots and Seabreeze Drive, the plat map shows an eight-foot-wide pedestrian beach access easement (the "Easement") running from the double cul-de-sac to the beach between lots 2 and 3:

1. The Town of Duck was incorporated after recordation of the plat, and Sand Dollar Shores now resides within Duck's city limits.



The plat map includes a "certificate of dedication," which provides that the developer "hereby . . . dedicate[s] all roads, alleys, walks, parks, and other sites to public or private use as noted." The certification further states that "the streets and roads in this subdivision are dedicated to public use." Nothing on the face of the plat map notes the Easement as for either public or private use.

¶ 5 The plat map was approved for recordation by Dare County, which, per a certificate of approval and acceptance of dedication on the face of the plat map, "accepted the dedication of roads, easements, right-of-way, public parks, and other sites for public purposes as shown hereon." Two days later, the developer recorded restrictive covenants for Sand Dollar Shores. The covenants stated that the Easement is for the sole use of homeowners within Sand Dollar Shores and their guests and that use of the Easement by anyone else "is prohibited" and may result in prosecution for trespassing on Sand Dollar Shores Property.

¶ 6 Defendant was established in 1990, nine years after the plat map and covenants were recorded, and a few months later the developer deeded

the beach access to Defendant. Following the transfer, Defendant assumed the sole and exclusive responsibility for the ownership and maintenance of the Easement and has continued to maintain it ever since.

¶ 7 Plaintiffs purchased a house across the highway from Sand Dollar Shores in 2002 and began renting out the house on a weekly basis during the summer months. They also started a beach equipment rental business to serve their residential renters and other vacationers. Plaintiffs and their customers used the Sand Dollar Shores beach access to reach the beach.

¶ 8 In 2015, Defendant amended its restrictive covenants to provide, among other things, that the Easement was dedicated for the use of Defendant's members only. Plaintiffs continued to use the Easement during this time, and, in April 2016, Defendant's attorney wrote a letter to Plaintiffs stating that they would be held liable if they and their tenants did not stop using the Easement. Following the receipt of this letter, Plaintiffs' residential rental management company cancelled its property management contract with Plaintiffs and refused to include Plaintiffs' rental home in the rental management program for the 2016 summer rental season.

¶ 9 Later in 2016, Plaintiffs filed declaratory judgment actions against Defendant and the Town of Duck, requesting that the trial court declare the Easement had been dedicated to the public. The Town of Duck did not file a responsive pleading, but the city manager filed an affidavit attesting that the Town had "no intention of arresting the Plaintiffs for use of any of the Accesses absent a Court decision settling any civil disputes arising between the Plaintiffs and the underlying owners of the Accesses." Plaintiffs voluntarily dismissed their action without prejudice and continued using the Easement.

¶ 10 On 29 May 2019, Robert Hovey was arrested for trespassing on Defendant's property. In response to the arrest, Plaintiffs again filed suit requesting that the trial court declare the Easement dedicated to the public. The Town, as before, took no position on the litigation but agreed to be bound by any judgment. Plaintiffs moved for summary judgment a few months after Defendant filed its answer.

¶ 11 The parties entered into several stipulations prior to the summary judgment hearing and agreed "that no issues of material fact exist between the parties to this lawsuit, and that the action before the [trial court] exists only as a matter of law." At the summary judgment hearing itself, Plaintiffs argued that the plat map alone established a public dedication of the Easement.

¶ 12 Defendant disagreed and requested summary judgment be entered in its favor, asserting, among other arguments, that the face of the plat map failed to disclose an unambiguous intention to dedicate the Easement to the public. Following the hearing, the trial court granted the Plaintiffs' motion for summary judgment. Defendant filed timely notice of appeal.

II. ANALYSIS

¶ 13 Defendant argues that a public dedication of private property requires a clear and unmistakable intent on the part of the landowner to dedicate the land to public use. Because the plat map here states an intention only to dedicate "all roads, alleys, walks, parks, and other sites to public or private use as noted," and the document contains no note dedicating the Easement as for public use, Defendant contends the evidence fails to establish a clear intention to dedicate the Easement for public use. Plaintiffs disagree, asserting that the plat map language reflects a public dedication. For the reasons explained below, we hold that the plat map fails to show an unambiguous intention to dedicate the Easement to public use. We reverse the trial court's judgment and remand with instructions to enter summary judgment for Defendant.

1. Standard of Review

¶ 14 A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgement as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). We review an order granting or denying summary judgment de novo. *Craig v. New Hanover Cnty. Bd. Of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

2. The Law of Public Dedication

¶ 15 "Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands." *Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 418, 645 S.E.2d 132, 135 (2007) (citing *Spaugh v. Charlotte*, 239 N.C. 149, 159, 79 S.E.2d 748, 756 (1954)). Transfer by dedication requires an intent by the landowner to share use of the land with the public, "though such intention may be shown by deed, by words, or by acts." *Milliken v. Denny*, 141 N.C. 224, 230, 53 S.E. 867, 869 (1906). "The evidence in support of the intent of an owner to dedicate an easement should be ' "clear and unmistakable." ' " *Wright v. Town of Matthews*, 177 N.C. App. 1, 11, 627 S.E.2d 650, 658 (2006) (quoting *Green v. Barbee*, 238 N.C. 77, 81, 76 S.E.2d 307, 310 (1953)). In other words:

> The intention of the owner to set apart land for the use of the public is the foundation and very life of every dedication. . . . The acts and declarations of the landowner indicating the intent to dedicate his land to the public use, must be unmistakable in their purpose and decisive in their character to have that effect.

Nicholas v. Salisbury Hardware & Furniture Co., 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958) (citations and quotation marks omitted).

¶ 16 Intention alone is not adequate to accomplish a dedication; a public authority must also accept the offer. *See*, *e.g.*, *Tower Development Partners v. Zell*, 120 N.C. App. 136, 140, 461 S.E.2d 17, 20 (1995) ("Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply." (citation omitted)).[2] Acceptance, too, may be express or implied. *Kraft*, 183 N.C. App. at 420, 645 S.E.2d at 137. A public authority expressly accepts a dedication by proper adoption or execution of an official act, including "a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper authorities." *Bumgarner v. Reneau*, 105 N.C. App. 362, 366-67, 413 S.E.2d 565, 569, *aff'd as modified*, 332 N.C. 624, 422 S.E.2d 686 (1992). Acceptance may be implied when the offered land is "generally used by the public and . . . the proper authorities have asserted control [over it] for the period of twenty years or more." *Scott v. Shackelford*, 241 N.C. 738, 743, 86 S.E.2d 453, 457 (1955) (citation and quotation marks omitted).

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2. Plaintiffs contend that N.C. Gen. Stat. § 136-102.6 (2019) abrogated the common law rules governing dedications for subdivision plats recorded after 1975. *Tower Development Partners*, which held the common law of dedications governed a subdivision plat recorded in 1986, precludes Plaintiffs' argument. 120 N.C. App. at 140, 461 S.E.2d at 20. Also, the statute expressly recognizes that public dedications are offered and accepted, incorporating the common law rather than abrogating it. *See* N.C. Gen. Stat. § 136-102.6(b) ("Any street designated on the plat or map as public shall be conclusively presumed to be an *offer* of dedication to the public of such street." (emphasis added)); N.C. Gen. Stat. § 136-102.6(d) ("The certificate of approval shall not be deemed an *acceptance* of the dedication of the streets on the subdivision plat or map." (emphasis added)). The General Assembly has made it clear that the statute is intended "to insure that new subdivision streets described herein to be dedicated to the public will comply with the State Standards *for placing subdivision streets on the State highway system for maintenance*, or that full and accurate disclosure of the responsibility for construction and maintenance of *private streets* be made." N.C. Gen. Stat. § 136-102.6(i) (emphasis added). The statute has no bearing on the public dedication of a pedestrian beach access easement, which is beyond the scope of highway construction standards.

¶ 17 The burden of proving both an offer and acceptance of dedication falls on the party propounding the dedication's existence. *See*, *e.g.*, *Town of Lumberton v. Branch*, 180 N.C. 249, 250, 104 S.E. 460, 461 (1920) (holding, in a town's action asserting possession by public dedication, that "[t]he burden was on the plaintiff to show that the land in controversy, and now in possession of the defendant, is a public street of Lumberton."). This is not a low burden, as "[d]edication is an exceptional and peculiar mode of passing title to an interest in land. . . . It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication for public use." *Nicholas*, 248 N.C. at 470, 103 S.E.2d at 843 (citation and quotation marks omitted).

3. Plaintiffs Have Not Shown Unmistakable Intent to Dedicate the Easement

¶ 18 Under the applicable law described above, we hold that Plaintiffs have not shown a clear and unmistakable intent by the developers of Sand Dollar Shores to publicly dedicate the Easement. The dedication on the face of the plat provides that the developer "dedicate[d] all roads, alleys, walks, parks, and other sites *to public or private use as noted*," (emphasis added), meaning dedications of any walks "for public . . . use" and "private use" would be "noted" on the plat. Only the "streets and roads" are noted as for public use. Given the qualified language of the dedication that only items noted "for public . . . use" would be dedicated to the public, and in light of the dedication of the streets in such a manner, the failure to designate the Easement as public creates, at best, an ambiguity as to whether the Easement was offered for dedication. *Cf. Ocean Hill Joint Venture v. Currituck Cnty. Bd. of Comm'rs.*, 178 N.C. App. 182, 184, 630 S.E.2d 714, 716 (2006) (describing a failure to designate a road as either public or private under dedication language practically identical to that at issue here as an "ambiguity"). Because an offer of public dedication must be shown by evidence indicating a "clear and unmistakable" intent, *Wright*, 177 N.C. App. at 11, 627 S.E.2d at 658 (citation and quotation marks omitted), and no such unambiguous intention is present on the face of the Sand Dollar Shores plat, the trial court erred in entering summary judgment for Plaintiffs and their claim should have been dismissed.

¶ 19 Plaintiffs asserted at oral argument that the language noting the streets as dedicated to the public was not actually a notation attributable to the developer because it was found below and apart from the signed dedication. Plaintiffs contend that the language instead simply served to put the public on notice that the streets would be governed by particular statutes referenced in the note. Plaintiffs did not offer any legal support

for this proposition, and we can find no authority suggesting the placement of such a note above, below, or beside the dedication signed by the party seeking to record the plat has any bearing on its application or interpretation. As for whether the note was simply intended to provide notice, *all* portions of the plat serve that purpose, the very reason for recordation of land rights. *See*, *e.g.*, *Hill v. Pinelawn Memorial Park, Inc.*, 304 N.C. 159, 163, 282 S.E.2d 779, 782 (1981) ("The purpose of [the recordation] statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles." (citations omitted)).

¶ 20 Plaintiffs also argue that other decisions by this Court establish that once a subdivision plat has been dedicated by the developer and approved by a governing body, any easements shown on that plat are dedicated to the public irrespective of any qualifying language conscribing the dedication to sites noted as public. The decisions cited by Plaintiffs are distinguishable, and none of them support Plaintiffs' argument.

¶ 21 Plaintiffs rely on this Court's holdings in *Ocean Hill*, *Sampson v. City of Greensboro*, 35 N.C. App. 148, 240 S.E.2d 502 (1978), *Smith v. County of Durham*, 214 N.C. App. 423, 714 S.E.2d 849 (2011), and *Emanuelson v. Gibbs*, 49 N.C. App. 417, 271 S.E.2d 557 (1980). A comparison of each of these cases to the one before us undermines Plaintiffs' argument.

¶ 22 Plaintiffs rely most heavily on *Ocean Hill*. In that case, a subdivision plat was recorded in the late 1970s with language—virtually identical to that at issue here—dedicating "all streets, alleys, walks, parks, and other open space to public or private use as noted." *Ocean Hill*, 178 N.C. App. at 184, 630 S.E.2d at 716. And, like the Easement in this case, the plat did *not* specify whether the streets shown on the map were public or private, resulting in an "ambiguity in the plat whether [the subdivision's] roads were designated for public or private use." *Id.* at 184, 630 S.E.2d at 716.

¶ 23 The homeowners association grew concerned about the public use of the road; however, instead of filing a declaratory judgment action contesting any public dedication, the association conceded that the roads had been dedicated to the public and successfully petitioned the County Commissioners to close the roads to the public pursuant to a public road closure statute. *Id.* Interested members of the public—including the original developers who recorded the subdivision plat—petitioned for trial *de novo* in superior court to reverse the Board's decision and reopen the roads. *Id.* One of the developers, as well as that developer's attorney, testified that it was always the developers' intention that the

roads be public and that the conveyance of the roads to the association in 1993 was not intended to revoke public access. *Id.* at 185, 630 S.E.2d at 716. A jury returned a verdict against the association. *Id.* at 185, 630 S.E.2d at 717. The association unsuccessfully appealed to this Court on grounds independent of any issues pertinent to dedication. At no point did the association rescind their concession that the roads had been publicly dedicated, and this Court did not address that issue on appeal. *Id.*

¶ 24 *Ocean Hill* does not support Plaintiffs' position because the question of whether the plat contained an offer to dedicate the roads was not raised below or on appeal and was, in fact, conceded by the party seeking to limit access. *Id.* at 184, 630 S.E.2d at 716. While it is true that the dedication language in *Ocean Hill* and the failure to note the roads as public or private is factually similar to this case, it does not show the necessary unmistakable intention of dedication—indeed, this Court described the dedication and failure to denote the roads in *Ocean Hill* as creating an "*ambiguity* in the plat whether [the subdivision's] roads were designated for public or private use." *Id.* (emphasis added). Further, there was ample evidence in that case to resolve the ambiguity in favor of dedication, including direct testimony from one of the developers and his attorney that it was always the developers' intent to dedicate the roads to the public. Plaintiffs here have offered no such additional evidence,[3] and an ambiguous plat cannot alone support the requisite clear and unmistakable intent necessary for public dedication. *Cf. Wright*, 177 N.C. App. at 11, 627 S.E.2d at 658-59 (holding a deed that "failed to specify whether [a] right-of-way was for purposes of a public or private street" was insufficient to show clear and unmistakable intent to dedicate the street to the public).

¶ 25 Plaintiffs' reliance on *Sampson* is likewise misplaced. In that case, which involved whether a sewer easement had been dedicated to the public, the landowners did not argue the plat map and dedication language failed to dedicate the sewer easement; the dispute instead centered on whether the landowners, who claimed they did not know how the plat and dedication they signed came to be recorded, could plead ignorance to renege on the dedication. *Sampson*, 35 N.C. App. at 148-49, 240 S.E.2d at 502-503. *Sampson* simply stands for the proposition that a landowner who signs and records a plat map that dedicates an easement to the public cannot undo the dedication by claiming ignorance of the

3. The only additional evidence presented to the trial court regarding the developer's intent were the restrictive covenants filed by the developer two days after the plat and restricting use of the beach access to the homeowners of Sand Dollar Shores and their guests.

dedication language or recordation. *Id.* Defendant in this case occupies a different position from the landowners in *Sampson*, as it specifically asserts the Sand Dollar Shores plat map does not show, on its face, a public dedication of the Easement. *Sampson*'s holding has no bearing on this case.

¶ 26 *Smith* is similarly distinguishable. Just as in *Ocean Hill* and *Sampson*, the uncontroverted evidence in *Smith* showed a public dedication had occurred upon recordation and the landowners *did not contest* whether the facts showed a dedication. 214 N.C. App. at 432-33, 714 S.E.2d at 855-56. And, as with *Ocean Hill* and *Sampson*, nothing in *Smith* supports the conclusion that a recorded plat containing a dedication results in a dedication of any listed easements as a matter of law, regardless of the actual language and express scope of dedication language.

¶ 27 A fourth case cited by Plaintiffs, *Emanuelson*, is also inapplicable. There, a dispute arose between a developer and a nearby landowner over the public or private nature of a road on a subdivision plat map. 49 N.C. App. at 419, 271 S.E.2d at 558. The developer conceded that it had offered the road for public dedication, but argued that it had not been properly accepted by a public authority. *Id.* at 419, 271 S.E.2d at 559. That case thus did not address the issue here: whether the language on the Sand Dollar Shores plat map shows an offer to dedicate the Easement.

¶ 28 Plaintiffs' remaining arguments seek to interpret and apply various statutes that have no bearing on whether the developer of Sand Dollar Shores intended to dedicate the Easement to the public, namely: (1) N.C. Gen. Stat. § 136-102.6, addressed *supra*; (2) the legislative findings section of the Coastal Area Management Act, N.C. Gen. Stat. § 113A-134.1(b) (2019), which simply discloses the legislature's desire to establish public accessways to the State's beaches; and (3) N.C. Gen. Stat. §§ 136-66.1, 160A-299, and 160A-301 (2019), which allow towns to spend funds on road improvements, close public roads and walks, and regulate parking. None of those statutes abrogates the common law of dedication. Plaintiffs also rely on Dare County ordinances in effect at the time the plat map was recorded to assert the Easement was dedicated to the public as a matter of law upon recordation. But, as conceded at oral argument, those ordinances expressly provided that both public and private easements could be recorded. *See* Dare County Code § 18-2 (1975) (defining "Easement" as "[a] grant by the property owner for use by the public *or any person* of a strip of land for specified purposes" (emphasis added)).

¶ 29 We acknowledge that our holding means that the Town of Duck, as an incorporated municipality, lacks public beach access. The subdivision, Easement, and Defendant association predate the incorporation of the Town. The Town has not sought to establish a public beach access and generally maintains that all of the beach access locations within the town limits of Duck are located on private property. This Court must uphold these private property rights under the law. Though we hold their suit must be dismissed, Plaintiffs are not barred from the beach. They may, as suggested by counsel, negotiate for access with Defendant or, failing that, drive to nearby municipalities or any unincorporated areas in the county to the north and south that maintain public beach accesses.

III. CONCLUSION

¶ 30 For the foregoing reasons, we reverse the judgment of the trial court and remand with instructions to enter summary judgment for Defendant.

REVERSED AND REMANDED.

Judges TYSON and HAMPSON concur.

IN THE MATTERS OF J.M., N.M.

No. COA20-677

Filed 6 April 2021

1. Child Abuse, Dependency, and Neglect—permanent plan—reunification efforts with mother ceased—unsupported by evidence

In an abuse and neglect matter, in which two children were removed from the home due to unexplained non-accidental injuries to the younger child, the trial court's determination that reunification efforts with the mother would be unsuccessful or inconsistent with the children's health, safety, and need for a permanent home based on the mother's inability to definitively state what caused her child's injuries, was unsupported by clear and convincing evidence. The mother complied with all of her recommended services, required the father to move out of the home, continued to care for two older children in her home with no issues, had appropriate visitation with the two younger children, and otherwise exhibited changed behaviors from engaging in her case plan.

2. Child Abuse, Dependency, and Neglect—permanent plan—reunification efforts with father ceased—unsupported by evidence

In an abuse and neglect matter, in which two children were removed from the home due to unexplained non-accidental injuries to the younger child, the trial court's determination that reunification efforts with the father would be unsuccessful or inconsistent with the children's health, safety, and need for a permanent home based on the father's refusal to admit responsibility or to otherwise state what caused his child's injuries, was unsupported by clear and convincing evidence. The father complied with his case plan, including completing an abuser treatment program, did not act inappropriately when visiting the children, and exhibited changed behaviors as a result of the services he engaged in.

3. Child Abuse, Dependency, and Neglect—visitation plan—parent's right to file motion to review—not advised by trial court

In an abuse and neglect matter, the trial court was not required by statute to advise the parents of their right to file a motion to review the visitation plan, since the court was mandated to hold permanency planning hearings every six months pursuant to N.C.G.S. § 7B-906.1(a).

4. Child Abuse, Dependency, and Neglect—reasonableness of reunification efforts—non-accidental injuries to one child—siblings in home not interviewed

In an abuse and neglect matter, in which two children were removed from the home due to unexplained non-accidental injuries to the younger child, but two older half-siblings remained in the home, the efforts of the department of social services (DSS) towards reunification were not reasonable where DSS did not interview the older children regarding a possible cause of the younger child's injuries in accordance with state investigative guidelines.

5. Child Abuse, Dependency, and Neglect—constitutionally protected status as parent—not addressed in findings

In an abuse and neglect matter, in which two children were removed from the home due to unexplained non-accidental injuries to the younger child, the trial court erred by entering an order ceasing reunification efforts with the parents and changing the primary plan to adoption and guardianship without first finding that the parents were unfit or had acted inconsistently with their constitutionally protected status as the children's parents.

IN RE J.M.

[276 N.C. App. 291, 2021-NCCOA-92]

Appeal by Respondents from order entered 12 February 2020 by Judge Burford A. Cherry in Catawba County District Court. Heard in the Court of Appeals 24 February 2021.

Lauren Vaughan for petitioner-appellee Catawba County Department of Social Services.

Michelle F. Lynch for Guardian ad Litem.

David Perez for Respondent-Appellant-Mother.

J. Lee Gilliam for Respondent-Appellant-Father.

WOOD, Judge.

¶ 1 Respondent-Mother and Respondent-Father appeal a permanency planning order eliminating reunification from the children's permanent plan. We reverse and remand.

I. Background

¶ 2 Jon[1] was born on April 20, 2017 and Nellie was born on July 3, 2018. Jon and Nellie have two older half-siblings, ages 10 and 14. Jon and Nellie's half-siblings are Respondent-Mother's children from a prior relationship, and resided in the home with Respondents, Jon, and Nellie. Nellie was briefly hospitalized after her birth. On August 15, 2018, Nellie exhibited some additional bowel problems and could be heard crying. At approximately 10:30 a.m., Respondent-Father fed Nellie a bottle and changed her diaper. Shortly thereafter, Nellie became completely silent and limp. Respondents took her to the hospital, where a CAT scan showed an acute subdural hematoma. Nellie then was transferred to Levine Children's Hospital ("Levine").

¶ 3 Dr. James LeClair ("Dr. LeClair"), a radiologist, and Dr. Patricia Morgan ("Dr. Morgan"), a board-certified child-abuse pediatrician, examined Nellie at Levine. Dr. LeClair reviewed Nellie's CAT scan and found two areas of bleeding and an ischemic infarct. Dr. LeClair categorized these injuries as resulting from the deprivation of oxygenated blood to Nellie's brain. Dr. LeClair also noted that Nellie's past medical history did not include tonic-clonic seizures that could cause such brain injuries. Nellie was also treated for severe multilayer retinal hemorrhages

1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

to both eyes and rib fractures that appeared to be several days old. Dr. Morgan opined that Nellie's injuries were highly specific for child abuse. Since this incident, Nellie has been recovering, and the Children's Developmental Service Agency has reported that Nellie has been doing well and making great progress.

¶ 4 On August 21, 2018, the Catawba County Department of Social Services ("DSS") filed a petition alleging that Nellie was abused, neglected, and dependent, and that Jon was neglected and dependent. On the same day, the children were placed in DSS's custody. Respondent-Mother's older two children were left in Respondents' care. DSS did not interview Respondent-Mother's older two children to see if either child knew how Nellie was harmed. Respondents were granted only one hour per month supervised visitation.

¶ 5 Despite the statutory mandate requiring adjudication of the children occur within 60 days of the filing of the petition, the adjudication and disposition hearing regarding Jon and Nellie occurred *nearly a year* after the children were removed from the familial home. *See* N.C. Gen. Stat. § 7B-801(c) (2019) ("The adjudicatory hearing shall be held . . . *no later than 60 days from the filing of the petition.*") (emphasis added). The hearing occurred over several sessions held on May 7, May 22, June 5, and July 2, 2019. On August 26, 2019, more than a year after the petition was filed, Jon was adjudicated neglected, and Nellie was adjudicated abused and neglected. At the disposition hearing on the same day, the trial court determined that the children's proper dispositional alternative was to remain in the custody of DSS with DSS having placement discretion. The trial court ordered Respondents to enter into specific case plans to work toward reunification with the children. Based on statements made by Respondents to social workers and police about persons responsible for the care of Nellie, the court accepted that Jon and Nellie were in Respondents' exclusive custody and care, and thus, they were responsible for any harm done to Nellie. Respondents were granted one hour per week supervised visitation.

¶ 6 Although Respondents could not be required to do so, Respondents entered into, complied with, and substantially completed their case plans developed by DSS prior to Jon and Nellie's adjudication. In the adjudication order, the trial court specifically noted Respondents' substantial progress toward completing their case plans.

¶ 7 Respondent-Mother's case plan required her to complete a full psychological evaluation; collaborate with social workers to learn proper disciplinary techniques; watch the short film "Period of Purple Crying"

and prepare a report; submit to random drug testing; abstain from recreational drug use; complete substance abuse counseling; complete a domestic violence assessment; and obtain and maintain stable housing and employment.

¶ 8 Respondent-Mother had complied with and substantially completed this plan prior to the adjudication. Specifically, Respondent-Mother completed a full psychological evaluation in March 2019; participated in substance abuse and domestic violence counseling; participated in individual and group therapy; and watched "Period of Purple Crying" and prepared a report for the social worker. Respondent-Mother also completed a comprehensive clinical assessment; submitted to drug screens, all of which returned negative results; attended "domestic violence/life skills classes"; maintained independent housing; and obtained employment. Respondent-Mother arranged to attend Triple P Parenting sessions. DSS also included in its adjudication report that Respondent-Mother consistently acted appropriately during visits with the children and that she had put safeguards in place throughout her home to protect the children. In therapy, Respondent-Mother expressed her concern that Respondent-Father could have caused Nellie's injuries. Due to this concern, Respondent-Mother required Respondent-Father to move out of the familial home.

¶ 9 Respondent-Father's case plan required him to complete a full psychological evaluation; collaborate with social workers to learn proper disciplinary and coping mechanisms; submit to random drug testing; abstain from recreational drug use; complete a substance abuse assessment and comply with any associated treatment recommendations; and obtain and maintain stable housing and employment.

¶ 10 Respondent-Father completed all necessary appointments for his first psychological exam by March 2019; discussed appropriate coping and disciplinary mechanisms with social workers; watched the short film "Period of Purple Crying" and prepared a report; completed a comprehensive clinical assessment that addressed substance abuse and mental health; and submitted to all drug screens, only the first of which returned a positive result.

¶ 11 Respondent-Father also completed a domestic violence assessment in January 2019; obtained independent housing, separate from Respondent-Mother; and maintained employment. Respondent-Father completed an additional court ordered psychological exam, because the therapist was concerned he was "not completely forthcoming during the course of the evaluation," and his responses indicated deception.

Although the therapist noted Respondent-Father "externaliz[ed] blame," she was able to recommend services to Respondent-Father.

¶ 12 At the November 4, 2019 permanency planning hearing, DSS reported further compliance by Respondents with their case plans. Respondent-Father consistently exhibited appropriate behavior during visits with the children; regularly attended therapy; and maintained stable housing and employment. Respondent-Father completed all necessary appointments for his second psychological evaluation on October 16, 2019. The therapist noted Respondent-Father's "positive progress on his case plan over the past year." However, the therapist expressed her concern over the seriousness of Nellie's injuries and recommended Respondent-Father "continue to participate in counseling to address the stresses of parenting, manage those stresses effectively and guard against increased risk of aggressive behavior." Respondent-Mother enrolled in an online Triple P Parenting course and maintained stable housing and employment. Both Respondents continued to test negative at required drug screens.

¶ 13 The trial court ordered a primary plan of reunification and a secondary plan of adoption. The trial court also ordered DSS to make reasonable efforts to finalize both plans. The trial court ordered Respondents to comply with their case plans and significantly increased Respondents' supervised visitation with the children from one to three hours per week. DSS had the discretion to increase weekly supervised visitation to four hours.

¶ 14 On February 12, 2020, another permanency planning hearing was held. Prior to the hearing, and in addition to Respondents' conduct discussed *supra*, Respondent-Father completed an online Triple P Parenting course, and Respondent-Mother had begun her online parenting course. Respondent-Mother also provided completion certificates for two Triple P Positive Parenting Workshops. DSS and the children's foster parents, who supervised Respondents' visitations, reported no concerns about Respondents' interactions with their children. DSS recommended a primary plan of reunification and a secondary plan of adoption. The Guardian *ad Litem* recommended a primary plan of adoption with a secondary plan of reunification, as the cause of Nellie's injury remained unexplained.

¶ 15 At the hearing, the children's foster mother, who had been engaging in shared parenting with Respondents and supervising Respondents' visitation, testified that the children "have a good bond" with Respondent-Father, and she never observed any inappropriate behavior

by Respondent-Father. She further testified that she had no safety concerns with Respondent-Father and the children. The foster mother testified Respondent-Mother was an attentive mother who appeared to have a good bond with the children. She further testified she saw no cause for concern and noted no safety concerns during Respondent-Mother's visits with the children. The trial court acknowledged Respondents' "strong bond" with the children.

¶ 16 Respondent-Mother acknowledged at the February 2020 permanency planning hearing that Nellie's injuries likely were nonaccidental. However, she did not admit to causing Nellie's injuries nor could she affirmatively state, under oath, Respondent-Father or anyone else caused Nellie's injuries. Respondent-Mother repeatedly informed the trial court she could not explain Nellie's injuries, as "[she] didn't see her get hurt," and "[w]hatever happened to her, I didn't – I don't know what it was 'cause [sic] I wasn't there." Respondent-Father testified that "[i]f [he] knew, [he] would have told [the court] by now." Respondents have remained adamant that they do not know how the child was injured.

¶ 17 On March 17, 2020, the trial court entered its order, noting Respondents' progress as discussed *supra*. The trial court also found:

> 20. The purpose of the parents' case plans is to address the issue that brought these children before the Court and into foster care, i.e. the nonaaccidental [*sic*] traumatic and life-threatening injuries to the minor child [Nellie] while in the care of her parents. As of this date, neither parent has offered any better explanation for these injuries than they offered at the adjudication of this matter or at any hearing since. Without some acknowledgement by the parents of responsibility for the injuries, there can be no mitigation of the risk of the harm to the children.
>
> 21. In her testimony today, the Mother has stated that she acknowledges that her child suffered nonaccidental injury; however, she does not know how. Her position is that, if the father was a danger to the child at the time of the removal, he is not a danger now.
>
> . . .
>
> 23. The injuries to the minor child [Nellie] which brought these children before the Court included two subdural hematomas caused by abusive head

> trauma . . . . In addition, [Nellie] sustained multiple retinal hemorrhages [], and a posterior rib fractures [*sic*] . . . . Although the parents have participated and completed services, neither has acknowledged responsibilities for these nonaccidental abusive injuries to [Nellie]. Without that acknowledgement, the Court has no evidence that either parent will protect their children over protecting one another, and therefore the risk to these children of abuse and neglect remains high.
>
> 24. Therefore, it is possible, however, unlikely that the minor children will return to the home of a parent within six months for the reasons set forth above. The most appropriate permanent plans are now a primary plan of equal adoption and guardianship and a secondary plan of custody. The barriers to a primary plan of adoption and guardianship include identifying a guardian for the children. Barriers to a secondary plan of custody include identifying a court approved family to assume custody of the children.
>
> 25. Although the concurrent primary plans include adoption, the Court is not convinced that adoption will be in the children's best interest due to the bond with their parents. Therefore, the Court finds that filing a termination of parental rights action at this time is not in the best interest of the children. It may be appropriate to file such action after further assessment.

¶ 18 Thus, as neither Respondent admitted to causing Nellie's injuries, and maintained their position that neither of them purposefully harmed her, the court abandoned reunification efforts. In ceasing reunification efforts, the trial court made several conclusions of law. These conclusions included "[r]eturn to the home of the parents is contrary to the best interest of the children, and is contrary to the health, safety, and welfare of the children," and "[f]urther efforts to reunify with the children . . . would clearly be unsuccessful and inconsistent with the children's health and safety . . . ." The primary plan changed to adoption and guardianship, with a secondary plan of custody. Nonetheless, the trial court also increased the minimum required visitation to four hours per week of supervised visitation. Respondents timely appealed.

II. Standards of Review

¶ 19 This Court "reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations omitted); *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018) (citation omitted). "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." *In re N.G.*, 186 N.C. App. 1, 10–11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

¶ 20 The determination of parental unfitness or whether parental conduct is inconsistent with the parents' constitutionally protected status is reviewed *de novo*. *In re D.A.*, 258 N.C. App. at 249, 811 S.E.2d at 731. Under *de novo* review, the appellate court "considers the matter anew and freely substitutes judgment for that of the lower tribunal." *Id.* (alterations, citations and internal quotations omitted).

III. Analysis

¶ 21 Respondents raise several arguments on appeal. Each will be addressed in turn.

A. Respondent-Mother's Compliance with Reunification Efforts

¶ 22 **[1]** Respondent-Mother first contends the trial court erred when it ceased reunification efforts. We agree.

¶ 23 This Court reviews the order to cease reunification:

> [to] consider whether the trial court's order contains the necessary statutory findings to cease reunification efforts. Under our statutes: "Reunification shall remain a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). . . . The court could only cease reunification efforts after finding that those efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

In re D.A., 258 N.C. App. at 253, 811 S.E.2d at 733–34.

¶ 24 Under our statutes, reunification whenever possible is the goal of juvenile court. The trial court may cease reunification efforts only upon supported findings "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b); *In re D.A.*, 258 N.C. App. at 253, 811 S.E.2d at 733-34; *In re K.L.*, 254 N.C. App. 269, 274, 802 S.E.2d 588, 592 (2017). In making this determination, the trial court considers

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019). The focus of this statute is on the actions of the parents. While the trial court is not mandated to use the precise language of Section 7B-906.2(d), the order must embrace the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or inconsistent with the juvenile's health, safety, or need for a safe, permanent home within a reasonable period of time. *See In re K.R.C.*, 374 N.C. 849, n.7, 845 S.E.2d 56, n. 7 (2020).

¶ 25 The trial court's order, DSS's evaluation, and the Guardian *ad Litem*'s observations do not constitute evidence to support specific findings addressing any of the factors in Section 7B-906.2(d). To the contrary, the evidence in the record and the trial court's findings address Respondents' compliance with and substantial completion of their case plans, entered and substantially completed prior to the adjudication.

¶ 26 Here, the trial court removed reunification for the sole reason that neither Respondent would accept responsibility for or blame the other for Nellie's purported non-accidental traumatic injuries. Despite Respondent-Mother's substantial compliance with and completion of her case plan; the foster mother's testimony that there were no safety concerns with Respondent-Mother's interactions with her children; DSS's and the Guardian *ad litem*'s recommendations that reunification efforts continue; and Respondent-Mother's older two children remain-

ing in her custody and care, the trial court found reunification efforts would be inconsistent with Jon and Nellie's health and safety.

¶ 27 There is no evidence that Respondent-Mother failed to exhibit appropriate disciplinary techniques, coping mechanisms, appropriate parenting, or otherwise provide a safe environment for her children after they were removed from her care. Respondent-Mother consistently expressed her desire to reunify with the minor children. Prior to the February 2020 permanency planning hearing, Respondent-Mother's therapist sent a letter to her attorney stating "[i]t is paramount to [Respondent-Mother's] mental and emotional well-being that [she] experience substantial progress in being reunited with her children. There appears to be no observable or reported barriers to unsupervised or overnight visits with her children."

¶ 28 The trial court did not make any findings of fact suggesting Respondent-Mother could not take care of her children. In fact, the evidence demonstrated Respondent-Mother could care appropriately for Jon and Nellie, as her older two children had remained unharmed in her care. Further, Respondent-Mother required Respondent-Father, whom the trial court had deemed the most likely cause of Nellie's injuries, to move out of the familial home. By doing so, Respondent-Mother removed all known potential risks to the health and safety of her children. *See In re Eckard*, 148 N.C. App. 541, 545-46, 559 S.E.2d 233, 235 (2002). Thus, the evidence presented before the trial court was not only insufficient to support ceasing reunification efforts, but contradictory to its finding that reunification would be unsuccessful or inconsistent with the children's health or safety.

¶ 29 In arguing this Court should affirm the trial court's cessation of reunification efforts, DSS and the Guardian *ad Litem* rely on *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517 (2010). We agree with the holding in *Y.Y.E.T.* that the parents' case plans are not merely checklists. Parents must engage in the services in their case plans as well as be able to objectively demonstrate that they have learned from and have benefitted from the services. The goal of the case plan is to identify services that will assist the parents in correcting the conditions that led to the removal of the children. In *Y.Y.E.T.*, this Court affirmed the decision of the trial court to terminate the parents' rights as neither would accept responsibility for the nonaccidental traumatic injuries of a four-month-old-child. *Id.* at 130-32, 695 S.E.2d at 522-24. Neither parent would even admit the child suffered nonaccidental injuries or explained their two-day delay in seeking medical care for the child. *Id.* at 122-23, 695 S.E.2d at 519. No other children resided in Y.Y.E.T.'s home, and the individuals who per-

formed the parents' parental capacity evaluations were unable to make recommendations for services for the parents. *Id.*

¶ 30 Here, Respondent-Mother not only completed a comprehensive clinical assessment, but she complied with all recommended services to her therapist's satisfaction, *prior* to Jon and Nellie's adjudication. Further, the psychologist who performed her evaluation found Respondent-Mother to be engaged in services and benefitting from the recommended services detailed in her case plan. On more than one occasion, Respondent-Mother acknowledged Nellie's injuries were nonaccidental. She did not admit to harming Nellie, nor could she affirmatively state, under oath, that Respondent-Father or anyone else had done so because she did not witness Nellie's harm. Respondent-Mother repeatedly told the trial court that she did not know what happened, as she was not in the room when Nellie was injured.

¶ 31 A review of the record and transcript shows Respondent-Mother complied with and substantially completed her case plan; acknowledged what brought Jon and Nellie into DSS's care; and exhibited changed behaviors, including installing safeguards in the familial home and requiring Respondent-Father to move out of the home. The record is replete with evidence that Respondent-Mother engaged in all services required of her in order to correct the conditions that led to the removal of the children and that she had objectively learned from and benefitted from the services. The reports from DSS and the Guardian *ad Litem*, as well as letters from the mother's therapist, relate to the court that Respondent-Mother was able to demonstrate changed behaviors as a result of what she had learned from the services that were provided. No evidence to the contrary was introduced or admitted.

¶ 32 Thus, a finding and conclusion that reunification efforts would be unsuccessful or inconsistent with the children's health, safety, and need for a permanent home is contradictory to all evidence presented to the trial court. We hold its findings and conclusions of law that reunification efforts would be futile is unsupported by clear and convincing evidence and does not meet the mandatory requirements of N.C. Gen. Stat. § 7B-906.2(b). *See In re L.M.T.*, 367 N.C. App. 165, 167-68, 752 S.E.2d 453, 455 (2013).

B. Respondent-Father's Compliance with Reunification Efforts

¶ 33 **[2]** Respondent-Father first contends there was insufficient evidence to support ceasing reunification efforts. We agree.

¶ 34 The court shall not cease reunification efforts without supported findings of fact and conclusions of law which state continued efforts

would be unsuccessful or inconsistent with the children's health or safety. *In re P.T.W.*, 250 N.C. App. 589, 595, 794 S.E.2d 843, 848 (2016); *In re D.A.*, 258 N.C. App at 253, 811 S.E.2d at 733-34. The trial court's order, DSS's evaluation, and the Guardian *ad Litem*'s observations do not provide any evidence to support findings specifically addressing any of the factors in Section 7B-906.2(d) or otherwise demonstrate how reunification would be inconsistent with the children's health or safety.

¶ 35 No evidence tends to show that Respondent-Father acted inappropriately toward the children after they left his care. Respondent-Father was observed implementing appropriate disciplinary techniques and coping mechanisms. Respondent-Father has consistently expressed a desire to reunify with his children, and demonstrated changed behaviors as a result of what he learned from the services provided. The trial court's findings of fact reflect that Respondent-Father completed all of the weekly sessions in the Mate Abuser Treatment Program, and he was projected to complete all domestic violence classes for perpetrators in April 2020. No evidence to the contrary was introduced or admitted. Thus, the trial court's findings of fact, reflecting Respondent-Father's progress, directly contradict its conclusion that reunification would be unsuccessful or inconsistent with the health or safety of his children.

¶ 36 DSS and the Guardian *ad Litem* also rely on *In re Y.Y.E.T.* to support ceasing reunification efforts with Respondent-Father. In *Y.Y.E.T.*, the parental evaluator deemed his evaluation of the parents "invalid," and thus, could not make any recommendations for services. *In re Y.Y.E.T.*, 205 N.C. App. at 123, 695 S.E.2d at 519. Further, the child in *Y.Y.E.T.* was in the exclusive care of the parents. *Id.* In contrast, Respondent-Father was recommended numerous services and participated in and completed all recommendations, including a domestic violence assessment and the Mate Abuser Treatment program. Although Respondent-Father's initial psychological evaluation indicated deception, he complied with the services recommended by his therapist. Respondent-Father underwent a second psychological evaluation, where he "was more open and forthcoming." Respondent-Father was recommended additional counseling services after his second evaluation. Although Respondents were Jon and Nellie's primary caregivers, two other children resided in the home, and DSS failed to interview those children in investigating Nellie's injuries. Respondent-Father has consistently stated that he does not know how the minor child was injured. No evidence to the contrary was introduced or admitted.

¶ 37 Respondent-Father's appeal is more akin to *In re D.A.*, 258 N.C. App. 247, 811 S.E.2d 729 (2018). *In re D.A.* concerned an abused juvenile, where

allegations of abuse arose from rib fractures noted on a skeletal survey. *Id.* at 248, 811 S.E.2d at 730-31. This Court found insufficient evidence to support the trial court's findings that reunification would be inconsistent with the child's health and safety where the trial court's findings were "more directed at [the mother's] failure to admit she had caused D.A.'s injuries . . . ." Here, the trial court's findings were directed at the failure of either Respondent to acknowledge responsibility for Nellie's injuries, and it found that due to that lack of acknowledgement there is "no evidence that either parent will protect their children over protecting one another." The evidence in the record does not support a finding that either parent is protecting the other.

¶ 38 The trial court found Respondent-Father participated in and completed services; heard evidence that Respondent-Mother and the children's foster mother, who supervised his visitation with the children, did not have safety concerns about Respondent-Father with the children; and recognized Respondent-Father had completed all the weekly sessions in the Mate Abuser Treatment Program. Respondent-Father was projected to complete all domestic violence classes in April 2020. The evidence presented before the trial court demonstrated Respondent-Father had also changed his behavior as a result of what he had learned from the services provided. Despite noting Respondent-Father's substantial progress thus far, the trial court ceased reunification efforts. The trial court's order does not make "findings that embrace the requisite ultimate finding that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *See id.* at 254, 811 S.E.2d at 734.

C. Respondents' Right to File a Motion to Review

¶ 39 **[3]** Next, both Respondents contend the trial court erred in failing to advise them of their right to file a motion to review the visitation plan. We disagree.

¶ 40 Here, DSS retained nonsecure custody and the trial court was statutorily mandated to conduct a periodic review of Jon and Nellie's case. *See* N.C. Gen. Stat. § 7B-906.1(a). Section 7B-906.1(a) requires permanency planning hearings on a periodic basis, where the trial court reviews the progress made in finalizing a permanent plan for the juvenile(s). As the trial court is required to determine "whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C. Gen. Stat. §] 7B-905.1," the visitation plan is reviewed at least once every six months. *See* N.C. Gen. Stat. §§ 7B-905.1 and 7B-906.1(a), (d).

¶ 41 Section 7B-905.1 of our General Statutes addresses visitation for parents in abuse, neglect, and dependency proceedings. Respondents contend the trial court was required to advise them of their right to file a motion to review the visitation plan under Section 7B-905.1(d). We agree with DSS and the Guardian *ad Litem*'s contention that the application of Section 7B-905.1(d) is limited to instances where the trial court is not otherwise mandated to review the visitation plan.

¶ 42 Section 7B-905.1(d) provides, "[i]f the court retains jurisdiction, all parties shall be informed of the right to file a motion to review the visitation plan . . . ." N.C. Gen. Stat. § 7B-905.1(d) (2019). Thus, subsection (d)'s application is limited to instances where the trial court retains jurisdiction, but is not otherwise mandated to conduct such reviews. *See* N.C. Gen. Stat. § 7B-905.1(d); *In re J.L.*, 264 N.C. App. 408, 422, 826 S.E.2d 258, 268-69 (2019) (Finding error where the trial court granted custody to a nonparent and failed to inform the mother of her right to review the visitation plan).

¶ 43 This Court has not held, and we decline to do so today, that the trial court is obligated to advise parents of their right to file a motion to review the visitation plan where the trial court is statutorily mandated to hold permanency planning hearings at least every six months. *See* N.C. Gen. Stat. § 7B-906.1(a). Respondents' assignment of error is without merit.

D. DSS's Reasonable Efforts

¶ 44 **[4]** Next, Respondent-Father argues the trial court erred in concluding DSS made reasonable efforts to reunify and eliminate the need for placement of the children. Specifically, Respondent-Father argues DSS should have investigated all potential causes of Nellie's nonaccidental traumatic injuries by interviewing Respondent-Mother's two older children. We agree.

¶ 45 "Our General Assembly requires social service agencies to undertake reasonable, not exhaustive, efforts towards reunification." *In re: A.A.S.*, *A.A.A.T.*, *J.A.W.*, 258 N.C. App. 422, 430, 812 S.E.2d 875, 882 (2018). "Reasonable efforts" is defined as "[t]he diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18) (2019).

¶ 46 Here, DSS attempted to locate a relative placement; completed safety assessments; aided in the development and implementation of case plans; supervised visitations; arranged psychological and substance

abuse assessments; and conducted Child and Family Team Meetings. However, DSS did not interview Respondent-Mother's older two children in the home during their investigation of Nellie's injuries.

¶ 47 DSS offers no reason why it failed to interview Respondent-Mother's older children. The trial court found, in the adjudication order, Jon and Nellie were under Respondents' exclusive custody and care based on the statements made by the Respondents to social workers and police regarding their care of Nellie. It is unreasonable to presume, however, that parents have eyes on their children at all times. Parents and children must sleep at some point, and presumably, parents must tend to other children or to household needs, allowing for children to be left without eyes-on supervision for some periods of time, no matter how short.

¶ 48 Pursuant to N.C. Gen. Stat. § 7B-300, DSS is required "to establish protective services for juveniles alleged to be abused, neglected, or dependent. [The p]rotective services shall include the screening of reports, the performance of an assessment using either a family assessment response or an investigative assessment response . . . ." N.C. Gen. Stat. § 7B-300 (2019). This Court in its discretion takes judicial notice that the policies and protocols that guide and govern family assessments and investigative assessments, "CPS Family and Investigative Assessments, Policy, Protocol, and Guidance," ("DSS's Assessment Manual"), are found in North Carolina's Child Welfare Manual published by the North Carolina Department of Health and Human Services. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019).

¶ 49 The "purpose of the [Child Protective Services] Assessment is to . . . determine if . . . [t]he child is safe within the home and, if not, what interventions can be implemented that will ensure the child's protection and maintain the family unit intact if reasonably possible." N.C. Dep't of Health & Hum. Servs., *CPS Family and Investigative Assessments Policy, Protocol, and Guidance*, 1 (July 2019), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/modified-manual-1/assessments.pdf.

¶ 50 DSS can approach an instance of alleged neglect, abuse, and dependency through a "Family Assessment," or "Investigative Assessment.[2]"

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2. According to DSS's "CPS and Investigative Assessment," published in July 2019, "[t]o assess reports of abuse, neglect, and/or dependency, each county child welfare services agency may use either The Family Assessment Response; or the Investigative Assessment Response." "The Family Assessment track is a response to selected reports

Both methods require face-to-face interviews with *all children residing in the home*. N.C. Dep't of Health & Hum. Servs., *CPS Family and Investigative Assessments Policy*, *Protocol*, *and Guidance*, 64, 69 (July 2019), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/modified-manual-1/assessments.pdf. (emphasis added).

¶ 51 Here, DSS did not interview Jon and Nellie, the alleged victim children due to their young age. Nor did DSS interview Respondent-Mother's older two children, ages 10 and 14, who resided in the familial home with Respondents, Jon, and Nellie. Thus, DSS did not interview all children residing in the home and could not have diligently investigated all potential causes of Nellie's injuries. *See In re K.L. & J.L. II*, 272 N.C. App. 30, 41, 845 S.E.2d 182, 191-92 (2020) (Where a DSS social worker interviewed the other child in the home to determine how he was disciplined and if he knew how his younger sibling was injured). Therefore, we hold DSS failed to make reasonable efforts to promptly reunify Respondents with the minor children.

E. Respondent-Father's Constitutionally Protected Parental Status

¶ 52 **[5]** Lastly, Respondent-Father contends the trial court erred in failing to make findings regarding his constitutionally protected parental status. We agree. "A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (alterations, quotation marks, and citation omitted). "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the best interest standard." *Id.* at 549, 704 S.E.2d at 503 (citation and quotation marks omitted). However, a parent can forfeit their right to custody of their child by unfitness or acting inconsistently with their constitutionally protected status. *Id.*

¶ 53 A determination that a parent has forfeited this status must be based on clear and convincing evidence. *In re D.A.*, 258 N.C. App. at 249, 811

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of child neglect and dependency using a family-centered approach that is protection- and prevention-oriented and that evaluates the strengths and needs of the juvenile's family, as well as the condition of the juvenile. The Family Assessment track is based on family support principles and offers a much less adversarial approach to a CPS Assessment." "The Investigative Assessment track is a response to reports of child abuse and selected reports of child neglect and dependency using a formal information gathering process to determine whether a juvenile is abused, neglected, or dependent."

S.E.2d at 731; *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016). The trial court must clearly address whether the parent is unfit or if their conduct has been inconsistent with their constitutionally protected status as a parent, where the trial court considers granting custody or guardianship to a nonparent. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009); *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E. 258, 266 (2019).

¶ 54 The trial court's insistence for Respondents to admit blame as a pre-condition to continuing reunification and as a basis to cease reunification has no lawful basis without the threshold finding of unfitness or conduct inconsistent with their constitutionally protected status as a parent. The fact Nellie suffered injuries does not, by itself, prove Respondents harmed her, were neglectful, or acted inconsistently with their constitutionally protected parental status.

IV. Conclusion

¶ 55 Reunification shall remain "a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §§] 7B-901(c) or [] 7B-906.1(d)(3), the permanent plan is or has been achieved . . . or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b). A trial court may cease reunification efforts only when the written findings comply with N.C. Gen. Stat. §§ 7B-901(c) and 7B-906.1(d)(3).

¶ 56 We hold the trial court's findings are unsupported by competent evidence, and its conclusion that reunification is contrary to the children's health and safety is unsupported by its findings. To the contrary, the evidence demonstrated that Respondents substantially completed their respective case plans as required by the court and objectively demonstrated changed behaviors as a result of what they learned from the services provided in order to reunify with their minor children. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.

IN RE S.D.

[276 N.C. App. 309, 2021-NCCOA-93]

IN RE S.D.

No. COA20-636

Filed 6 April 2021

1. Child Abuse, Dependency, and Neglect—permanency planning order—mother's lack of adequate housing—unsupported by evidence

A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where no competent evidence supported the trial court's finding that the mother was voluntarily homeless because she rejected meaningful housing assistance from the department of social services (DSS). Evidence showed that DSS directed the mother to a three-year waiting list for Section 8 housing; DSS sent her an unvetted list of addresses compiled by third-party agencies; the mother looked at approximately eighty residences from that list but they were already occupied, in bad condition, or otherwise unsuitable; and other obstacles prevented the mother from obtaining housing, including her low credit score and a housing shortage following a recent hurricane.

2. Child Abuse, Dependency, and Neglect—permanency planning order—findings of fact—unsupported by evidence

A permanency planning order in a dependency case, which granted guardianship of a mother's son (who was diagnosed with attention-deficit/hyperactivity disorder) to his foster parents and terminated further review hearings, was reversed and remanded where no competent evidence supported the trial court's finding that the mother had not learned how to meet her son's medical needs, did not participate in her son's doctor appointments or speech therapy sessions, and was late for unsupervised visits with all three of her children.

3. Child Abuse, Dependency, and Neglect—permanency planning order—reasonable reunification efforts—son unlikely to return home—unsupported by evidence

A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where no competent evidence supported the trial court's finding that the

department of social services (DSS) made reasonable efforts to reunify the mother with her son and that he was unlikely to return home in six months. DSS failed to provide meaningful housing assistance to the mother, who was homeless, and yet the mother had a reasonable prospect of obtaining housing after locating three potential homes on her own.

4. Child Abuse, Dependency, and Neglect—permanency planning order—guardianship to non-parent—constitutionally protected parental status—failure to make findings

A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where the order did not contain findings that the mother was unfit or acted inconsistently with her constitutional rights as a parent.

5. Child Abuse, Dependency, and Neglect—permanency planning order—reunification efforts implicitly ceased—required statutory findings

A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where the order—which implicitly ceased reunification efforts with the mother— did not contain findings that reunification efforts would be unsuccessful or inconsistent with the child's health or safety, as required under N.C.G.S. § 7B-906.2(b), or any findings regarding the factors listed in N.C.G.S. § 7B-906.2(d) for determining whether to cease reunification efforts.

6. Child Abuse, Dependency, and Neglect—permanency planning order—further review hearings ceased—required statutory findings

A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded because the trial court failed to enter written findings of fact addressing the criteria under N.C.G.S. § 7B-906.1(n) for waiving future review hearings.

Appeal by Respondent-Mother from order entered 2 March 2020 by Judge Sarah C. Seaton in Onslow County District Court, Juvenile Division. Heard in the Court of Appeals 10 March 2021.

Christina Freeman Pearsall for Guardian ad Litem.

Mercedes O. Chut for Respondent-Appellant.

WOOD, Judge.

¶ 1 Respondent-Mother appeals a permanency planning order which granted guardianship of Sawyer[1] to his foster parents and terminated further review hearings. We reverse and remand.

I. Background

¶ 2 On September 30, 2016, the Onslow County Department of Social Services ("DSS") filed a petition alleging Sawyer and his two siblings, Laura and Susan, were neglected and dependent juveniles. Laura was 10 years old; Susan was 5 years old; and Sawyer was 4 years old at the time the petition was filed. On the same day, the trial court granted DSS nonsecure custody of the three minor children.

¶ 3 At the adjudication and disposition hearing on March 13, 2017, Respondent-Mother did not contest an adjudication of dependency. The trial court found Respondent-Mother had a history of homelessness and was residing in a motel with the children at the time the petition was filed. The social worker observed dog feces on the floor, and the room smelled of feces and urine. The motel room was cluttered. The children were unbathed and had recently been treated for a lice infestation. DSS supplied basic personal care items for the children, such as toothbrushes and hairbrushes. At the time, Susan had been belatedly enrolled in school, and Laura had missed more than ten days. The children were not current on their immunizations. Laura had been prescribed medication; however, Respondent-Mother was "unable to ensure medication compliance." The trial court had concerns that Respondent-Mother had unaddressed mental health issues and parenting deficits.

¶ 4 The trial court noted Sawyer was considered "delayed." When Sawyer entered foster care, he had a vocabulary of 6 words and was not potty-trained. Laura and Susan were placed in a foster home together.[2]

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1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

2. Reunification remains the primary permanent plan for Laura and Susan's primary permanent plans. Therefore, they are not the subjects of this appeal.

DSS placed Sawyer in a separate, therapeutic foster home where he began counseling and speech therapy through Coastal Carolina Neuropsychiatric Center.

¶ 5 The trial court ordered Respondent-Mother to enter into and comply with a case plan. This plan required Respondent-Mother to obtain and maintain appropriate housing and employment, and to participate in a psychological evaluation and comply with recommendations.

¶ 6 The first permanency planning hearing occurred on June 9, 2017. At that time, the primary permanent plan of care was reunification with a secondary plan of adoption. Respondent-Mother was homeless and unemployed. Following a request by DSS and prior to the hearing, Respondent-Mother completed a forensic psychological evaluation in May 2017. Respondent-Mother was diagnosed with "Other Specified Personality Disorder – significant Borderline, Narcissistic, Histrionic, and Paranoid Traits."

¶ 7 On December 21, 2017, a second permanency planning hearing occurred. Sawyer remained in his therapeutic foster home. He was successfully potty-trained, and his vocabulary had expanded. Sawyer was attending kindergarten and continuing speech therapy. He was diagnosed with and prescribed medication for attention-deficit/hyperactivity disorder ("ADHD").

¶ 8 On October 9, 2017, DSS brought a motion before the trial court requesting Respondent-Mother's visitation be suspended until she "compl[ied] with the recommendations of her psychological evaluation" as required by her case plan. The trial court granted this motion.

¶ 9 The trial court found Respondent-Mother completed a psychiatric diagnostic evaluation on October 19, 2017. She was diagnosed with Major Depressive Disorder and post-traumatic stress disorder ("PTSD"). On October 23, 2017, Respondent-Mother saw Dr. Gary Whitlock at Port Human Services, and he prescribed medication to treat a diagnosis of Bipolar II disorder. However, Respondent-Mother discontinued the medication because she experienced side effects. Respondent-Mother continued to be homeless and unemployed. The permanent plan was changed to adoption with a secondary plan of reunification at the December 21, 2017, permanency planning hearing. Supervised visitation for a minimum of two hours per month was reinstated after the trial court found Respondent-Mother had "compl[ied] with the recommendations of her psychological evaluation." Respondent-Mother's visitation was supervised by DSS.

¶ 10 The third permanency planning hearing occurred on May 24, 2018. The trial court found that Respondent-Mother had completed Triple P and Active series parenting classes at PEERS. The trial court further found that Respondent-Mother missed her medication management appointments in January 2018. Despite several referrals from DSS, Respondent-Mother reported difficulty securing appointments due to the loss of her Tricare insurance after her divorce. Respondent-Mother reported new employment at that time.

¶ 11 On November 7, 2018, the trial court held the fourth permanency planning hearing where the Guardian *ad Litem* reported that Respondent-Mother's residence status had changed due to Hurricane Florence from her staying in a home in Hubert, to being in the process of signing a rental agreement for a rent-to-own home. Respondent-Mother reported to the trial court that she was leasing to own a home, had purchased a car, and had attended therapy sessions twice per month since June 2018. Respondent-Mother provided proof of employment. The trial court found that Respondent-Mother actively participated in her case plan. For the first time, the court found that it was likely that the children could be returned to Respondent-Mother's care within the next six months. The permanent plan was changed to a primary plan of reunification with a secondary plan of adoption.

¶ 12 The Guardian *ad Litem* also reported Sawyer was to repeat kindergarten in the upcoming school year. Sawyer was able to "complete a full night's sleep, bath [sic] himself, and still needs assistance from a speech program" though the Guardian *ad Litem* reported Sawyer's communication had improved.

¶ 13 On February 11, 2019, the trial court held the fifth permanency planning hearing where it found Respondent-Mother was no longer living in the house but was renting a room elsewhere. Respondent-Mother remained on the waiting list for the Family Unification Program Referral. Respondent-Mother remained employed and continued therapy. The therapist reported that Respondent-Mother had made "tiny steps towards progress." The trial court noted visitation had increased in January 2019 to include a third supervised visit per month, supervised by Sawyer's foster mother ("Ms. S"). The primary permanent plan remained reunification, and the court found reunification was likely within the next six months.

¶ 14 At the July 10, 2019 permanency planning hearing, the trial court found that Respondent-Mother attended biweekly therapy appointments and participated in family therapy with her children one to two times per month, as required by her case plan.

¶ 15 On September 11, 2019, the trial court held the next permanency planning hearing and found that although Respondent-Mother's therapist discharged her, she felt she needed "additional support" and continued therapy on her own. Family therapy continued, as required by Respondent-Mother's case plan, and Respondent-Mother remained employed with the same employer. The court found Sawyer would require therapeutically guided transition assistance should he return to Respondent-Mother's care. The court also found that Sawyer was receiving multiple services, including speech therapy and medication management for his ADHD. He was fully potty-trained but had "urine and fecal accidents with varying frequency." The court granted unsupervised visitation with all three children, beginning on August 2, 2019.

¶ 16 At the December 2, 2019 permanency planning hearing, the trial court found that Respondent-Mother had complied with her case plan by maintaining stable employment and regularly attending therapy. However, Respondent-Mother had not completed the final step in her case plan of securing safe and consistent housing for the children. Respondent-Mother enjoyed two four-hour unsupervised visitations per month with an additional two-hour visitation supervised by DSS in September 2019 and October 2019.

¶ 17 The trial court considered Emily Sinning Sewell's ("Ms. Sewell"), Sawyer's therapist's, November 19, 2019 letter in which she stated that Sawyer was diagnosed with ADHD, Combined Type, Phonological Disorder and Rule Out Anxiety Disorder. The trial court found that Sawyer was diagnosed with chronic constipation with encopresis and was "on a fairly strict treatment regimen that includes weekly cleanses, Miralax, mineral oil and fiber gummies every day." Sawyer had to maintain a healthy diet and a rigid toileting schedule. Sawyer's doctor reported that his condition would likely continue until his teenage years and potentially for life; and if not properly treated and monitored, his condition could be fatal.

¶ 18 After hearing the testimony of the DSS social worker and considering other evidence, the trial court found reunification unlikely "due to [Respondent-Mother's] continued reluctance to accept housing assistance offered to her." The trial court acknowledged a letter dated October 3, 2019, from DSS to Eastern Carolina Human Services Agency ("ECHSA"), requesting that Respondent-Mother's position on the wait list for housing assistance be reconsidered, and Respondent-Mother had met with an ECHSA representative in November 2019. The trial court also found that the primary barriers to achieving the permanent plan of reunification were Respondent-Mother's failure to obtain and main-

tain stable housing, Sawyer's "continued anxious symptoms related to discussions of returning home," and Respondent-Mother's lack of understanding of Sawyer's diagnosis. The primary permanency plan was changed to guardianship with a secondary plan of reunification.

¶ 19 At the final permanency planning review hearing on January 31, 2020, the social worker, Respondent-Mother, Ms. S, and the Guardian *ad Litem* testified. The trial court took notice of the existing juvenile record and received into evidence DSS' and the Guardian *ad Litem's* court reports. The trial court found that Respondent-Mother maintained employment, as required by her case plan. Respondent-Mother resumed therapy after being discharged due to a misunderstanding. She maintained contact with DSS and her children. Respondent-Mother continued to lack safe and consistent housing despite several referrals and other supports that have been put in place by DSS. The social worker testified DSS provided various services to Respondent-Mother. DSS referred her to various housing agencies, which included financial assistance of $1,300.00 to help with deposits; provided a list of potential available homes; and provided a community social service assistance for several weeks the previous summer. The social worker further testified that Respondent-Mother preferred not to live in some housing that was available to her due to its poor condition in the wake of Hurricane Florence. Respondent-Mother testified that she looked at approximately eighty potential housing possibilities over the course of the case. Respondent-Mother stated she was unsuccessful at securing stable housing due to several factors, including her credit score and the unavailability of rental homes. Respondent-Mother also testified she was looking into three potential rentals on the date of the hearing, but she had not yet seen any of the three potential rentals.

¶ 20 Respondent-Mother testified that she occasionally stayed with friends, rented rooms, or spent the night in a hotel. The trial court found Respondent-Mother had opportunities for housing but declined to stay in the housing available to her. Specifically, the trial court noted that

> [s]everal referrals and other supports have been put in place to attempt to aid [Respondent-Mother] in this process without success. [Respondent-Mother] has opportunities for housing; however, she does not wish to stay in the housing available to her . . . . [Respondent-Mother] stated that she stays with friends, rents rooms occasionally, and spends the night in hotels.

At the time of the hearing, Sawyer was in the first grade. The trial court found he was behind academically and had delays and speech issues. Sawyer saw his gastroenterologist every other month, had special dietary needs, and was on a regimen of medications. The trial court found Respondent-Mother did not understand Sawyer's special medical and dietary needs. The trial court also found that Respondent-Mother had begun unsupervised visitations on August 2, 2019. Since the visits began, she arrived late and brought the children home early on several occasions.

¶ 21 Ms. S testified that Sawyer had lived in her home since October 3, 2016. She testified if she were granted guardianship and the foster care subsidies were no longer paid, she would still be able to take care of Sawyer legally, financially, mentally, and emotionally and that she would do so indefinitely.

¶ 22 Ms. Foster, Sawyer's social worker, testified Sawyer enjoyed visiting with his mother and siblings, but he was bonded with his foster family. Sawyer expressed a desire to be with them long-term.

¶ 23 The trial court ultimately entered its order, granting guardianship of Sawyer to his foster parents. The trial court found guardianship to be in Sawyer's best interest. In its order, the trial court made the following findings of fact:

> 5. [D]espite the progress she has made, [Respondent-Mother] has still failed to remedy the housing situation that brought her children into care. She continues to lack consistent, safe housing that could support her three children. Several referrals and other supports have been put in place to attempt to aid [Respondent-Mother] in this process without success. [Respondent-Mother] has had opportunities for housing; however, she does not wish to stay in the housing available to her.
>
> . . .
>
> 10. The Department has continued to assist [Respondent-Mother] in finding housing by referring [Respondent-Mother] for a housing voucher, working with [Respondent-Mother] and CSSA to maintain and apply for housing, and [Respondent-Mother] currently has a referral in to East Carolina Human services for housing. The Department continues to assist

> [Respondent-Mother] in attempting to find suitable and appropriate housing.
>
> . . .
>
> 13. It is contrary to the juvenile's welfare and best interest to return to the home of the respondent parent at this time and it is not likely to take place within the next six months, due to [Respondent-Mother's] continued reluctance to accept housing assistance offered to her.

¶ 24 The trial court further found that the primary permanent plan of guardianship had been achieved and, accordingly, ordered that all further review hearings cease. Respondent-Mother timely appealed.

II. Standards of Review

¶ 25 This Court "reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations omitted); *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018). A trial court's findings of fact are "conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *Matter of Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983).

¶ 26 "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." *In re N.G.*, 186 N.C. App. 1, 10–11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

¶ 27 The determination of parental unfitness or whether parental conduct is inconsistent with the parents' constitutionally protected status is reviewed *de novo*. *In re D.A.*, 258 N.C. App. at 249, 811 S.E.2d at 731. Under *de novo* review, the appellate court "considers the matter anew and freely substitutes judgment for that of the lower tribunal." *Id.* (alterations, citations and internal quotations omitted).

III. Analysis

¶ 28 Respondent-Mother raises several arguments on appeal. Each will be addressed in turn.

A. Lack of Competent Evidence for Trial Court's Findings

1. Respondent-Mother's Lack of Housing

¶ 29 **[1]** Respondent-Mother first contends the trial court's findings that Respondent-Mother rejected opportunities for adequate housing and that her lack of housing is volitional are not supported by competent evidence. We agree.

¶ 30 The trial court's findings of fact suggest that DSS provided meaningful assistance that produced real housing opportunities for Respondent-Mother and that she turned down suitable housing. We find no evidence to support that characterization.

¶ 31 In this case, Respondent-Mother had two avenues to obtain housing. First, Respondent-Mother could work with the family reunification program ("FUP")—part of Section 8 housing—or she could get assistance in paying a rental deposit up to $1,300.00. However, there was a three-year waiting list for Section 8 housing. That is why Ms. Foster did not recommend that Respondent-Mother go through Section 8 and the family reunification program to obtain housing.

¶ 32 The second avenue required Respondent-Mother to find housing on her own. DSS gave Respondent-Mother a list of potentially available houses through "Eastern Carolina or other agencies"; however, Ms. Foster never identified the "other agencies." She identified "Eastern Carolina" as "Eastern Carolina Human Services," which is "another branch of the Section 8 housing/FUP." Assuming Ms. Foster's "other agencies" were independent of Section 8, Ms. Foster could not say whether the houses or apartments on that list were available and met the needs of Respondent-Mother and her children. She admitted that she never checked. Ms. Foster only knew that Respondent-Mother told her the houses on the DSS list had occupants or were not in good repair. When asked how many homes Respondent-Mother supposedly turned down, Ms. Foster admitted, "I'm not sure."

¶ 33 Respondent-Mother explained that she had looked at approximately eighty residences without success. Because of Hurricane Florence, there was a shortage of rental housing in Onslow County. With her low credit score, Respondent-Mother could not qualify for rental housing in that competitive market. Ms. Foster agreed that Hurricane Florence severely impacted the housing market.

¶ 34 Indeed, in the letter Ms. Foster wrote to Eastern Carolina Services Agency on October 3, 2019, to request review of Respondent-Mother's

housing application, she touted Respondent-Mother's "tremendous progress" and that "the children's therapists have stated that they have no current concerns about [Respondent-Mother] reunifying with her children." Ms. Foster reported that the only thing standing in the way of reunification was "a lack of safe, stable, and appropriate housing." She noted that Respondent-Mother was in a "difficult position in that she makes too much money for some types of aid but does not make enough money to comfortably afford a lot of homes that are available in the area now post-[H]urricane Florence."

¶ 35 Additionally, Respondent-Mother explained that some of the houses or apartments on the lists DSS gave her were occupied or were not in good condition. DSS presented no evidence of what Respondent-Mother should have done if she found a residence on the list to be occupied. Ms. Foster indicated that Respondent-Mother should wait to see if the occupants moved, presumably by driving by the location from time to time. Ms. Foster never explained how Respondent-Mother could get information about when, if ever, those homes would be available. Though Respondent-Mother did knock on the door and speak to one occupant, the record contains no evidence that knocking on doors and asking occupants if they were moving would have produced positive results.

¶ 36 Respondent-Mother testified that she did not turn down one viable residence. Instead, none of the homes on the lists provided by DSS "panned out." Ms. Foster could not identify one viable residence that Respondent-Mother turned down. Ms. Foster did not refute Respondent-Mother's reports of the homes she investigated, as Ms. Foster never investigated the homes.

¶ 37 Speculation that, in general, people who earn "decent" wages should be able to find housing in the vicinity of Onslow County is not proof that Respondent-Mother could obtain adequate housing for herself and the children. There is no evidence that Respondent-Mother voluntarily declined adequate housing. The record and transcript contain no evidence that any housing support DSS offered Respondent-Mother led to an adequate residence that Respondent-Mother rejected. At best, DSS gave Respondent-Mother a list of addresses compiled by a third-party, which no employee of DSS reviewed, directing her to the three-year waiting list with the Housing Authority. For this reason, we conclude the evidence does not support the trial court's findings of fact to the extent they state that DSS provided Respondent-Mother with practical, timely, or meaningful assistance in obtaining housing, and Respondent-Mother failed to cooperate with that assistance or rejected adequate residences.

2. Respondent-Mother's Ability to Meet Sawyer's Needs

¶ 38 **[2]** Next, Respondent-Mother contends the trial court's findings that she had not learned how to meet Sawyer's needs, did not participate in therapy, and was late for visits are not supported by competent evidence. We agree.

¶ 39 Respondent-Mother's court-ordered case plan required her to obtain and maintain appropriate housing and employment, and to participate in a psychological evaluation and comply with recommendations. She obtained the psychological evaluation on May 12, 2017, and the provider recommended that Respondent-Mother participate in therapy for three to four months and then receive a psychiatric evaluation for possible medication.

¶ 40 At the June 9, 2017 permanency planning hearing, the court ordered Respondent-Mother to take parenting classes and "to demonstrate the skills learned during visits with the juveniles." On October 9, 2017, Respondent-Mother obtained a psychiatric evaluation and was prescribed psychiatric medication. At the December 21, 2017 permanency planning hearing, the court ordered Respondent-Mother to follow the recommendations of her psychological evaluation and to participate in individual and group therapy weekly, as well as satisfy the previously established reunification goals of stable housing and employment. Subsequent permanency planning orders never changed or added to those reunification requirements.

¶ 41 A close review of the initial dispositional order and subsequent orders from permanency planning hearings does not reveal any requirement from DSS or the court that Respondent-Mother attend Sawyer's medical appointments or individual therapy. Neither the orders nor the court reports mention these topics until the vague finding in the December 2, 2019 order that Respondent-Mother did not understand Sawyer's diagnosis. Additionally, Respondent-Mother asked Sawyer's foster family for the name and contact information for Sawyer's therapist and medical providers, but there is no evidence this information was provided to her.

¶ 42 On the topic of Sawyer's "needs," Ms. Foster had no first-hand knowledge of whether Respondent-Mother understood Sawyer's gastrointestinal issues. She said that the foster parents told her that Respondent-Mother gave Sawyer mozzarella sticks "several times" and "cheese tends to make him worse." She also said the foster parents reported several conversations with Respondent-Mother about Sawyer's diet.

¶ 43 The evidence is undisputed that, at the worst, Respondent-Mother gave Sawyer cheese sticks, which upset his stomach. Respondent-Mother said she had not been told to avoid giving Sawyer cheese beforehand. At the January 31, 2020 hearing, Respondent-Mother voiced an understanding of Sawyer's medical issues and condition. The evidence does not support a finding that Respondent-Mother was unable or unwilling to provide proper care for Sawyer.

¶ 44 The trial court also found that Respondent-Mother was late to several visits and, on occasion, returned the children early. That finding, standing alone, does not accurately portray the evidence. Ms. Foster explained that Respondent-Mother was late to a few visits and had to return the children early because she was solely responsible for transporting all three children to and from unsupervised visits, and she was late because of "traffic or . . . the school pick up lines." Nothing in the record indicates that Respondent-Mother could avoid being late and returning the children early on occasion, given her transportation burden and traffic patterns.

¶ 45 Therefore, we conclude the evidence does not support the trial court's findings that Respondent-Mother had not learned how to meet Sawyer's needs, failed to participate in therapy, and was late for visits.

3. DSS's Reasonable Efforts

¶ 46 **[3]** Next, Respondent-Mother argues the trial court's findings that DSS made reasonable efforts to reunify, and Sawyer was not likely to return home in six months, are not supported by competent evidence. We agree.

¶ 47 "Our General Assembly requires social service agencies to undertake reasonable, not exhaustive, efforts towards reunification." *In re: A.A.S*, *A.A.A.T.*, *J.A.W.*, 258 N.C. App. 422, 430, 812 S.E.2d 875, 882 (2018). "Reasonable efforts" is defined as "[t]he diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18) (2019).

¶ 48 Here, DSS attempted to reunify the family and eliminate the need for continued placement through case plan development; holding regular Child and Family Team Meetings; linking Respondent-Mother with mental health services and parenting education; confirming completion of services; facilitating visitation; and ensuring Sawyer and his sisters' medical and developmental needs were met. However, DSS did not give Respondent-Mother meaningful assistance in obtaining housing.

¶ 49 The limited assistance DSS gave Respondent-Mother in finding housing consisted of handing her an unvetted list of addresses produced by a third party and directing her to the Housing Authority with its three-year waiting list. Both suggestions proved useless.

¶ 50 Nonetheless, by January 31, 2020, Respondent-Mother had located three more potential homes and was optimistic she could rent one of them. Given Respondent-Mother's success and her prospect of obtaining housing soon, the trial court erred in concluding DSS made reasonable efforts to reunify, and that Sawyer was unlikely to return home within six months.

4. Respondent-Mother's Constitutionally Protected Parental Status

¶ 51 **[4]** Next, Respondent-Mother contends the trial court erred in failing to make findings regarding her constitutionally protected parental status. We agree. "A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (alterations, quotation marks, and citation omitted). This right is paramount to claims by third parties for custody of the child. *Petersen v. Rogers*, 337 N.C. 403-04, 445 S.E.2d 901, 905 (1994). "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the best interest of the child standard." *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (citation and quotation marks omitted). However, a parent can forfeit their right to custody of their child by unfitness or acting inconsistently with their constitutionally protected status. *Id.*

¶ 52 A determination that a parent has forfeited this status must be based on clear and convincing evidence. *In re D.A.*, 258 N.C. App. at 249, 811 S.E.2d at 731; *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016). The trial court must clearly address whether the parent is unfit or if their conduct has been inconsistent with their constitutionally protected status as a parent, where the trial court considers granting custody or guardianship to a nonparent. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009); *In re A.S.*, 203 N.C. App. 140, 142, 693 S.E.2d 659, 661 (2010); *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 266 (2019).

¶ 53 Here, the trial court never found Respondent-Mother unfit or to have acted inconsistently with her constitutional right to parent her child. On the contrary, the trial court's finding "[t]hat the best interests of [Sawyer]

would be served by granting [Sawyer's foster parents] guardianship" because Respondent-Mother is still "attempting to find suitable and appropriate housing" does not, by itself, prove Respondent-Mother is unfit or acted inconsistently with her constitutionally protected parental status.

5. Respondent-Mother's Compliance with Reunification Efforts

¶ 54 **[5]** Next, Respondent-Mother contends the trial court erred when it ceased reunification efforts. We agree.

¶ 55 This Court reviews the order to cease reunification:

> [to] consider whether the trial court's order contains the necessary statutory findings to cease reunification efforts. Under our statutes: "Reunification shall remain a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). . . . The court could only cease reunification efforts after finding that those efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

In re D.A., 258 N.C. App. at 253, 811 S.E.2d at 733–34.

¶ 56 "Under our statutes, reunification whenever possible is the goal of juvenile court." *In re J.M., N.M.*, 276 N.C. App. 291, 2021-NCCOA-92, ¶ 24. The trial court may cease reunification efforts only upon supported findings "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b); *In re D.A.*, 258 N.C. App. at 253, 811 S.E.2d at 733-34; *In re K.L.*, 254 N.C. App. 269, 280, 802 S.E.2d 588, 592 (2017). In making this determination, the trial court considers

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.

> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019). "The focus of this statute is on the actions of the parent[]." *In re J.M., N.M.*, ¶ 24. "While the trial court is not mandated to use the precise language of Section 7B-906.2(d), the order must embrace the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or inconsistent with the juvenile's health, safety, or need for a safe, permanent home within a reasonable period of time." *Id.* (citing *In re K.R.C.*, 374 N.C. 849, n.7, 845 S.E.2d 56, n.7 (2020)).

¶ 57 The findings must also "demonstrate the degree of success or failure toward reunification," including addressing the factors outlined in section 7B-906.2(d). *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020). "The trial court's written findings must address the statutes[']' concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013). Failure to enter findings that satisfy the statutory criteria is reversible error. *Id.* The findings must logically support the court's legal conclusions. *In re Anderson*, 151 N.C. App. 94, 96, 564 S.E.2d 599, 601 (2002).

¶ 58 An order may implicitly cease reunification efforts if the order's effect is the cessation of reunification efforts. *In re A.P.W.*, 225 N.C. App. 534, 537-38, 741 S.E.2d 388, 390-91, *disc. rev. denied*, 367 N.C. 215, 747 S.E.2d 251 (2013). That the order does not expressly cease reunification efforts is irrelevant. *Id.*

¶ 59 Here, the order does not expressly cease reunification efforts between Sawyer and Respondent-Mother, but it places Sawyer in the guardianship of his foster parents and terminates further review. The order precludes the possibility that Respondent-Mother and Sawyer will be reunited.

¶ 60 The trial court failed to make the findings required by N.C. Gen. Stat. § 7B-906.2(b) and (d) to cease reunification efforts. The trial court did not fully address any of the criteria listed in N.C. Gen. Stat. § 7B-906.2(d) in its findings of fact. The trial court found that Respondent-Mother did not make progress in finding housing, but it did not address whether her lack of progress was "adequate . . . within a reasonable period of time." N.C. Gen. Stat. § 7B-906.2(d)(1). The trial court should have evaluated Respondent-Mother's progress in securing housing in light of the evidence that Hurricane Florence made housing scarce. Respondent-Mother's credit score barred her from many rental units. Respondent-Mother made too much money to qualify for some

types of aid but did not make enough to afford many of the homes available in the area after Hurricane Florence. There is no indication the trial court considered that evidence.

¶ 61 Instead, the trial court found that DSS presented adequate housing options to Respondent-Mother and she turned them down capriciously. The trial court failed to address whether Respondent-Mother was "actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(2). The evidence shows Respondent-Mother was actively participating in her case plan and had cooperated with DSS.

¶ 62 The trial court did not address whether Respondent-Mother "remains available to the court, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3). All evidence indicated that Respondent-Mother was very involved with and cooperative with all parties. Lastly, the trial court did not address whether Respondent-Mother was "acting in a manner inconsistent with the health or safety of the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(4). The trial court found only that "[i]t is contrary to the juvenile's welfare and best interests to return to the home of the Respondent-Mother parent at this time."

¶ 63 The trial court did not address any criteria of N.C. Gen. Stat. § 7B-906(b). The evidence does not explain why it would be contrary to Sawyer's welfare to remain in foster care six more months to allow Respondent-Mother to try to secure housing. The trial court's failure to comply with the mandatory statutory analysis in ceasing reunification efforts, demonstrated by the entry of sufficient findings, is reversible error.

B. The trial court erred in ceasing further review hearings.

¶ 64 **[6]** Lastly, Respondent-Mother contends the trial court erred in ceasing further review hearings. We agree. A trial court may not cease further review hearings without making the following findings of fact required by N.C. Gen. Stat. § 7B–906.1(n) (2019):

> (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 when the court enters a consent order pursuant to [N.C. Gen. Stat. §] 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.

Absent a waiver under subsection (n), Section 7B–906.1(a) requires that "subsequent permanency planning hearings shall be held at least every six months [after the initial permanency planning hearing] . . . to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." *Id.* If the trial court waives these hearings, it "must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B–906.1(n), and its failure to do so constitutes reversible error." *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015)).

¶ 65 Here, the trial court failed to make findings under N.C. Gen. Stat. § 7B–906.1(n). Therefore, the trial court committed reversible error and its order must be remanded. *In re R.A.H.*, 182 N.C. App. 52, 62, 641 S.E.2d 404, 410 (2007).

IV. Conclusion

¶ 66 "Reunification shall remain 'a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved . . . or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' N.C. Gen. Stat. § 7B-906.2(b). A trial court may cease reunification efforts only when the written findings comply with N.C. Gen. Stat. §§ 7B-901(c) and 7B-906.1(d)(3)." *In re J.M., N.M.*, ¶ 55 (alterations omitted).

¶ 67 We hold the trial court's findings are unsupported by competent evidence, and its conclusion that reunification is contrary to Sawyer's health and safety is unsupported by its findings. To the contrary, the evidence demonstrated that Respondent-Mother substantially completed her case plan, with only the requirement of adequate housing remaining outstanding and which she was working to fulfill, to reunify with

Sawyer. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ZACHARY and JACKSON concur.

IN THE MATTER OF S.R.J.T.

No. COA20-29

Filed 6 April 2021

1. Child Abuse, Dependency, and Neglect—neglect—environment injurious to child's welfare—sufficiency of findings

The trial court properly adjudicated a child neglected upon findings of fact, which were supported by evidence, that the child was exposed to substance abuse and domestic violence in the home and was diagnosed with post-traumatic stress disorder as a result of his home life, and that his behavior regressed after visitation with his parents.

2. Child Abuse, Dependency, and Neglect—disposition order—ceasing reunification efforts—findings

After adjudicating a child neglected and dependent, the trial court did not abuse its discretion by ordering the cessation of reunification efforts with the parents where it made sufficient findings, in accordance with N.C.G.S. § 7B-906.2, addressing how the parents' history of substance abuse, domestic violence, and lack of suitable home environment would impact the child's health, safety, and need for a permanent home.

3. Child Abuse, Dependency, and Neglect—neglected juvenile—guardianship to relative—constitutional argument waived

In a neglect and dependency matter, a mother's challenge to the trial court's decision to grant guardianship of her child to a paternal aunt was overruled where the mother was provided notice that guardianship or custody to the aunt would be considered but did not appear at the hearing, present any evidence opposing the guardianship, or raise any issues regarding her constitutional rights.

4. Child Abuse, Dependency, and Neglect—neglected juvenile—further review hearings waived—insufficient findings

In a neglect and dependency matter, the trial court's disposition order was reversed in part where its waiver of further review hearings was not supported by findings required by N.C.G.S. § 7B-906.1(n).

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent-mother from orders entered on 17 July 2018 and 27 September 2019 by Judge David V. Byrd in District Court, Wilkes County. Heard in the Court of Appeals 17 November 2020.

Vannoy, Colvard, Triplett & Vannoy, PLLC, by Daniel S. Johnson, for petitioner-appellee Wilkes County Department of Social Services.

Lisa Anne Wagner for respondent-appellant-mother.

STROUD, Chief Judge.

¶ 1 Respondent-Mother appeals from the trial court's order adjudicating Scottie[1] as a neglected and dependent juvenile and from the trial court's disposition order which ceased reunification efforts and granted guardianship of Scottie to his aunt. Because the trial court's findings support its conclusion that Scottie was neglected, we affirm the adjudication order as to neglect, and we affirm in part, reverse in part, and remand the disposition order for entry of an order containing findings of fact in compliance with North Carolina General Statute § 7B-906.1(n).

I. Background

¶ 2 Mother has an extensive history with the Wilkes County Department of Social Services ("DSS"), and her parental rights were terminated to two children in 2008 and 2010. DSS initially removed Scottie and his brother[2] in 2015 due to issues of domestic violence and substance abuse. Scottie was adjudicated neglected, and Mother previously appealed this order. On 20 June 2017, this Court reversed the trial court's adjudication order in an unpublished opinion. *See In re J.L.T. and S.R.J.T.*, 254 N.C. App. 240, 801 S.E.2d 391 (2017) (unpublished).

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1. Pseudonyms are used to protect the identity of the juvenile.

2. Mother has only appealed as to Scottie, and Scottie's Father is not a party to this appeal.

¶ 3 On 3 July 2017, DSS filed a new petition alleging Scottie was neglected and dependent. An adjudication hearing was held on 18 December 2017. On 17 July 2018 the trial court entered an adjudication order which declared Scottie to be neglected and dependent. Disposition hearings were held on 8 January 2018, 6 March 2018, and 21 August 2018. The written disposition order, entered on 27 September 2019, ceased reunification efforts, granted guardianship of Scottie to his paternal aunt, and suspended visitation and further hearings. Mother timely appealed from the disposition order and petitioned this Court for a writ of certiorari in the event we found her notice of appeal to be defective.

II. Petition for Writ of Certiorari

¶ 4 Mother's notice of appeal stated, Mother "hereby gives Notice of Appeal to the Court of Appeals of North Carolina from the Adjudication Judgment and Dispositional Order that was filed on September 27th 2019." However, the adjudication order was filed on 17 July 2018. Because we can infer from the notice of appeal that Mother intended to appeal the both the adjudication and disposition orders, in our discretion, we allow her petition as to the disposition order. N.C. R. App. P. 21(a)(1).

III. Adjudication

¶ 5 **[1]** Mother argues, "[t]he trial court erred by adjudicating Scottie neglected and dependent when the trial court failed to make necessary finding of fact, there is insufficient evidence to support the findings of fact the trial court did make, and the findings that are supported by the evidence are insufficient to support its conclusions of law."

A. Standard of Review

> We review an adjudication under N.C. Gen. Stat. § 7B-807 to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings support its conclusions of law. 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. . . . [W]e review a trial court's conclusions of law de novo.

In re N.K., 274 N.C. App. 5, 8, 851 S.E.2d 389, 392 (2020) (quoting *In re M.H.*, 272 N.C. App. 283, 286, 845 S.E.2d 908, 911 (2020)). Unchallenged findings are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

B. Adjudication of Neglect

¶ 6 Mother argues, "DSS failed to present any evidence that the children were present for, or impacted by, any acts of domestic violence or substance use, or that they suffered any physical, mental or emotional impairment as a result."

¶ 7 A neglected juvenile is defined as one

> who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]

N.C. Gen. Stat. § 7B-101(15) (2017). "[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016). "A trial court's failure to make specific findings regarding a child's impairment or risk of harm will not require reversal where the evidence supports such findings." *Id.*

¶ 8 Here, the trial court found:

> 5. The Respondents have unstable living arrangements and maintain a strange, ongoing, and inappropriate relationship with one another. [Mother] alternates living with [Scottie's Father] and [Aaron], choosing to stay with whichever father has money and drugs to offer to her.
>
> 6. [Mother] and [Scottie's Father] have failed numerous drug screens during the time that the children have been in the care of DSS.
>
> . . . .
>
> 8. On October 6, 2017, the Respondents submitted to hair follicle drug tests and the results were as follows: [Mother]: positive for amphetamines and methamphetamine[.]
>
> 9. On October 13, 2017, social worker Carver made a surprise visit to [Aaron's] home. When she arrived, [Aaron] was lying on a couch and [Mother] was

scurrying around the kitchen. [Mother] told social worker Carver that she was pouring a beer out. Social worker Carver noticed a needle on the kitchen counter, two more needles in the sink, a packet of some sort, and a spoon containing a burned substance. [Aaron] told the social worker that he didn't know why [Mother] was using the "junk" in his home. [Mother] admitted that she was using drugs and that she was depressed since her children had not been at home.

. . . .

13 Since the children have been in the care of DSS, ... [Scottie] has been diagnosed with post-traumatic stress disorder.

15. [Scottie] receives counseling from Brooke Gregory at Kids Count Pediatrics. Therapist Gregory was duly qualified as an expert witness and provided the following opinions regarding [Scottie]:

> (a) He suffers from post-traumatic stress disorder as a result of matters he witnessed while in the care of [Mother] and [Scottie's Father], including drug use, domestic violence, and his mother moving back and forth between [Scottie's Father] and [Aaron];
>
> (b) He regressed in treatment following visits with his parents. Interaction with his parents increased his behaviors of acting out, not listening, and oppositional defiance;
>
> (c) He experienced nightmares of being left alone and someone cutting his head off after contact with his parents;
>
> (d) He was exposed to sexual behavior during the time that he was with his parents. He has talked to other children about sexual behavior and engaged in sexualized conduct; and
>
> (e) It is not in the best interests for [Scottie] to have visitation with his biological parents.

And the trial court concluded:

> 3. With regard to neglect, each child would be placed at a serious risk of impairment in the event that they were placed with their parents due to the parents' ongoing drug abuse and their unstable living arrangements. Each of the children would be placed at substantial risk of physical, mental, and emotional impairment in the event that they were returned to their parents.

1. Finding of Fact No. 15

¶ 9 Mother raises several arguments regarding Finding of Fact No. 15. Mother argues that portions of finding of fact 15(a) and (e) are conclusions of law and should be reviewed de novo. We disagree. First, we note that Finding No. 15 is phrased as a recitation of testimony as to facts about the juvenile since it specifically lists the observations and opinions of Therapist Gregory. *See In re L.C.*, 253 N.C. App. 67, 70, 800 S.E.2d 82, 86 (2017). Although recitations of evidence may not allow for appropriate appellate review where the trial court fails to make findings demonstrating if it found the evidence to be credible, *id.*, when we consider Finding No. 15 in the context of the entire order, the trial court did determine the evidence to be credible and this finding is supported by the evidence. To the extent that Finding 15(e) is a finding of fact and not a recitation of testimony, we review the trial court's determination of whether visitation is in the best interest of the juvenile for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) ("This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion.").

¶ 10 Mother also contends Finding 15(d) is not supported by the evidence. Ms. Gregory testified about the reasons she saw Scottie:

> Q. Why did you begin work counseling with [Scottie]?
>
> A. He was referred to my case load due to family circumstances where he was removed from his family and lives with [his Aunt]. There's a pretty significant neglect and abuse history there, so he has post-traumatic stress disorder.
>
> Q. When did you diagnose [Scottie] with post-traumatic stress disorder?

> A. On 6/14/16.
>
> Q. And it's your opinion that that stress disorder resulted from abuse and the circumstances that he encountered in his parents home?
>
> A. Yes, sir.
>
> Q. How did you arrive at that diagnosis?
>
> A. Well, there are several criteria you need in order to get diagnosed with post-traumatic stress disorder. [Scottie] exhibits mood changes, anxiety, sleep disturbances, eating disturbances, attachment issues, and [Scottie] qualifies for all of those.
>
> . . . .
>
> Q. Now, has [Scottie] indicated to you during counseling sessions that he had witnessed his parents using illegal drugs?
>
> A. Yes.
>
> Q. What did he tell you about seeing his parents use illegal drugs?
>
> A. He has talked about seeing needles. There's an actual quote here in the letter from July 19th, 2017 that I provided for Department of Social Services. "My parents will never get me back because they do drugs. They take a shot every day. I have seen them. They put medicine in their arm with a shot."

Ms. Gregory testified, "There has been some sexualized behavior after he has interacted with his parents that comes out in session. I don't have enough to pursue that at this moment[.]" On cross examination, Ms. Gregory stated, "I'm not sure where the sexualized behavior has come from."

¶ 11 The portion of the finding of fact 15(d) about exposure to sexual behavior "during the time that he was with his parents" is not supported by clear and convincing evidence. The rest of the challenged portions of Finding No. 15 are supported by clear and convincing evidence which support the trial court's conclusion that Scottie was a neglected juvenile. *In re N.G.*, 186 N.C. App. at 12-13, 650 S.E.2d at 52. In addition, these findings, considered along with the other unchallenged findings regard-

ing drug abuse and domestic violence in the home, Scottie's regression after visitation with the parents, and the diagnosis of post-traumatic stress disorder demonstrate that "the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518. We affirm the trial court's adjudication of neglect on this basis and need not address the other adjudicatory grounds in the court's order. *See In re F.C.D.*, 244 N.C. App. 243, 250, 780 S.E.2d 214, 220 (2015) ("Because this ground standing alone is sufficient to support the adjudication of abuse, we need not address the trial court's two other grounds for adjudicating . . . an abused juvenile.").

IV. Disposition Order

¶ 12 Mother argues, "[t]he trial court reversibly erred and abused its discretion by ceasing reunification, granting guardianship of Scottie to his paternal aunt at the initial disposition, and waiving review hearings without making statutorily required findings."

A. Standard of Review

¶ 13 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. at 213, 644 S.E.2d at 594. "An abuse of discretion occurs when a trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Id.* This Court "review[s] statutory compliance *de novo*." *In re N.K.*, 274 N.C. App. at 13, 851 S.E.2d at 395.

B. Reunification

¶ 14 **[2]** "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017).

> At any permanency hearing . . . the trial court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> > (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.

> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health and safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2017).

> Although "use of the actual statutory language [is] the best practice, the statute does not demand a verbatim recitation of its language." Instead, "the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time."

In re L.E.W., 375 N.C. 124, 129-30, 846 S.E.2d 460, 465 (2020) (alteration in original) (citation omitted).

¶ 15 Here, the trial court found as following regarding Scottie:

> 1. The status of the above-named minor children is accurately described in the Court Summaries and Reports prepared by DSS and the GAL which were introduced into evidence for purposes of disposition in these matters and are incorporated herein by reference as Findings of Fact.
>
> 2, The children have been declared neglected and dependent juveniles as those terms are defined by N.C.G.S. § 7B-101.
>
> 3. The children have not been in the custody of their parents since the fall of 2015. It would be contrary to the children's health and safety to be returned to the home of a parent as a result of their special needs and the instability of their parents.
>
> 4. There are no issues regarding paternity of the children. . . .

> 5. The Court has considered the requirements of N.C.G.S. § 7B-901(c) and finds that DSS should not be required to utilize reasonable efforts to reunify the children with a parent. [Mother] and [Scottie's Father] have had their parental rights terminated involuntarily to other children. Each of these parents have a significant history of substance abuse and their living arrangements are not suitable. . . .
>
> 6. [Scottie] has been placed in the care of his paternal aunt, [Rebecca], since April 2016. He has been diagnosed with post-traumatic stress disorder from exposure to domestic violence, abuse, and his parents' substance abuse which he witnessed while in the care of his parents. He displays anxiety, mood changes, sleep and eating disorders, and attachment issues. He is fearful of being removed from his aunt. [Scottie] receives counseling from therapist Brooke Gregory at Kids Count Pediatrics. Visitation between [Scottie] and his parents was ceased at the recommendation of therapist Gregory. [Scottie] has told the GAL's office that he does not want to live with his parents.
>
> . . . .
>
> 8. [Rebecca] has the financial means and capability to care for [Scottie]. She has provided care solely for the child with no assistance from his parents for over two years. [Rebecca] understands the legal significance of the appointment and has adequate resources to care appropriately for the child. [Scottie] is bonded to his aunt.
>
> 9. The children are not members of a state or federally recognized Indian tribe.

The trial court concluded:

> 1. The Court has jurisdiction of the subject matter and the parties.
>
> 2. DSS made reasonable efforts to prevent or eliminate the need for placement of the minor children; however, these efforts were not effective in light of the parents' histories of drug abuse, instability, and

> incarceration. DSS . . . placed [Scottie] in the care of a paternal relative.
>
> 3. The best interests of the minor children would be best served by the disposition set forth in the Decree below. DSS shall not be required to utilize reasonable efforts to reunify either child with a parent.
>
> 4. Any Finding of Fact that is a more appropriate Conclusion of Law is incorporated herein by reference.
>
> Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED, ADJUDGED, AND DECREED that:
>
> . . . .
>
> 3. [Rebecca] is appointed as guardian of the person of [Scottie] pursuant to N.C.G.S. § 7B-600. No accountings or bond shall be required. No further review hearings shall be required concerning this child. Neither of [Scottie's] parents shall have any visitation unless the same is approved by the Court.

These findings make it clear that the trial court "considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *Id.* at 129-30, 846 S.E.2d at 465. In addition, the trial court did not abuse its discretion by ceasing reunification efforts based upon these findings.

C. Guardianship

¶ 16 **[3]** Mother argues, "[t]he trial court reversibly erred by failing to make necessary findings of fact to support its order granting guardianship of Scottie to [Rebecca]." Mother argues the trial court did not make a finding that her conduct was inconsistent with her constitutionally protected status as a parent and she had "participated in a substance abuse assessment and begun receiving [substance abuse] treatment, had consistently been providing clean drug screens . . . had inquired of DSS what she could provide for Scottie's needs, and was on waiting lists for housing of her own." DSS argues that Mother did not raise this constitutional issue at trial and should not be considered for the first time on appeal.

> " '[P]arents have a constitutionally protected right to the custody, care and control of their child,

> absent a showing of unfitness to care for the child.' " "[A] parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child." Prior to granting guardianship of a child to a nonparent, a district court must "clearly address whether [the] respondent is unfit as a parent or if [his] conduct has been inconsistent with [his] constitutionally protected status as a parent[.]" "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence."

In re R.P., 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (alterations in original) (citations omitted).

¶ 17 This Court has held that where a parent is on notice that guardianship with a third party has been recommended and will be determined at the hearing, if the parent fails to raise this argument at the hearing, appellate review of the constitutional issue is waived:

> "[T]o apply the best interest of the child test in a custody dispute between a parent and a non-parent, a trial court must find that the natural parent is unfit or that . . . her conduct is inconsistent with a parent's constitutionally protected status." This finding should be made when the court is considering whether to award guardianship to a non-parent. To preserve the issue for appellate review, the parent must raise it in the court below. However, for waiver to occur the parent must have been afforded the opportunity to object or raise the issue at the hearing. Here, although counsel had ample notice that guardianship . . . was being recommended, Respondent-mother never argued to the court or otherwise raised the issue that guardianship would be an inappropriate disposition on a constitutional basis. We conclude Respondent-mother waived appellate review of this issue.

In re C.P., 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (first alteration in original) (citations omitted).

¶ 18 Here, Mother was on notice of the recommendations of both DSS and the GAL of guardianship or custody to be granted to the juvenile's aunt. The Court Report and GAL's reports prior to the last hearing recommended this plan. Mother did not appear for the hearing and did not present any evidence opposing the recommendation of guardianship. Mother did not make any argument regarding her constitutional rights and did not make any argument against guardianship on this or any other basis. Instead, her counsel's argument to the trial court addressed primarily visitation, as he asked the trial court to maintain Mother's visitation along with drug testing. This argument is overruled.

D. Waiving Further Review Hearings

¶ 19 **[4]** Mother argues, "[t]he trial court did not make adequate findings to support its decision to waive further review hearings." North Carolina General Statute § 7B-906.1(n) requires the trial court to make the following findings before having review hearings less often than every six months:

> (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 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. Gen. Stat. § 7B-906.1(n) (2019).

> This Court has held that the trial court must make written findings of fact satisfying each of the above criteria in its order. An order which fails to address all of the criteria will be reversed and remanded for

entry of an order containing findings of fact in compliance with N.C. Gen. Stat. § 7B-906(b).

In re M.M., 230 N.C. App. 225, 239, 750 S.E.2d 50, 59 (2013) (citation omitted). The trial court's disposition order, quoted above, is silent as to the third and fourth criteria listed above. Accordingly, we reverse this portion of the order and remand for additional findings regarding review hearings.

V. Conclusion

¶ 20 We affirm the adjudication order as to Scottie being a neglected juvenile. We affirm the disposition order in part and reverse and remand in part. In particular, we reverse the provisions of the disposition order waiving review hearings and remand for entry of an order containing findings of fact in compliance with North Carolina General Statute § 7B-906.1(n).

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

¶ 21 I concur with the majority's opinion holding that both the adjudication and disposition orders are properly before this Court. I also concur with the majority's conclusion that the portion of finding of fact 15(d) about Scottie's purported exposure to sexual behavior "during the time that he was with his parents" is not supported by clear and convincing evidence. The majority also correctly concludes the trial court's disposition order is silent, does not address the third and fourth statutory criteria, and it must be reversed and remanded for additional findings regarding review hearings.

¶ 22 The majority's opinion sets forth the proper standard of review, but it applies the incorrect "best interests" standard of appellate review to the adjudication order instead of the disposition. Further, the trial court erroneously and unlawfully delegated the availability and timing of a parent's visitation with a child to a therapist. Reunification of a child with parents cannot be ceased as a planned and statutorily mandated goal prior to the trial court's threshold findings and conclusions of pa-

rental unfitness or conduct inconsistent with their parental rights. These errors are prejudicial to warrant reversal. I respectfully dissent.

I. Adjudication

A. Standard of Review

¶ 23 The majority's opinion properly states the proper appellate standard of review for an appeal of an order of adjudication. This Court reviews a trial court's adjudication of a child to be a neglected juvenile to determine whether the findings of fact are supported by clear and convincing evidence, and whether the conclusions are supported by the findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation omitted).

¶ 24 "A trial court must determine by clear and convincing evidence that a parent's conduct is inconsistent with his or her protected status." *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016) (citations and internal quotation marks omitted). The determination of parental unfitness or whether parental conduct is inconsistent with the parents' constitutionally protected status is reviewed *de novo*. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018).

¶ 25 The majority's opinion recites the proper standard of review, reviews and concludes the findings of fact are insufficient, but then applies the wrong standard of review to the orders. Regarding testimony given by Brooke Gregory, the expert witness and Scottie's therapist, the majority's opinion states: "To the extent that Finding 15(e) is a finding of fact and not a recitation of testimony, we review the trial court's determination of whether visitation is in the best interest of the juvenile for abuse of discretion." This assertion is erroneous.

¶ 26 Findings of fact must be supported by clear and convincing evidence to support a statutory conclusion of parental abuse, neglect, or dependency before we review the trial court's "best interests" determination of disposition for an abuse of discretion. The testimony of the therapist may be relevant, but clear and convincing evidence must support findings and conclusions of unfitness or conduct inconsistent with parental rights to deny a parent's care, custody, and control with her child. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2019); *In re J.C.-B.*, 276 N.C. App. 180, 2021-NCCOA-65, 856 S.E.2d 883 (2021); *In re J.M.*, *N.M.*, 276 N.C. App. 291, 2021-NCCOA-92, 856 S.E.2d 904 (2021); *In re N.T.*, *A.T.*, 276 N.C. App. 146, 2021-NCCOA-50, 854 S.E.2d 604, 2021 WL 795438

(2021) (unpublished). Since this finding is threshold and jurisdictional for the State to inject itself into the constitutionally protected status and relationship between a parent and child, the failure of the trial court to so find is not waived by the parents' failure to expressly assert it. *Id.*

B. Neglect and Dependency

¶ 27 A neglected juvenile is defined as a child "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2019). Notwithstanding the many errors and deficiencies in the order, as is correctly pointed out in the majority's opinion, the majority concludes sufficient evidence shows Scottie is neglected. The majority's opinion fails to address the unsupported finding and erroneous conclusion that Scottie is also dependent.

¶ 28 A dependent juvenile is "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative childcare arrangement." N.C. Gen. Stat. § 7B-101(9) (2019). The trial court's dependency adjudication is also unsupported by findings of fact based upon clear and convincing evidence and is properly reversed. *Id.*

1. Scottie's Therapist

¶ 29 At the time of trial, Ms. Gregory, a therapist, had been meeting with Scottie twice a month for 18 months. She testified Scottie suffered with PTSD from abuse, based upon some of Scottie's observed behaviors. The trial court considered her testimony as an expert witness.

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2019).

¶ 30 Ms. Gregory failed to explain either the correlation or to establish any causation between purported acts of parental neglect or dependency of Scottie and his PTSD diagnosis, nor provided any methods or psychoanalysis consistently supplied to support that conclusion.

¶ 31 After a year of meeting with Scottie, Ms. Gregory asserted he should not visit his parents because his nightmares purportedly increase when he interacts with them. Scottie has also told his therapist that he has seen drug paraphernalia in his home, and he likes to live with his aunt. Finally, the therapist testified about Scottie's sexualized behaviors because Scottie talked about sex and may have pulled down either his or another child's pants. Ms. Gregory admitted she does not know enough about that conduct to form an opinion of its origin or cause. No allegations of sexual exposure or abuse of Scottie by his parents are asserted or shown. We all agree part of finding of fact 15(d), Scottie's alleged exposure to sexual behavior "during the time that he was with his parents," is not supported by clear and convincing evidence and is erroneous.

¶ 32 Insufficient evidence supports the trial court's findings of fact. The findings are insufficient to support its conclusions of law. A trial court cannot find, adjudicate, and conclude a child is neglected or dependent without clear and convincing evidence to support the findings and the consequent conclusions. *See In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365. The orders are properly reversed.

2. DSS' Evidence

¶ 33 Evidence and testimony offered by DSS during trial relied heavily upon Mother's alleged previous drug use. The last report DSS offered of purported drug use was dated over five months prior to the adjudication hearing.

¶ 34 The trial court concludes:

> 3. With regard to neglect, each child would be placed at a serious risk of impairment in the event that they were placed with their parents due to the parents' ongoing drug abuse and their unstable living arrangements. Each of the children would be placed at substantial risk of physical, mental, and emotional impairment in the event that they were returned to their parents.

¶ 35 Here, as we all agree, the trial court's order merely repeated allegations and testimony of the DSS social worker and Scottie's therapist, without engaging in the required judicial process of reconciling and

adjudicating conflicts in the evidence. "Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) (holding each step in the logical sequence must be taken by the trial judge, "evidence must support findings; findings must support conclusions; conclusions support the judgment"). "Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law[.]" *Id.*

¶ 36 No clear and convincing evidence supported an adjudication of current neglect or dependency outside of generalized assertions. *Id.* No evidence tends to show Scottie has been injured or was at risk of injury in his home environment at the time of the adjudication hearing.

II. Disposition

A. Ceasing Reunification

¶ 37 Our General Statutes mandate: "Reunification *shall* be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3) . . . or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2019) (emphasis supplied). The court shall not cease reunification efforts without supported findings of fact and conclusions of law which state continued efforts would be unsuccessful or inconsistent with the children's health or safety. *See In re P.T.W.*, 205 N.C. App. 589, 595, 794 S.E.2d 843, 848 (2016); *In re D.A.*, 258 N.C. App. at 253, 811 S.E.2d at 733-34.

¶ 38 Mother asserts the trial court erred and abused its discretion by ceasing reunification efforts without making statutorily required findings of fact. The majority's opinion states that the court's findings make it clear it considered the evidence in light of whether reunification would be futile or inconsistent with the juvenile's health and safety. However, as the trial court points out, Scottie has not been in the custody of Mother since 2015. The court cites Mother's alleged and past history of substance abuse and the unsupported history of Scottie's PTSD.

¶ 39 The trial court's order fails to apply the mandatory standard, and its failure infringes upon the constitutional rights of the parents to the care, custody and control of their children. *See In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (holding a parent has a constitutional right to the care for their children absent a showing of unfitness). The order does not show the court concluded reunification with Mother

would be futile or inconsistent with Scott's health, safety, and need for a permanent home within a reasonable period of time from the date of this adjudication to comply with the statute. *In re D.A.*, 258 N.C. App. at 253, 811 S.E.2d at 733-34.

¶ 40 The trial court failed to make the constitutionally and statutorily required findings to cease visitation and reunification efforts. *In re R.P.*, 252 N.C. App. at 304, 798 S.E.2d at 430. These conclusions are properly vacated.

B. Guardianship

¶ 41 Mother argues the trial court reversibly erred by failing to make necessary findings of fact to support the order to grant custody to a third-party.

> Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child. A parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child. *Prior to granting guardianship of a child to a nonparent, a district court must clearly address whether the respondent is unfit as a parent or if his conduct has been inconsistent with his constitutionally protected status as a parent. A trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.*

Id. at 304, 798 S.E.2d at 430 (emphasis supplied) (alterations, citations and internal quotation marks omitted).

¶ 42 N.C. Gen. Stat. § 7B-600(a) provides "when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile." N.C. Gen. Stat. § 7B-600(a) (2019).

¶ 43 Prior to moving to and engaging in any "best interests" analysis, a trial court must have previously found "the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re J.H.*, 244 N.C. App. 255, 272, 780 S.E.2d 228, 241 (2015) (citations omitted); *In re J.C.-B.*, 276 N.C. App. at 180,

2021-NCCOA-65, ¶17, 856 S.E.2d at 887; *In re N.T., A.T.*, 2021-NCCOA-50, ¶7, 2021 WL 795438, at *2.

¶ 44 This Court reviews an order "that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re D.A.*, 258 N.C. App. at 249, 811 S.E.2d at 731 (citation omitted).

¶ 45 The majority's opinion asserts Mother did not appear for the dispositional hearing. This assertion is not consistent with the record. Mother was present in court for the hearing on 21 August until 12:15 p.m. Mother had to report to work by 1:00 p.m. to maintain her employment, as is required under her plan, and this case was not called until 4:00 p.m. Her attorney remained present and addressed the court on her behalf.

¶ 46 The majority's opinion also asserts Mother did not make any argument against guardianship. Mother produced evidence that she had: (1) participated in a substance abuse assessment; (2) received substance abuse treatment; (3) consistently provided clean drug screens; (4) exercised visitation with her other child; (5) attained and maintained employment; (6) paid child support for her other child; and, (7) provided clothing and other items for her children.

¶ 47 Finally, the majority's opinion asserts Mother did not make an argument regarding her constitutional parental rights. Mother's counsel argued her case had already been sent back from this Court previously, referring to this Court's reversal of the earlier adjudication for lack of clear and convincing evidence to support findings of neglect and dependency. *See In re J.L.T.*, 254 N.C. App. 240, 801 S.E.2d 391, 2017 WL 2644127 at *6 (2017) (unpublished).

¶ 48 Mother's counsel continued, "I would ask the [c]ourt not to change the plans for [Scottie], leave it reunification (sic) without something more recent to start the visits." Counsel referred to DSS having produced no new evidence in the more than eight months since the adjudication hearing, implying this case lacked the required evidence, as this Court concluded the earlier order had, and reunification should remain the primary plan. An argument for or to continue reunification is an assertion to uphold the Mother's constitutional right to custody and care of her child. *See In re P.T.W.*, 205 N.C. App. at 595, 794 S.E.2d at 849; *In re D.A.*, 258 N.C. App at 253, 811 S.E.2d at 733-34.

¶ 49 DSS reported her visits with her other child were going well. She inquired of DSS how she could provide for Scottie's needs. She has applied for and has been placed on waiting lists for her own housing.

¶ 50 The 27 September 2019 dispositional order does not contain any findings of fact or conclusions of law that Mother is unfit or that her conduct is inconsistent with her constitutionally protected status as a parent. *See id.* Further, the findings supporting Ms. Gregory's recommendation were more than eight months old at the time of the disposition hearing. No clear and convincing or timely evidence supports such findings. Further, the trial court's order contains no findings and ignores Mother's efforts and accomplishments to comply with her case plan. *See Coble*, 300 N.C. at 714, 268 S.E.2d at 190.

¶ 51 The majority's opinion correctly recognizes the foundational parental rights to the care, custody, and control of their children, but errs in affirming the trial court's decision to cease reunification and award custody to a third-party without proof of either unfitness or conduct inconsistent with being a parent. The trial court failed to make the statutorily required findings to support its grant of guardianship. The findings do not support such conclusion. The order is properly vacated and remanded. *See In re J.H.*, 244 N.C. App. at 272, 780 S.E.2d at 241.

III. Waiver of Further Review Hearings

¶ 52 The disposition order provides "No further review hearings shall be required concerning [Scottie]." Mother correctly argues the trial court failed to make the statutorily required findings to support waiver of future review hearing.

¶ 53 N.C. Gen. Stat. § 7B-906.1 mandates a trial court to make all five of the following enumerated findings of fact supported by clear, cogent, and convincing evidence before future review hearings may be waived.

> (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 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. Gen. Stat. § 7B-906.1(n) (2019).

¶ 54 "The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n) [and its] failure to do so constitutes reversible error." *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015) (citation omitted). This Court has previously held that strict compliance with these statutory provisions is mandatory before a trial court may discontinue and waive review hearings. *In re K.L.*, 254 N.C. App. 269, 284, 802 S.E.2d 588, 598 (2017).

¶ 55 Mother argues the trial court only addressed: (1) Scottie's placement is in the care of his aunt for more than a year; and, (5) Scottie's guardian is a relative. I concur with the majority's opinion that the trial court failed to address N.C. Gen. Stat. § 7B-906.1(n) prongs (3) and (4). The trial court failed to make the required findings to support waiver of further review hearings. The proper mandate in the absence of the required findings is to vacate and remand. *See id.*

IV. Conclusion

¶ 56 I concur with the majority's opinion that both issues of adjudication and disposition are properly before this Court. I also concur with the majority's conclusion finding of fact 15(d) about Scottie's purported exposure to sexual behavior "during the time that he was with his parents" is not supported by clear and convincing evidence, and the trial court's disposition order is silent on the third and fourth statutory criteria and must be vacated and remanded for additional findings regarding review hearings.

¶ 57 The trial court failed to make the threshold conclusion of unfitness or conduct inconsistent with parental rights to cease reunification. Further, the trial court failed to find clear and convincing evidence to support the findings and conclusions for adjudication, prior to proceeding to any "best interests" analysis in disposition.

¶ 58 The trial court failed to comply with the statute's mandatory findings of all factors to grant guardianship to a third-party. The orders are properly vacated and remanded. I respectfully concur in part and dissent in part.

JACKSON v. HOME DEPOT, U.S.A., INC.

[276 N.C. App. 349, 2021-NCCOA-95]

GEORGE W. JACKSON, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,
THIRD-PARTY PLAINTIFF
v.
HOME DEPOT, U.S.A., INC. AND CAROLINA WATER SYSTEMS, INC.,
THIRD-PARTY DEFENDANTS

No. COA20-313

Filed 6 April 2021

1. Arbitration and Mediation—third-party beneficiaries—authority to compel arbitration—credit card agreement

In an action to collect the unpaid balance on a store credit card that was used to purchase a water treatment system, which resulted in a third-party class action, the trial court properly concluded that a third-party defendant (Home Depot) was not entitled to compel arbitration as to the purchaser's claims where Home Depot was not a third-party beneficiary of the credit card agreement (between the purchaser and the bank) containing an arbitration clause. The express language of the agreement between Home Depot and the purchaser stated that Home Depot was not a party to separate financing agreements, and the card agreement itself did not give Home Depot authority to compel arbitration.

2. Arbitration and Mediation—equitable estoppel—not party to contract—claims not arising from contract

In an action to collect the unpaid balance on a store credit card that was used to purchase a water treatment system, which resulted in a third-party class action, the trial court properly concluded that a third-party defendant (Home Depot) was not entitled to compel arbitration as to the purchaser's claims where, even assuming the issue of equitable estoppel was preserved for appellate review, the purchaser's claims did not arise from any alleged violations of the credit card agreement and he was not seeking a direct benefit from the provisions of the credit card agreement.

3. Arbitration and Mediation—denial of motion—findings of fact—agreement to arbitrate—credit card agreement

In an action to collect the unpaid balance on a store credit card that was used to purchase a water treatment system, which resulted in a third-party class action, the Court of Appeals rejected a third-party defendant's (Home Depot) argument that the trial court erred by failing to make findings of fact regarding the store credit card agreement when it denied Home Depot's motion to dismiss or

stay in favor of arbitration. Although it was in the "Conclusions of Law" section of the order, the trial court did make a finding that Home Depot was not a party to the store credit card agreement.

4. Contracts—novation—purchase and installation agreements —plain language

In an action to collect the unpaid balance on a store credit card that was used to purchase a water treatment system, which resulted in a third-party class action, when the trial court denied a third-party defendant's (Home Depot) motion to dismiss or stay in favor of arbitration, there was sufficient evidence to support its conclusion that a novation had occurred upon execution of an agreement that was signed when the water system was installed (which contained no arbitration clause), superseding a previous agreement signed upon purchase of the water system (which contained an arbitration clause)—based on the plain language of the installation agreement.

Appeal by third-party defendant Home Depot, U.S.A., Inc., from order entered 21 October 2019 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 March 2021.

Whitfield Bryson LLP, by Daniel K. Bryson, Scott C. Harris, and J. Hunter Bryson, for third-party plaintiff-appellee.

Erwin, Bishop, Capitano, & Moss, P.A., by Lex M. Erwin, and King & Spalding LLP, by S. Stewart Haskins, pro hac vice, for third-party defendant-appellant Home Depot, U.S.A., Inc.

ZACHARY, Judge.

¶ 1 Third-Party Defendant Home Depot, U.S.A., Inc. ("Home Depot") appeals from an order denying its motion to dismiss or stay in favor of arbitration. After careful review, we affirm the trial court's order.

Background

¶ 2 In July 2014, Third-Party Plaintiff George W. Jackson entered into agreements with Third-Party Defendants Carolina Water Systems, Inc. ("CWS") and Home Depot for the purchase and installation of a water-treatment system. The events leading up to these agreements form the basis of Jackson's complaint in this case. However, the issue before us on appeal is Home Depot's attempt to enforce an arbitration agreement that it asserts applies to Jackson's claims. Without addressing the underlying merits of Jackson's claims, we first describe the

various agreements at issue in this case before describing the procedural history.

I. The Agreements

A. The CWS Purchase Agreement

¶ 3 On 24 July 2014, Jackson and a CWS representative executed an agreement ("the CWS Purchase Agreement") that described the water-treatment equipment being sold and setting its price. The CWS Purchase Agreement contained an arbitration clause, which provided in pertinent part:

> THIS CONTRACT CONTAINS A BINDING AGREEMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT. . . . Any controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration in Charlotte, North Carolina in accordance with the rules and laws of the State of North Carolina.

The next day, the water-treatment equipment was installed at Jackson's home.

B. The Home Depot Agreement

¶ 4 On 6 August 2014, Jackson and John Blum, the President of CWS, executed a document entitled "Home Improvement Agreement: Approval of Completed Installation" ("the Home Depot Agreement"). Blum signed the document above a signature line that read: "Professional/Authorized Representative on Home Depot's Behalf." The Home Depot Agreement contained a merger clause, which provided in pertinent part:

> You understand this Agreement constitutes the entire understanding between You and Home Depot and may only be amended by a Change Order signed by Home Depot (or by Installation Professional or its authorized representative on Home Depot's behalf) and You. *This Agreement expressly supersedes all prior written or verbal agreements or representations made by Home Depot, Installation Professional, You, or anyone else.* Except as set forth in this Agreement, You agree there are no oral or written representations or inducements, express or implied, in any way

> conditioning this Agreement, and You expressly disclaim their existence.

(Emphasis added).

¶ 5 The Home Depot Agreement also provided for a separate financing agreement, while explicitly stating that Home Depot would not be a party to such an agreement:

> If You are financing this transaction in whole or in part, *Your separate loan agreement (to which Home Depot is NOT a party)* will determine: (i) the amount financed (the amount of credit provided to You); (ii) the associated finance charges (the dollar amount the loan will cost You); and (iii) the total payment (the amount You will have paid when You have made all scheduled payments). You will be further subject to Your loan agreement's terms and conditions.

(Emphasis added).

¶ 6 The Home Depot Agreement did not contain any language regarding arbitration.

C. The Card Agreement

¶ 7 At some point, Jackson entered into an agreement ("the Card Agreement") with Citibank, N.A. ("Citibank") to open an account for a Home Depot-branded credit card. The parties do not contend that Home Depot was a signatory to the Card Agreement.

¶ 8 The Card Agreement provided that "[f]ederal law and the law of South Dakota, where we are located, govern the terms and enforcement of this Agreement."[1] It also included an arbitration clause, stating that "[e]ither you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us[.]"

¶ 9 The Card Agreement further stated that the claims subject to arbitration include "[n]ot only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us

1. We note that Jackson claims that "Home Depot failed to meet its burden of proving that [he] in fact agreed to the Citibank Cardholder Agreement and its arbitration clause." However, under South Dakota law, "use of an accepted credit card . . . creates a binding contract between the card holder and the card issuer[.]" S.D. Codified Laws § 54-11-9 (2019). Here, it is undisputed that Jackson used the card to purchase the water-treatment system.

or you, such as a co-applicant or authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy." Various terms are specifically defined: the terms "***we***, ***us***, and ***our*** mean Citibank," and the terms "***you***, ***your***, and ***yours*** mean the person who applied to open the account. It also means any other person responsible for complying with this Agreement."

II. Procedural History

¶ 10 On 9 June 2016, Citibank filed suit against Jackson in Mecklenburg County District Court seeking, *inter alia*, to collect the unpaid balance due on the Home Depot credit card. On 26 August 2016, Jackson filed his answer, in which he generally denied Citibank's allegations, asserted various affirmative defenses, brought a class action counterclaim against Citibank, and brought third-party class action claims against Home Depot and CWS. Jackson's third-party class action claims against Home Depot and CWS arose from alleged violations of the North Carolina statutes prohibiting referral sales and unfair or deceptive trade practices.

¶ 11 Thereafter, on 23 September 2016, Citibank voluntarily dismissed its claims against Jackson.

¶ 12 On 12 October 2016, Home Depot filed notice of removal of Jackson's third-party suit from state court to the United States District Court for the Western District of North Carolina. Sixteen days later, Home Depot filed a motion in federal court to dismiss Jackson's claims or, in the alternative, to stay Jackson's claims in favor of arbitration.

¶ 13 On 8 November 2016, Jackson filed a motion in the federal court to remand the case to the state court. On 2 December 2016, Home Depot filed another motion in federal court to dismiss or stay in favor of arbitration. On 21 March 2017, the federal district court entered its order granting Jackson's motion and remanding the case to Mecklenburg County Superior Court. Home Depot appealed the remand order to the United States Court of Appeals for the Fourth Circuit, which affirmed the federal district court's order on 22 January 2018. *Jackson v. Home Depot U.S.A.*, 880 F.3d 165 (4th Cir. 2018).

¶ 14 On 23 April 2018, Home Depot filed a petition for writ of certiorari with the United States Supreme Court, seeking review of the Fourth Circuit's ruling. Meanwhile, while the matter was on remand in Mecklenburg County Superior Court, on 10 May 2018, Home Depot and CWS filed a new motion to dismiss or stay in favor of arbitration. The

United States Supreme Court granted Home Depot's petition for writ of certiorari on 27 September 2018, and on 28 May 2019, it issued an opinion affirming the Fourth Circuit's ruling. *Home Depot U.S.A., Inc. v. Jackson*, ___ U.S. ___, 204 L. Ed. 2d 34, *reh'g denied*, ___ U.S. ___, 204 L. Ed. 2d 1172 (2019).

¶ 15 On 19 June 2018, the Chief Justice of the North Carolina Supreme Court designated this matter as an "exceptional civil case" pursuant to Rule 2.1 of the General Rules of Practice, and assigned the Honorable Forrest D. Bridges to preside over the case.

¶ 16 On 6 September 2019, Home Depot and CWS's motion to dismiss or stay in favor of arbitration came on for hearing before Judge Bridges in Mecklenburg County Superior Court. On 21 October 2019, the trial court entered its order denying the motion. Home Depot filed its notice of appeal on 20 February 2020.[2]

Appellate Jurisdiction

¶ 17 As a preliminary matter, the trial court's order denying Home Depot's motion to dismiss or stay in favor of arbitration is interlocutory "because it does not determine all of the issues between the parties and directs some further proceeding preliminary to a final judgment." *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). "Ordinarily, interlocutory orders are not immediately appealable." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354, 826 S.E.2d 567, 571, *disc. review denied*, 373 N.C. 253, 835 S.E.2d 446 (2019). However, this Court has previously determined that an appeal from an order denying arbitration, although interlocutory, "is immediately appealable because it involves a substantial right . . . which might be lost if appeal is delayed." *Pressler v. Duke Univ.*, 199 N.C. App. 586, 590, 685 S.E.2d 6, 9 (2009) (citation omitted). Accordingly, the interlocutory nature of the trial court's order denying the motion does not deprive this Court of jurisdiction to reach the merits of this appeal.

¶ 18 Also at issue is the timeliness of Home Depot's notice of appeal. Home Depot filed its notice of appeal three months after the trial court entered the order from which Home Depot appeals. In its notice of appeal, Home Depot asserts that "[t]hrough some inadvertent error, the parties did not receive" the trial court's order until the court notified the parties of the order by email on 22 January 2020. The record in this appeal contains no certificate of service of the superior court's order.

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2. CWS did not join Home Depot's appeal of the trial court's order.

¶ 19 Nonetheless, Home Depot's notice is sufficient to confer jurisdiction on this Court. It is well settled that the appellee must establish that the notice of appeal was untimely where the record on appeal contains no certificate of service:

> Although this notice ordinarily would be untimely under N.C. R. App. P. 3(c), where there is no certificate of service in the record showing *when* [the] appellant was served with the trial court judgment, [the] *appellee* must show that [the] appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal.

In re Duvall, 268 N.C. App. 14, 17, 834 S.E.2d 177, 180 (2019) (citation and internal quotation marks omitted). "[U]nless the appellee argues that the appeal is untimely, and offers proof of actual notice, we may not dismiss." *Id.* (citation omitted).

¶ 20 In the instant case, Jackson does not argue that the appeal is untimely, nor does he offer proof of actual notice or service more than 30 days prior to Home Depot's filing of its notice of appeal. Thus, Home Depot's appeal is properly before us. *See id.*

Discussion

¶ 21 On appeal, Home Depot argues that the trial court erred in denying its motion to dismiss or stay in favor of arbitration. Home Depot claims that the trial court erred by (1) concluding that Home Depot was not entitled to enforce the arbitration agreement found in the Card Agreement, either as a third-party beneficiary or under the doctrine of equitable estoppel; (2) failing to make findings of fact regarding the Card Agreement; and (3) concluding that a novation occurred upon execution of the Home Depot Agreement.

I. Existence of an Arbitration Agreement

¶ 22 Of the various contracts at issue in this case, the Home Depot Agreement is the only one to which Home Depot is a signatory, and the Home Depot Agreement does not contain an arbitration clause. Nevertheless, Home Depot argues that it is entitled to enforce the arbitration agreement found in the Card Agreement, either as a third-party beneficiary or under the doctrine of equitable estoppel.

A. Standard of Review and Applicable Legal Principles

¶ 23 "North Carolina has a strong public policy favoring the settlement of disputes by arbitration." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). "However, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. . . . The party seeking arbitration bears the burden of proving the parties mutually agreed to the arbitration provision." *King v. Owen*, 166 N.C. App. 246, 248, 601 S.E.2d 326, 327 (2004) (citation and internal quotation marks omitted).

¶ 24 On appeal, findings of fact made by the trial court are binding upon the appellate court in the absence of a challenge to those findings. *Id.* "The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The 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." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citations and internal quotation marks omitted). "The question of whether a dispute is subject to arbitration is an issue for judicial determination. A trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law," which this Court reviews de novo. *Pressler*, 199 N.C. App. at 590, 685 S.E.2d at 9 (citation omitted).

¶ 25 The determination of whether a particular dispute is subject to arbitration "involves 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." *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580 (citation and internal quotation marks omitted).

¶ 26 The first step of this analysis—whether the parties had a valid agreement to arbitrate—is the issue presented in this case.

B. Third-Party Beneficiary Status

¶ 27 **[1]** Home Depot first argues that under South Dakota law, it is a third-party beneficiary of the Card Agreement. We disagree.

¶ 28 "Under South Dakota law, a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." *Jennings v. Rapid City Reg'l Hosp., Inc.*, 802 N.W.2d 918, 921 (S.D. 2011) (citation and internal quotation marks omitted). "This does not, however, entitle every person who received

some benefit from the contract to enforce it." *Sisney v. State*, 754 N.W.2d 639, 643 (S.D. 2008) (emphasis added). South Dakota law "requires that *at the time the contract was executed*, it was the contracting parties' intent to *expressly* benefit the third party. And, even then, not all beneficiaries qualify: incidental beneficiaries are not entitled to third-party beneficiary status." *Id.*; *accord Jennings*, 802 N.W.2d at 922 ("The terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member." (citation omitted)). In this respect, South Dakota law is substantively in accord with North Carolina law. *See, e.g.*, *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336, 641 S.E.2d 721, 723 ("It is not enough that the contract, in fact, benefits the third party, if, when the contract was made, the contracting parties did not intend it to benefit the third party directly."), *disc. review denied*, 361 N.C. 430, 648 S.E.2d 844 (2007).

¶ 29 In the present case, Home Depot argues that the trial court erred by declining to enforce the arbitration clause of the Card Agreement, as requested by Home Depot. The trial court explained that "as the express language of the Home Depot Agreement provides, Home Depot is not a party to separate financing agreements. [Thus], . . . any separate loan or financing agreement between only Mr. Jackson and CitiBank does not serve as an agreement to arbitrate between *the parties to this action*."

¶ 30 In response, Home Depot asserts that, by its own terms, the arbitration clause of the Card Agreement covers "[c]laims made by or against anyone connected with us or you or claiming through us or you," and that this language authorizes it to compel arbitration in this case. Home Depot further argues that Jackson's "decision to bring Home Depot into the action that Citibank initiated under the Card Agreement leaves no doubt that [Jackson] himself saw Home Depot as 'connected with' Citibank for purposes of the Card Agreement and [Jackson]'s transaction."

¶ 31 However, by its own terms, the Card Agreement does not provide Home Depot with the authority to compel arbitration. In *White v. Sunoco, Inc.*, 870 F.3d 257 (3d Cir. 2017), the United States Court of Appeals for the Third Circuit analyzed a similar argument regarding identical language in another Citibank credit-card agreement. Although *White* is not binding authority on this Court, we are nevertheless persuaded by the Third Circuit's analysis and adopt its reasoning here.

¶ 32 The plaintiff in *White* sued Sunoco, alleging fraud on behalf of a putative class, and Sunoco similarly sought to enforce an arbitration agreement contained in a Citibank card agreement to which it was not a signatory. *Id.* at 259. The Third Circuit rejected Sunoco's argument:

> Sunoco's argument fails because it confuses the nature of the *claims covered by the arbitration clause* with the question of *who can compel arbitration*. Even if Sunoco is "connected" with Citibank and the claims against Sunoco are covered claims, that does not give Sunoco the right to elect to arbitrate against White. The arbitration clause of the Cardholder Agreement establishes unequivocally that "[e]ither you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called 'Claims')." Moreover, the clause also provides, "At any time you or we may ask an appropriate court to compel arbitration of Claims." The Cardholder Agreement defines "you" as the card holder and "we" and "us" as Citibank. Nowhere does the agreement provide for a third party, like Sunoco, the ability to elect arbitration or to move to compel arbitration.

Id. at 267–68 (emphases added) (citations omitted).

¶ 33 The arbitration clause of the Citibank agreement in *White* contained the same "anyone connected with us" language regarding claims covered by the arbitration clause as does the Card Agreement at issue in this case. *Id.* at 261. The Card Agreement at issue here contains the same pertinent language as the arbitration clause in *White*, including the definitions and the statements as to who may compel arbitration. Although not binding authority, we find *White* to be directly on point and persuasive. The Card Agreement does not provide Home Depot with the authority to compel arbitration.

¶ 34 Home Depot also argues that the trial court erred by ignoring that (1) Jackson entered into the Card Agreement "for the sole purpose of purchasing his water treatment system"; (2) the Card Agreement "is replete with references to Home Depot"; and (3) Jackson "agreed to allow Citibank to share information with Home Depot about [his] transaction history and experiences with the credit card." Home Depot asserts that, taken together, these considerations "compel the conclusion that the Card Agreement was intended to benefit Home Depot."

¶ 35 These assertions are meritless. Again, we find *White* persuasive. Sunoco presented a similar argument before the Third Circuit, which was "skeptical of whether the joint marketing campaign between Sunoco and Citibank could make Sunoco a 'connected' entity under the

arbitration clause." *Id.* at 268. The card agreement in *White* again contained identical language to the Card Agreement at issue here, providing that arbitration could be invoked for any claims "made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant or authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy." *Id.*

¶ 36 The Third Circuit concluded that Sunoco was not intended to be a third-party beneficiary of the card agreement, particularly with regard to the arbitration clause:

> [N]one of these enumerated relationships apply to Sunoco, and Sunoco is not even mentioned in the Cardholder Agreement. Additionally, while the enumerated items are preceded by "such as," the relationships listed evoke far closer connections—ones where rights and obligations are intertwined and where liability may be shared—than the one that Sunoco purports to have with Citibank in this case. The clause read in context suggests that the parties did not intend for it to govern an entity with merely a marketing relationship with Citibank.

Id.

¶ 37 While Home Depot attempts to distinguish *White* by noting that it is mentioned throughout the Card Agreement in this case, that is a distinction without a difference; with the sole exception of the term allowing Citibank to share transaction history with Home Depot, every reference to Home Depot is merely an identification of the branded credit card. These references to the name of the card, with the isolated support of the transaction-history term, do not provide a sufficient "rationale for why its marketing agreement with Citibank confers on it a close enough relationship to merit coverage by this clause." *Id.*

¶ 38 Competent evidence in the record supports the trial court's conclusion that Home Depot was not a third-party beneficiary of the Card Agreement. The trial court's conclusion is thus binding on appeal. *See Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580. Home Depot's argument is overruled.

C. Equitable Estoppel

¶ 39 **[2]** Home Depot also argues that Jackson is equitably estopped from claiming that Home Depot cannot compel arbitration under the Card

Agreement. We first note that Jackson maintains that Home Depot did not raise this argument before the trial court and asserts that it cannot argue it for the first time on appeal. Home Depot responds that it "did argue equitable estoppel before the trial court in both its briefing and proposed order on the arbitration motion[,]" but that Jackson "refused to consent to including the parties' motion briefing in the record on appeal."

¶ 40 Under Rule 11 of the North Carolina Rules of Appellate Procedure, the appellant bears the burden of settling the record on appeal. Where one party objects to the inclusion of an item or items in the record on appeal, "then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in a volume captioned 'Rule 11(c) Supplement to the Printed Record on Appeal[.]' " N.C. R. App. P. 11(c). Home Depot did not file a Rule 11(c) Supplement in this appeal, so we are unable to definitively discern whether it argued the issue of equitable estoppel at the trial court below. However, even assuming that this issue is properly before us, equitable estoppel does not apply to the case at bar.

¶ 41 Home Depot argues before this Court that equitable estoppel is "a doctrine which prevents a party from asserting a right that he otherwise would have had against another when his conduct would make the assertion of those rights contrary to equity." *LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542, 548, 548 S.E.2d 574, 579 (2001) (citation and internal quotation marks omitted). However, in *LSB* and the other authorities cited by Home Depot, the courts applied the doctrine of equitable estoppel where a signatory to a contract containing an arbitration clause sought to enforce the clause against a non-signatory that was claiming that other provisions of the contract should be enforced to its benefit. *Id.* at 548–49, 548 S.E.2d at 579; *see also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). These cases are inapposite in the factual setting of the case at bar, in which Home Depot is seeking to enforce an arbitration clause in an agreement to which it was not itself a signatory.

¶ 42 In contrast to the cases cited by Home Depot, in which a plaintiff seeks to avoid arbitration while suing to enforce other provisions of the same contract that provides for the authority to compel arbitration, here, Jackson's claims all arise from alleged violations of North Carolina's statutes prohibiting referral sales and unfair or deceptive trade practices—Jackson's claims do not arise from any alleged violation of the terms or conditions of the Card Agreement, and he does not seek to enforce any provision of the Card Agreement. Therefore, because Jackson is "not

seeking a direct benefit from the provisions of the [Card Agreement], we conclude that the doctrine of equitable estoppel cannot be used to force [him] to arbitrate" his claims. *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 322–23, 615 S.E.2d 729, 733 (2005), *cert. and disc. review denied*, 360 N.C. 575, 635 S.E.2d 430 (2006); *see also White*, 870 F.3d at 265 ("[E]ven if the Card Agreement contained entirely different terms—for example, about the interest rate, credit limit, billing address, annual membership fee, foreign transaction fees, payment schedules, credit reporting rules, or even the arbitration agreement—that would not have any bearing on the validity of White's claims against Sunoco regarding its allegedly fraudulent promise . . . . Accordingly, White cannot be required to arbitrate based on the Card Agreement[.]").

¶ 43 Thus, assuming that this issue is properly before us, Home Depot has not shown that Jackson is equitably estopped from arguing that Home Depot cannot compel arbitration under the Card Agreement. Home Depot's argument is overruled.

II. Findings of Fact

¶ 44 **[3]** We next address Home Depot's argument that the trial court erred by failing to make findings of fact regarding the Card Agreement. We disagree.

¶ 45 "This Court has repeatedly held that an order denying a motion to compel arbitration must include findings of fact as to whether the parties had a valid agreement to arbitrate and, if so, whether the specific dispute falls within the substantive scope of that agreement." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012) (citation and internal quotation marks omitted); *accord United States Tr. Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 290, 681 S.E.2d 512, 514 (2009) ("This Court has stressed repeatedly that, in making this determination, the trial court must state the basis for its decision in denying a defendant's motion to stay proceedings pending arbitration in order for this Court to properly review whether or not the trial court correctly denied the defendant's motion." (citation and internal quotation marks omitted)). "When a trial court fails to include findings of fact in its order, this Court has repeatedly reversed and remanded to the trial court for a new order containing the requisite findings." *Cornelius*, 224 N.C. App. at 16–17, 734 S.E.2d at 871.

¶ 46 However, it is well settled that "[t]he 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). "Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. On the other hand, any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (citations and internal quotation marks omitted).

¶ 47 The trial court did not make any findings of fact concerning the Card Agreement within the "Findings of Fact" section of its order, but it did make a finding of fact concerning that Agreement in its "Conclusions of Law" section:

> The Court also notes Third-Party Defendants' contention that an arbitration provision in a CitiBank credit card agreement is a basis for their motion to compel arbitration; *however*, *as the express language of the Home Depot Agreement provides*, *Home Depot is not a party to separate financing agreements*.

(Emphasis added). The italicized language is more properly described as a "determination reached through logical reasoning from the evidentiary facts" than one "requiring the exercise of judgment or the application of legal principles[.]" *Id.* (citation and internal quotation marks omitted). Thus, Home Depot is not correct that the trial court made no findings of fact regarding the Card Agreement.

¶ 48 Further, we note that *Cornelius*, and the cases it cites, stand for the proposition that "an order denying a motion to compel arbitration must include findings of fact as to *whether the parties had a valid agreement to arbitrate*[.]" 224 N.C. App. at 16, 734 S.E.2d at 871 (emphasis added) (citation and internal quotation marks omitted). Although it may not contain the findings of fact that Home Depot preferred, the trial court's order nevertheless satisfied this mandate. Our precedent does not compel us to reverse and remand to the trial court for the entry of further findings of fact as to a separate and distinct agreement that the trial court properly concluded did not govern "*the parties to this action*." Home Depot's argument is overruled.

III. Novation

¶ 49 **[4]** Lastly, Home Depot argues that the trial court erred in concluding that a novation occurred upon execution of the Home Depot Agreement, thereby extinguishing the CWS Purchase Agreement. We disagree.

¶ 50 "A novation is the substitution of a new contract for an old one which is thereby extinguished." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 98, 834 S.E.2d 404, 412 (2019) (citation omitted). "The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract." *Id.* (citation omitted). Whether a novation occurred is a question of law, which this Court reviews de novo. *See Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 269, 598 S.E.2d 393, 395 (2004).

¶ 51 Our Supreme Court has explained that, in determining whether a novation has occurred,

> the intent of the parties governs. If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

Intersal, 373 N.C. at 98–99, 834 S.E.2d at 412 (citation omitted).

¶ 52 As regards this issue, the trial court determined:

> 4. Although CWS and Mr. Jackson entered into the initial CWS Purchase Agreement on July 25, 2014, the parties to this action agreed to the Home Depot Agreement on August 6, 2014.
>
> 5. The plain language on the face of the Home Depot Agreement makes it clear that the parties expressly intended for the Home Depot Agreement to supersede the CWS Purchase Agreement.
>
> 6. Moreover, the Home Depot Agreement deals with the subject matter of the CWS Purchase Agreement so comprehensively as to be complete within itself.
>
> 7. The CWS Purchase Agreement was therefore extinguished upon the execution of the Home Depot Agreement and, accordingly, the Home Depot

> Agreement is the sole, operative agreement between the parties to this action.
>
> 8. As a result, because the Home Depot Agreement does not contain an arbitration clause, the Court concludes that no agreement to arbitrate exists between the parties to this action.

¶ 53 Home Depot argues that the trial court erred because "Home Depot was not a party to the [CWS] Purchase Agreement, and CWS was not a party to the Home [Depot] Agreement." However, John Blum—the President of CWS—signed the Home Depot Agreement on a signature line labeled "Professional/Authorized Representative on Home Depot's Behalf." This alone is competent evidence to support the trial court's findings, and eventual conclusion, that a novation occurred.

¶ 54 Home Depot also argues that the Home Depot Agreement "does not even reference the [CWS] Purchase Agreement, much less demonstrate an intent to 'supersede' it." However, this contention is meritless, as the explicit language of the Home Depot Agreement's merger clause supports the trial court's conclusion:

> [T]his Agreement constitutes the entire understanding between You and Home Depot and may only be amended by a Change Order signed by Home Depot (or by Installation Professional or its authorized representative on Home Depot's behalf) and You. *This Agreement expressly supersedes all prior written or verbal agreements or representations made by Home Depot*, *Installation Professional*, *You*, *or anyone else.*

(Emphasis added).

¶ 55 On the same page, the Home Depot Agreement defines "Installation Professional" as "an independent contractor authorized by Home Depot (licensed and insured as required by Home Depot and applicable law) and the contractor's employees, agents and subcontractors." Indeed, in an unchallenged finding of fact—which is thus binding on appeal, *King*, 166 N.C. App. at 248, 601 S.E.2d at 327—the trial court noted that "CWS is the 'Installation Professional' or 'Professional' as defined in the Home Depot Agreement."

¶ 56 Accordingly, there is sufficient evidence to support the trial court's conclusion that the Home Depot Agreement, by its own terms, expressly superseded the CWS Purchase Agreement. Home Depot's argument is overruled.

Conclusion

¶ 57 For the foregoing reasons, the trial court did not err by denying Home Depot's motion to dismiss or stay in favor of arbitration. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges WOOD and JACKSON concur.

DALE LUNSFORD, Plaintiff
v.
DAVID K. TEASLEY, Defendant

No. COA20-436

Filed 6 April 2021

Civil Procedure—commencement of action following voluntary dismissal—Civil Procedure Rule 3(a)—issuance of summons required

The trial court properly dismissed plaintiff's second complaint, which was filed more than a year after plaintiff took a voluntary dismissal without prejudice of his original action pursuant to Civil Procedure Rule 41(a)(1), where there was no indication a summons was issued in accordance with Rule 3(a) prior to plaintiff obtaining a twenty-day extension of time to file a complaint.

Appeal by Plaintiff from Order entered 27 January 2020 by Judge Orlando F. Hudson, Jr. in Person County Superior Court. Heard in the Court of Appeals 9 March 2021.

Paulina Y. Lopez for plaintiff-appellant.

David K. Teasley, pro se, defendant-appellee.

MURPHY, Judge.

¶ 1 A civil action is "commenced" only through the procedures set out in Rule 3 of our Rules of Civil Procedure. Regardless of an intervening expiration of the statute of limitations, when a party voluntarily dismisses a claim without prejudice, "a new action based on the same claim

may be commenced within one year after such dismissal." N.C.G.S. § 1A-1, Rule 41(a)(1) (2019). Under Rule 3(a), there are two methods available to a party to commence the new action. First, the party may commence an action "by filing a complaint with the court." N.C.G.S. § 1A-1, Rule 3(a) (2019). Second, the new civil action may be commenced by the issuance of a summons and a trial court's grant of a twenty-day extension to file the complaint, which tolls the statute of limitations and/or expiration of the Rule 41(a)(1) extension. N.C.G.S. § 1A-1, Rule 3(a) (2019); *Goodman v. Living Ctrs.-Se., Inc.*, 234 N.C. App. 330, 335, 759 S.E.2d 676, 680 (2014). Here, because neither method of commencing a suit occurred before the expiration of one year, the trial court properly dismissed the action.

¶ 2 Plaintiff Dale Lunsford appeals from an order granting Defendant David Teasley's motion to dismiss his *Complaint* as untimely. Lunsford commenced his original action on 14 November 2017. On 26 September 2018, Lunsford gave notice of his voluntary dismissal without prejudice in accordance with Rule 41(a)(1). N.C.G.S. § 1A-1, Rule 41(a)(1) (2019). Almost one year later, on 24 September 2019, Lunsford requested the issuance of an order extending his time to file a complaint pursuant to Rule 3(a)(1) from the Clerk of Person County. N.C.G.S. § 1A-1, Rule 3(a)(1) (2019). The clerk purported to grant a twenty-day extension pursuant to Rule 3(a)(2). N.C.G.S. § 1A-1, Rule 3(a)(2) (2019). However, the Record does not demonstrate a summons was issued to commence the new action, and Lunsford makes no argument a summons was issued as required by Rule 3(a)(1). N.C.G.S. § 1A-1, Rule 3(a)(1) (2019). Lunsford did not file his second *Complaint* in this action until 9 October 2019, over one year after his Rule 41(a)(1) extension.

¶ 3 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of [our] Rules of Civil Procedure is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). "Likewise, questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 594, 821 S.E.2d 711, 722 (2018) (internal citation and marks omitted).

¶ 4 "Where statutory language is clear and unambiguous, our Courts do not 'engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.' " *Edwards v. Morrow*, 219 N.C. App. 452, 455, 725 S.E.2d 366, 369 (2012) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)), *appeal dismissed, disc. rev. denied*, 366 N.C. 403, 737 S.E.2d 378 (2012). Rule 3(a) of our Rules of Civil Procedure provides two methods by which a civil action may be commenced:

> (a) A civil action is commenced *by filing a complaint* with the court. . . .
>
> A civil action may also be *commenced by the issuance of a summons* when
>
> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.
>
> The summons and the court's order shall be served in accordance with the provisions of Rule 4.

N.C.G.S. §1A-1, Rule 3(a) (2019) (emphasis added).

¶ 5 Lunsford commenced an action under the first method by filing a complaint on 9 October 2019, outside of the one-year period granted by Rule 41(a)(1). As a result, Lunsford could only have complied with the Rule 41(a)(1) one-year limitation by issuing a summons and receiving a twenty-day extension. However, nothing in the Record indicates a summons was ever issued. Applying the plain language of Rule 3(a), the *Application and Order Extending Time to File Complaint*, filed on 24 September 2019, did not commence a new action under the second method absent the issuance of a summons. The trial court did not err in dismissing the second *Complaint* as the new action was commenced on 9 October 2019 by the filing of the *Complaint*, after the expiration of the one-year period prescribed by Rule 41(a)(1).

AFFIRMED.

Judges TYSON and GORE concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER BALDWIN

No. COA20-17

Filed 6 April 2021

Homicide—first-degree murder—acting in concert—ambush of vehicle with another—sufficiency of evidence

The State presented sufficient evidence from which a jury could convict defendant of first-degree murder (based on lying in wait), attempted first-degree murder, and felony conspiracy to commit first-degree murder on the theory of acting in concert, where defendant's conduct—by meeting his friend an hour before the two of them assumed positions on opposite sides of a road where they knew a vehicle would be passing by, they each fired their guns numerous times at the vehicle, and one person was injured and another killed—gave rise to an inference that defendant and his friend acted in furtherance of a common plan to ambush and kill the victims.

Appeal by defendant from judgments entered 1 February 2019 by Judge Imelda Pate in Bladen County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco Benzoni, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

TYSON, Judge.

¶ 1 Christopher Baldwin ("Defendant") appeals from judgments entered after a jury returned verdicts of guilty of first-degree murder, attempted first-degree murder, and felony conspiracy to commit first-degree murder. We find no error.

I. Background

¶ 2 Montise Mitchell had engaged in a long-standing feud with the Council family. In March 2013, Montise, Antwan Council, and Antwan's cousin, Robert Council, worked together at a Smithfield Foods processing and packing plant. A supervisor asked Robert to assist a pregnant coworker with lifting meat. Montise, the putative father of the coworker's

unborn child, observed the interaction, and became angry with Robert for helping the coworker. Montise wanted to fight with Robert. Robert agreed to meet and fight Montise at a nearby gas station.

¶ 3 When Robert left work that evening, Montise, his father and brother, and several other people blocked Robert's car in the plant's parking lot with a truck and ambushed him. They assaulted Robert and injured him so badly he required medical attention. Smithfield's security officers were called to break up the affray. Montise was criminally prosecuted for the assault on Robert. Montise was ordered to pay restitution for Robert's medical bills.

¶ 4 Antwan called Robert several months after the fight and let Robert know Montise was visiting another cousin. Robert and Antwan drove over to their cousin's house and a fight ensued. As Antwan and Robert approached Montise, he reached for his waistband. Antwan restrained Montise by grabbing his arms. Robert hit Montise several times. No one reported this fight to the police.

¶ 5 On 8 November 2015, Montise's sister, Shanika Mitchell, and Montise's girlfriend, D'Nayza Downing, contacted Antwan to obtain marijuana. D'Nayza and Shanika traveled to Antwan's and his brother, Darrell Council's home. D'Nayza and Shanika returned to Montise and Shanika's mother's house for some time and later contacted Antwan again about getting together. Antwan and Darrell picked up the women sometime after 5:00 p.m. and returned to the Council home. The group sat outside for two hours in Darrell's SUV and smoked marijuana.

¶ 6 D'Nayza and Shanika texted Montise to set up Antwan to be ambushed while the group smoked in the car. Montise responded that he planned to shoot Antwan. He texted them he was "gonna do it" when Antwan and Darrell dropped D'Nayza and Shanika off. Montise later texted he would "do it" down the road somewhere from Montise and Shanika's mother's house.

¶ 7 Antwan and Darrell drove D'Nayza and Shanika back to Montise and Shanika's mother's house off Center Road shortly after 8:00 p.m., well after dark. Antwan told Shanika that he would see her later. Shanika responded, "You ain't got to worry about that."

¶ 8 The Council brothers left and drove back down Center Road. When they approached the intersection of Center Road and Twisted Hickory Road, they saw a man dressed in a black hoodie standing in the middle of the street. The man pulled a gun from his waistband and opened fire. Antwan recognized the shooter as Montise Mitchell, Shanika's brother.

¶ 9 Defendant was also present at the intersection and opened fire on Darrell's truck. Montise fired eight shots into Darrell's vehicle from the driver's side of the road. Defendant opened fire from the opposite side of the road. Defendant fired thirteen shots from the passenger's side of the road.

¶ 10 Antwan heard gunshots coming from both sides of the vehicle and ducked down in the backseat of the truck. The truck spun in the intersection. Antwan asked Darrell if he was okay. Darrell responded "no" and put his head down. The truck came to a stop in the ditch. Antwan rolled down the passenger window and crawled out. Antwan saw two men fleeing from the scene. Antwan also ran from the scene and called 911. Police responded to the scene of the shooting. Antwan was able to escape unharmed. Darrell was killed in the ambush.

¶ 11 Montise and Defendant were close friends, who were together six or seven days per week. Prior to the ambush, Montise and Defendant had driven around, before returning to Montise's and Shanika's mother's house. They had waited at the house for almost an hour prior to leaving for the ambush.

¶ 12 Montise and Defendant returned to Montise's and Shanika's mother's house a few minutes after the shooting. Montise had left a rental car at his mother's house. Defendant, Montise, Shanika, and D'Nayza drove together to a grocery store parking lot in Cameron. Montise gave the keys of the car to an unknown person in the parking lot. This person drove the car away. Montise's father and grandmother then picked them up and drove them away. Montise and the others in the car dropped D'Nayza off at her grandmother's house and left together.

¶ 13 During the investigation police found shell casings on both sides of the intersection. Forensic evidence showed bullets struck Darrell's vehicle on both sides. The driver's side was hit five times and the passenger's side was hit once. Montise was positioned on the driver's side of the vehicle at the intersection and fired eight times. Defendant was positioned on the passenger's side and fired thirteen times. Darrell's truck passed between the two shooters.

¶ 14 Lt. Johnson, the lead investigator with the Bladen County Sheriff's Office, interviewed D'Nayza. D'Nayza identified Defendant as a suspect. Lt. Johnson called Defendant's mother. Defendant returned Lt. Johnson's call and agreed to meet at his mother's house. Lt. Johnson arrested Defendant at his mother's house and transported him to the Lumberton police station. Lt. Johnson advised Defendant of his *Miranda* rights,

which he waived. Defendant told Lt. Johnson he was at home all day 8 November 2015 in a videotaped interview.

¶ 15 Defendant was transported to Bladen County and jailed. Defendant told Lt. Johnson he wished to speak to him again. Defendant was again advised of and waived his rights. Defendant admitted to Lt. Johnson that he had lied in his first interview. Defendant was present with Montise on 8 November 2015 at Montise and Shanika's mother's house for an hour prior to the shooting. Defendant admitted being present at the scene of the shooting, where he possessed and fired a gun. Defendant claimed he was firing reflexively and trying to protect himself. He heard gunshots, pulled his gun, and fired at an angle. Defendant said he did not know who was inside the vehicle.

¶ 16 Montise and Shanika were later apprehended in Robeson County with the assistance of the United States Marshals Service and the Robeson County Sheriff's Department.

¶ 17 Defendant was indicted for (1) first-degree murder of Darrell Council; (2) discharging a firearm into a vehicle while occupied and in operation; (3) attempted first-degree murder of Antwan Council; and (4) conspiracy to commit first-degree murder against Antwan Council. The case was tried and a jury returned guilty verdicts on all charges. Defendant was found guilty of first-degree murder on the basis of lying in wait and felony murder but acquitted on the basis of malice, premeditation and deliberation.

¶ 18 Judgment on the offense of discharging a firearm was arrested. The trial court sentenced Defendant to life without possibility of parole for the first-degree murder of Darrell, consolidated the other offenses and sentenced Defendant to an active sentence of 150 to 192 months to run at the expiration of the sentence for first-degree murder. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 19 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issue

¶ 20 Defendant argues since the State presented his exculpatory statement, which was otherwise consistent with the evidence, the State's evidence was insufficient to submit or support a conviction for first-degree murder, conspiracy to commit first-degree murder, and attempted first-degree murder.

IV. Defendant's Motion to Dismiss

A. Standard of Review

¶ 21 "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) (citations omitted).

¶ 22 "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Exculpatory Statement

¶ 23 Defendant argues his statement that after he heard gunshots being fired from the vehicle, he turned and pulled his gun and fired shots at an angle not aiming at the vehicle was exculpatory evidence and consistent with other evidence presented by the State. Defendant asserts the evidence is insufficient to show he acted in concert with Montise to murder Darrell.

¶ 24 Defendant's statement is inconsistent with the other evidence presented by the State. Defendant admitted: he was on the opposite side of the road during the shooting than Montise; had a gun at the scene of the shooting; fired the gun during the shooting; and, initially lied about his location during his first interview with the police. Forensic evidence showed Defendant fired the weapon thirteen times during the incident and both sides of the vehicle were hit by bullets. Defendant testified he spent an hour at Montise and Shanika's mother's house prior to the shooting and fled from the scene with Montise, Shanika, and D'Nayza.

C. First-Degree Murder

¶ 25 Our General Statutes define first-degree murder as: "A murder which shall be perpetrated by means of . . . lying in wait . . . shall be deemed to be murder in the first degree." N.C. Gen. Stat. § 14-17(a) (2019). A murder in which the perpetrator lies in wait and ambushes a victim in a private attack is also a first-degree murder. *State v. Grullon*, 240 N.C.

App. 55, 60, 770 S.E.2d 379, 383 (2015) (citing *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990)).

¶ 26 Under the felony-murder rule, the killing of a human being in the course of committing another felony with the use of a deadly weapon is also a first-degree murder. N.C. Gen. Stat. § 14-17; *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 70-71 (1982). This felony includes firing into an occupied vehicle while in operation with a deadly weapon. *Wall*, 304 N.C. at 612-13, 286 S.E.2d at 71 (citations omitted).

¶ 27 The State advanced the theory of Defendant acting in concert with Montise. "Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Calderon*, 242 N.C. App. 125, 135, 774 S.E.2d 398, 407 (2015) (citations and internal quotations omitted).

¶ 28 Under this theory, two or more persons, who joined together in a purpose to commit a crime, are responsible for the unlawful acts committed by the other person, so long as those acts are committed in furtherance of the crime's common purpose. *Id.* The State need not show Defendant in fact fired the bullet that killed Darrell, but that Defendant acted in concert with Montise to perform the killing. If Montise's actions met every element of first-degree murder, with Defendant acting in concert with Montise, Defendant is criminally liable for the murder of Darrell Council. *Id.*

¶ 29 Here, the State's evidence tends to show all elements of first-degree murder were met. Darrell was killed as the proximate cause of an assault with a deadly weapon by Montise and Defendant lying in wait and ambush. Darrell was killed when Montise and Defendant fired their guns into a vehicle occupied and in operation, a felony, as Darrell drove his vehicle on the public highways through the intersection of Center Road and Twisted Hickory Road.

¶ 30 The State's evidence tended to show Montise had a longstanding feud with the Council family. This feud predated the shooting by two years. Immediately prior to the shooting, Montise texted his sister, Shanika, and girlfriend, D'Nayza to set up an ambush in which he planned to kill the Council brothers. While Defendant was present, Montise texted Shanika and D'Nayza for several hours while they were with the Councils and shared his intent to kill the brothers.

¶ 31 The State's evidence also tended to show Montise and Defendant were close friends. They spent part of the day prior to the shooting

driving around together. They then spent over an hour at Montise's and Shanika's mother's house immediately prior to the shooting.

¶ 32 The evidence also tended to show this was a planned ambush. When the Council brothers drove up to the intersection, Montise was positioned in the center of the road, and then moved to one side as the Councils drove through the intersection. Defendant was positioned opposite Montise. Both fired their guns at the vehicle as Darrell drove it through the intersection. Montise and Defendant were positioned such that the SUV had to drive between them.

¶ 33 Montise fired eight shots; Defendant fired thirteen. The driver's side of the vehicle was hit five times. The passenger's side was hit once. A bullet fired through the driver side door dealt the fatal injury to Darrell.

¶ 34 After the shooting, Montise and Defendant fled from the scene together. They met with Shanika and D'Nayza, who had communicated with Montise to set up the ambush. Defendant, the Mitchells, and D'Nayza drove together to Cameron, where the rental car they rode in was disposed of. All four were picked up by Montise's father and grandmother and left together.

¶ 35 The jury was instructed on the theory of acting in concert. The State was required to present evidence tending to show all the elements of first-degree murder and that Montise and Defendant were acting according to a common scheme or plan. This evidence must have been sufficient to permit a reasonable juror to find, beyond a reasonable doubt, all elements of first-degree murder were met. This evidence must also be sufficient to permit a reasonable juror to conclude Montise and Defendant were acting in concert.

¶ 36 Here, the State's evidence is sufficient to present the charge of first-degree murder to the jury. The State provided sufficient evidence to show that Darrell was killed as the proximate cause of an assault with a deadly weapon, by Montise and Defendant lying in wait to ambush Darrell as he drove through the intersection. The State also provided sufficient evidence tending to show Darrell was killed when Montise and Defendant fired into his occupied and moving vehicle. Every element of the convicted theories of first-degree murder is attributable to Montise. Montise and Defendant's conduct during and following the shooting is sufficient for a reasonable juror to infer they were acting in concert. Defendant may be held responsible for Montise's felonious conduct made in furtherance of the common plan to ambush and kill Darrell. Defendant's argument is overruled.

D. Attempted First-Degree Murder

¶ 37 Defendant was also charged with the attempted first-degree murder of Antwan. Attempted first-degree murder is when a person has (1) the specific intent to kill another person unlawfully; (2) performs an overt act calculated to carry out that intent; (3) with malice, premeditation, and deliberation; (4) and fails to complete the intended killing. *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000) (citations omitted). As with the first-degree murder charge of Darrell, the State advanced a theory of acting in concert. *See Calderon*, 242 N.C. App. at 135, 774 S.E.2d at 407.

¶ 38 The State's proffered evidence sufficient to support a conviction of attempted first-degree murder overlaps, in part, with the evidence in supporting the first-degree murder of Darrell. Acting together, Montise and Defendant had the specific intent to kill Antwan. Montise's intent is evidenced by the text messages shared between Montise, his sister, and D'Nayza. Montise expressly states his intent to kill Antwan upon discovering Shanika and D'Nayza were with him and Darrell. Defendant's intent to assist Montise in the killing may be reasonably inferred by: Defendant spent a portion of the day immediately prior to the shooting with Montise, he was present at the shooting with Montise, fired his own gun at the scene of the shooting, fled the scene with Montise, rode with Montise while he disposed of his rental vehicle, and then continued riding with Montise after Montise's family dropped off D'Nayza.

¶ 39 Both Montise and Defendant performed an overt act to execute Montise's intent to kill Antwan. As Darrell drove himself and Antwan through the intersection, both Montise and Defendant opened fire in the direction of the Councils' vehicle. Evidence shows Montise fired eight shots, and Defendant thirteen shots.

¶ 40 Malice, deliberation, and premeditation may be shown by the evidence presented at trial. Montise texted his sister and D'Nayza while with Defendant. Montise expressly shared his desire to kill Antwan. Montise and Defendant spent the hour immediately prior to the shooting together at Montise's and Shanika's mother's house. Montise and Defendant were both positioned at the intersection of Center Road and Twisted Hickory Road. Both were armed and fired their weapons when Darrell and Antwan drove through the intersection.

¶ 41 While Darrell was killed in the shooting, Antwan miraculously escaped physical harm. The first-degree murder fell short of completion. The State's evidence tends to show Defendant attempted to kill Antwan. Construed in the light most favorable to the State, sufficient evidence

exists from which a reasonable jury could find and convict Defendant of being guilty of attempted first-degree murder. Defendant's argument is overruled.

E. Conspiracy to Commit First-Degree Murder

¶ 42 "The elements of conspiracy to commit murder are: (1) defendant entered into an agreement with at least one other person; and (2) the agreement was for an unlawful purpose, here, to commit or assist in committing [first-degree] murder." *State v. Jackson*, 189 N.C. App. 747, 754, 659 S.E.2d 73, 78 (2008) (citing *State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995)).

¶ 43 "Direct proof of [a conspiracy] is not essential . . . it 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. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (citation omitted).

¶ 44 As with the chargers discussed above, the State provided evidence that tended to show Montise and Defendant were close friends, often together for several days a week. They spent the day immediately prior to the shooting together. Montise communicated with his sister and D'Nayza to set up an ambush for the Council brothers that evening. Both Montise and Defendant were at the shooting; Defendant was positioned on the opposite side of the road from Montise. Defendant had a firearm.

¶ 45 Defendant fired his weapon thirteen times at Darrell's vehicle as it drove past. Defendant fled the scene of the shooting with Montise. Defendant rode with Montise while Montise's rental car was disposed of. Defendant got in a second vehicle and left with several members of the Mitchell family and D'Nayza. Later, Defendant lied to the police about his whereabouts on the day of the shooting.

¶ 46 Taken together, sufficient evidence exists for a juror to conclude beyond a reasonable doubt that Montise and Defendant acted in concert to kill Antwan, according to a common scheme or plan between them. A juror could reasonably infer that Montise and Defendant conspired and came to an agreement in which Defendant would help Montise carry out his intent to ambush and kill Antwan and Darrell. The State's evidence was sufficient to support the jury's finding of Defendant's guilt. Defendant's argument is overruled.

IV. Conclusion

¶ 47 The State's evidence tended to show Montise and Defendant acted together to murder Darrell, and pursuant to a conspiracy attempted to

murder Antwan. Under the theory of acting in concert, the State's evidence is sufficient to show the elements of each of the offenses charged, and Defendant was a perpetrator of each offense. The trial court did not err in denying Defendant's motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 651-52 (1982). *It is so ordered.*

NO ERROR.

Judges MURPHY and GORE concur.

STATE OF NORTH CAROLINA
v.
JAQUAN STEPHON GETER, DEFENDANT

No. COA20-706

Filed 6 April 2021

Probation and Parole—revocation—statutory requirements—finding of good cause

The revocation of defendant's probation was not an abuse of discretion where the trial court complied with N.C.G.S. § 15A-1344(f)(3) by making a finding that good cause existed to revoke probation, even though the probationary period had ended, and the finding was supported by evidence. Defendant had incurred new criminal charges which were not resolved during his probationary period and those charges would have had an impact on a later hearing of the probation violation, even though they were eventually dismissed.

Appeal by Defendant from judgments entered 15 July 2020 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State.

Jason Christopher Yoder for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Jaquan Stephon Geter appeals from judgments revoking his probation. Defendant argues that the trial court erred by finding

good cause to revoke his probation after the probationary period expired. Upon review, we affirm the trial court's ruling.

I. Factual and Procedural Background

¶ 2 On 29 August 2016, Defendant pled guilty to possession of a firearm by a felon, resisting a public officer, possession of a stolen motor vehicle, and eluding arrest with a motor vehicle. Pursuant to the plea arrangement, Defendant received a suspended sentence and was placed on 18 months of supervised probation, due to expire 28 February 2018.

¶ 3 In February 2018, Probation Officer Jenni Holste filed violation reports alleging, *inter alia*, that Defendant had been charged with possession of marijuana, possession of drug paraphernalia, maintaining a vehicle or dwelling place for keeping or selling controlled substances, and possession of a firearm by a felon. Defendant later filed a motion to suppress evidence with respect to the charges, which was granted on 22 February 2019. The State subsequently dismissed the charges.

¶ 4 On 4 April 2019, the trial court entered judgments revoking Defendant's probation based on the charges alleged in Officer Holste's violation reports. The revocation occurred approximately 399 days after Defendant's probationary period expired. Defendant then appealed to this Court.

¶ 5 On appeal, we remanded this matter to the trial court because the judgments revoking Defendant's probation did not indicate (1) which of the four alleged criminal offenses served as the basis for revoking Defendant's probation; and (2) whether good cause existed to revoke Defendant's probation after the probationary period expired. *State v. Geter*, 272 N.C. App. 222, 843 S.E.2d 489, 2020 WL 3251033, at *5 (2020) (unpublished).

¶ 6 This matter came on for rehearing on 15 July 2020 in Buncombe County Superior Court. At the conclusion of the hearing, the trial court found that good cause existed to revoke Defendant's probation after the probationary period expired because the charges forming the basis of the violations were not resolved before the probationary period ended. The trial court reasoned that the disposition of those charges "would have had a direct impact on the later hearing of the probation violation." The court then entered judgments revoking Defendant's probation. The judgments identified the specific criminal offenses that formed the basis of the revocation and included findings that "good cause exist[ed] to revoke Defendant's probation despite the expiration of his probationary period[.]" Defendant gave oral notice of appeal in open court.

II. Analysis

¶ 7 Defendant argues that the trial court erred by finding good cause to revoke his probation after it expired because "the 'good cause' found by the trial court failed as a matter of law[.]" We disagree.

¶ 8 "A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation[.]" *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and internal quotation marks omitted). "Accordingly, the decision of the trial court is reviewed for abuse of discretion." *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citation omitted).

¶ 9 N.C. Gen. Stat. § 15A-1344(f) provides in pertinent part:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> > (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
> >
> > (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
> >
> > (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

Id. § 15A-1344(f)(1)-(3) (2019).

¶ 10 Pursuant to subsection (f)(3), the trial court is required to make a "finding of good cause shown and stated to justify the revocation of probation even though the defendant's probationary term has expired." *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019) (internal quotation marks omitted). "[I]n the absence of [the] statutorily mandated factual finding[]" of good cause, "the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *Id.* at 617-18, 831 S.E.2d at 260 (citation and internal quotations marks omitted).

¶ 11 Although the trial court in the instant case did make the required factual finding of good cause, Defendant argues that this Court's deci-

sion in *State v. Sasek*, 271 N.C. App. 568, 844 S.E.2d 328 (2020), requires us to vacate the trial court's judgments revoking Defendant's probation. In *Sasek*, the trial court revoked the defendant's probation approximately "fourteen months after his probation expired" without making the required finding of good cause. *Id.* at 575, 844 S.E.2d at 334. Additionally, there was no evidence in the record to indicate that good cause existed to justify the untimely revocation. *Id.* This Court held that, when a trial court fails to make the required finding of good cause to revoke a defendant's probation after it has expired, the appropriate remedy on appeal is to vacate the trial court's judgment unless there is evidence in the record to indicate that good cause existed to justify the delay. *Id.* If the record contains evidence of good cause, however, "the case must be remanded so that proper findings can be made." *Id.* Because the trial court in *Sasek* failed to make a finding of good cause, and no evidence in the record indicated that good cause existed to justify the untimely revocation, this Court vacated the trial court's judgment revoking the defendant's probation. *Id.* at 576, 844 S.E.2d at 335.

¶ 12 We find the holding in *Sasek* inapplicable to the facts of the instant case. In *Sasek*, this Court only vacated the trial court's judgment after first holding that "the trial court erred *by not making the required finding that good cause existed* to revoke [the] [d]efendant's probation after his probation period had expired." *Id.* (emphasis added). Here, the trial court *did*, in fact, make the required finding of good cause under N.C. Gen. Stat. § 15A-1344(f)(3).

¶ 13 The trial court's finding of good cause is also supported by the facts in the record. At the conclusion of Defendant's revocation hearing, the trial court stated, "it is clear to the Court that the State waited until the disposition of the underlying offenses alleged before proceeding with the probation violation. The Court would find this would constitute good cause." Additionally, Officer Holste's violation reports were filed only weeks before Defendant's probation was due to expire, and the record indicates that Buncombe County only holds one session of hearings per week in criminal cases.

¶ 14 Our review of caselaw and our General Statutes has revealed no specific set of factors that must be considered in evaluating whether "good cause" exists under N.C. Gen. Stat. § 15A-1344(f)(3). Absent such a standard, we hold that the trial court did not err by finding good cause to revoke Defendant's probation after the probationary period expired. Unlike in *Sasek*, the trial court's judgments included the "statutorily mandated factual findings" of good cause to justify the untimely revocation. *Morgan*, 372 N.C. at 617, 831 S.E.2d at 260. Moreover, the evidence

in the record supports the trial court's finding that good cause existed for the delay.

¶ 15 We note that the trial court in this case proceeded to revoke Defendant's probation approximately 399 days after his probationary period expired. While we find this delay significant and unadvisable in the administration of justice, we cannot conclude that the trial court abused its discretion in finding good cause to justify the revocation.

III. Conclusion

¶ 16 For the reasons stated herein, we hold that the trial court did not err by finding good cause to revoke Defendant's probation after the probationary period expired.

AFFIRMED.

Judges DIETZ and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BILLY JOE KENNEDY

No. COA20-140

Filed 6 April 2021

Firearms and Other Weapons—possession of firearm by felon—constructive possession—sufficiency of evidence

The State presented sufficient evidence from which it could be inferred that defendant, a convicted felon, constructively possessed a firearm based on evidence that law enforcement discovered a gun in a backpack in defendant's truck and that defendant admitted ownership of the backpack and its other contents, including marijuana.

Appeal by Defendant from judgment entered 22 May 2019 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 26 January 2021.

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

James R. Parish, for Defendant-Appellant.

GORE, Judge.

¶ 1 Billy Joe Kennedy ("Defendant") appeals from a judgment entered following a jury verdict convicting him of possession of a firearm by a felon, misdemeanor possession of marijuana and drug paraphernalia, and attaining habitual felon status. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon due to insufficiency of the evidence. Specifically, Defendant contends that the State failed to establish his constructive possession of the firearm found in his vehicle and his convictions for possession of a firearm by a felon and habitual felon should be dismissed. We disagree.

I. Background

¶ 2 On 12 July 2018, Lieutenant Derrick McGinnis ("Lt. McGinnis") of the McDowell County Sheriff's office received a call about a suspicious vehicle, and Detective Ryan Crisp ("Det. Crisp") responded to investigate. When Det. Crisp arrived on scene, he saw a white Ford Ranger pickup truck parked on the side of the road. As Det. Crisp approached the truck, he observed Billy Joe Kennedy ("Defendant") exiting the driver's side of the vehicle, and Defendant's girlfriend Amber Honeycutt ("Honeycutt"), sitting in the passenger seat. Shortly thereafter, Lt. McGinnis and other officers arrived on scene due to concerns for officer safety.

¶ 3 Det. Crisp asked if there was anything illegal inside the truck. Defendant said, "Bryon you know I like my pot," and told Det. Crisp that there might be a joint in the ashtray. Defendant said the truck was his, but it was not in his name. Det. Crisp asked Defendant and Honeycutt for consent to search the vehicle and her handbag. Honeycutt consented to a search of her handbag, but Defendant did not consent to a search of the vehicle. Det. Crisp found marijuana inside Honeycutt's handbag, and then directed other officers to search the vehicle.

¶ 4 Officers conducted a search of the vehicle and observed that the bed of the truck was full of household goods. Defendant did not further object to the search, but instead told the officers, "if you find any dope, it's mine." While searching an orange backpack sitting on top of the household goods, officers found an unlocked box containing a .22 caliber handgun, a drug pipe, corner baggies, and marijuana. All the contraband was found together in the largest compartment of the backpack. Deputy Walker presented the small caliber handgun to Det. Crisp, and Defendant informed the officers that the backpack and the marijuana belonged to him.

¶ 5 When asked if he wanted to make a statement, Defendant wrote out, "Got caught with my pot. I'm sorry, Amber." Defendant requested that his sister pick up the truck because there was a dog inside the vehicle. When Defendant's sister arrived, she spoke with him before he was placed in the police vehicle. Defendant's sister then told Det. Crisp that the handgun belonged to her.

¶ 6 At the hearing, Defendant's sister testified that the backpack belonged to Defendant, but that a friend gave her the gun as a gift. She did not tell Defendant that she placed the gun inside his backpack to transport it to her new home, and she did not give him the lockbox combination.

¶ 7 At trial, Det. Crisp testified that Defendant's sister's testimony was inconsistent with events as they transpired. Defendant made two motions to dismiss due to insufficiency of the evidence. The trial court denied both motions. Defendant appeals.

II. Motion to Dismiss

¶ 8 On appeal, Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon due to insufficiency of the evidence. Defendant claims that the State failed to establish that he constructively possessed the firearm found in his vehicle. We disagree.

A. Standard of Review

¶ 9 "[T]he denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed *de novo* by the appellate court." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). "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[ ] being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

¶ 10 "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (citations omitted). "When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from that evidence." *State v. Barnett*, 141 N.C. App. 378, 382, 540 S.E.2d 423, 427 (2000) (citations omitted).

"If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

B. Possession of a Firearm by a Felon

¶ 11 In this case, Defendant was charged by indictment with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1, which makes it ". . . unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" N.C. Gen. Stat. § 14-415.1(a) (2020). "Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007).

> Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.

State v. Taylor, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (internal citations omitted). Here, the State proceeded on a theory of constructive possession because Defendant did not have actual possession of the firearm.

> The requirements of power and intent necessarily imply that a defendant must be aware of the presence of a firearm if he is to be convicted of possessing it. There must be more than mere association or presence linking the person to the item in order to establish constructive possession. . . . Constructive possession cases often include evidence that the defendant had a specific or unique connection to the place where the contraband was found.

State v. McNeil, 209 N.C. App. 654, 663-64, 707 S.E.2d 674, 681-82 (2011) (*purgandum*).

> An inference of constructive possession can arise from evidence which tends to show that a defendant was the custodian of the vehicle where the contraband was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where contraband was found *is sufficient*, *in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Mitchell, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012) (*purgandum*).

¶ 12 In this case, law enforcement officers found the gun inside a backpack while searching Defendant's vehicle. Defendant was the owner and the driver of the truck, and the owner of the backpack. As this Court has held, "[p]ower to control the vehicle is sufficient evidence from which it is reasonable to infer possession." *Mitchell*, 224 N.C. App. at 178, 735 S.E.2d at 443. Defendant's ownership of the backpack, and the location of the firearm alongside drugs and drug paraphernalia belonging to Defendant is indicative of "a specific or unique connection to the place where the contraband was found." *McNeil*, 209 N.C. App. at 664, 707 S.E.2d at 82. Furthermore, Defendant did not express surprise that a gun was found in the vehicle, nor did he disclaim ownership of it. Under the totality of the circumstances, the State presented substantial circumstantial evidence that a jury could infer Defendant's constructive possession of the firearm.

III. Conclusion

¶ 13 The trial court did not err in denying Defendant's motion to dismiss for insufficiency of the evidence. The State presented substantial evidence of constructive possession because Defendant's power to control the contents of his vehicle is sufficient to present an inference of knowledge and possession of the firearm found therein.

NO ERROR.

Chief Judge STROUD and Judge ZACHARY concur.

STATE v. KNIGHT

[276 N.C. App. 386, 2021-NCCOA-100]

STATE OF NORTH CAROLINA
v.
EDWARD LYNN KNIGHT, DEFENDANT

No. COA20-403

Filed 6 April 2021

1. Appeal and Error—writ of certiorari—unilateral withdrawal of plea agreement by prosecutor—due process

A criminal defendant's petition for a writ of certiorari was allowed where the issue was whether the trial court erred by failing to sentence him in accordance with his plea agreement because the prosecutor unilaterally rescinded it. Although defendant pleaded guilty to all charges and the issue on appeal did not clearly fall under the exceptions to N.C.G.S. § 15A-1444(e) (providing that a defendant who enters a guilty plea has no right to appeal), the unilateral withdrawal of a plea agreement by the State involved a possible due process violation, which merited appellate review.

2. Sentencing—plea agreement—breach by prosecutor—due process violation—specific performance as remedy

In a criminal case, where defendant entered a plea agreement providing that all charges would be consolidated for judgment unless defendant failed to appear on a specific date, the trial court erred by sentencing defendant contrary to the agreement where defendant timely appeared on the agreed-upon date, the State continued sentencing until the next day, and defendant appeared one hour and fifteen minutes late to the re-scheduled hearing. Defendant complied with the agreement's terms and the State received the benefit of its bargain (avoiding a trial). Therefore, the State breached the agreement and violated defendant's due process rights by not pleading judgment at sentencing, and specific performance of the agreement was the proper remedy.

Appeal by Defendant from judgment entered 11 October 2019 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Rivera, for the State.

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

JACKSON, Judge.

¶ 1 Edward Lynn Knight ("Defendant") argues that the trial court erred in failing to sentence him in accordance with the terms of his plea agreement. We conclude that the trial court erred in determining that Defendant had breached the agreement, and therefore vacate its judgment and remand the case for resentencing.

I. Facts and Procedural History

¶ 2 On 4 February 2019, Defendant was indicted by a grand jury in Johnston County for assault by strangulation, second-degree kidnapping, and assault with a deadly weapon. The matter came on for hearing before the Honorable Thomas H. Lock in Johnston County Superior Court on 5 July 2019. The State offered Defendant one consolidated judgment in exchange for his plea of guilty to these three charges. Defendant asked if he could enter his guilty pleas on that date but postpone sentencing for a few months, so that he could make preparations before surrendering for an active prison term. The prosecutor agreed, without consulting with the victim of Defendant's crimes. Defendant then pleaded guilty to all three offenses in exchange for the State agreeing to consolidate the three charges for judgment purposes and dismiss other related charges.

¶ 3 In accepting Defendant's plea arrangement, Judge Lock informed Defendant that "[s]entencing will be continued until the September 3rd, 2019, session of this court. That is roughly two months. At that time, if you appear, the cases will be consolidated into one judgment for the purposes of sentencing." The plea agreement also provided that "[s]entencing will be continued to September 3, 2019. If Defendant fails to report for sentencing, this arrangement will no longer be binding[,] and the court may sentence in its discretion."

¶ 4 Consistent with the terms of the plea arrangement, Defendant appeared for sentencing on Tuesday, 3 September 2019. When the case was called on the calendar, the sentencing hearing was continued to Friday, 6 September 2019. Later that same day, however, the prosecutor informed Defendant's attorney that sentencing would instead take place the very next day, on Wednesday, 4 September 2019 at 10:30 a.m. Defendant's attorney stated in open court that he had notified Defendant of the change.

¶ 5 The next day, Defendant did not appear at 10:30 a.m. The prosecutor continued the sentencing hearing, and the trial court issued a warrant for Defendant's arrest. An hour and fifteen minutes later, at 11:45 a.m., Defendant appeared, indicating that he was under the impression

that sentencing was scheduled for 11:30 a.m. Defendant was taken into custody.

¶ 6 On 11 October 2019, Defendant's sentencing hearing was held before the Honorable Keith O. Gregory in Johnston County Superior Court. During the hearing, Defendant's attorney attempted to explain Defendant's late arrival to the 4 September 2019 sentencing hearing—emphasizing that although Defendant had arrived late, his attorney was still at the court in front of the sentencing judge. Defendant's attorney also emphasized that Defendant had timely appeared on 3 September 2019 for sentencing, as required by the plea agreement. Defendant's attorney explained that he had not sought to strike the warrant issued for Defendant's failure to appear on 4 September because Defendant had come to court prepared to be taken into custody.

¶ 7 Judge Gregory, in response to Defendant's attorney, indicated that he "[didn't] believe that it was forgotten. I believe that [Defendant] just didn't come on time. That's what I believe."

¶ 8 The prosecutor argued that Defendant had violated the terms of the plea agreement by not appearing at the 4 September 2019 sentencing hearing on time and thus, the trial court was permitted to sentence Defendant in its discretion. The prosecutor told the court that he had promised the victim, "[w]ell [Defendant] didn't show up, so the sentencing is going to be in the discretion of the court."

¶ 9 The prosecutor then called the victim as a witness. She testified that she was upset by the two-month delay of Defendant's sentencing, which the prosecutor had agreed to without her consent. Adding to her frustration, she had missed work to appear at Defendant's scheduled hearing on 4 September and had left the courthouse by the time he appeared late. That same day, she talked with other family members who said Defendant had second thoughts about appearing in court.

¶ 10 After hearing from the victim, the State, and counsel for Defendant, the trial court found Defendant to be in breach of the plea agreement and indicated that the court would sentence Defendant in its discretion. The trial court then imposed consecutive sentences for each charge: ten to 21 months for assault by strangulation, 33 to 52 months for second-degree kidnapping, and 33 to 52 months for assault with a deadly weapon. Defendant gave oral notice of appeal. Defendant subsequently filed a Petition for Writ of Certiorari with our Court requesting appellate review under N.C. Gen. Stat. § 15A-1444(e) and N.C. Gen. Stat. § 7A-32(c), should the court conclude that his arguments are not within the scope of his direct appeal.

II. Analysis

¶ 11 Defendant contends that the trial court erred in failing to sentence him in accordance with the plea agreement. We agree.

A. Petition for Writ of Certiorari

¶ 12 **[1]** As noted above, Defendant filed a Petition for Writ of Certiorari on 17 July 2020 seeking review of the trial court's judgment. The General Statutes provide that a defendant "is not entitled to appellate review as a matter of right when he has entered a plea of guilty." N.C. Gen. Stat. § 15A-1444(e) (2019). However, there are some exceptions. Pursuant to N.C. Gen. Stat. § 15A-1444,

> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2)(1)-(3) (2019).

¶ 13 The question presented by Defendant's appeal is whether the trial court erred by failing to adhere to the terms of the plea agreement. "In effect, the State [has] rescind[ed] a plea agreement which the State agreed to and was accepted by the court." *State v. Isom*, 119 N.C. App. 225, 227-28, 458 S.E.2d 420, 421-22 (1995). Because this issue does not clearly fall within the exceptions to N.C. Gen. Stat. § 15A-1444(e), Defendant requests that we issue a writ of certiorari to review it. Because the unilateral withdrawal of a plea agreement by the State involves a possible due process violation, *see Santobello v. New York*, 404 U.S. 257, 267 (1971), we exercise our broad discretion, pursuant to N.C. Gen. Stat. § 7A-32(c), and hereby allow Defendant's petition for a writ of certiorari.

B. Standard of Review

¶ 14 In general, "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). We review *de novo* the issue of whether a plea agreement has been breached and whether the trial court has erred in entering a judgment inconsistent with the terms of a plea agreement. *See State v. Rodriguez*, 111 N.C. App. 141, 147, 431 S.E.2d 788, 791 (1993).

C. Plea Agreement

¶ 15 **[2]** Although plea agreements "arise[ ] in the context of a criminal proceeding, it remains in essence a contract" and should be analyzed based on principles of contract law." *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999), *remanded on other ground*, 353 N.C. 259, 538 S.E.2d 929 (2000); *State v. Lacey*, 175 N.C. App. 370, 377, 623 S.E.2d 351, 356 (2006). Our courts, however, have recognized that plea agreements are "markedly different from an ordinary commercial contract[,]" because the defendant waives many of his constitutional rights by pleading guilty. *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315. Thus, the plea bargain "phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant [receives] what is reasonably due in the circumstances." *Santobello*, 404 U.S. at 262.

¶ 16 "If the parties have agreed upon a plea arrangement pursuant to G.S. 14A-1021 in which the prosecutor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead[,]" and the court must engage in a colloquy with the defendant to ensure that his acceptance of the plea is knowing and voluntary. N.C. Gen. Stat. § 15A-1023(a)-(b) (2019). "Although a defendant has no constitutional right to have a guilty plea accepted by a trial court, both the defendant and the State are bound by the terms of the plea agreement once the defendant has entered a guilty plea and such plea has been accepted by the trial court." *State v. Tyson*, 189 N.C. App. 408, 413-14, 658 S.E.2d 285, 289 (2008) (internal marks and citations omitted). "[W]hen a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he is entitled to relief." *Northeast Motor Co. v. N.C. State Bd. of Alcoholic Control*, 35 N.C. App. 536, 538, 241 S.E.2d 727, 729 (1978).

¶ 17 Here, Defendant bargained for the State's consolidation of three charges for judgement purposes and the dismissal of two separate offenses, in exchange for his guilty plea. As a special condition, the plea arrangement provided that Defendant would "report for sentencing[,]" which was continued to 3 September 2019. If Defendant failed to appear, the consolidation of judgments would not apply, and Defendant would be sentenced in the court's discretion.

¶ 18 The State argues that Defendant breached the plea agreement by failing to appear in court at the time appointed for his sentencing. The State heavily relies on a Seventh Circuit case in which the court determined that a defendant's "failure to appear for sentencing violates the conditions of pretrial release and one of the fundamental premises underlying any plea agreement: a willingness to face the consequences of admitted criminal conduct." *United States v. Munoz*, 718 F.3d 726, 730 (7th Cir. 2013). "Federal cases, although not binding on this Court, are instructive and persuasive authority." *State v. Tutt*, 171 N.C. App. 518, 531, 615 S.E.2d 688, 697 (2005).

¶ 19 In *Munoz*, the defendant pleaded guilty to distributing and possessing cocaine with intent to distribute in accordance with a plea agreement. 718 F.3d at 728. After formally entering the plea, and prior to sentencing, the defendant fled to Mexico. *Id.* Nearly five years later, the defendant was arrested. *Id.* In finding that the defendant had breached the plea agreement, the court explained that "it is not as though [the defendant] had a flat tire while driving to the scheduled sentencing and made himself available for sentencing the next day. Because [the defendant] spent five years on the run, the government got much less than it bargained for." *Id.* at 730.

¶ 20 This case is remarkably distinguishable from *Munoz*. Here, Defendant did not abscond or attempt to evade sentencing. The plea arrangement specifically provided that sentencing would be continued until 3 September 2019. Defendant quite reasonably interpreted this to mean that he would be taken into custody on 3 September 2019 following his sentencing hearing. Defendant did not anticipate or influence the State's decision to continue sentencing to another day. To that end, Defendant did in fact appear for the re-scheduled sentencing hearing on 4 September 2019, albeit over an hour late.

¶ 21 This is not a case in which the defendant absconded or lacked "a willingness to face the consequences of admitted criminal conduct." *Munoz*, 718 F.3d at 730. Indeed, by appearing an hour and fifteen minutes late to court, Defendant in no way deprived the State of the benefit

of its bargain—the benefit of avoiding a trial—and Defendant "should not be forced to anticipate loopholes that the State might create in its own promises." *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315.

¶ 22 We do not endorse the proposition that a defendant can willfully disregard the court's time and expectations and still hold the State to the terms of a plea agreement. However, we are not at liberty to minimize the effect of a defendant's decision to waive nearly all his fundamental constitutional rights in reliance on a promise made by the State. Our courts have consistently recognized the importance of protecting one of a defendant's most fundamental rights—the right to a jury trial—emphasizing that "[n]o other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Thus, in plea agreement disputes, the State should be held to "a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (internal marks and citations omitted).

¶ 23 The State promised to pray judgment if Defendant appeared for sentencing on 3 September 2019. Defendant did, in fact, appear for sentencing on 3 September 2019, and again on 4 September 2019, at the request of the State. We cannot conclude that by arriving one hour and fifteen minutes late to court Defendant forfeited what was promised to him by the State. Not only was the State still afforded the benefit of its bargain, but the spirit of the agreement—having Defendant appear for sentencing—was not violated. We therefore hold that the State violated the plea agreement by not pleading judgment at the sentencing hearing, and the trial court erred by imposing a sentence different than the terms of the plea agreement.

> When the State fails to fulfill promises made to the defendant in negotiating a plea bargain the defendant is entitled to relief, typically in the form of specific performance of the plea agreement or withdrawal of the plea itself (i.e. rescission). Other courts have found that while rescission is an available remedy, it is not always appropriate under the circumstances. When a prosecutor breaches a plea agreement, the purpose of the remedy is, to the extent possible, to repair the harm caused by the breach.

State v. King, 218 N.C. App. 384, 390, 721 S.E.2d 327, 331 (2012) (internal marks and citations omitted).

¶ 24 Here, Defendant fulfilled his obligations under the plea agreement by formally entering a guilty plea, which was accepted by the trial court, and appearing for sentencing on the date specified in the plea agreement. When the State failed to plead judgment, but instead insisted that the court should sentence Defendant at its discretion, it violated the terms of the plea agreement, and the trial court imposed a sentence in violation of Defendant's due process rights. As a result, Defendant was sentenced to at least three and half more years than the punishment the State agreed to in exchange for his guilty pleas. The harm can "be addressed by holding the [S]tate to its agreement and affording [the Defendant] the benefit of his bargain[,] i.e. specific performance." *Id.* (internal quotations and citations omitted). Thus, this Court vacates the trial court's judgment and remands for the trial court to reinstate the plea agreement.

III. Conclusion

¶ 25 Altogether, Defendant did not breach the plea agreement. He appeared on the date required and his tardiness to the sentencing hearing that occurred a day later did not amount to a breach of the plea agreement, as the State was still afforded the benefit of its bargain. The State failed to uphold its end of the plea agreement by pleading judgment at sentencing, thereby depriving Defendant of the benefit of the bargain. Accordingly, we vacate the trial court's judgment, reinstate the plea agreement, and remand the case for further proceedings.

VACATED AND REMANDED.

Judges DILLON and INMAN concur.

STATE v. SWAIN

[276 N.C. App. 394, 2021-NCCOA-101]

STATE OF NORTH CAROLINA
v.
RICARDO SWAIN, DEFENDANT

No. COA20-232

Filed 6 April 2021

Judges—motion to suppress on remand—original judge retired—material conflicts in evidence—new suppression hearing required

Where the Court of Appeals had remanded a criminal case for entry of a written order clarifying the trial court's findings of fact on defendant's amended motion to suppress, but the judge who entered the original order in the case had since retired, the new judge assigned to the case should have held a new evidentiary hearing and erred by basing its new order upon the transcript from the prior proceedings conducted by the original judge.

Petition for writ of certiorari by defendant from order entered 28 June 2018 by Judge Karen Eady-Williams in Superior Court, Mecklenburg County. Heard in the Court of Appeals 17 November 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals the denial of his remanded amended motion to suppress.[1] In the prior appeal of this case, this Court remanded for entry

1. As noted within this opinion in further detail, this appeal stems out of the case of *State v. Swain*, 259 N.C. App. 253, 812 S.E.2d 411 (2018) ("*Swain I*"). In *Swain I*, defendant appealed an oral ruling denying his motion to suppress and his criminal judgment, but ultimately this Court was unable to review defendant's arguments regarding the denial of the motion to suppress because the trial court had not entered a written order resolving the factual issues arising from the evidence; thus the case was remanded for entry of a written order. *See generally id.* Defendant now, out of an abundance of caution, petitions this Court for a *writ of certiorari*, since he appealed the written order denying the motion to suppress based upon the remand, but did not again appeal his underlying criminal judgment which had never been reviewed in the first appeal. We note that defendant never received resolution of his arguments regarding the judgment in his first appeal because this

of "a written order clarifying the trial court's findings of fact on defendant's amended motion to suppress for lack of probable cause." *State v. Swain*, 259 N.C. App. 253, 812 S.E.2d 411, slip op. *6 (2018) (unpublished) ("*Swain I*"). As the judge who entered the order in *Swain I* had since retired and was not available to enter the order on remand, the trial court was required to hold a new evidentiary hearing and enter a written order with the findings of fact as directed in *Swain I*. Since we had already determined in *Swain I* that we were unable to discern the basis for denial of defendant's motion to suppress from the transcript, the trial court erred by basing the order on remand on this same transcript. We therefore vacate and remand.

I. Background

¶ 2 This case is a continuation of a prior unpublished case, *State v. Swain*, 259 N.C. App. 253, 812 S.E.2d 411 (2018) (unpublished). The factual background of this case was provided in *Swain I*:

> The State's evidence showed that on 8 November 2013 law enforcement officers executed a search warrant; the warrant allowed officers to search an apartment in Charlotte and a black Porsche. When the garage to the apartment opened, officers found defendant backing out in the black Porsche. During the execution of the warrant, officers found cocaine.
>
> Defendant was indicted for trafficking in drugs. Defendant moved to suppress "all evidence seized pursuant to the Search Warrant[.]" The legal basis of defendant's motion to suppress was *Franks v. Delaware*, 438 U.S. 154 (1978). Defendant contended that the "warrant affidavit contained an intentionally or recklessly false statement" in "that there was no CRI[, Confidential Reliable Informant,] involved[.]" The trial court denied defendant's motions to suppress, and a jury found defendant guilty. The trial court entered judgment, and defendant appeals.
>
> Defendant argues on appeal that the trial court erred in denying his motion to suppress "because the

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Court was unable to do so without a filed order denying the motion to suppress. Out of an abundance of caution, we allow defendant's petition for a *writ of certiorari* on defendant's meritorious appeal of the judgment, where, for a second time, this Court is ultimately unable to consider defendant's arguments on appeal due to the trial court's failure to resolve the factual issues raised by the motion to suppress and to follow statutory mandates.

search warrant did not state sufficient, reliable facts to establish probable cause in violation of his" rights. (Original in all caps.) The basis of defendant's challenge on appeal differs from the written motion to suppress, which was based upon *Franks*. Defendant's argument in this appeal arises from a later amended motion to suppress. Due to the many motions before the trial court, and the lack of a written order, we have had difficulty in reviewing defendant's arguments on appeal.

Before defendant's trial began, defendant moved to dismiss the case before the trial court and that motion was denied. Defendant then turned to his written motion to suppress based on *Franks*. Defendant called three witnesses to testify on behalf of his motion, including the detective who wrote the affidavit in support of the search warrant. After much discussion, the trial court ordered the State to hand a document over to defendant to which defendant's attorney stated, "So, Your Honor, I'd ask Mr. Swain here in the midst of a motion to suppress or in the midst of a *Frank's* motion has been turned over the very document he's been looking for since 2015." Defendant's attorney then asked for leeway to file an amended motion based upon the new information; the request was denied. Defendant's counsel again requested time to file an amended motion, and the trial court asked defendant's attorney if he would like to present any further evidence regarding the written motion to suppress which was under consideration by the trial court. The trial court then orally rendered its decision and denied defendant's motion to suppress. The trial court then moved on to defendant's motion to disclose the confidential informant. The trial court denied defendant's motion to disclose the confidential informant and during this ruling made many findings of fact which were relevant to defendant's forthcoming motion to suppress.

It appears from the transcript that defendant later filed a written amended motion to suppress, but that motion is not in the record before us. According to the transcript, defendant's amended motion focuses

> on a lack of probable cause because "[t]he Almond case, Your Honor, which I've passed up addresses the issue which we contend in this case of does the search warrant contain any information supporting the search of a specific residence." Defendant did not present any additional evidence on the amended motion to suppress.
>
> Before ruling on the amended motion to suppress, the trial court stated regarding other motions, "I want to cover all of that now before addressing the final ruling on the motion to suppress[.]" The trial court then heard arguments regarding motions to join and sever and then the State raised "a motion in limine concerning the defendant's proof of guilt of another[.]" The State then moved to amend an indictment. At this point, the trial court returned to the amended motion to suppress and orally rendered its ruling denying it because there was probable cause.

Swain I *1-4 (alterations in original).

¶ 3 In *Swain I*, this Court was unable to review defendant's arguments because the trial court had not entered a written order resolving the factual issues arising from the evidence. *See id.* As we noted in *Swain I*,

> Defendant raises many issues on appeal regarding a lack of probable cause for the issuance of the warrant including that the trial court's "analysis was superficial and inadequate. (Tpp. 347-349)[.]" Defendant directs us to the trial court's ultimate oral rendition on the amended motion to suppress in the transcript and contends that the trial court did not make adequate findings of fact. But defendant's argument takes the trial court's final rendition of its denial of the amended motion out of context. The trial court's analysis and findings relevant to the amended motion to suppress were not limited to the three pages cited by defendant in the transcript, 347-349, because the trial court was making various rulings and findings at various points during the prior proceedings as shown in the preceding 346 pages of the transcript. The trial court had already ruled on several other motions, including the original motion to suppress and a motion to disclose the identity of the confidential informant; the

> trial court's rendition of its rulings on these motions included many findings of fact which would also be pertinent to the amended motion to suppress.
>
> We cannot address defendant's arguments on appeal because we cannot determine the trial court's exact rationale for denial of the amended motion to suppress and how much its ultimate determination depended upon the findings of fact it had made in ruling on the prior motions. Some of the confusion arises because the trial court was considering several different motions over a period of about two days. In addition, defendant presented evidence, and there were material conflicts in the evidence. Since the trial court did not enter a written order denying the amended motion to suppress, we are unable to review the ruling.

Id. at *4-5 (footnote omitted). This Court ultimately remanded the case to the trial court "for a written order clarifying the trial court's findings of facts on defendant's amended motion to suppress for lack of probable cause." *Id.* at *5.

¶ 4 When the case returned to the trial court for hearing as directed in *Swain I*, the trial judge who had originally denied defendant's amended motion to suppress had retired, so another judge was assigned to the case. The judge reviewed the transcript from the prior proceedings and entered an order based upon the transcript. The order includes extensive findings of fact. These findings begin by summarizing the transcript and procedural history of the case. The trial court then determined that the former judge, Judge Foust, "considered the following facts" in support of his ruling regarding the motion to suppress and listed the facts in finding 24, subsections a through h. (Emphasis in original.) In support of these findings, the order cites to transcript pages 347-349. Ultimately, the trial court denied defendant's motion to suppress, based upon its findings and ruling explicitly upon what the trial court believed Judge Foust had considered and found in the evidentiary hearings prior to the first appeal. The order did not address any of the material conflicts, which needed to be resolved as noted by this Court in *Swain I*. Ultimately, the trial court again denied defendant's motion. Defendant appeals.

II. Amended Motion to Suppress

¶ 5 Defendant contends that once again his case must be remanded to the trial court for findings of fact regarding his amended motion to

suppress, and the State agrees. We need not address the standard for reviewing a motion to suppress as once again, we cannot review defendant's arguments on appeal without written findings of fact on the substantive issues raised in defendant's amended motion to suppress, as noted in *Swain I*. On remand, defendant requested the new trial judge hold an evidentiary hearing so that she could make substantive findings of fact, but this request was denied. Because Judge Foust had retired, the trial judge read *Swain I* as asking her "to get in his head" based upon the transcript. In *Swain I*, this Court directed as follows: "We must remand for a written order clarifying the trial court's findings of facts on defendant's amended motion to suppress for lack of probable cause." *Id.* *6.

¶ 6 When a case is remanded, this Court has no way of predicting if the original judge who heard a particular motion will still be available to enter a new order when the case is heard on remand. Sometimes, the original judge is still available and can enter a new order without holding a new hearing; other times, the original judge, as here, is no longer available. In this situation, if the judge who conducted the hearing is not available to enter a new order on remand, a new evidentiary hearing on the motion to suppress is required:

> When the superior court conducts a pretrial hearing on a motion to suppress pursuant to N.C.G.S. § 15A–977, *only the judge who presides at the hearing may make findings of fact concerning the evidence presented*. When findings of fact are necessary to resolve a material conflict in the evidence and the judge who presides at the hearing does not make them, a new suppression hearing is required. In this case, a material conflict in the evidence arose . . ., and a judge who did not hear the testimony . . . resolved that conflict. Accordingly, a new suppression hearing is required.

State v. Bartlett, 368 N.C. 309, 310, 776 S.E.2d 672, 673 (2015) (emphasis added).

¶ 7 If this Court had been able to determine Judge Foust's findings on all the relevant issues from the transcript alone, the order in *Swain I* would not have been remanded for entry of a new order. Rather, this Court noted material conflicts in the evidence that needed to be addressed and directed "a written order clarifying the trial court's findings of facts on defendant's amended motion to suppress for lack of probable cause." *Swain I* *6. We also note the trial court cited to transcript pages 347-349

in support of the substantive "findings of fact" noted in the order on remand, but in *Swain I* we explicitly determined that we could not determine the basis for Judge Foust's ruling based *on these same pages*:

> Defendant raises many issues on appeal regarding a lack of probable cause for the issuance of the warrant including that the trial court's "analysis was superficial and inadequate. (Tpp. 347-349)[.]" Defendant directs us to the trial court's ultimate oral rendition on the amended motion to suppress in the transcript and contends that the trial court did not make adequate findings of fact. But defendant's argument takes the trial court's final rendition of its denial of the amended motion out of context. The trial court's analysis and findings relevant to the amended motion to suppress were not limited to the three pages cited by defendant in the transcript, 347-349, because the trial court was making various rulings and findings at various points during the prior proceedings as shown in the preceding 346 pages of the transcript. The trial court had already ruled on several other motions, including the original motion to suppress and a motion to disclose the identity of the confidential informant; the trial court's rendition of its rulings on these motions included many findings of fact which would also be pertinent to the amended motion to suppress.

Id. *4-5.

¶ 8 Thus, once again, "[w]e must remand for a written order clarifying the trial court's findings of facts on defendant's amended motion to suppress for lack of probable cause." *Id.* *6. On remand, in accord with *Bartlett*, the trial court shall conduct an evidentiary hearing on defendant's amended motion to suppress and enter a written order including findings of fact addressing all material conflicts in the evidence. *See Bartlett*, 368 N.C. at 310, 776 S.E.2d at 673. In addition, we do not express any opinion on whether the trial court should deny or allow defendant's motion on remand, as we have yet to address the substantive issues raised on appeal.

¶ 9 Defendant also contends that the trial court disregarded the law of the case in two regards: (1) determining the prior judge's rationale could be ascertained from the transcript, and (2) noting there were no material factual conflicts. We agree that this Court had already deter-

mined that the actual basis of the trial court's ruling was unclear as the oral findings of fact were strewn throughout the transcript. Again, as we noted in *Swain I*, "[t]he trial court's analysis and findings relevant to the amended motion to suppress were not limited to the three pages cited by defendant in the transcript, 347-349, because the trial court was making various ruling and findings at various points during the prior proceedings as shown in the preceding 346 pages of the transcript." *Swain I* at *4. Further, "the trial court's rendition of its rulings on" prior "motions included many findings of fact which would also be pertinent to the amended motion to suppress." *Id.* *5.

¶ 10 Moreover, as we noted in *Swain I*, there were material conflicts in the evidence which this Court cannot resolve. *Id.* *5. For example, the search warrant lists defendant's address as the home which was searched but an officer testified the home was actually leased by someone else and did not belong to defendant. In fact, the officer testified, "another person . . . presumably lived there" and "[a]ll of defendant's "documents" were found at a different address the officer noted as "Mr. Swain's address." While certainly defendant could reside or keep drugs in a home that does not belong to him, and that home could be subject to a search, the evidence raises an issue of fact relevant to defendant's motion to suppress which the trial court must resolve.

> N.C. Gen. Stat. § 15A–977(f) (2011) requires that the judge must set forth in the record his findings of facts and conclusions of law. However, N.C. Gen. Stat. § 15A–977(f), has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing.

Swain I at *5 (citation omitted).

III. Conclusion

¶ 11 Because the trial court failed to conduct the required evidentiary hearing and enter a written order upon defendant's amended motion to suppress, we vacate and remand. On remand, the trial court shall hold an evidentiary hearing on defendant's amended motion to suppress and shall issue an order, with findings of fact resolving any disputes in the evidence and ruling upon the motion.

VACATED AND REMANDED.

Judges TYSON and HAMPSON concur.

STATE v. WAUGH

[276 N.C. App. 402, 2021-NCCOA-102]

STATE OF NORTH CAROLINA
v.
JAY JOHNSON WAUGH, JR.

No. COA20-191

Filed 6 April 2021

Evidence—sexual offenses against child—expert opinion—symptoms consistent with sexual abuse—plain error analysis

In a trial for sexual offenses against a child, there was no plain error in the admission of testimony from a pediatric nurse practitioner that the victim's symptoms of anxiety, feelings of shame, and self-harm were consistent with general characteristics of children who have been sexually abused. Given the overwhelming evidence provided by two victims of defendant's guilt, there was not a reasonable probability that, but for the expert testimony, a different result would have been reached.

Appeal by Defendant from judgments entered 5 November 2019 by Judge James Greg Bell in Brunswick County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Chris D. Agosto Carreiro, for the State-Appellee.

Epstein Law, by Drew Nelson, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals judgments entered upon his convictions for rape of a child, indecent liberties with a child, and sexual offense with a child. Defendant argues that the trial court plainly erred by allowing the admission of certain testimony that the minor child's symptoms were consistent with sexual abuse. We discern no plain error.

I. Procedural History

¶ 2 Defendant was convicted by a jury on 5 November 2019 of one count of rape of a child, one count of indecent liberties with a child, and eight counts of sexual offense with a child. The trial court issued four judgments to run consecutively. Defendant timely entered oral notice of appeal.

II. Factual Background

¶ 3 Defendant is the father of two children, Paige and Jessie.[1] Defendant lived with his mother and his step-father. Paige, who was no longer a minor child at the time of trial, stayed with Defendant every weekend from as far back as she could remember until she was seven years old. Paige testified that Defendant forced her to perform oral sex on him at least once a weekend, starting when she was around four years old until she was seven years old. Defendant also had penetrative sex with her when she was four or five years old and performed oral sex on her when she was approximately five years old. Jessie testified that when she was three or four years old, Defendant took her to his friend's house, exposed himself to her, and told her to touch his genitals.

¶ 4 When Paige was nine years old, she told her best friend about the sexual abuse while they were playing at an arcade center. A few years later, Paige told her friends at a sleepover about the sexual abuse, and Paige's friend told her mother about the abuse. A few years after that, Paige told her mother about the sexual abuse.

¶ 5 Taanya Mannain, a licensed independent social worker for seventeen years and Director of Behavioral Health Services at Little River Medical Center, was Paige's therapist from 2016 to 2017. In March of 2017, Paige told Mannain about the sexual abuse. Mannain testified that Paige had difficulty sleeping, poor appetite, anxiety related to school, significant feelings of low self-worth, and thoughts of committing self-harm. When asked by the prosecutor, Mannain confirmed that these symptoms were consistent with the disclosure of suffering sexual abuse. Mannain also testified that Paige expressed anxiety, shame, and guilt about reporting anything to law enforcement because she did not want to disrupt Defendant's sobriety and new life.

¶ 6 Lieutenant April Cherry of the Brunswick County Sheriff's Office testified that on 29 December 2017, the sheriff's office received an email from the Brunswick County Department of Social Services ("DSS") that Paige had reported sexual abuse by Defendant to her therapist, and that the therapist had reported it to DSS. The sheriff's office referred Paige to the Carousel Center, a Child Advocacy Center, where she was examined by Mary Beth Koehler, a pediatric nurse practitioner and a child medical provider at the Carousel Center. Koehler testified, without objection, "as an expert in the field of pediatrics, child abuse pediatrics, with a specific focus on child medical examinations, child abuse and

1. Pseudonyms have been used to protect the identity of the children.

maltreatment." Based on her medical examination of Paige in February of 2018, Koehler was of the opinion that Paige's symptoms, characteristics, and history were consistent with the general characteristics of children who have been sexually abused.

III. Discussion

¶ 7 Defendant's sole argument on appeal is that the trial court plainly erred by allowing Mannain to testify that Paige's symptoms were consistent with sexual abuse.

¶ 8 Defendant acknowledges his failure to object to the challenged testimony at trial but specifically and distinctly argues plain error on appeal. *See* 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). To show fundamental error, a defendant must establish that the error "had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted). In determining whether the admission of improper testimony had a probable impact on the jury's verdict, we "examine the entire record" of the trial proceedings. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

¶ 9 "[E]xpert testimony on the symptoms and characteristics of sexually abused children is admissible to assist the jury in understanding the behavior patterns of sexually abused children." *State v. Hall*, 330 N.C. 808, 817, 412 S.E.2d 883, 887 (1992) (citing *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987)). "Only an expert in the field may testify on the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent with this profile." *Hall*, 330 N.C. at 818, 412 S.E.2d at 888 (citations omitted). An expert witness is one who is qualified "by knowledge, skill, experience, training, or education[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019).

¶ 10 In his brief, Defendant identifies the testimony he alleges was erroneously admitted as follows:

> Mannain testified that [Paige's] "worsening anxiety", her "history of self-harm", and her "perfectionist attitude toward school" all "made sense when [Paige] disclosed [the alleged abuse]." . . . She further connected [Paige's] "feelings of shame and her low self-worth" to [Paige's] decision to accuse her father of the alleged prior sexual abuse, and testified that the disclosure of the alleged abuse "provide[d] at least a good explanation for all of her symptoms."

¶ 11 We need not determine whether the challenged testimony was admissible because, even assuming error *arguendo*, Defendant has failed to show that the error "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citations omitted).

¶ 12 At trial, both Paige and Jessie testified about sexual abuse Defendant perpetrated against them. The jury had the opportunity to observe Paige and Jessie and to evaluate their credibility. Paige testified that she slept with her father in the back bedroom when she visited him. She further testified:

> The first memory I have was I walked into the back bedroom. I didn't knock. I just busted in the room. I was young. I was 4. I remember I was excited about going to Head Start, and he was touching himself underneath the blanket with the–he had a computer laptop. He was watching porn when I walked in. He told me to come in and shut the door. So, I did, and he showed me what was on the computer screen, and it was a girl that looked like me. She looked young, and she was giving oral to a man. And he asked me if I would do that, and then, I don't remember my answer. I don't remember if I even did answer, but I remember him, you know, having my head and showing me, you know, to lick, and it felt good, and this was our little secret and stuff like that. So and I don't feel like that was the first time it happened because I remember being scared, but I wasn't surprised. I can't say for a fact that that was the first time, but that's the first time I remember vividly.

¶ 13 When asked some follow-up questions, Paige clarified:

> I remember him having my hand and, you know, I was obviously smaller than him, and so I was around level, and he would tell me to put his hand, to, you know, hold and not squeeze. . . . Hold his penis. . . . [A]nd he told me then to give it a little lick and things like that. . . . I did.

¶ 14 Paige further testified:

> He used to tell me he was in pain, . . . and that this made him feel better, and he'd tell me, "Come here

> and let me -- let me show you. Let me teach you, you know, how to help your daddy, how to make Daddy feel better." . . . He would normally remove all my clothing and have me either give him a hand job or give him oral sex.

¶ 15 Paige estimated that Defendant made her perform oral sex on him "at least once a weekend, if not multiple times a weekend. Sometimes once a day. Sometimes multiple times a day. Every weekend until I was 7." Defendant would ejaculate in her mouth and ask her to "swallow it." When she was seven, Defendant got arrested for doing drugs and Paige didn't see him again until she was nine years old.

¶ 16 When asked if there were any other things that Defendant tried to make her do or tried to do to her, Paige responded, "Yes. I only remember one time, and I can't forget the time he tried to have penetrative sex with me." Paige expounded that when she was four or five years old,

> I had -- well, it was originally a pair of jeans that became high waters on me, but I loved them so much because they had bedazzled butterflies on them that I cut them into shorts. . . . But I remember I was wearing my little denim shorts I had cut, and I loved those shorts. I loved them so much. But he took them off of me. I remember I could see myself in the full mirror closet that we had, and he said he wanted to try something. And so he had me -- I was on the edge of the bed, and he put me towards the head of the bed. And so, I was laying down with my knees up, and he came with his knees on the bed, and he would try to get his penis inside of me, and I remember, like, it being, like, pressure, a lot of pressure, and I would say, you know, "Daddy, this hurt. Daddy, I'm hurt. Daddy, I'm not big enough yet. Daddy, it hurts," and he told me -- he had told me, like we had talked about before how, like, I had to stretch, and that, you know, I'd feel it a little bit, like he had discussed it with me, and I told him I just wasn't big enough yet, and that it hurt and that it hurt really bad. I kept saying, "Ow, Daddy, ow." And so he stopped. He was even mad. He was, like, he was, like, "Well, if you're not going to do that" he had me do oral until he finished. I didn't want to. I just kept asking if we could go to the park with the blue seahorse. I know he knows the one I'm

> talking about. And I kept asking if we could go there and just go there, and he said, "Yes, in a minute, in a minute, when you're finished, when you're finished." And so he made me go, hand on the back of my head until I made him finish. And then we left the room, and he took me to the park like nothing happened.

¶ 17 When asked why she didn't call for her grandparents, Paige responded, "My dad had always told me that it was our little secret" and that "he'd go to jail and he'd probably die or my mom would kill him" if she told someone. Paige testified,

> I knew that something would happen, and so I was scared. I just -- I tried to just pretend like everything was normal and not tell anybody. Keep it inside. And so, I didn't tell my [grandparents] because I didn't want anybody to know. I didn't want anyone to know. . . . Because that's not what I wanted my story to be. I felt embarrassed and disgusted with myself, and I still do. I felt like -- I felt like I might even be in trouble if I told, so I just -- I didn't . . . .

¶ 18 When Paige was nine years old, she decided she could share her secret with her best friend Patty.[2] While they were at an arcade, she told Patty that Defendant had "messed with" her, but made Patty pinky swear not to tell anyone. When Paige was about eleven years old, she told her close friend Regina[3] about the abuse. Regina also promised not to tell anyone. Approximately two years later, Paige told another friend about the abuse while they were at a sleepover.

¶ 19 When Paige was a sophomore or junior in high school, she began having repeated nightmares about the sexual abuse. After her teacher confronted her about dozing off in class, Paige realized that her mental health was "deteriorating fast," she could not help herself, and that she needed to get help for "what was done to [her]." She testified,

> I texted my dad, and I told him that I'm sorry and I hope he understands that I do not hate him. I still do not hate you. I needed help and I had to tell somebody. So I told him that I would be telling my mom, and so I could get some help, and he replied almost

2. A pseudonym is used to protect the identity of the child.

3. A pseudonym is used to protect the identity of the child.

> immediately saying that he would not go back to jail, that he would do anything to stay out of jail, and he advised me not to tell anyone.

¶ 20 Jessie testified that when she was three or four years old, Defendant took her to a friend's house. No one was there when they got there. Defendant went into the kitchen and "pulled out a thing out of the drawer, and he put it on his thingy."

> It was purple, and before he had stretched it out, it was a circle, and it was rubber, it was a circle, and it was purple. And then he, like, stretched it out and put it over his -- word I really don't want to say. He put it over that, and then he told me that if I go up and down on it, the lotion will come out.

¶ 21 She testified that he pulled down his pants, pulled up his shirt, lay down on the rug, and "he had put the thingy on his thing." Defendant "then heard [his friend's] car pull up, and he pulled his pants up real fast, and he told me not to tell nobody what had happened." Jessie testified that she learned when she got older that the purple rubber circle was a condom and she clarified that Defendant put the condom on his penis.

¶ 22 Paige's friends, mother, and the other law enforcement witnesses testified about Paige's behavior before and after the sexual abused occurred. This testimony corroborated Paige's testimony.

¶ 23 Patty described when Paige first told her about the abuse. "[S]he said, 'My dad touched me,' and at the time we were little, so I didn't know -- I knew it was not good because she looked upset when she was saying it . . . . She made me promise I wouldn't tell anybody, and so, I didn't tell anyone." Tina[4] testified that Paige disclosed during a sleepover at Tina's house that Defendant had "messed with" Paige. Tina testified that Paige looked sick and that Tina "just felt like she needed help and . . . felt like the right thing to do was to tell [my] mom [that Paige] needed help."

¶ 24 Paige's mother recalled the day that Paige told her about Defendant's sexual abuse. "[S]he goes, 'Mom, he touched me,' and I just started crying and I held her. "[W]e were both -- I was hysterical, but it seemed like she was just relieved to tell me." Prior to this conversation, Paige's mother had taken Paige to a therapist and other medical professionals because

4. A pseudonym is used to protect the identity of the child.

Paige had been engaging in self-harm, reporting suicidal thoughts, and experiencing heart palpitations that would bring Paige to her knees.

¶ 25 Both Morgan Traynham, a social worker with Brunswick County Child Protective Services, and Cherry testified that Paige told them that she believed if she endured the sexual abuse, Defendant would not hurt Jessie. Cherry's notes from an interview with Paige state that Paige described the oral sex Defendant forced her to perform as "gross" and that she felt she would throw up but "eventually realized if you go with it, it gets over quicker."

¶ 26 Finally, the State tendered Koehler "as an expert in the field of pediatrics, child abuse pediatrics, with a specific focus on child medical examinations, child abuse and maltreatment." Without objection, Koehler was accepted by the trial court as such. Koehler testified that she conducted a child medical examination on Paige in February of 2018 and completed a report based upon the examination. The report was admitted into evidence without objection.

¶ 27 Koehler first interviewed Paige's mother. In that interview, Paige's mother "reported that she had found some razors, and that she thought [Paige] was self injuring at that time and may have had some issues. She had had behaviors that the mother was concerned about anger. Not aggression, but a lot of anger. . . ."

¶ 28 Koehler then interviewed Paige. During the interview, Paige told Koehler that Defendant "put his penis in my mouth. This happened almost every time I saw him until he went to jail when I was 7[;]" Defendant touched "[m]y vagina with his hand and his mouth[;]" and "[o]ne time he tried to put a finger in me, but it hurt and he stopped. And one time he tried to put his penis in me, and that really hurt and he stopped." Koehler also testified that Paige reported bedwetting behaviors that stopped around age eight, after the abuse had stopped.

¶ 29 Koehler then conducted a complete physical examination. She noted some linear marks on Paige's skin that were consistent with Paige's explanation that they were from previous cutting and self-injury behavior. Paige's "genital exam was within normal limits" meaning that there were no signs of injury, infection, or scarring. Koehler testified that this result was not unusual and that "[i]n about 95 to 97 percent of cases there [are] no findings at all. . . . That part of our body is made to heal very quickly, and in general, even if there [are] injuries, the injuries heal within about two to four days." Koehler testified that the lack of physical injury was consistent with the type of alleged sexual behavior and the amount of time that had passed since the abuse took place.

¶ 30 Koehler acknowledged that she was familiar with the profile evidence of the general characteristics of children who have been sexually abused and testified that behaviors such as depression, anxiety, problems sleeping, nightmares, bedwetting, self-injury behaviors, and suicidal thoughts may be connected to abuse. Additionally, Koehler testified that there are a lot of reasons why children delay talking about abuse when it first happens, and that a younger child may delay reporting sexual trauma because "they just may not actually have the ability to say what exactly is happening to them." At the end of direct examination, the prosecution asked,

> You testified earlier and described for the jury the profile evidence of the general characteristics of children who have been sexually abused. In reviewing all the information that you have from [Paige's] visit to the Carousel Center, are [Paige's] symptoms and characteristics, as well as the history provided to you, consistent with those general profile characteristics?

Koehler responded, "Yes."

¶ 31 In light of the overwhelming evidence of Defendant's guilt, including Paige's testimony, Jessie's testimony, and Koehler's expert testimony that Paige's symptoms and characteristics, as well as her history, were consistent with the profile evidence of the general characteristics of children who have been sexually abused, we conclude that even had the challenged testimony not been admitted, the jury probably would not have reached a different result. *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

IV. Conclusion

¶ 32 The trial court did not plainly err by allowing the admission of Mannain's testimony that Paige's symptoms were consistent with sexual abuse.

NO PLAIN ERROR.

Judges MURPHY and JACKSON concur.

STATE v. WYNN

[276 N.C. App. 411, 2021-NCCOA-103]

STATE OF NORTH CAROLINA
v.
GREGORY JEROME WYNN, JR., DEFENDANT

No. COA18-536-2

Filed 6 April 2021

1. Appeal and Error—preservation of issues—criminal cases—motion for directed verdict—interchangeable with motion to dismiss

The holding in *State v. Golder*, 374 N.C. 238 (2020), that a motion to dismiss preserves all issues related to sufficiency of the evidence in criminal cases, applied to this case, in which defendant moved for a directed verdict in his trial for drug offenses and possession of a firearm by a felon, because a motion to dismiss and a motion for directed verdict are interchangeable in criminal cases.

2. Firearms and Other Weapons—possession of firearm by felon—sufficiency of evidence—confession of possession—gun not found

Defendant's conviction for possession of a firearm by a felon was vacated because there was insufficient evidence that the alleged crime took place, despite defendant's statement to law enforcement that he had been carrying a gun but had dropped it. Although a pistol magazine was found in the house where defendant was apprehended, which the homeowner stated was not his, and shell casings, bullet fragments, and bullet holes were found at defendant's house, no gun was recovered from either location or the surrounding areas and there was no evidence about when a gun may have been fired at defendant's house.

3. Drugs—possession—constructive—sufficiency of evidence

There was no error in defendant's convictions for trafficking in heroin by possession and possession with intent to sell or deliver a controlled substance where the State presented sufficient evidence from which the jury could find that defendant constructively possessed drugs, including that defendant was observed moving throughout a house that was not his, he exited the house with a substantial quantity of cash and a white substance on and in his nose, and plastic bags containing drugs and other drug paraphernalia were recovered from the house, none of which belonged to the homeowner.

Appeal by defendant from judgments entered on or about 15 November 2017 by Judge Jerry R. Tillett in Superior Court, Dare County. Heard in the Court of Appeals 13 February 2019 and opinion filed 5 March 2019. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 On remand from the North Carolina Supreme Court, we review defendant's first argument on appeal in accordance with *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020). We conclude there was not sufficient evidence of a firearm, and thus defendant's conviction for possession of a firearm by a felon must be vacated. We also conclude there was sufficient evidence of constructive possession of controlled substances, and thus defendant's convictions for trafficking in heroin by possession, possession with the intent to sell or deliver a controlled substance, and attaining the status of habitual felon, remain intact. There is no error in the judgments entered for trafficking in heroin by possession, possession with the intent to sell or deliver a controlled substance, and attaining the status of habitual felon.

I. Background

¶ 2 We begin with the procedural and factual background of this case.

A. Procedural Background

¶ 3 Defendant appealed "his convictions for possession of a firearm by a felon, trafficking in heroin by possession, possession with the intent to sell or deliver cocaine, and attaining the status of habitual felon." *State v. Wynn*, 264 N.C. App. 250, 824 S.E.2d 210, slip op. *1 (COA18-536) (2019) (unpublished) ("*Wynn I*"). This Court concluded there was no error. *See Wynn I*, 264 N.C. App. 250, 824 S.E.2d 210. Defendant filed a "petition for discretionary review and motion in the alternative to remand" with the Supreme Court of North Carolina. *State v. Wynn*, 374 N.C. 427, 840 S.E.2d 781 (mem.) (2020). The Supreme Court allowed the petition for discretionary review "for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's

decision in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020)." *Id.* We now take up defendant's case "for the limited purpose" of considering it in light of *Golder*.

B. Factual Background

¶ 4 The background of this case was provided by this Court in *Wynn I*:

> The State's evidence tended to show that on 14 March 2016, the Dare County Sheriff's Department received a call regarding a suspicious person on Jones Circle. Deputy Sheriff Andrew Creech noticed a screen pulled out of a window of a home, and the window was open; inside the house he saw defendant. Deputy Creech tried to coax defendant outside of the house, but he would not come as he claimed people were "after him." Defendant was "very active in the house" and [Deputy Creech saw him] walking around much of the interior, heard slamming doors or drawers, and saw defendant pulling up his pants. Defendant eventually came out of the house with $2,216.00 in cash and a white substance on and in his nose. Defendant told law enforcement he had a gun when he was running to the house – he was running from the people he claimed were "after him" – but was not sure where he dropped it.
>
> The law enforcement officers called the man who owned the house, [Mr. Gradeless,] and he allowed them to search the house. Inside they found a black plastic bag containing smaller red plastic baggies of cocaine and heroin, digital scales, and a pistol magazine. The homeowner said none of the items belonged to him. Law enforcement then searched defendant's home and found several bullet holes, some from shots fired from inside the house and some from shots fired from the outside into the house.
>
> Defendant was indicted for trafficking in heroin by possession, possession with the intent to sell or deliver a controlled substance, possession of a firearm by a felon, and attaining the status of habitual felon. At defendant's trial, two witnesses testified that they had purchased heroin and cocaine from defendant, always in a little red plastic baggie similar to those recovered by law enforcement. A jury

> found defendant guilty of all of the charges against him; defendant pled to attaining the status of habitual felon; and the trial court entered judgments accordingly. Defendant appeals.

Wynn I at *2-3.

II. Sufficiency of the Evidence

¶ 5 Defendant's first argument on appeal challenged the sufficiency of the evidence against him. *See id.* at *3. In *Wynn I*, this Court dismissed defendant's argument for failure to preserve the issue before the trial court. *Id.* at *3-6. In *Golder*, while analyzing whether a motion to dismiss was adequate to preserve the issue of sufficiency of the elements of the crimes, our Supreme Court held "under Rule 10(a)(3) and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." *Golder*, 374 N.C. at 246, 839 S.E.2d at 788.

A. Application of *State v. Golder* to Motion for Directed Verdict

¶ 6 **[1]** Defendant's attorney moved for a directed verdict at the close of the State's evidence:

> "For the defense, Your Honor, at the close of the State's case, we would move for a directed verdict in favor of the defendant. I do not care to argue that motion, however." The trial court denied the motion. Defendant did not present any evidence and at the close of all of the evidence his attorney stated, "I would just renew my motions."

Wynn I at *3.

¶ 7 The State contends that defendant's motions for a directed verdict do not suffice as a motion to dismiss pursuant to Rule 10(a)(3) as noted in *Golder*. *See generally id.* The State cites no law for why the two motions – a motion for directed verdict and a motion to dismiss – should be treated differently for purposes of *Golder*, but instead simply relies upon the argument that *Golder* is applicable *only* to motions to dismiss made under Rule 10(a)(3).

> A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's

> *prima facie* case. In passing on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn therefrom must be resolved in favor of the nonmovant.

Coates v. Niblock Development Corp., 161 N.C. App. 515, 516–17, 588 S.E.2d 492, 493 (2003) (citations and quotation marks omitted).

¶ 8 "When granted, the common law motion for a directed verdict resulted in a judgment on the merits in either a criminal or a civil case." *Cutts v. Casey*, 278 N.C. 390, 419, 180 S.E.2d 297, 312 (1971). In *State v. Clanton*, our Supreme Court noted that a motion to dismiss and a motion for a directed verdict are "interchangabl[e]" terms that should be applied the same. *See* 278 N.C. 502, 504, 180 S.E.2d 5, 6 (1971) (noting "[t]o survive a motion to dismiss, or for a directed verdict of not guilty, or for judgment as of nonsuit (*used interchangeably in criminal prosecutions*) the evidence must be sufficient to permit a legitimate inference the defendant committed every essential element of the crime charged" (emphasis added)).

¶ 9 Because our Supreme Court has noted a motion to dismiss and a motion for a directed verdict are "interchangabl[e]" terms in criminal cases, we conclude defendant's motion for a directed verdict should be reviewed in the same manner as a motion to dismiss. *See id.* Accordingly, "defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." *Golder*, 374 N.C. at 246, 839 S.E.2d at 788.

B. Motion for Directed Verdict

¶ 10 We thus consider whether the trial court erred in denying defendant's motion for directed verdict based on insufficiency of the evidence as to "his convictions for possession of a firearm by a felon, trafficking in heroin by possession, possession with the intent to sell or deliver cocaine, and attaining the status of habitual felon." *Wynn I* at *1.

1. Standard of Review

> In ruling on a motion for a directed verdict or a motion to dismiss, the trial court must determine whether the State has offered substantial evidence of the defendant's guilt on every essential element of the crime charged. Substantial evidence requires that

> the evidence must be existing and real, not just seeming and imaginary. In considering the evidence, the State is entitled to every reasonable inference that may be drawn therefrom. Contradictions and discrepancies in the evidence are for the jury to decide. The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct. When a motion for a directed verdict involves circumstantial evidence in a case:
>
> The court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty.

State v. McKenzie, 122 N.C. App. 37, 45, 468 S.E.2d 817, 824 (1996) (citations and brackets omitted).

2. Possession of a Firearm by a Felon

¶ 11 **[2]** Defendant contends that the trial court erred in denying his motion for directed verdict on the charge of possession of firearm by a felon because there was insufficient evidence of the existence of a firearm. "The State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008) (citation, quotation marks, and brackets omitted); *see* N.C. Gen. Stat. §14-415.1 (2015).

¶ 12 In this case, the primary evidence of defendant's possession of a firearm was his statement to the officers that he had a gun before they arrived at the house. "Defendant told law enforcement he had a gun when he was running to the house – he was running from the people he claimed were 'after him' – but was not sure where he dropped it." *Wynn I* at *2. The officers never found a gun, either in the house where defendant was found, in defendant's home, or in the area outside where defendant said he dropped it before he entered the house.

¶ 13 The State contends sufficient evidence tended to show defendant possessed a firearm "because the police recovered a 9mm pistol magazine from the house defendant had broken into, defendant admitted to possessing a gun, and the police found 9mm shell casings, bullet fragments, and bullet holes in defendant's home." (Original in all caps.)

¶ 14 A pistol magazine was found in the house defendant had broken into, but a magazine alone is not a firearm. *See* N.C. Gen. Stat. § 14–415.1(a) (2015) ("For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer."). A pistol magazine alone is not a weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" nor is it a muffler or silencer. *Id.* As for the shell casings and bullet fragments and holes found at defendant's home, there no evidence as to when a gun may have been fired or who fired it. Thus, the evidence presents an issue of *corpus delicti*. *See generally State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985).

¶ 15 Where a defendant has confessed to a crime, this confession is not sufficient evidence to support a conviction unless there is "substantial independent evidence tending to establish" the "trustworthiness" of the confession "including facts" which strongly corroborate the "essential facts and circumstances embraced in the defendant's confession." *Id.*

> We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.
>
> *We wish to emphasize, however, that when independent proof of loss or injury is lacking, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession.* Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice. We emphasize this point because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

State v. Parker, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985) (emphasis added).

¶ 16 Here, the only evidence of a gun or defendant's possession was his statement that he had a gun before the officers arrived at the house. The house was not his home or residence. No gun was found in the area where defendant claimed he had dropped it. There was no evidence of any gunshots fired. There was no "proof of loss or injury[.]" *Id.* The magazine was found in Mr. Gradeless's house, while the shell casings, bullet fragments and holes were found at defendant's residence, but there was no evidence regarding when a gun was fired either from or into defendant's residence. This evidence does not provide "strong corroboration of essential facts and circumstances embraced in the defendant's confession." *Id.* The magazine in conjunction with the shell casings, bullet fragments and holes are "insignificant facts or those unrelated to the commission of the crime[.]" *Id.*

¶ 17 It is important to note here, that without some evidence of a firearm beyond defendant's own statement, whether recovery of a firearm, evidence that someone heard or saw gunfire, evidence that another person saw the alleged firearm, or injury to a person or property, there is simply no evidence the alleged crime even took place, and thus to convict defendant on such little evidence risks "conviction[] for [a] crime[] that ha[s] not in fact occurred." *Id.* We conclude the trial court erred in failing to dismiss the charge of possession of a firearm by a felon. As such, we must vacate defendant's conviction for possession of a firearm by a felon.

3. Possession of Controlled Substances

¶ 18 **[3]** As for defendant's convictions for trafficking in heroin by possession and possession with the intent to sell or deliver a controlled substance, defendant challenges only the element of possession. *See generally* N.C. Gen. Stat. § 90-95 (2015).[1]

> The State must prove that Defendant possessed . . . [a controlled substance] either actually or constructively. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Wirt, 263 N.C. App. 370, 373, 822 S.E.2d 668, 671 (2018) (citation and quotation marks omitted). For purposes of constructive possession,

1. North Carolina General Statute § 90-95 has since been amended. *See* N.C. Gen. Stat. § 90-95 (2020).

> the State is not required to prove actual physical possession of the controlled substance; proof of constructive possession is sufficient and such possession need not be exclusive. Constructive possession exists when a person, while not having actual possession of the controlled substance, has the intent and capability to maintain control and dominion over a controlled substance. Where a controlled substance is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury. If a defendant does not maintain control of the premises, however, other incriminating circumstances must be established for constructive possession to be inferred.

State v. Neal, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993) (citations omitted). North Carolina courts have issued an abundance of case law addressing the specific factual nuances of constructive possession as was noted by our Supreme Court in *State v. Miller*, 363 N.C. 96, 99–100, 678 S.E.2d 592, 594–95 (2009):

> Our cases addressing constructive possession have tended to turn on the specific facts presented. *See*, *e.g.*, *Butler*, 356 N.C. at 143–44, 147–48, 567 S.E.2d at 138–39, 141 (finding constructive possession when the defendant acted suspiciously upon alighting from a bus; hurried to a taxicab and yelled "let's go" three times; fidgeted and ducked down in the taxicab once in the back seat, then exited the taxicab at the instruction of police officers and walked back to the bus terminal without being told to do so, drawing officers away from the taxicab; and drugs were recovered from under the driver's seat of the taxicab approximately ten minutes later when the cab returned from giving another customer a ride); *Matias*, 354 N.C. at 550–52, 556 S.E.2d at 270–71 (finding constructive possession when officers, after smelling marijuana emanating from a passing automobile occupied by the defendant and three others, recovered marijuana and cocaine stuffed between the seat pad and back pad where the defendant had been seated, and an officer testified the defendant was the only occupant who could have placed the package there); *State*

> *v. Brown*, 310 N.C. 563, 569–70, 313 S.E.2d 585, 588–89 (1984) (finding sufficient other incriminating circumstances when cocaine and other drug packaging paraphernalia were found on a table beside which the defendant was standing when the officers entered the apartment, the defendant had been observed at the apartment multiple times, possessed a key to the apartment, and had over $1,700 in cash in his pockets); *State v. Baxter*, 285 N.C. 735, 736–38, 208 S.E.2d 696, 697–98 (1974) (finding constructive possession when the defendant was absent from the apartment when police arrived but a search of the bedroom that the defendant and his wife occupied yielded men's clothing and marijuana in a dresser drawer, with additional marijuana found in the pocket of a man's coat in the bedroom closet); *State v. Allen*, 279 N.C. 406, 408, 412, 183 S.E.2d 680, 682, 684–85 (1971) (finding constructive possession when, even though the defendant was absent from the apartment at the time of a search, heroin was found in the bedroom and kitchen; the defendant's identification and other personal papers were in the bedroom, public utilities for the premises were listed in the defendant's name; and a witness testified that the defendant had provided heroin to him for resale).

Id. *Miller* went on to explain, "These and other cases demonstrate that two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.*

¶ 19 In this case, the controlled substances were not found in defendant's actual possession or in a domain exclusively controlled by him, and thus we must consider "other incriminating circumstances[,]" *Neal*, 109 N.C. App. at 686, 428 S.E.2d at 289, remaining mindful of "defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Miller*, 363 N.C. at 100, 678 S.E.2d at 595.

¶ 20 Here, the local sheriff's department was called reporting a "suspicious person[.]" *Wynn I* at *2. Law enforcement "noticed a screen pulled out of a window of a home, and the window was open[.]" *Id.* "[I]nside the house [law enforcement] saw defendant[;]" though the home was not his. *Id.* "Defendant was 'very active in the house' and seen walking

around much of the interior and heard slamming doors or drawers[;]" *id.*, thus, defendant's presence was not limited to one room or particular spot; defendant moved throughout the house as if exercising dominion over the space. "Defendant eventually came out of the house with $2,216.00 in cash and a white substance on and in his nose."

> The law enforcement officers called the man who owned the house, and he allowed them to search the house. Inside they found a black plastic bag containing smaller red plastic baggies of cocaine and heroin, digital scales, and a pistol magazine. The homeowner said none of the items belonged to him.

¶ 21 The cocaine and heroin found inside the house coupled with the white powder on defendant's nose tend to show the drugs belonged to defendant, particularly in light of the fact that the controlled substances were packaged in red plastic baggies, a method used by defendant for selling drugs. The State presented sufficient evidence of possession of the controlled substances for both defendant's trafficking in heroin by possession and possession with the intent to sell or deliver a controlled substance convictions. As such, the trial court did not err in denying defendant's motion for directed verdict on his controlled substance charges.

III. Evidence of Other Wrongs

¶ 22 In *Wynn I*, we considered another issue on appeal under Rules 403 and 404, *see Wynn I* at *6-10, but we note the Supreme Court remanded this case for the limited purpose of considering this case under *Golder*, *see Wynn*, 374 N.C. 427, 840 S.E.2d 781, and we conclude *Golder* applies only as to defendant's first argument on appeal. As such, the Supreme Court left, and we shall too, leave intact our prior analysis, regarding defendant's second argument of evidence of other wrongs.

IV. Conclusion

¶ 23 As to defendant's conviction for possession of a firearm by a felon, we vacate. As there was evidence of constructive possession of the controlled substances, we conclude there was no error as to defendant's convictions and judgments for trafficking in heroin by possession, possession with the intent to sell or deliver a controlled substance, and attaining the status of habitual felon.

VACATED IN PART; NO ERROR IN PART.

Judges TYSON and ARROWOOD concur.

TOG PROPERTIES, LLC, Plaintiff
v.
KAREN PUGH, Defendant

No. COA20-351

Filed 6 April 2021

1. Civil Procedure—consolidated lawsuits—voluntary dismissal of one lawsuit—notice to plaintiff in other lawsuit—not required

In a property damage case involving two lawsuits—one filed by an individual (appellant) and another filed by a corporation (appellee)—that were consolidated for trial, appellant was not entitled to notice of the voluntary dismissal of appellee's lawsuit, and therefore the voluntary dismissal was proper under Civil Procedure Rule 41. Parties to an action are entitled to notice of that action's voluntary dismissal, but consolidated actions remain separate rather than becoming one action, and therefore appellant was not a party to appellee's lawsuit.

2. Jurisdiction—to rule on motion to strike—after notice of voluntary dismissal—property damage case

In a property damage case involving two lawsuits—one filed by an individual (appellant) and another filed by a corporation (appellee)—that were consolidated for trial, where appellee voluntarily dismissed its lawsuit pursuant to Civil Procedure Rule 41 and then moved to strike appellant's cross claim in that suit, the trial court properly declined to enter an order on appellee's motion to strike because, as of the date that appellee filed its notice of voluntary dismissal, the court lacked jurisdiction over appellee's lawsuit. A notice of voluntary dismissal "closes the file" on a pending suit and no further court action is necessary to effect a dismissal.

Appeal by Donald Sullivan from order entered 2 January 2020 by Judge W. Allen Cobb, Jr., in Pender County Superior Court. Heard in the Court of Appeals 27 January 2021.

The Law Offices of Oliver and Cheek, PLLC, by Ciara L. Rogers and Linda B. Green, for Appellee TOG Properties, LLC.

Lt. Col. Donald Sullivan, Appellant, pro se.

COLLINS, Judge.

I. Factual Background

¶ 1 This is the second appeal to this Court by Donald Sullivan regarding certain timbered property damaged by a fire allegedly set by Karen Pugh. An extensive procedural history and factual background can be found in this Court's opinion on Sullivan's first appeal. *See Sullivan v. Pugh*, 258 N.C. App. 691, 814 S.E.2d 117 (2018). In *Sullivan*, this Court affirmed the trial court's order in a declaratory judgment action brought by TOG Properties, LLC ("TOG") against Sullivan, declaring TOG the holder of any legal claims against Robert and Karen Pugh resulting from the damages to the property caused by the fire.

¶ 2 Facts and procedural history relevant to this appeal follow: On 3 February 2015, Sullivan filed an amended complaint against Robert and Karen Pugh, seeking to recover damages resulting from the fire ("Sullivan Lawsuit"). On 10 April 2015, TOG filed a complaint against Karen Pugh, also seeking to recover damages resulting from the fire ("TOG Lawsuit"). Upon Robert and Karen Pugh's motion[1] and consent of the parties, the trial court consolidated the Sullivan Lawsuit and the TOG Lawsuit for trial.

¶ 3 In April 2016, TOG filed a cross-claim for declaratory judgment against Sullivan ("Cross Claim") requesting that the trial court declare TOG the owner of any claims for damages against Robert and Karen Pugh for the damages caused to the property by the fire.[2] Sullivan filed an answer and motion to dismiss the Cross Claim. The trial court denied Sullivan's motion to dismiss by written order entered 17 August 2016.

¶ 4 On 16 November 2016, TOG filed a motion for summary judgment on its Cross Claim ("Summary Judgment Motion"). Sullivan filed a notice of objection to the Summary Judgment Motion.

¶ 5 After a hearing, the trial court granted summary judgment to TOG by written order entered 14 February 2017 ("Summary Judgment Order"). Sullivan appealed the Summary Judgment Order to this Court. In March 2017, the trial court entered an order moving the TOG Lawsuit to inactive status because of Sullivan's notice of appeal.[3] By opinion entered

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1. This motion is not in the Record on Appeal, although it is referenced in the Consent Order for Consolidation.

2. TOG also requested the trial court declare that Kenner Day did not have authority to waive or release any claims owned by TOG. This request is not at issue in this appeal.

3. This order does not appear in the Record on Appeal but is referenced in the trial court's 2 January 2020 order on appeal.

3 April 2018, the Court of Appeals affirmed the Summary Judgment Order. *See Sullivan*, 258 N.C. App. 691, 814 S.E.2d 117.

¶ 6 On 7 May 2018, Sullivan filed a notice of appeal in the Supreme Court of North Carolina, pursuant to N.C. Gen. Stat. § 7A-30.[4] TOG filed a motion to dismiss the appeal for lack of substantial constitutional question.[5] On 14 August 2018, the Supreme Court of North Carolina entered an order allowing TOG's motion to dismiss.

¶ 7 At some point, Sullivan filed a petition for writ of certiorari to the Supreme Court of the United States.[6] On 1 April 2019, the Supreme Court denied the petition. On 12 April 2019, TOG filed a notice of voluntary dismissal with prejudice in the TOG Lawsuit, pursuant to Rule 41 of the Rules of Civil Procedure ("Voluntary Dismissal"). At some point, Sullivan filed a petition for rehearing in the Supreme Court of the United States.[7] On 28 May 2019, the Supreme Court denied the petition.

¶ 8 On 17 June 2019, Sullivan filed a cross complaint in the TOG Lawsuit, seeking to recover damages and costs from TOG. On 12 July 2019, TOG filed a motion to strike the cross complaint, pursuant to Rules 8 and 12(f) of the North Carolina Rules of Civil Procedure ("Motion to Strike"). On 2 October 2019, Sullivan filed an Objection to the Motion to Strike ("Objection"), alleging that the trial court lacked jurisdiction to allow the Voluntary Dismissal of the TOG Lawsuit. Sullivan asserted that he was denied due process because he was not served notice of the Voluntary Dismissal and that TOG was unjustly enriched by an alleged settlement agreement.

¶ 9 On 10 October 2019, the trial court held a hearing on TOG's Motion to Strike and Sullivan's Objection. By written order entered 2 January 2020, the trial court made findings of fact and concluded that the Voluntary Dismissal of the TOG Lawsuit was proper and that the trial court lacked jurisdiction to enter any further orders, including an order on the Motion

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4. This notice of appeal is not in the Record on Appeal but is referenced in the North Carolina Supreme Court's order allowing TOG's motion to dismiss the appeal.

5. This motion is not in the Record on Appeal but is referenced in the Supreme Court's order allowing TOG's motion to dismiss the appeal.

6. This petition for writ of certiorari to the Supreme Court of the United States is not in the Record on Appeal but is referenced in the Supreme Court of the United States' denial of the petition.

7. The petition for rehearing to the Supreme Court of the United States is not in the Record on Appeal but is referenced in the Supreme Court of the United States' denial of the petition.

to Strike ("Final Order"). On 3 February 2020, Sullivan filed a notice of appeal of the Final Order to the North Carolina Court of Appeals.

II. Analysis

¶ 10 Defendant presents two issues on appeal: (1) "Whether the notice requirement in Rule 41 that a voluntary dismissal be allowed upon 'notice to the court' includes the requirement that notice be given to all parties[;]" and (2) "Whether the ruling judge committed reversible error in his order by failing to accept jurisdiction over appellee's motion to strike appellant's cross complaint."

A. Standard of Review

¶ 11 This Court reviews de novo questions of statutory interpretation. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Likewise, this Court reviews de novo a trial court's conclusions of law. *Hairston v. Harward*, 371 N.C. 647, 656, 821 S.E.2d 384, 391 (2018). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citations omitted).

1. Notice of Voluntary Dismissal

¶ 12 **[1]** Sullivan first essentially argues that TOG was required to serve its notice of Voluntary Dismissal upon Sullivan and that TOG's failure to do so somehow rendered the notice of Voluntary Dismissal invalid. We disagree.

¶ 13 "[I]f no counterclaim is pending, . . . a [plaintiff] may voluntarily dismiss his suit without the opposing party's consent by filing a notice of dismissal." *Gillikin v. Pierce*, 98 N.C. App. 484, 487, 391 S.E.2d 198, 199 (1990) (citing N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(i)) (other citation omitted). The notice of voluntary dismissal shall be served upon a party, pursuant to Rule 5 of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 5(a) (2019) ("[E]very written notice . . . shall be served upon each of the parties[.]"). A party is one "who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209 (1977) (citation omitted).

¶ 14 Under N.C. Gen. Stat. § 1A-1, Rule 42(a) (2019), which governs the consolidation of civil actions, generally "when actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue

in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." N.C. Gen. Stat. § 1A-1, Rule 42(a). "[I]t is the rule in this jurisdiction that when cases are consolidated for trial, although it becomes necessary to make only one record, the cases remain separate suits and retain their distinctiveness throughout the trial and appellate proceedings." *Kanoy v. Hinshaw*, 273 N.C. 418, 424, 160 S.E.2d 296, 301 (1968) (citations omitted); *see also Pack v. Newman*, 232 N.C. 397, 400-01, 61 S.E.2d 90, 92 (1950) (Where the court consolidated the two independent actions for judgment, "the actions did not become one action. They remained separate suits.") (citation omitted). *See also Hall v. Hall*, 138 S. Ct. 1118, 1124, 1128 (2018) (examining the meaning of "consolidation" and the Courts' 125-year history interpreting the term and determining that "consolidated cases remain distinct" as to "parties, pleading, and judgment," and "that there must be separate verdicts, judgments, or decrees") (quotation marks and citations omitted).[8]

¶ 15 In this case, Sullivan filed a complaint against Robert and Karen Pugh, seeking to recover damages resulting from the fire. TOG filed a separate complaint against Karen Pugh, seeking to recover damages resulting from the fire. Upon Robert and Karen Pugh's motion and consent of the parties, the trial court consolidated the actions for trial. Although the actions were to be tried together for the sake of convenience and judicial economy, "the actions did not become one action. They remained separate suits." *Pack*, 232 N.C. at 400-01, 61 S.E.2d at 92. Accordingly, Sullivan was not a party to the TOG Lawsuit, brought by TOG against Karen Pugh, and TOG was not required to serve its notice of Voluntary Dismissal upon Sullivan.

2. Trial Court's Jurisdiction

¶ 16 **[2]** Defendant also argues that the trial court erred by "failing to accept jurisdiction" over TOG's Motion to Strike. We disagree.

¶ 17 "It is well established that where [a] plaintiff takes a voluntary dismissal pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 41(a)(1), no suit is pending thereafter on which the court could make a final order." *Ward v. Taylor*, 68 N.C. App. 74, 78, 314 S.E.2d 814, 818 (1984). "The rule clearly does not require court action, other than ministerial record-keeping functions, to effect a dismissal." *Id.* at 78, 314 S.E.2d at 819. The no-

8. "The North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules. Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina Rules." *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citations omitted).

tice of dismissal is the operative document and "itself closes the file." *Carter v. Clowers*, 102 N.C. App. 247, 251, 401 S.E.2d 662, 664 (1991) (citation omitted).

¶ 18 Here, TOG filed its Voluntary Dismissal on 12 April 2019, thus closing the file on that date. Thereafter, no suit was pending upon which the trial court could enter an order. Accordingly, the trial court correctly concluded that TOG's notice of Voluntary Dismissal deprived the trial court of jurisdiction to enter further orders, including an order on TOG's motion to strike.

III. Conclusion

¶ 19 As Sullivan was not entitled to TOG's notice of the Voluntary Dismissal dismissing the TOG Lawsuit, and because TOG's Voluntary Dismissal deprived the trial court of jurisdiction to enter further orders in the TOG Lawsuit, we affirm the Final Order.

AFFIRMED.

Judges INMAN and GRIFFIN concur.

JULIUS WILLIAM WOODY, AND SHANNON CHAD GAINES, PLAINTIFFS
v.
RANDY LYNN VICKREY, INDIVIDUALLY AND IN HIS CAPACITIES AS TRUSTEE OF THE JULIUS WILLIAM WOODY TRUST AND AS ATTORNEY-IN-FACT FOR JULIUS WILLIAM WOODY, DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
CARRIE F. VICKREY, AND DONALD G. AYSCUE, THIRD-PARTY DEFENDANTS

No. COA20-337

Filed 6 April 2021

1. Appeal and Error—interlocutory appeal—substantial right—risk of inconsistent verdicts—only a damages claim remaining

Appellants in a quiet title action were not entitled to immediate review of their interlocutory appeal (challenging orders granting a declaratory judgment, partial summary judgment, and a permanent injunction) on grounds that the trial court deprived appellants of a substantial right to avoid the risk of inconsistent verdicts in two potential trials. No such risk existed where the trial court had determined all issues of liability and the only remaining claim (a civil conspiracy claim) was for damages. Moreover, appellants failed to

provide sufficient facts and argument in their statement of grounds for appellate review, pursuant to Appellate Rule 28(b), to demonstrate that the challenged orders affected a substantial right.

2. Appeal and Error—interlocutory appeal—substantial right—right to jury trial—constitutional and statutory requirements

Appellants in a quiet title action were entitled to immediate review of their interlocutory appeal (challenging orders granting a declaratory judgment, partial summary judgment, and a permanent injunction), which affected their substantial right to a jury trial. Appellants had a constitutional right to a jury trial where each claim in the action related to property and existed at the time that the state constitution was adopted, and where genuine issues of material fact remained regarding key preliminary issues affecting each claim (mental capacity and undue influence). Appellants also had a statutory right to a jury trial where all parties to the action demanded a jury trial pursuant to Civil Procedure Rule 38(b) and no party withdrew that right under Rule 38(d).

3. Jurisdiction—quiet title action—summary judgment on amended complaint—previously granted on original complaint

In a quiet title action regarding property held in a trust, where a trial judge denied defendant's summary judgment motion with respect to plaintiff's original complaint and then granted plaintiff leave to file an amended complaint, the trial court (under a different presiding judge) had jurisdiction to address defendant's subsequent motion for summary judgment on the amended complaint. Although one superior court judge may not overrule or modify a judgment that another superior court judge enters in the same action, the amended complaint superseded the original complaint, thereby rendering moot any summary judgment issues pertaining to the original complaint.

4. Real Property—quiet title action—documents affecting property held in trust—mental capacity to execute—incorrect standard applied

In a dispute over property held in a trust, which the trustee (appellee) transferred to himself after the original landowner executed multiple legal instruments benefitting appellants—including a revocation of the trust, a will, and deeds to the property—the trial court erred by granting partial summary judgment in appellee's favor on his claims for quiet title, conversion, and rescission of the legal instruments. Specifically, the trial court improperly relied

upon an expert opinion when concluding that the landowner lacked capacity to execute the instruments because, by opining that the landowner was incapable of contracting in a "knowing, voluntary, and intelligent manner," the expert applied an incorrect standard for determining the landowner's testamentary and contractual capacity.

5. Real Property—quiet title action—documents affecting property held in trust—undue influence—partial summary judgment

In a dispute over property held in a trust, which the trustee (appellee) transferred to himself after the original landowner executed multiple legal instruments benefitting appellants—including a revocation of the trust, a will, and deeds to the property—the trial court improperly granted partial summary judgment in appellee's favor on his claims for quiet title, conversion, and rescission of the legal instruments on grounds that the landowner signed the instruments under undue influence. Once appellee presented a prima facie case of undue influence through expert testimony, the issue was required to be submitted to a jury.

6. Injunctions—quiet title action—permanent injunction—before final trial—improper

In a quiet title action regarding property held in a trust, which the trustee (appellee) transferred to himself after the original landowner executed multiple legal instruments benefitting appellants—including a revocation of the trust, a will, and deeds to the property—it was improper for the trial court to issue a permanent injunction—enjoining appellants from entering the property or communicating with the original landowner—before a final trial of the action had occurred.

7. Conversion—summary judgment—genuine issue of material fact—parties responsible for removing personal property from land—civil conspiracy

In a quiet title action regarding real property held in a trust, where defendant trustee filed a counterclaim for conversion against two individuals living on the property (third-party defendants), the trial court improperly granted summary judgment in defendant's favor on the counterclaim because—where defendant failed to specify which parties removed his vehicles and hunting equipment from the property, and evidence suggested the property's original owner and another individual (plaintiffs) disposed of the vehicles and equipment—a genuine issue of material fact existed as

to which parties wrongfully exercised ownership and control over defendant's personal property. By deciding the conversion claim, the court also eliminated a genuine issue of material fact (liability) for the jury to determine in defendant's other counterclaim for civil conspiracy, and therefore the court erred by not granting summary judgment on both counterclaims.

Judge HAMPSON concurring in result with separate opinion.

Judge JACKSON dissenting.

Appeal by plaintiff and third-party defendants from orders entered 11 October 2019, and 4 November 2019, by Judges Carl R. Fox and Susan E. Bray in Chatham County Superior Court. Heard in the Court of Appeals 27 January 2021.

Coleman Gledhill Hargrave Merritt & Rainsford, P.C., by Cyrus Griswold, for Plaintiff-Appellant and Third-Party Defendants-Appellants

Reiss & Nutt, PLLC, by W. Cory Reiss, for Defendant-Appellee

CARPENTER, Judge.

¶ 1 Plaintiff Shannon Chad Gaines and Third-Party Defendants Carrie Vickrey and Donald Ayscue appeal from interlocutory orders including a declaratory judgment, an order on partial summary judgment, and a permanent injunction.

I. Factual & Procedural Background

¶ 2 The evidence tends to show that on 22 July 2008, Julius William Woody ("Plaintiff Woody") appointed his long-time friend Randy Lynn Vickrey, defendant and third-party plaintiff ("Defendant Vickrey"), as trustee of a revocable trust. Plaintiff Woody executed a general warranty deed and a bill of sale to transfer real property and personal property into the trust.

¶ 3 In the spring of 2017, Carrie Vickrey ("Third-Party Defendant Vickrey"), Donald Ayscue ("Third-Party Defendant Ayscue"), and Shannon Chad Gaines ("Plaintiff Gaines") (collectively "Appellants") moved at least one trailer onto Plaintiff Woody's parcel and lived on his property. Friends and family members of Plaintiff Woody noticed a change in his home and living conditions after Appellants moved to

the property: cameras and sensors were installed around the home, curtains remained closed, Plaintiff Woody became isolated, and his personal property went missing. They were also concerned about his mental and physical wellbeing as he became increasingly feeble and susceptible to scams. Within one month after Appellants moved onto Plaintiff Woody's property, he executed multiple legal instruments including a revocation of the 2008 trust, a general power of attorney, a will, a certificate of trust, and general warranty deeds—all of which benefited one or more Appellants.

¶ 4 On 30 August 2017, Defendant Vickrey executed a certificate of trust to affirm his status as trustee of Plaintiff Woody's 2008 trust. To further protect the trust, he also transferred two parcels of land held by the trust to himself.

¶ 5 Plaintiffs Woody and Gaines filed a complaint in the Chatham County Superior Court against Defendant Vickrey on 22 November 2017, seeking to quiet title to the real property that Defendant Vickrey had transferred to himself. In Defendant Vickrey's answer to the initial complaint, he brought counterclaims including an action for declaratory judgment seeking the court to name him the trustee and sole beneficiary of Plaintiff Woody's trust, and a claim to quiet title to remove a 2017 deed executed by Plaintiff Woody. Defendant Vickrey also brought third-party claims against Third-Party Defendants Vickrey and Ayscue. These claims were for cancellation or rescission of certain documents signed by Plaintiff Woody in 2007 due to duress, undue influence, and lack of capacity; quiet title to remove a 2017 deed executed by Plaintiff Woody; punitive damages; injunctive relief; conversion; and civil conspiracy. All parties to the case prayed the court for a trial by jury.

¶ 6 Dr. George Corvin, a board-certified forensic psychiatrist, performed a mental examination on Plaintiff Woody in November of 2017 pursuant to court order. Dr. Corvin rendered an opinion with a "reasonable degree of medical certainty" that Plaintiff Woody lacked competence to sign the legal instruments executed in June of 2017 "in a knowing, voluntary, and intelligent manner." Defendant Vickrey filed his first motion for summary judgment on 10 January 2019, which was denied by presiding judge, the Honorable Allen Baddour, in an order (the "Baddour Order") entered pursuant to Rule 58 of the North Carolina Rules of Civil procedure on 10 February 2019. On 1 February 2019, Plaintiff Woody was granted leave to file, and filed, an amended and restated complaint, which brought claims against Defendant Vickrey relating to his alleged breach of fiduciary duties. Defendant Vickrey answered the amended and restated complaint and amended his counterclaims on 22 February 2019.

¶ 7 Defendant Vickrey filed a second motion for summary judgment on 18 September 2019 based on the amended pleadings. On 10 October 2019, the presiding judge, the Honorable Carl Fox, entered an order (the "Fox Order") granting declaratory judgment designating Defendant Vickrey as the trustee and sole beneficiary of Plaintiff Woody's trust. In his order, Judge Fox granted summary judgment in favor of Defendant Vickrey on the parties' claims for quiet title and conversion. He also granted summary judgment in favor of Defendant Vickrey on his third-party claim for cancellation and recission of the 2017 instruments. Finally, Judge Fox denied summary judgment regarding Defendant Vickrey's third-party claim for civil conspiracy.

¶ 8 Plaintiff Woody voluntarily dismissed his other claims, without prejudice on 22 October 2019. Defendant Vickrey moved for a preliminary injunction on 7 September 2018 to prevent the transfer of assets from the 2008 trust, which the court granted on 1 November 2018.

¶ 9 A permanent injunction was entered on 4 November 2019, by the presiding judge, the Honorable Susan Bray, to enjoin Plaintiff Gaines and Third-Party Defendants Vickrey and Ayscue from communicating with Plaintiff Woody and from entering his property. The only remaining unresolved claim in the proceeding is Defendant Vickrey's counterclaim for civil conspiracy.

¶ 10 Appellants filed their notice of appeal to the Court of Appeals from the Fox Order and the permanent injunction. The trial court proceedings for this matter were stayed pursuant to N.C. Gen. Stat. § 1-294 until this Court issues its opinion.

II. Issues

¶ 11 The issues are whether: (1) Appellants have shown harm to a substantial right sufficient to warrant an immediate appeal from interlocutory orders, which removed the preliminary factual determinations of undue influence and lack of mental capacity from a jury; (2) the trial court properly granted summary judgment in favor of Defendant Vickrey after a motion for summary judgment had been previously denied; (3) the trial court properly granted partial summary judgment, which effectively resolved the critical preliminary factual issues of undue influence and lack of capacity; (4) the trial court properly issued a permanent injunction before a final hearing on the merits; and (5) the trial court properly granted summary judgment on Defendant Vickrey's counterclaim for conversion in the partial summary judgment order.

III. Jurisdiction

A. Interlocutory Appeal

¶ 12 As an initial matter, this Court must determine whether it possesses jurisdiction over the interlocutory appeal of the declaratory judgment, partial summary judgment, and permanent injunction. All parties agree that the orders from which Appellants appeal are interlocutory.

¶ 13 "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, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation omitted). "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, "[t]here are . . . two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right . . . ." *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 153 (1999) (quotations omitted). An appellant's substantial right is deprived if it is "lost, prejudiced or [will] be less than adequately protected" without an immediate appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) or 7A-27(b)(3)(a). *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987).

¶ 14 In this case, the trial court's judgment was final as to some but not all of the claims; however, the trial court did not certify the order so there is no immediate appeal authorized under Rule 54(b). In order for the Appellants to have a right of appeal, the trial court must have deprived Appellants of a substantial right that would be lost, prejudiced, or less than adequately protected absent immediate review. *See J & B Slurry Seal Co.*, 88 N.C. App. at 6, 362 S.E.2d at 815. Appellants contend that their substantial rights are prejudiced, including: (1) the right to not receive inconsistent verdicts in two potential trials; and (2) the right to have a jury determine all factual issues where a genuine issue of material fact exists.

1. Inconsistent Verdicts

¶ 15 **[1]** We first consider Appellants' argument that the interlocutory orders affect their right to not receive inconsistent verdicts. Appellants argue in their statement of grounds for appellate review: "In a trial limited to Appellee's remaining claims, a jury could find Appellants not liable. If the summary judgment at issue here were then reversed on appeal, a second jury could find Appellants liable on those same claims."

¶ 16 Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires that an appellant's brief include, *inter alia*:

> A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b)(4). The burden is on the appellant to explain in the statement of the grounds for appellate review "why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Denney v. Wardson Constr., LLC*, 264 N.C. App. 15, 18, 824 S.E.2d 436, 438 (2019).

¶ 17 A party's right to avoid separate trials of the same factual issues may constitute a substantial right. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). To determine whether a substantial right exists, "[t]his Court has interpreted the language of *Green* and its progeny as creating a two-part test requiring that a party show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735–36, 460 S.E.2d 332, 335 (1995) (citation omitted). "The test is satisfied when overlapping issues of fact between decided claims and those remaining create the possibility of inconsistent verdicts from separate trials." *Newcomb v. Cty. of Carteret*, 183 N.C. App. 142, 145, 643 S.E.2d 669, 671 (2007), *disc. rev. denied*, 365 N.C. 212, 710 S.E.2d 26 (2011) (citations omitted). "The mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 80, 711 S.E.2d 185, 190 (2011) (citation omitted). The risk of inconsistent verdicts means that there

is "a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time." *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439.

¶ 18 This Court has held the risk of inconsistent verdicts is not present when the issue of liability has been determined and only damages claims remain for a trial court's consideration. *See*, *e.g.*, *Tridyn Indus.*, *Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979). Therefore, when only claims for damages remain, there is no substantial right affected which warrants immediate appeal. *CBP Resources*, *Inc.*, 134 N.C. App. at 172, 517 S.E.2d at 154. Our Supreme Court has stated that a civil action for conspiracy is an action for damages:

> Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof -- the damage -- not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable.

Reid v. Holden, 242 N.C. 408, 414–15, 88 S.E.2d 125, 130 (1955) (quoting 11 Am. Jur. 577, Conspiracy § 45).

¶ 19 Here, issues of liability were determined by the trial court, and the only claim remaining for consideration is a claim for civil conspiracy, or a claim for damages. Therefore, Appellants have not identified in their statement of grounds for appellate review a risk of inconsistent verdicts. *See CBP Resources*, *Inc.*, 134 N.C. App. at 172, 517 S.E.2d at 154. Moreover, Appellants have not put forth sufficient facts and argument to show how irreconcilable verdicts would arise if a fact finder determined the remaining claim, and the order on partial summary judgment was subsequently reversed. *See Union Cty. v. Town of Marshville*, 255 N.C. App. 441, 446–47, 804 S.E.2d 801, 805–06 (2017); N.C. R. App. P. 28(b)(4). In considering Appellants' hypothetical, we do not find that inconsistent verdicts would arise if a jury found them not liable on the remaining claim for civil conspiracy, the summary judgment was reversed, and a second jury found them liable on the other claims.

2. Right to Trial by Jury

¶ 20 **[2]** We next consider Appellants' argument that an immediate appeal from the interlocutory orders is necessary to protect their substantial right to a trial by jury because all parties to the suit prayed the court for a jury on all triable issues, and Appellants did not waive this right at any time.

¶ 21 In order to exercise the right to a jury trial in North Carolina, a party must meet certain constitutional and statutory requirements. The North Carolina Constitution provides a right to a jury trial "[i]n all [civil] controversies at law respecting property . . . ." N.C. Const. art. I, § 25 ("[T]he ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."). Our Court has found "the right to a jury trial is a substantial right of great significance." *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975), *disc. rev. denied*, 289 N.C. 140, 220 S.E.2d 798 (1976). However, "[t]he constitutional right to trial by jury, N.C. Const., Art. I, § 25, is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979).

¶ 22 In *N.C. State Bar v. Du Mont*, our Supreme Court interpreted "Article I, § 25 of the North Carolina Constitution [as] preserv[ing] intact the right to trial by jury in all cases where the [action] existed at common law or by statute at the time the 1868 Constitution was adopted." 304 N.C. 627, 641, 286 S.E.2d 89, 98 (1982). "If the action existed at the time of the adoption of the 1868 Constitution, then the court [must] 'determine[ ] whether the remedy sought is one at law respecting property.' " *Kiell v. Kiell*, 179 N.C. App. 396, 400, 633 S.E.2d 827, 830 (2006) (quoting *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 518, 385 S.E.2d 329, 332 (1989)). In *Kiell*, our Court stated that "when the issues upon which a jury trial is sought 'form no part of the ultimate relief sought [and] do not affect the final rights of the parties,' then 'the power of the judge to make them is constitutionally exercised without the intervention of the jury.' " *Kiell*, 179 N.C. App. at 401, 633 S.E.2d at 830 (quoting *Peele v. Peele*, 216 N.C. 298, 300, 4 S.E.2d 616, 618 (1939)).

¶ 23 Here, each property claim at issue, including a quiet title action, a petition for declaratory judgment designating a trust's trustee and beneficiary, a claim for conversion, and the nullification of legal instruments relating to property, "existed at common law or by statute at the time

the 1868 Constitution was adopted." *See N.C. State Bar*, 304 N.C. at 641, 286 S.E.2d at 98; *see, e.g.*, *Suanderson v. Ballance*, 55 N.C. 322 (2 Jones Eq.) (1856) (reviewing a quiet title action and holding the plaintiff was entitled to "mak[e] his title good"); *Goodrum v. Goodrum*, 43 N.C. 313 (8 Ired. Eq.) (1852) (plaintiff sought a declaratory judgment that her slaves were separate property from her husband's); *Nichols v. Newsom*, 6 N.C. 302 (2 Mur.) (1813) (defining conversion as "wrongfully turning to one's use the personal goods of another, or doing some wrongful act inconsistent with or in opposition to the right of the owner"); *Millison v. Nicholson*, 1 N.C. 612 (1 Cam. & Nor.) (discussing the validity of an executed deed when mental capacity of the grantor was at issue); *Hemphill v. Hemphill*, 13 N.C. 291 (1 Dev.) (stating that when there is proof of undue influence exerted upon an individual executing a contract or a will, the weight of the evidence is to be determined by a jury). Therefore, as long as a genuine issue of a material fact exists with respect to a claim, the parties have a constitutional right to a jury trial on that civil claim. *See N.C. Nat'l Bank*, 297 N.C. at 537, 256 S.E.2d at 396.

¶ 24 In this case, the remedies sought by the parties are declaratory relief, damages, and a decree naming certain conveyance instruments void. Each "remedy sought is one at law respecting property." *See Kiell*, 179 N.C. App. at 400, 633 S.E.2d at 830. The issues for which a jury is sought include the preliminary issues of mental incapacity and undue influence as well as the disputed claims of conversion and quiet title. Genuine issues of fact exist with respect to the issues of whether Plaintiff Woody is mentally competent and whether he was unduly influenced. These issues are in the province of a jury and must be determined before the ultimate issues of the quiet title action, the declaratory judgment regarding the trust, and the validity of legal instruments may be resolved. Thus, the issues upon which a jury trial is sought "form [*some*] part of the ultimate relief sought [and] . . . affect the final rights of the parties." *See id.* at 401, 633 S.E.2d at 830 (emphasis added). Unlike *Kiell*, where a jury was directed on only the preliminary issues and not on the ultimate merits of the underlying claims, the jury in this case would be directed to decide both preliminary issues of mental capacity and undue influence, and the ultimate merits of the underlying claims for quiet title, conversion, nullification of documents, as well as a declaratory judgment regarding a trust—all of which respect property. *See id.* at 401, 633 S.E.2d at 830. Thus, the final rights of the parties are affected. *See id.* at 401, 633 S.E.2d at 830. Therefore, Appellants in the case *sub judice* have satisfied the test to establish their constitutional right to a trial by jury under Article I, § 25.

¶ 25 Along with satisfying constitutional mandates, a party must meet statutory requirements to exercise the right of a jury trial. Rule 38 of the North Carolina Rules of Civil Procedure establishes the manner by which a party must request a jury trial:

> (b) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.
>
> . . . .
>
> (d) . . . A demand for trial by jury . . . may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 38(b), (d) (2019). Pursuant to Rule 39, "[w]hen trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action." N.C. Gen. Stat. § 1A-1, Rule 39(a) (2019). The trial shall be by jury for all triable issues in which it has been demanded unless the parties, by stipulation, consent to a trial without a jury or the court finds that there is no constitutional or statutory right to a trial by jury. *Id.*

¶ 26 In this case, each party to the suit demanded a jury trial pursuant to Rule 38(b), and their right was not withdrawn at any point in the action under Rule 38(d). Therefore, the action should have been designated upon the docket as a jury action on these triable issues pursuant to Rule 39(a).

¶ 27 *Ayscue v. Griffin* is instructive on the issue of whether the trial court prejudiced Appellants' constitutional and statutory rights to a jury trial. 263 N.C. App. 1, 823 S.E.2d 134 (2018). In *Ayscue*, this Court granted an interlocutory appeal after the trial court improperly deprived a party of its right to a jury trial on a "critical preliminary issue," the location of a disputed property boundary line. *Id.* at 9, 823 S.E.2d at 140. We held that the location of the boundary line was a factual question, and the plaintiffs had a constitutional and statutory right to a jury trial that was not waived; therefore, the trial court improperly relied upon a witness's opinion in issuing its orders rather than having the question heard before a jury. *Id.* at 9, 823 S.E.2d at 140. The orders "effectively mooted and resolved" the plaintiffs' claims and "denied and deprived" them of their

right to a jury trial. *Id.* at 9, 823 S.E.2d at 140. Accordingly, we vacated the order, and the matter was remanded for a jury trial on all triable issues. *Id.* at 14, 823 S.E.2d at 143.

¶ 28 Here, the Fox Order "effectively . . . resolved" the claims before the court and "denied and deprived" Appellants of a jury trial on the factual issues of undue influence and lack of mental capacity. *See Ayscue*, 263 N.C. App. at 9, 823 S.E.2d at 140. Appellants' right to a jury determination of all triable issues constitutes a substantial right. *Id.* at 9, 823 S.E.2d at 140. The issues of undue influence and mental capacity in the context of this case are critical and material issues of fact for the jury to determine; however, the court resolved these factual issues as a matter of law by granting a declaratory judgment and an order for partial summary judgment in favor of Defendant Vickrey. *See Walker v. Walker*, 256 N.C. 696, 698, 124 S.E.2d 807, 808 (1962) (stating the issue of mental capacity is one for a jury); *In re Will of Andrews*, 299 N.C. 52, 56, 261 S.E.2d 198, 200 (1980) (stating that once a *prima facie* case of undue influence has been presented, the "case must be submitted to the jury for its decision"). Appellants' right to a jury determination of these issues would be prejudiced without our immediate review because nearly all parties' claims, including an undecided claim of conspiracy, rest on the determination of whether there was undue influence and whether Plaintiff Woody lacked capacity.

¶ 29 Finally, North Carolina courts have recognized that an "order denying [a party's] motion for a jury trial is appealable." *In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985) (citation omitted); *see In re Ferguson*, 50 N.C. App. 681, 274 S.E.2d 879 (1981). By the same token, a court order that effectively denies a party's constitutional and statutory right to a jury trial is appealable. *See Faircloth v. Beard*, 320 N.C. 505, 507, 358 S.E.2d 512, 514 (1987) (holding that "an order requiring a jury trial" is appealable since "an order denying [a party's motion to] a jury trial is appealable").

¶ 30 Appellants have met North Carolina's constitutional and statutory requirements to exercise their right to a jury trial in the instant action. Accordingly, their substantial right to a jury was prejudiced by the Fox Order. This Court holds Appellants have an immediate right to appeal.

IV. Jurisdiction for Summary Judgment

A. Standard of Review

¶ 31 We review questions of subject-matter jurisdiction *de novo*. *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007) (citation omitted).

B. Analysis

¶ 32 **[3]** Appellants contend the grant of partial summary judgment entered by Judge Fox was improper because Judge Baddour had previously denied an initial motion for summary judgment.

¶ 33 We acknowledge the well-established rule in North Carolina that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). In this case, the Baddour Order recognizing that issues of material fact existed, addressed summary judgment on the original complaint. However, Plaintiff Woody had been granted leave of the Court and had filed an amended and restated complaint six days prior to the Baddour Order being entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure. "[A]n amended complaint has the effect of superseding the original complaint." *Hyder v. Dergance*, 76 N.C. App. 317, 319–20, 332 S.E.2d 713, 714 (1985) (citation omitted). Thus, the filing of the amended and restated complaint rendered any arguments regarding the original complaint moot, including a motion for summary judgment on the original complaint. *See Houston v. Tillman*, 234 N.C. App. 691, 695, 760 S.E.2d 18, 20 (2014). Therefore, this Court holds the trial court had jurisdiction to address the subsequent motion for summary judgment on the amended and restated complaint addressed by the Fox Order.

V. Critical Preliminary Factual Issues

A. Standard of Review

¶ 34 We review *de novo* the issues of the trial court's Fox Order granting partial summary judgment on critical and material issues of fact and effectively denying Appellants the right to a trial by jury. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.").

B. Mental Incapacity

¶ 35 **[4]** Appellants argue Dr. Corvin applied an incorrect standard for determining Plaintiff Woody's testamentary capacity and contractual capacity.

¶ 36 The correct standard for testamentary capacity in North Carolina is the individual: "(1) comprehends the natural objects of h[is] bounty, (2) understands the kind, nature and extent of h[is] property, (3) knows the

manner in which [ ]he desires h[is] act to take effect, and (4) realizes the effect h[is] act will have upon h[is] estate." *In re Will of McNeil*, 230 N.C. App. 241, 249, 749 S.E.2d 499, 505 (2013). The capacity required to execute a deed includes: (1) understanding the nature and consequences of making a deed; (2) comprehending its scope and effect; and (3) knowing what land he is disposing of and to whom and how. *Hendricks v. Hendricks*, 273 N.C. 733, 734, 161 S.E.2d 97, 98 (1968). Finally, for other contracts, a person has sufficient mental capacity if he has "the ability to understand the nature of the act in which he is engaged and its scope and effect . . . ." *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905).

¶ 37 Dr. Corvin used the standard of "knowingly, voluntarily, and intelligently" to determine testamentary and contractual capacity in his opinion of Plaintiff Woody's mental state. This standard was also cited by the trial court in the Fox Order, where it concluded Plaintiff Woody lacked capacity to execute legal instruments in 2017. The "knowingly, voluntarily, and intelligently" standard is normally applied in the waiver of rights in the context of criminal matters. *See State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984). Not only were improper standards for mental capacity used, but the court's adoption of Dr. Corvin's opinion effectively resolved critical issues of fact arising from the claims addressed in the Fox Order, denying and depriving Appellants of their right to have a jury determine those issues of fact. *See Walker*, 256 N.C. at 698, 124 S.E.2d at 808. Therefore, this Court holds the trial court improperly granted partial summary judgment because mental capacity was a critical preliminary factual issue for a jury.

C. Undue Influence

¶ 38 **[5]** Appellants further argue that summary judgment was inappropriate on the underlying issue of undue influence because it was question of fact for a jury.

¶ 39 On appeal and at the hearing for summary judgment, Defendant Vickrey improperly relied on the case of *Leonard v. England* for the proposition that providing "a 'competent and unchallenged' expert opinion that a person lacked necessary capacity . . . is grounds for summary judgment on that issue." *See Leonard v. England*, 115 N.C. App. 103, 445 S.E.2d 50 (1994), *disc. rev. vacated and denied*, 340 N.C. 113, 455 S.E.2d 663 (1995). Defendant Vickrey does not raise, nor do we find, one case in which summary judgment was granted on the issue of undue influence after a *prima facie* case had been presented before a court. Our Supreme Court has stated that once a *prima facie* case of undue influ-

ence has been presented by a party, "the case must be submitted to the jury for its decision." *In re Will of Andrews*, 299 N.C. at 56, 261 S.E.2d at 200.

¶ 40 The petition for declaratory judgment as well as the claims for quiet title and rescission and cancellation of instruments rely on the critical and material factual issues of undue influence and lack of capacity, which were improperly determined as a matter of law by the trial court; therefore, the declaratory judgment and partial summary judgment orders on these claims are vacated.

VI. Permanent Injunction

A. Standard of Review

¶ 41 "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) (emphasis added).

B. Analysis

¶ 42 **[6]** Appellants argue that the trial court lacked jurisdiction to issue a permanent injunction before the full case had been heard on its merits.

¶ 43 A trial court lacks authority to issue "the extreme remedy of a permanent injunction" before the final trial of the action. *Cty. of Johnston v. City of Wilson*, 136 N.C. App. 775, 781, 525 S.E.2d 826, 830 (2000); *see Shishko v. Whitely*, 64 N.C. App. 668, 308 S.E.2d 448 (1983).

¶ 44 In contrast to a permanent injunction, a preliminary injunction, is:

> an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits. The issuing court, after weighing the equities, and the advantages and disadvantages to the parties, determines in its sound discretion whether an interlocutory injunction should be granted or refused. The court cannot go further and determine the final rights of the parties, which must be reserved for the final trial of the action.

Cty. of Johnston, 136 N.C. App. at 780, 525 S.E.2d at 829–30 (citations and quotations omitted).

¶ 45 Here, it was improper for the trial court to grant the "extreme remedy of a permanent injunction" because it "determine[d] the final rights of the parties" before the "final trial of the action." *See id.* at 780–81, 525 S.E.2d at 829–30. Therefore, the permanent injunction is vacated.

VII. Conversion Claim

A. Standard of Review

¶ 46 "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)) (emphasis added).

B. Analysis

¶ 47 **[7]** Lastly, we address Appellants' contention that the trial court erred in granting summary judgment on the conversion claim because genuine issues of material fact were present.

¶ 48 The tort of conversion is defined in North Carolina as the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986).

¶ 49 Appellants concede Defendant Vickrey owned vehicles and hunting equipment located on Plaintiff Woody's parcel prior to August of 2017, and further concede the personal property was removed. Appellants argue, however, Plaintiff Vickrey failed to distinguish between Appellants in his counterclaim with respect to who had wrongfully exercised ownership over his property. Moreover, they contend Defendant Vickrey received notice to remove his property and failed to do so, thereby abandoning it.

¶ 50 The evidence tends to show a receipt from NC Recycling for automobile and steel shredding dated 14 August 2017 and signed by Plaintiff Woody. The record also contains a letter signed by Plaintiff Woody and Plaintiff Gaines dated 19 August 2017, addressed to Defendant Vickrey, informing him to remove his vehicles and hunting equipment from Plaintiff Woody's property before 8 September 2017. As Defendant Vickrey has properly raised, the demand letter is dated five days after the receipt, which shows the vehicles and steel were recycled. Appellants did not provide any additional evidence to prove that the vehicles were not disposed of before the demand letter was delivered to Defendant Vickrey. Based on the evidence, Plaintiffs Woody and Gaines assumed and exercised the right of ownership over Defendant Vickrey's personal property without his authorization and disposed of it. *See Myers*, 80 N.C. App. at 695, 343 S.E.2d at 283. However, in Defendant Vickrey's counter-

claim, he asserts that the "Conspiring Parties," or Appellants, are liable for conversion of his personal property. The Fox Order granted summary judgment for Defendant Vickrey on his claim for conversion, and only Third-Party Defendants Carrie Vickrey and Ayscue were found to have "wrongfully exercised ownership" over the property. Given that the evidence tends to show Plaintiffs Gaines and Woody took part in disposing of Defendant Vickrey's property, there is a genuine issue of material fact as to who had exercised ownership and control over Defendant Vickrey's property; thus, summary judgment was not appropriate. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 524–25, 723 S.E.2d 744, 748 (2012) (holding that a question of contractual intent was a genuine issue of material fact that precluded summary judgment).

¶ 51 Furthermore, given that the trial court granted summary judgment on the conversion claims, it erred by not also granting summary judgment on the conspiracy claim since there was no genuine of issue of material fact for a jury to determine once the conversion claims were decided. The trial court's improper grant of partial summary judgment on the conversion claims had the effect of eliminating a genuine issue of material fact as to the civil conspiracy claim because the liability of the parties was already decided, and the civil conspiracy claim would only determine damages. Thus, Appellants' right to a jury trial was prejudiced when the trial court ordered partial summary judgment on the conversion claims. For the foregoing reasons, the order on partial summary judgment with respect to the conversion claims is vacated.

VIII. Conclusion

¶ 52 This Court has jurisdiction to address the merits of Appellants' interlocutory appeal. Appellants have shown that their substantial right to a jury trial was prejudiced because the trial court improperly deprived Appellants of their right to a jury trial on the critical preliminary factual issues of undue influence and lack of mental capacity. To the extent the Fox Order was based on these critical preliminary issues, it is vacated.

¶ 53 Appellants have shown a genuine issue of material fact exists with respect to the liable parties of the conversion claims decided in the Fox Order, and this improper grant of summary judgment also eliminated any existing genuine issues of material fact with respect to the undecided civil conspiracy claim; therefore, this Court vacates this portion of the Fox Order.

¶ 54 The permanent injunction was improper because it determined the final rights of the parties before a hearing on the merits had been held.

¶ 55 Accordingly, this Court vacates the permanent injunction; declaratory judgment regarding the trust; and partial summary judgment regarding the cancellation and rescission, quiet title, and conversion claims, and this Court remands to the trial court for further proceedings and for a jury trial on all triable issues. *It is so ordered.*

VACATED IN PART AND REMANDED.

Judge HAMPSON concurs in result with separate opinion.

Judge JACKSON dissents with separate opinion.

HAMPSON, Judge, concurring in result.

¶ 56 I agree the trial court's Orders granting partial summary judgment and entering a permanent injunction must be vacated and this matter remanded for further proceedings and, as such, concur in the result. I differ, however, both in (I) the articulation of a substantial right permitting an immediate appeal of these interlocutory Orders and (II) the analysis on the merits as it relates to whether summary judgment was proper on the claims arising from the allegations of undue influence and, in turn, the issuance of the permanent injunction.[1]

I.

¶ 57 This case provides an excellent illustration that "[t]he 'substantial right' test for appealability is more easily stated than applied." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (citations omitted). Indeed, articulating a generally applicable substantial right in any given case can be challenging at best. Thus, as our Supreme Court has cautioned: "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." *Id.* (citations and quotation marks omitted). Hence, as our Court summarized: "Whether an interlocutory appeal affects a substantial right is determined on a case-by-case basis." *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 853, 616 S.E.2d 688, 689 (2005) (citation omitted). Here, the "case-by-case" approach is particularly applicable.

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1. To be clear, I fully agree with the Opinion of the Court in Parts IV and VII addressing the trial court's jurisdiction to consider Summary Judgment and the grant of Summary Judgment on the Conversion counterclaim.

¶ 58 We are unanimous in agreeing Appellants have failed to articulate a substantial right arising from the possibility of inconsistent verdicts. Moreover, I agree with the dissent that the trial court's grant of partial summary judgment in and of itself does not affect a substantial right to a jury trial pertaining to the Appellants' property rights. However, the trial court's partial Summary Judgment Order does directly and materially impact title to property—and, specifically, finally determines a threshold question in this case necessary to resolve the remaining claims: Who properly holds title to the property at issue?

¶ 59 Here, the trial court's partial Summary Judgment Order decides that threshold question and, then, goes further by ordering:

> All instruments executed by Plaintiff Woody in 2017 are *void*, *rescinded*, *and ordered stricken* from the records of the Chatham County Register of Deeds and title to the property is established consistent with the General Warranty Deed recorded by Defendant Vickrey on 30 August 2017, subject to a constructive trust in favor of Plaintiff Woody until his death.

In addition, the trial court's subsequent, permanent injunction permanently bars Appellants from any access to the property and from Mr. Woody, including in advance of a trial on the remaining merits. Further, on the particular facts and procedural context of this case, time is of the essence because it involves the estate of a person who is still alive and, thus, may still have the ability to amend and alter his estate, participate in ongoing litigation, and who is still a party to this case. The efficacy of reaching the merits in this particular case is further underscored by the fact the trial court, purportedly applying N.C. Gen. Stat. § 1-294, has stayed any further proceedings pending this appeal.

¶ 60 Under the current state of our caselaw, "outside of the condemnation context, the fact that an interlocutory appeal may affect title to land does not automatically render an interlocutory appeal permissible. The appellant must still demonstrate that the particular order, if not addressed prior to a final judgment, would adversely affect a substantial right of the appellant." *Superior Constr. Corp. v. Intracoastal Living, LLC*, 207 N.C. App. 750, 701 S.E.2d 403 (2010) (unpublished). This may be done by a showing: "Resolution of the remaining claims could not move forward until the question of who held title to the property was finally decided and, therefore, a substantial right was at stake." *Id.* Here, the central threshold question is who held title to the property and absent final resolution of that question, the remaining questions are left for decision. The trial court's partial Summary Judgment Order, and particu-

larly in combination with the permanent injunction barring Appellants from the property, finally resolves the issue of title to the property and, moreover, impairs the property rights of Appellants in a manner such that they are prejudiced resulting in immediate harm, which could not be cured by a later appeal. That is, their alleged title to the property is immediately stricken from the public record and they are barred from entering their alleged property or contacting Mr. Woody while still in the course of litigation. As such, in the interests of justice, I would conclude on the specific facts of this case that Appellants do have a right to a permissive interlocutory appeal under the substantial right doctrine.

II.

¶ 61 Next, I would vacate the trial court's partial Summary Judgment Order on the claims for declaratory judgment, quiet title, and rescission and cancellation of instrument arising from undue influence and lack of mental capacity. Each side presented sufficient evidence to create a genuine issue of material fact on the key question of Mr. Woody's competence at the time of the property transfers in question and, in turn, whether Mr. Woody was coerced to execute documents and transfer property by Appellants' undue influence.

¶ 62 Here, Defendant proffered the expert opinion of Dr. Corvin in support of summary judgment. I agree with the lead opinion that Defendant's reliance on *Leonard v. England*, 115 N.C. App. 103, 445 S.E.2d 50 (1994), is misplaced. *Leonard* stands for the proposition that summary judgment for a defendant was not proper on statute-of-limitations grounds where uncontradicted expert medical evidence showed the plaintiff was incompetent as defined by N.C. Gen. Stat. § 35A-1101(7) at the time the action accrued, and thus the statute of limitations was tolled. *Id.* at 107-108, 445 S.E.2d at 52.

¶ 63 It does not stand for the broad proposition Defendant advocates—that in order to defeat summary judgment on the issue of testamentary capacity and the existence of undue influence, the non-moving party *must* present expert testimony to rebut a movant's expert. Here, while Dr. Corvin's testimony is evidence tending to call into question Mr. Woody's capacity to execute legal documents at the time in question, it does not compel summary judgment in Defendant's favor. Appellants presented contradictory evidence in the form of witness testimony of people who observed Mr. Woody first-hand, including the attorney present when Mr. Woody executed the revocation of power of attorney and other acquaintances of Mr. Woody as to their observations of Mr. Woody's mental state during the time in question. Indeed, even Dr.

Corvin acknowledged he could not determine a precise time when Mr. Woody's testamentary incapacity began, his opinion was, at least in part, reliant on the credibility of the information and contemporaneous accounts provided to him, and that his opinion was subject to disagreement, even going so far as to note "another trier of fact can look at these set of facts and disagree with me."

¶ 64 Consequently, because there is a genuine issue of material fact on the question of Mr. Woody's competency to execute legal documents, partial summary judgment on these issues was erroneous and must be vacated. Moreover, because the partial Summary Judgment Order was erroneously entered, the permanent injunction entered as a result must also necessarily be vacated, and I would not reach the issue of whether entry of the permanent injunction was premature. Accordingly, I concur in the result reached in the Opinion of the Court vacating those Orders and remanding the case for trial.

JACKSON, Judge, dissenting.

¶ 65 Appellants raised two grounds for interlocutory appeal: (1) the right to not receive inconsistent verdicts in two potential trials; and (2) the right to have a jury determine all issues of fact. While I agree with the majority finding that the interlocutory orders do not affect Appellants' right to receive consistent verdicts, I cannot agree with its determination that Appellants' right to a jury trial was prejudiced. Because I believe Appellants' right to a jury trial was not prejudiced and Appellants therefore failed to show how denial of this interlocutory appeal would affect a substantial right, I respectfully dissent.

¶ 66 As the majority explains, for Appellants to have a right of appeal, "the trial court must have deprived Appellants of a substantial right that would be lost, prejudiced, or less than adequately protected absent immediate review." Our Court has recognized that "[t]he right to a jury trial is a substantial right of great significance." *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975), *disc. review denied*, 289 N.C. 140, 220 S.E.2d 798 (1976). However, "[t]he appealing party [still] bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature[,]" due to loss, prejudice, or inadequate protection of their right to trial. *Union Cty. v. Town of Marshville*, 255 N.C. App. 441, 444, 804 S.E.2d 801, 804 (2017) (citation omitted).

¶ 67 The North Carolina Constitution provides that the right to a jury trial should be preserved "[i]n all [civil] controversies at law respecting

property[,]" N.C. Const. art. I, § 25, however, our Supreme Court has explained that "[t]he constitutional right to trial by jury, N.C. Const., Art. I, § 25, is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). Thus, trial judges act as gatekeepers to all claims—preliminarily determining whether the jury is at liberty to hear the issues.

¶ 68 This notion is consistent with the majority's explanation of Rule 38 of the North Carolina Rules of Civil Procedure, which establishes the manner by which a party must request a jury trial. The Rule provides that "[a]ny party may demand a trial by jury of any issue *triable* of right by a jury[.]" N.C. Gen. Stat. § 1A-1, Rule 38(b) (2017) (emphasis added). The use of the word "triable" relates back to our Supreme Court's recognition in *Burnette*—that only certain issues make it to a jury.

¶ 69 Here, we are presented with a substantial right—the right to trial by jury—but said right is not lost, prejudiced, or less than adequately protected absent immediate review. In finding otherwise, the majority believes that *Ayscue v. Griffin*, 263 N.C. App. 1, 823 S.E.2d 134 (2018) is instructive here. However, this case is easily distinguishable from *Ayscue*. In *Ayscue*, by establishing the boundary line, the trial court "effectively mooted all of Plaintiff's claims[,]" leaving no issues to be decided by the jury. 263 N.C. App. at 8, 823 S.E.2d at 139. Thus, the court's order essentially operated as a final judgement. In this case, the partial summary judgment order did not operate as a final judgment because it did not decide the remaining RICO or civil conspiracy claims. Accordingly, Appellants are not being deprived of any substantial right by sending the remaining claims to trial before the appeal. Indeed, the issues warranting this appeal can be raised after a final judgment has been rendered on the remaining claims.

¶ 70 Altogether, Appellants failed to meet the burden of demonstrating that the trial court's grant of partial summary judgment will result in loss, prejudice, or inadequate protection of their right to trial. Contrary to Appellant's contentions, all issues do not warrant jury consideration and a party's preference for a jury trial does not amount to a substantial right. A trial is only required if there is a genuine issue of material fact for the jury to decide. Because Appellants failed to demonstrate how denial of this interlocutory appeal would affect a substantial right, the appeal should be dismissed.

¶ 71 For the reasons stated above, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 APRIL 2021)

ALBA v. BLUE CROSS & BLUE SHIELDOF N.C. 2021-NCCOA-106 No. 20-512	Wake (19CVS11906)	Affirmed.
BOST REALTY CO., INC. v. CITY OF CONCORD 2021-NCCOA-107 No. 19-309-2	Cabarrus (17CVS1144)	Affirmed
CZECH v. COLE 2021-NCCOA-108 No. 19-1165	Carteret (17CVS738)	Affirmed in Part; Reversed and Remanded in Part
IN RE B.M.P. 2021-NCCOA-109 No. 20-794	Buncombe (18JA227)	Affirmed
IN RE K.S. 2021-NCCOA-110 No. 20-31	Cumberland (16JA493) (17JA530)	Vacated in part and remanded.
JOURNEY CAP., LLC v. CITY OF CONCORD 2021-NCCOA-111 No. 19-310-2	Cabarrus (17CVS210)	Affirmed
LEWIS v. LAWSON 2021-NCCOA-112 No. 20-329	Guilford (18CVD7830)	Dismissed
METRO DEV. GRP., LLC v. CITY OF CONCORD 2021-NCCOA-113 No. 19-311-2	Cabarrus (16CVS3017)	Affirmed
STATE v. ABEL 2021-NCCOA-114 No. 20-174	Rowan (14CRS55711-12) (14CRS55730-31)	NO PREJUDICIAL ERROR
STATE v. AUTRY 2021-NCCOA-115 No. 20-341	Mecklenburg (17CRS236477-80) (18CRS12976)	No Error
STATE v. BLACK 2021-NCCOA-116 No. 20-415	Cleveland (10CRS4323)	Vacated and Remanded.

STATE v. CRANDLE 2021-NCCOA-117 No. 20-407	Pitt (18CRS52469)	Vacated and remanded for resentencing.
STATE v. CRUZ 2021-NCCOA-118 No. 20-352	Cabarrus (19CRS51752)	No Plain Error; Remanded for Correction of Clerical Errors
STATE v. DAVIS 2021-NCCOA-119 No. 20-144	Guilford (17CRS27147) (17CRS68742-49)	No Error in Part; No Plain Error in Part
STATE v. ETTERS 2021-NCCOA-120 No. 20-208	Lincoln (18CRS352) (18CRS50822)	No Error
STATE v. GREENFIELD 2021-NCCOA-121 No. 20-360	Onslow (17CRS54937-39)	No Error
STATE v. HALL 2021-NCCOA-122 No. 20-349	Gaston (03CRS18275) (03CRS19233) (03CRS62555-56) (03CRS62558-59)	Affirmed
STATE v. JOHNSON 2021-NCCOA-123 No. 20-549	Guilford (18CRS87890) (18CRS87892) (19CRS25146)	No Error
STATE v. KIRLEY 2021-NCCOA-124 No. 20-451	Onslow (18CRS54430)	NO ERROR IN PART, REMANDED FOR CORRECTION OF CLERICAL ERROR IN PART.
STATE v. MALKER 2021-NCCOA-125 No. 20-449	Mecklenburg (17CRS228157)	No Error
STATE v. McCAIN 2021-NCCOA-126 No. 19-1069	Orange (17CRS51665)	No plain error in part; vacated and remanded for resentencing in part.
STATE v. NELSON 2021-NCCOA-127 No. 20-370	Cherokee (16CRS51752) (18CRS549)	Vacated and Remanded

STATE v. TORRES 2021-NCCOA-128 No. 20-477	Lenoir (15CRS051770)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. WALDROP 2021-NCCOA-129 No. 19-1146	Catawba (14CRS5087-91) (16CRS2040-41)	No Error
STATE v. WILLIAMS 2021-NCCOA-130 No. 20-184	Wilson (19CRS1286)	Reversed and Remanded.
SUAZO v. GUTIERREZ-BOJORQUEZ 2021-NCCOA-131 No. 19-1079	N.C. Industrial Commission (16-732039)	Affirmed
THOMAS v. CHAVIS 2021-NCCOA-132 No. 20-258	Cumberland (18CVS6976)	Dismissed.
U.S. BANK TR. v. ROGERS 2021-NCCOA-133 No. 20-506	Caldwell (18CVS1253)	Dismissed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Neglected juvenile—guardianship to relative—constitutional argument waived—In a neglect and dependency matter, a mother's challenge to the trial court's decision to grant guardianship of her child to a paternal aunt was overruled where the mother was provided notice that guardianship or custody to the aunt would be considered but did not appear at the hearing, present any evidence opposing the guardianship, or raise any issues regarding her constitutional rights. **In re S.R.J.T., 327.**

Orders—signed by judge who did not preside over hearing—nullity—In a child abuse and neglect matter in which respondent-parents stipulated to the underlying facts but no other evidence was presented, adjudication and disposition orders signed by the chief district court judge after the presiding judge resigned were a nullity. Where the presiding judge did not articulate findings of fact, enter conclusions of law, and render an order, the chief district court judge could not sign written orders as merely a ministerial function. **In re R.P., 195.**

Permanency planning order—findings of fact—unsupported by evidence—A permanency planning order in a dependency case, which granted guardianship of a mother's son (who was diagnosed with attention-deficit/hyperactivity disorder) to his foster parents and terminated further review hearings, was reversed and remanded where no competent evidence supported the trial court's finding that the mother had not learned how to meet her son's medical needs, did not participate in her son's doctor appointments or speech therapy sessions, and was late for unsupervised visits with all three of her children. **In re S.D., 309.**

Permanency planning order—further review hearings ceased—required statutory findings—A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded because the trial court failed to enter written findings of fact addressing the criteria under N.C.G.S. § 7B-906.1(n) for waiving future review hearings. **In re S.D., 309.**

Permanency planning order—guardianship to non-parent—constitutionally protected parental status—failure to make findings—A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where the order did not contain findings that the mother was unfit or acted inconsistently with her constitutional rights as a parent. **In re S.D., 309.**

Permanency planning order—mother's lack of adequate housing—unsupported by evidence—A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where no competent evidence supported the trial court's finding that the mother was voluntarily homeless because she rejected meaningful housing assistance from the department of social services (DSS). Evidence showed that DSS directed the mother to a three-year waiting list for Section 8 housing; DSS sent her an unvetted list of addresses compiled by third-party agencies; the mother looked at approximately eighty residences from that list but they were already occupied, in bad condition, or otherwise unsuitable; and other obstacles prevented the mother from obtaining housing, including her low credit score and a housing shortage following a recent hurricane. **In re S.D., 309.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Permanency planning order—reasonable reunification efforts—son unlikely to return home—unsupported by evidence—A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where no competent evidence supported the trial court's finding that the department of social services (DSS) made reasonable efforts to reunify the mother with her son and that he was unlikely to return home in six months. DSS failed to provide meaningful housing assistance to the mother, who was homeless, and yet the mother had a reasonable prospect of obtaining housing after locating three potential homes on her own. **In re S.D., 309.**

Permanency planning order—reunification efforts implicitly ceased—required statutory findings—A permanency planning order in a dependency case, which granted guardianship of a mother's son to his foster parents and terminated further review hearings, was reversed and remanded where the order—which implicitly ceased reunification efforts with the mother—did not contain findings that reunification efforts would be unsuccessful or inconsistent with the child's health or safety, as required under N.C.G.S. § 7B-906.2(b), or any findings regarding the factors listed in N.C.G.S. § 7B-906.2(d) for determining whether to cease reunification efforts. **In re S.D., 309.**

Permanent plan—ceasing reunification efforts—statutory requirements—In a matter involving a neglected and dependent child, the trial court erred by ordering the department of social services (DSS) to cease reunification efforts with respondent-mother without making the necessary statutory findings pursuant to N.C.G.S. § 7B-906.2 regarding the reasonableness of DSS's efforts or whether reunification efforts would be unsuccessful or inconsistent with the child's health, safety, and need for a permanent home. Further, there was no evidence from which these findings could be made, where respondent was actively participating in her case plan, she had maintained stable employment and housing, and DSS had established no steps or timelines to reunify respondent with her son. **In re J.C.-B., 180.**

Permanent plan—reunification efforts with father ceased—unsupported by evidence—In an abuse and neglect matter, in which two children were removed from the home due to unexplained non-accidental injuries to the younger child, the trial court's determination that reunification efforts with the father would be unsuccessful or inconsistent with the children's health, safety, and need for a permanent home based on the father's refusal to admit responsibility or to otherwise state what caused his child's injuries, was unsupported by clear and convincing evidence. The father complied with his case plan, including completing an abuser treatment program, did not act inappropriately when visiting the children, and exhibited changed behaviors as a result of the services he engaged in. **In re J.M., 291.**

Permanent plan—reunification efforts with mother ceased—unsupported by evidence—In an abuse and neglect matter, in which two children were removed from the home due to unexplained non-accidental injuries to the younger child, the trial court's determination that reunification efforts with the mother would be unsuccessful or inconsistent with the children's health, safety, and need for a permanent home based on the mother's inability to definitively state what caused her child's injuries, was unsupported by clear and convincing evidence. The mother complied with all of her recommended services, required the father to move out of the home, continued to care for two older children in her home with no issues, had appropriate