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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 Unpublished cases appear in *Italics*.

2. This opinion was moved from its original filing date and is published in Volume 280 of the N.C. App. Reports.

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3. This opinion was moved from its original filing date and is listed in Volume 279 of the N.C. App. Reports.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LAWRENCE BENIGNO, PLAINTIFF
v.
SUMNER CONSTRUCTION, INC. AND JAMES A. RIGGAN, JR., DEFENDANTS

No. COA20-321

Filed 15 June 2021

1. Contracts—real property—offer to purchase and contract—plain and unambiguous terms—acceptance of property

In a dispute concerning the location of a fence around plaintiff's personal residence, the trial court did not err in dismissing plaintiff's breach of contract claim against defendant builder, with whom plaintiff had contracted for the purchase of the newly constructed residence and the addition of the fence "surrounding property lines." The plain and unambiguous language of the offer to purchase and contract stated that closing would constitute acceptance of the property in its then-existing condition unless otherwise provided in writing; therefore, by closing on the property, plaintiff accepted the property in its existing condition and could not successfully pursue a breach of contract claim based on the placement of the fence.

2. Construction Claims—negligent construction—location of fence—statute of limitations—latent defect

In a dispute concerning the location of a fence around plaintiff's personal residence, the trial court erred in dismissing plaintiff's negligent construction claim against defendant subcontractor, who had installed the fence around the newly constructed residence, as time-barred by the statute of limitations. Judgment on the pleadings was improper because the pleadings raised a question of fact as to

when the improper installation of the fence—which was supposed to be installed "surrounding property lines"—ought reasonably to have become apparent.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from Order entered 31 January 2020 by Judge Debra A. Sasser in Wake County District Court. Heard in the Court of Appeals 12 January 2021.

Ryan Hayden Smith for plaintiff-appellant.

Howard, Stallings, From, Atkins Angell & Davis, P.A., by Brian E. Moore, for defendants-appellees.

MURPHY, Judge.

¶ 1 Plaintiff Lawrence Benigno ("Benigno") appeals a judgment dismissing his claims against Defendants Sumner Construction, Inc. ("Sumner") and James Riggan, Jr. ("Riggan") (collectively, "Defendants"). Benigno contends the trial court erred in granting *Defendants' Motion for Judgment on the Pleadings* because his breach of contract claim is not waived by the "as-is" provision in the Offer to Purchase and Contract; the implied warranty of workman-like quality requires his breach of contract claim be referred to a factfinder; and his negligent construction claim is not barred by the applicable statute of limitations, N.C.G.S. § 1-52(16).

¶ 2 Although we conclude the trial court did not err in dismissing Benigno's breach of contract claim, we are persuaded the trial court erred in dismissing Benigno's negligent construction claim as the statute of limitations may not bar the claim. We affirm the trial court's ruling dismissing Benigno's claim for breach of contract, reverse the portion of the order dismissing Benigno's negligent construction claim and remand to the trial court for further proceedings not inconsistent with this opinion.

BACKGROUND

¶ 3 On 14 May 2015, Benigno entered into a contract with Sumner for the purchase of a newly constructed residence located in Youngsville. Among other things, the contract consisted of a Standard Form 2-T "Offer to Purchase and Contract" ("the Agreement") and a Standard Form 2A3-T "New Construction Addendum" ("the Addendum"). The

Agreement provided "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Additionally, the Addendum stated Sumner would "[a]dd [a] Black Aluminum fence with [a] 5 foot gate in [the] back yard[,] surrounding property lines . . . ." Sumner hired Riggan as a subcontractor to install the fence, which was completed at or around the closing date. Benigno closed on the property on 1 July 2015.

¶ 4 During spring of 2019, Benigno's neighbor erected a fence along the neighbor's property line. The addition of the neighbor's fence created a gap between Benigno's fence and the neighbor's fence. At this point, Benigno realized his fence was not built "surrounding property lines" and was informed by Sumner (acting as the HOA architectural committee) he was responsible for maintaining the gap between the two fences.

¶ 5 In response, Benigno filed suit against Sumner alleging breach of contract and against Riggan alleging negligent construction. Defendants filed a motion for judgment on the pleadings, arguing in pertinent part:

> 2. [Benigno's] claim for breach of contract should be dismissed because, as alleged in the Complaint, Defendant Sumner installed a fence at the property prior to closing in accordance with the terms of the [Agreement] which was accepted by [Benigno] at closing and for four years thereafter without objection. The [Agreement] expressly provides that [Benigno] is accepting the property "as is."
>
> . . . .
>
> 4. As alleged in [Benigno's] Complaint, the fence was completed and closing occurred on [15 July 2015] and as such [Benigno's] claim against Defendant Riggan for negligent construction is barred by the statute of limitations.

After a hearing, the trial court granted Defendants' motion, ruling "[i]t appears from the pleadings that no material issue of fact remains to be resolved and that Defendants are entitled to an order dismissing [Benigno's] claims." Benigno timely appealed.

ANALYSIS

¶ 6 The ultimate issue on appeal is whether the trial court erred in granting *Defendants' Motion for Judgment on the Pleadings*. "This Court

reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

¶ 7 Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C.G.S. § 1A-1, Rule 12(c) (2019). In determining whether to grant a motion for judgment on the pleadings,

> [t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. 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.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted).

¶ 8 The function of Rule 12(c) "is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* "Judgments on the pleadings are disfavored in law[.]" *Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001).

A. Breach of Contract Claim

1. "As-Is" Provision in the Agreement

¶ 9 **[1]** In *Defendants' Motion for Judgment on the Pleadings*, Defendants argue:

> [Benigno's] claim for breach of contract should be dismissed because, as alleged in the Complaint, Defendant Sumner installed a fence at the property prior to closing in accordance with the terms of the [Agreement] which was accepted by [Benigno] at closing and for four years thereafter without objection. The [Agreement] expressly provides that [Benigno] is accepting the property "as is."

¶ 10 "Interpreting a contract requires the court to examine the language of the contract itself[.]" *State v. Philip Morris USA, Inc.*, 363 N.C. 623, 631, 685 S.E.2d 85, 90 (2009). When the terms of a contract are "plain and unambiguous, there is no room for construction. The contract is to be interpreted as written." *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942).

¶ 11 The plain and unambiguous language of the Agreement states, in relevant part: "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Since Benigno proceeded to closing, he agreed to accept the property in its current condition under the express terms of the Agreement. Pursuant to the Agreement, he could not thereafter claim Sumner's improvements to the property prior to the closing were inadequate. By executing this provision interpreted as it is written, Benigno cannot successfully pursue a breach of contract claim based on a defective condition of the property. The trial court properly concluded "Defendants are entitled to an order dismissing [Benigno's] claim[]" for breach of contract.

2. Implied Warranty of Workman-Like Quality

¶ 12 Benigno also argues that because every contract for the sale of a recently constructed dwelling contains an implied warranty of workman-like quality, the breach of contract claim must be referred to a factfinder. However, Benigno has failed to preserve this argument for our review.

¶ 13 Where "[t]he record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that [an] issue . . . was presented to the trial court[,] . . . we refuse to address the issue for the first time on appeal." *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 728, 554 S.E.2d 399, 402 (2001). Here, the Record does not contain anything in the pleadings,[1] transcripts, or otherwise to indicate the issue of the implied warranty of workman-like quality was presented to the trial court. We decline to review Benigno's argument regarding the implied warranty of workman-like quality. *See Domingue v. Nehemiah II, Inc.*, 208 N.C. App. 429, 435, 703 S.E.2d 462, 466 (2010) (declining to review the plaintiff's breach of implied warranty of habitability argument when the complaint and the transcript of the motion to dismiss hearing revealed this theory of relief was not raised by the plaintiff or addressed by the trial court).

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1. We note Benigno's complaint does not mention the implied warranty of workman-like quality.

B. Negligent Construction Claim

¶ 14 **[2]** Finally, Benigno argues the trial court erred in granting *Defendant's Motion for Judgment on the Pleadings* and dismissing the negligent construction claim, contending the matter should have been referred to a finder of fact because the applicable statute of limitations, N.C.G.S. § 1-52(16), does not bar the negligent construction claim.

¶ 15 Benigno contends his negligent construction claim accrued on or about 20 March 2019, when he received actual notice of the improper installation of the fence, and therefore the statute of limitations does not bar his claim. Riggan argues Benigno's claim accrued on 1 July 2015, when the improper installation of the fence ought reasonably to have become apparent to Benigno, and the statute of limitations bars Benigno's claim.

¶ 16 The applicable statute of limitations for claims involving negligence for personal injury or physical damage to a claimant's property[2] is three years, which "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C.G.S. § 1-52(16) (2019). "The primary purpose of [N.C.G.S.] § 1-52(16) is that it is intended to apply to plaintiffs with latent injuries." *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302, *disc. rev. denied*, 348 N.C. 500, 510 S.E.2d 654 (1998). In the case of a latent injury, N.C.G.S. § 1-52(16) "requires discovery of physical damage before a cause of action can accrue." *McCarver v. Blythe*, 147 N.C. App. 496, 499, 555 S.E.2d 680, 683 (2001). "[O]nce some physical damage has been discovered, . . . the injury springs into existence and completes the cause of action." *Id.* A central question in this case is whether the improper installation of the fence might constitute a latent defect in order to determine when Benigno's cause of action accrued.

¶ 17 A latent defect is a defect which is not "obvious or discoverable upon a reasonable inspection by the plaintiff[] . . . ." *Oates v. JAG, Inc.*, 314 N.C. 276, 281, 333 S.E.2d 222, 226 (1985). In *Oates*, the defects in the plaintiff's home consisted of

> the installation of a drain pipe which had been cut, the failure to use grade-marked lumber, the failure to comply with specific provisions of the North Carolina Uniform Residential Building Code pertaining to

2. Whether "physical damage" has occurred to Benigno's property is not in dispute in this appeal.

> certain weight bearing requirements, improper and insufficient nailing on bridging and beams, and faulty and shoddy workmanship.

Id. at 277, 333 S.E.2d at 224. Our Supreme Court held these defects were latent because they were "of such a nature that . . . they would not ordinarily be discovered by a purchaser during a reasonable inspection." *Id.* at 281-82, 333 S.E.2d at 226.

¶ 18 At the hearing, Riggan argued the location of the fence was not a latent defect because it could be easily discovered by a routine property survey:

> [T]his is not a latent defect[.] It's a fence. It was visible. [Benigno] . . . contend[s] it's too far off the property line . . . . [T]hat kind of issue could easily be discovered with a survey, which is a routine thing that is done or should be done in any residential purchase of real estate.

We disagree with the absoluteness of Riggan's logic—primarily because at this preliminary stage of the litigation, it is not supported by the allegations and admissions in the pleadings to support entry of judgment on the pleadings.

¶ 19 "Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 756, 615 S.E.2d 41, 43, *disc. rev. denied*, 360 N.C. 64, 621 S.E.2d 625 (2005). "[W]hen the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes a question of law, and [judgment on the pleadings] is appropriate." *Id.* However, "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired," judgment on the pleadings is premature. *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001). Indeed, the need for a land survey may even suggest to the factfinder that the exact location of the fence is not "obvious or discoverable upon a reasonable inspection by [Benigno]" and that the location of the fence "would not ordinarily be discovered by a purchaser during a reasonable inspection." *Oates*, 314 N.C. at 281-82, 333 S.E.2d at 226. At a minimum, development of an evidentiary record in this case is necessary to resolve this question. Ultimately, we hold on the Record before us at this stage of the litigation, the improper location of the fence may be a latent defect and, as such, Riggan is not entitled to judgment on the pleadings.

¶ 20 As Benigno suffers a potentially latent injury, he must have "discover[ed] [] physical damage before a cause of action can accrue."

McCarver, 147 N.C. App. at 499, 555 S.E.2d at 683. Taking the allegations in the complaint as true, Benigno reasonably discovered the physical damage upon the installation of his neighbor's fence, on or about 20 March 2019. Benigno's cause of action may have accrued on 20 March 2019 and the three-year statute of limitations may have begun to run on that date. Benigno brought suit on 9 October 2019, less than seven months after he discovered the physical damage. The statute of limitations does not necessarily bar Benigno's negligent construction claim.

¶ 21 "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Groves*, 144 N.C. App. at 87, 548 S.E.2d at 540 (citing *Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981)). "A judgment on the pleadings in favor of a defendant who asserts the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted." *Id.*

¶ 22 Here, Benigno alleged in his complaint, in pertinent part:

> 13. The fence appeared to [Benigno] to be properly installed at his property line. There was nothing to indicate to [Benigno] nor did anyone advise [Benigno] that the fence would be located anywhere other than at the property line.
>
> 14. Since closing [Benigno] maintained the property within the fence.
>
> 15. [Benigno's] neighbor to the east had maintained the yard up to the fence until he installed a plastic barrier around the spring of 2019.
>
> 16. When he did this, an uneven and excessive gap between that neighbor's property line and [Benigno's] fence was exposed. [] Sumner approached [Benigno] and told him he needed to maintain that property. It was at this point that [Benigno] realized that his fence was not installed "surrounding" his property.
>
> . . . .

> 26. This issue was latent and could not have been discovered by [Benigno] through a normal inspection.

¶ 23 In their *Answer*, Defendants responded to these allegations:

> 13. The allegations of paragraph 13 are denied.
>
> 14. The allegations of paragraph 14 are admitted upon information and belief.
>
> 15. Defendants are without information sufficient to form an opinion as to the truth or falsity of the allegations of paragraph 15 and therefore the same are denied.
>
> 16. It is admitted that [] Sumner informed [Benigno] that he needed to maintain his property. It is further admitted that [] [Benigno's] neighbor installed a fence. Except as expressly admitted herein, the allegations of paragraph 16 are denied.
>
> . . . .
>
> 26. The allegations of paragraph 26 are denied.

¶ 24 In substance, Benigno has alleged, and Riggan denied, the allegedly negligent construction of the fence was not "apparent or ought reasonably to have become apparent" until Benigno's neighbor began construction of the neighboring fence in the spring of 2019 for purposes of the statute of limitations. N.C.G.S. § 1-52(16) (2019). The pleadings simply raise issues of fact rendering disposition of Benigno's negligent construction claim via judgment on the pleadings premature.

¶ 25 Benigno's allegations are sufficient to support an inference that the limitations period has not expired and, as such, Riggan is not entitled to judgment on the pleadings. The trial court erred in dismissing Benigno's negligent construction claim.

CONCLUSION

¶ 26 The trial court did not err in dismissing Benigno's claim for breach of contract as Defendants were entitled to judgment as a matter of law as to the "as-is" provision in the Agreement.

¶ 27 The trial court erred in dismissing Benigno's claim for negligent construction as the applicable statute of limitations may not have run at the time the complaint was filed. The portion of the order granting *Defendants' Motion for Judgment on the Pleadings* in regard to

Benigno's negligent construction claim against Riggan is reversed and remanded to the trial court for further proceedings not inconsistent with this opinion.

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.

¶ 28 I concur with the majority's opinion concluding the trial court properly dismissed Benigno's breach of contract and implied warranty claims and affirming that portion of the order. The majority's opinion erroneously concludes the trial court erred in dismissing the negligent construction claim. I vote to affirm the trial court's order in its entirety. I concur in part and respectfully dissent in part.

I. Breach of Contract

¶ 29 Our Supreme Court stated: "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Plaintiff accepted the property "as-is" at closing and did not timely raise an express breach and did not assert implied warranty of workman-like quality in his complaint. We all agree Defendants are entitled to judgment as a matter of law to enforce the "as is" provision in the Agreement and for Benigno's failure to assert other claims.

¶ 30 Riggan argues all of Benigno's claims accrued on 1 July 2015, when the improper installation of the fence ought reasonably to have become apparent to Benigno, and he asserts the three-years statute of limitations bars Benigno's claims. Riggan asserts the fence's location is not a latent defect. The true location could be easily discovered by a routine property survey or Benigno could and should have verified the boundaries of his own property within the timelines of the statute of limitations.

¶ 31 The statute of limitations is three years for claims involving negligence for personal injury or physical damage to a claimant's property, which "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or *ought reasonably to have*

become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16) (Interim Supp. 2020) (emphasis supplied).

¶ 32 This Court stated "[w]hether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 756, 615 S.E.2d 41, 43, *disc. rev. denied*, 360 N.C. 64, 621 S.E.2d 625 (2005). "[W]hen the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes a question of law, and [the trial court's Rule 12(c) judgment on the pleadings] is appropriate." *Id.*

II. Negligent Construction Claim

¶ 33 As the majority's opinion states, a latent defect is a defect which is not "obvious or discoverable upon a reasonable inspection by the plaintiff[]." *Oates v. JAG, Inc.*, 314 N.C. 276, 281, 333 S.E.2d 222, 226 (1985) (citation omitted). In *Oates*, our Supreme Court held the damaged pipe, lumber and code violations were latent defects because they were "of such a nature that a jury could find they would not ordinarily be discovered by a purchaser *during a reasonable inspection*." *Id.* at 281-82, 333 S.E.2d at 226 (emphasis supplied).

¶ 34 In the trial court, Riggan argues:

> [T]his is not a latent defect. . . . It's a fence. It was visible . . . [Benigno] . . . contend[s] it's too far off the property line . . . . [T]hat kind of issue could easily be discovered with a survey, which is a routine thing that is done or should be done in any residential purchase of real estate.

¶ 35 I agree with Riggan that a fence is both clearly visible, and any purported defect in its location was easily discoverable by the owner, with or without a survey. It is not a hidden or latent defect that was not visibly apparent "*during a reasonable inspection*." *Id.* The location of the neighbor's fence may or may not be located exactly on their property line. In any event, Benigno cannot rely upon his neighbor's actions or non-actions to be the triggering event to put Benigno on notice of an alleged defect to toll the accrual and running of the statute. N.C. Gen. Stat. § 1-52(16).

¶ 36 The trial court properly dismissed Benigno's claim for negligent construction. He failed to show any latent or hidden defect, which delayed accrual of the three-year statute of limitations to toll the running until his neighbor's actions of installing their fence. The neighbor's actions are not a triggering event to toll the statute of limitations, not dispositive

of the location of Benigno's property line nor the proper placement of his fence. I vote to affirm the trial court's judgment on the pleadings in its entirety.

III. Conclusion

¶ 37 Plaintiff purchased the property "as-is" and failed to bring any breach of contract action within the statute of limitations. Plaintiff also failed to bring the negligent construction claim within the applicable statute of limitations. Any alleged defect is not a latent defect and is not shown by Plaintiff's neighbor's actions. The trial court correctly dismissed all of Plaintiff's claims. I concur in part and respectfully dissent in part.

CHARLES B. CLINE AND WIFE, DANIELLE C. CLINE, PLAINTIFFS
v.
JAMES BANE HOME BUILDING, LLC; JAMES BANE, INDIVIDUALLY; CURTIS HOPPER, IN HIS INDIVIDUAL CAPACITY AS AN INSPECTOR FOR GASTON COUNTY HEALTH DEPARTMENT; GASTON COUNTY, NORTH CAROLINA; LACHELLE CROSBY AND HOME BUYERS MARKETING, II, INC., DEFENDANTS

No. COA20-422

Filed 15 June 2021

1. Appeal and Error—interlocutory orders—granting defense of governmental immunity—substantial right

An interlocutory order granting a motion for summary judgment on the basis of governmental immunity affected a substantial right, and appeal of the order was properly before the Court of Appeals.

2. Immunity—governmental—insurance coverage—summary judgment

The trial court properly entered summary judgment in favor of county defendants on the basis of governmental immunity where the county defendants' motion relied on discovery responses and plaintiffs, the non-moving party, failed to produce the disputed insurance contract to create a genuine issue of material fact as to whether the county waived governmental immunity to the extent of its insurance coverage.

3. Immunity—public officials—county environmental health administrator—not created by statute

A county environmental health administrator who was sued in his individual capacity for his negligent approval of a septic system permit was a public employee, not a public official, because his position was not created by statute, and therefore he was not protected by public official's immunity.

Appeal by Plaintiffs from order entered 19 March 2020 by Judge Kevin M. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 9 February 2021.

Devore, Acton & Stafford, P.A., by Fred W. DeVore, III and Brittany N. Conner, for plaintiffs-appellants.

The Law Office of Martha R. Thompson, by Martha Raymond Thompson, for defendants-appellees.

MURPHY, Judge.

¶ 1 Unless waived, a county and its employees acting in their official capacities are protected from tort actions under the doctrine of governmental immunity. Likewise, the doctrine of public official's immunity protects a public official, when sued in his or her individual capacity, from actions for mere negligence in the performance of their duties. However, this immunity does not exist for public employees.

¶ 2 Here, the trial court did not err in granting summary judgment in favor of Gaston County and Curtis Hopper, in his official capacity, based on governmental immunity. However, the trial court erred in granting summary judgment in favor of Curtis Hopper, in his individual capacity, based on public official's immunity since he is a public employee. We affirm in part the trial court's judgment insofar as its ruling is based on governmental immunity, but reverse in part the trial court's decision to grant summary judgment on the basis of public official's immunity.

BACKGROUND

¶ 3 On 12 February 2016, Plaintiffs-Appellants Charles and Danielle Cline ("the Clines") closed on a newly constructed home from non-appealing Defendant James Bane Home Building, LLC ("Bane Homes"). The Clines' home is located in Gaston County and is serviced by a septic system. Curtis Hopper ("Hopper"), a Gaston County Environmental Health

Administrator, had previously approved a septic system permit classified as "provisionally suitable."[1] Within a few months of moving into the home, the Clines started to observe raw sewage bubbling in the yard and running down the driveway. To determine the source and cause of the raw sewage, the Clines hired an expert who opined that the septic system, as constructed, was undersized and insufficient for the size of the home.

¶ 4 The Clines sued Bane Homes and James Bane in his individual capacity for breach of contract and breach of implied warranty of habitability; Bane Homes for rescission; James Bane in his individual capacity for negligence; Hopper, in his individual capacity and official capacity, and Gaston County for negligence; LaChelle Crosby, the real estate agent who marketed the home, for negligence and misrepresentation; and LaChelle Crosby and Home Buyers Marketing, II, Inc. for unfair and deceptive trade practices.[2] Following discovery, Appellees filed a motion for summary judgment, arguing they were entitled to governmental immunity and public official's immunity.[3] In its order filed 19 March 2020 ("Order"), the trial court granted Appellees' motion for summary judgment, ordering "Defendants Gaston County and Curtis Hopper are entitled to judgment as a matter of law on the bases of governmental immunity and public official[']s immunity." The Clines timely appealed the Order. Bane Homes, James Bane, LaChelle Crosby, and Home Buyers Marketing, II, Inc. remain Defendants in the case and did not appeal the Order.

ANALYSIS

¶ 5 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

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1. "Provisionally suitable" is one of several choices of soil suitability and these sites "may be utilized for a ground absorption sewage treatment and disposal system." 15A N.C. Admin. Code § 18A.1948(b) (2019). "Sites classified [p]rovisionally [s]uitable require some modifications and careful planning, design, and installation in order for a ground absorption sewage treatment and disposal system to function satisfactorily." *Id.*

2. This appeal involves only the negligence claims against Hopper, in both his individual and official capacity, and Gaston County. When referring to Hopper and Gaston County collectively, the term "Appellees" will be used to avoid referring to any Defendants that are not the subject of this appeal.

3. Public official's immunity is also referred to as "public officers' immunity" and the two terms are interchangeable. *See e.g.*, *Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000), *disc. rev. denied*, 355 N.C. 215, 560 S.E.2d 136 (2002) (referring to "public officers' immunity"); *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (referring to "public official's immunity").

and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). When considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

¶ 6 We review a trial court's order granting summary judgment de novo. *See Builders Mut. Ins. Co. v. N. Main Constr. Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Under a *de novo* review, [we] consider[] the matter anew and freely substitute[] [our] own judgment" for that of the lower tribunal. *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim . . . would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

A. Jurisdiction

1. Subject Matter Jurisdiction

¶ 7 Hopper argues we do not have subject matter jurisdiction over the claims against him, in either capacity, because subject matter jurisdiction over his alleged acts of negligence is vested exclusively in the Industrial Commission pursuant to the State Tort Claims Act, N.C.G.S. Chapter 143, Article 31. We disagree.

¶ 8 In *Meyer v. Walls*, our Supreme Court decided "whether jurisdiction for [a] suit against [Buncombe County Department of Social Services lied] before the Industrial Commission pursuant to the Tort Claims Act or before the Superior Court as originally filed by [the] plaintiff." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Our Supreme Court held "the Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Id.* at 107-08, 489 S.E.2d at 885-86. Our Supreme Court also explicitly overruled *Robinette v. Barriger*, which held "Alexander County Health Department is a state agency, rather than a county agency, and that because the Industrial Commission has exclusive jurisdiction of negligence actions against the State, the trial court did not err in granting summary judgment for the county based on a lack of subject matter jurisdiction." *Id.* at 107, 489 S.E.2d at 886 (citing *Robinette v. Barriger*, 116 N.C. App. 197, 447 S.E.2d 498 (1994)). Our Supreme Court ultimately concluded "the Tort Claims Act does not apply to the claim against Buncombe County [Department of Social Services]." *Id.* at 107-08, 489

S.E.2d at 885-86. We similarly hold Gaston County's health department is not a state agency or institution.

¶ 9 Here, Hopper was acting as an agent for Gaston County's health department, which is not a state department, or institution, but rather a county agency. The Industrial Commission does not have exclusive jurisdiction over his alleged acts of negligence, and both the trial court and this Court have subject matter jurisdiction.

2. Appellate Jurisdiction

¶ 10 **[1]** Appellees argue this appeal "should be dismissed as an improper interlocutory appeal as there are insufficient grounds for appellate review." We disagree.

¶ 11 "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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). In contrast, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62, 57 S.E.2d at 381. "[T]he entry of summary judgment for fewer than all defendants is not a final judgment[,]" but rather an interlocutory judgment. *Long v. Giles*, 123 N.C. App. 150, 152, 472 S.E.2d 374, 375 (1996). Although an interlocutory order is ordinarily not immediately appealable, an interlocutory order may be immediately appealed if it affects a substantial right. *See* N.C.G.S. § 1-277(a) (2019); N.C.G.S. § 7A-27(b)(3)(a) (2019).

¶ 12 Here, the Order disposed of only the claims against Gaston County and Hopper, and the remaining claims include: breach of contract and breach of implied warranty of habitability against Bane Homes and James Bane in his individual capacity; rescission against Bane Homes; negligence against James Bane in his individual capacity; negligence and misrepresentation against LaChelle Crosby; and unfair and deceptive trade practices against LaChelle Crosby and Home Buyers Marketing, II, Inc. As the Clines' various claims against the other Defendants have not been resolved and further action by the trial court is required "in order to settle and determine the entire controversy[,]" the Clines' appeal from the Order is an appeal from "[a]n interlocutory order . . . , which does not dispose of the case[.]" *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. The Order must affect a substantial right in order for us to have proper appellate jurisdiction.

¶ 13 The Clines argue the Order affects a substantial right and is immediately appealable because

> [a] litigant appealing the denial of a sovereign[4] immunity defense need only show that they raised the issue below and that the trial court rejected it in order to establish that the challenged order affects [a] substantial right. [The trial court judge] ruled against [the Clines] exclusively on the issue of "governmental immunity and public official['s] immunity." Thus, this immediate appeal of governmental immunity is approved by statute and this Court. Applying the Court's logic in [*Greene v. Barrick*, 198 N.C. App. 647, 680 S.E.2d 727 (2009)] . . . , [the Clines] need not further explain why, when on the face of [the trial judge's] ruling a substantial right is affected. So long as the issue involves sovereign immunity, an immediate appeal is properly before this Court.

In *Greene*, we decided an interlocutory order granting summary judgment based on the defense of sovereign immunity was properly before us:

> This Court has held that "when the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable." *Moore v. Evans*, 124 N.C. App. 35, 39, 476 S.E.2d 415, 420 (1996) (citations omitted). Even though this case involves the grant, rather than the denial of sovereign immunity, we believe the same type of issues are called into question by the appeal, and therefore, [the] plaintiff's appeal is properly before this Court.

Greene, 198 N.C. App. at 650, 680 S.E.2d at 729-30. According to *Greene*, both an order *denying* a motion for summary judgment on the basis of sovereign immunity and an order *granting* a motion for summary judgment on the basis of sovereign immunity affect a substantial right. *Id.*

¶ 14 Appellees argue our "holding [in *Greene*] is inconsistent with the public policy bases for permitting interlocutory appeals." However,

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4. Gaston County is a county agency. "As such, the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335 n.3, 678 S.E.2d 351, 353 n.3 (2009). For the purposes of our analysis, the distinction is immaterial.

> as is often the case with our jurisprudence, what one might reasonably assume is not what our case law holds. In a series of cases that we are unable to distinguish from this one, our Court has held that the *grant* of a motion to dismiss based on sovereign or governmental immunity is immediately appealable. Because one panel of this Court cannot overrule another, we are bound to hold that [the Clines'] interlocutory appeal on this issue is permissible.

Ballard v. Shelley, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605-06 (2018) (citations omitted) (emphasis in original). As an appeal granting governmental immunity affects a substantial right, the Clines' appeal is properly before this Court. We now address the merits of the appeal.

B. Claims Against Gaston County and Hopper in his Official Capacity

¶ 15 **[2]** The Clines argue the trial court erred by granting summary judgment to Gaston County and Hopper, in his official capacity, on the grounds Gaston County waived its governmental immunity for itself and its employees when it purchased liability insurance.

¶ 16 "Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams ex rel. Overton v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (marks omitted). "In North Carolina, governmental immunity serves to protect a municipality, as well as its officers or employees who are sued in their official capacity, from suits arising from torts committed while the officers or employees are performing a governmental function." *Schlossberg*, 141 N.C. App. at 439, 540 S.E.2d at 52. Governmental immunity is "absolute unless the [county] has consented to [suit] or otherwise waived its right to immunity." *Id.* at 440, 540 S.E.2d at 52.

1. Governmental Function

¶ 17 Exercising a governmental function is a requirement for governmental immunity to attach. *See Estate of Williams*, 366 N.C. at 198, 732 S.E.2d at 140. However, the Clines do not argue, at the trial court level or on appeal, that Gaston County or Hopper, in his official capacity, were not performing a governmental function when they were allegedly negligent. As such, whether Gaston County or Hopper, in his official capacity, were performing a governmental function is deemed abandoned and not an issue before us on appeal. *See* N.C. R. App. P. 28(a) (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.").

2. Purchase of Insurance Coverage

¶ 18 "A plaintiff bringing claims against a governmental entity and its employees acting in their official capacities must allege and *prove* that the officials have waived their [governmental] immunity or otherwise consented to suit[.]" *Sellers v. Rodriguez*, 149 N.C. App. 619, 623, 561 S.E.2d 336, 339 (2002) (emphasis added). Under the plain language of N.C.G.S. § 153A-435, counties waive governmental immunity by purchasing an insurance policy that would indemnify the county and its employees:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, *to the extent of insurance coverage*, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 23 of [N.C.G.S.] Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

N.C.G.S. § 153A-435(a) (2019) (emphasis added). While "[a] county may waive [governmental] immunity by purchasing liability insurance [under N.C.G.S. § 153A-435], [it is waived] only to the extent of coverage provided." *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424, *disc. rev. denied and appeal dismissed*, 359 N.C. 850, 619 S.E.2d 405 (2005), *cert. denied*, 546 U.S. 1142, 163 L. Ed. 2d 1008 (2006).

¶ 19 Appellees argue the purchase of liability insurance does not constitute waiver of governmental immunity because the County Manager of Gaston County, Kim Eagle ("Eagle"), asserts in an affidavit that "the insurance purchased by Gaston County does not extend to those governmental functions for which governmental immunity would apply and does not operate as a waiver of the defense of governmental immunity." We have previously interpreted similar provisions in liability insurance contracts. *See Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008); *Wright v. Gaston Cty.*, 205 N.C. App. 600, 698 S.E.2d 83 (2010).

¶ 20 In *Patrick*, the plaintiff filed a complaint against the defendants in their official capacities as supervisors of the Child Protective Services of the Wake County Department of Human Services. *Patrick*, 188 N.C. App. at 593, 655 S.E.2d at 922. The insurance policy at issue there contained the following exclusion: "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense[] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable." *Id.* at 596, 655 S.E.2d at 923 (alteration omitted). In holding the exclusionary provision was clear and unambiguous and the defendants had not waived governmental immunity through the purchase of the policy, we stated:

> If the language in an exclusionary clause contained in a policy is ambiguous, the clause is to be strictly construed in favor of coverage. If the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Id. at 596-97, 655 S.E.2d at 924 (citations and marks omitted).

¶ 21 In *Wright*, the provision at issue stated:

> By accepting coverage under this policy, neither the *insured* nor States waive any of the *insured's* statutory or common law immunities and limits of liability and/or monetary damages . . . , and States shall not be liable for any *claim* or *damages* in excess of such immunities and/or limits.

Wright, 205 N.C. App. at 607, 698 S.E.2d at 89 (emphasis in original). We relied on our holding and reasoning in *Patrick* to conclude Gaston

County did not waive governmental immunity. *Id.* at 607-08, 698 S.E.2d at 89-90.

¶ 22 Here, the Record reflects a liability insurance policy for Gaston County was in effect from 1 July 2015 to 1 July 2016. However, the insurance contract in its entirety is not contained in the Record and does not appear to have been presented to the trial court. A total of three pages from the actual policy are included in the Record, entitled: the *Schedule of Forms and Endorsements*, the *Public Risk Liability Retained Limit Policy Declarations*, and the *"Wrongful Act" Claims-Made Coverage*. These three pages do not contain the language of the coverage provisions or exclusion provisions and their exact language does not appear anywhere else in the Record. In her affidavit, Eagle provided a parol summary of her interpretation of the policy:

> On the occurrence dates alleged in the Complaint and its amendments, Gaston County was self-insured up to $250,000[.00] and had certain excess liability insurance . . . that comes into effect for certain incidents after $250,000[.00] has been expended by the County on each such incident. However, the insurance purchased by Gaston County does not extend to those governmental functions for which governmental immunity would apply and does not operate as a waiver of the defense of governmental immunity.

While Appellees' motion for summary judgment indicates reliance on discovery responses, nothing in the Record indicates presentation of the insurance contract to the trial court for examination of its contents.

¶ 23 The lack of the insurance contract and exclusionary language in the Record restricts us from determining the existence of coverage for the alleged acts of Gaston County or Hopper in his official capacity.

> Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth specific facts showing that there is a genuine issue for trial. At [that] time, the non-movant must come forward with a forecast of his own evidence.

Crowder Constr. Co. v. Kiser, 134 N.C. App. 190, 196, 517 S.E.2d 178, 183 (marks omitted), *disc. rev. denied*, 351 N.C. 101, 541 S.E.2d 142 (1999).

The Clines, as the non-moving party, had the burden to produce the insurance contract to allow an examination of Gaston County's potential waiver of governmental immunity.

¶ 24 The Clines failed to forecast evidence showing the existence of a genuine issue of material fact as to whether Appellees waived governmental immunity to the extent of Gaston County's insurance coverage. The entry of summary judgment in favor of Gaston County and Hopper, in his official capacity, was proper. However, the claims against Hopper, in his individual capacity, are controlled by separate caselaw, which is addressed below.

C. Claims Against Hopper in His Individual Capacity

¶ 25 **[3]** The Clines argue Hopper's position as an Environmental Health Administrator is a public employee, rather than a public official, and therefore he is not entitled to public official's immunity. We agree.

¶ 26 The defense of public official's immunity is a "derivative form" of governmental immunity. *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850, *disc. rev. denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Public official's immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976).

¶ 27 "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888. "An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. rev. denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). "Public officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (marks omitted).

> Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official

> exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties.

Id. We are guided by the factors set forth in *Isenhour* and our prior holdings to determine whether Hopper, as an Environmental Health Administrator for a local county department of health, is a public official entitled to immunity or a public employee.

¶ 28 We begin our analysis by addressing the first factor, whether the position of Environmental Health Administrator is "created by the constitution or statutes[.]" *Id.* "A position is considered 'created by statute' when 'the officer's position has a clear statutory basis or the officer has been delegated a statutory duty by a person or organization created by statute' or the Constitution." *Baker v. Smith*, 224 N.C. App. 423, 428, 737 S.E.2d 144, 148 (2012) (alteration omitted) (quoting *Fraley v. Griffin*, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011), *cert. denied*, 367 N.C. 234, 748 S.E.2d 552 (2013)).

¶ 29 We have previously decided the positions of "Environmental Health Specialists" and "Environmental Health Supervisors" for a county health department are not created by statute. *See Murray v. Cty. of Person*, 191 N.C. App. 575, 580, 664 S.E.2d 58, 61-62 (2008), *disc. rev. denied*, 363 N.C. 129, 673 S.E.2d 360 (2009); *Block v. Cty. of Person*, 141 N.C. App. 273, 281-82, 540 S.E.2d 415, 421-22 (2000). However, whether an "Environmental Health Administrator" is a position created by statute is a question of first impression.

¶ 30 Hopper points to N.C.G.S. § 130A-41(b)(12) and N.C.G.S. § 130A-227(a) in arguing his position is created by statute. *See* N.C.G.S. §§ 130A-41(b)(12), 130A-227(a) (2019). N.C.G.S. § 130A-41(b)(12) authorizes the powers and duties of local health directors, including the power and duty "[t]o employ and dismiss employees of the local health department in accordance with [N.C.G.S. Chapter 126]" and N.C.G.S. § 130A-227(a) authorizes the Department of Health and Human Services to "employ environmental engineers, sanitarians, soil scientists and other scientific personnel necessary to carry out the sanitation provisions of this Chapter and the rules of the Commission." N.C.G.S. §§ 130A-41(b)(12), 130A-227(a) (2019). These statutes authorize and regulate the hiring of certain employees, but do not operate, either on their own or in conjunction, to create the position of Environmental Health Administrator. There is no "clear statutory basis" for the position of Environmental Health Administrator. *Baker*, 224 N.C. App. at 428, 737 S.E.2d at 148.

¶ 31 However, "[o]ur case law makes clear that where a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate passes the first [] *Isenhour* factor." *McCullers v. Lewis*, 265 N.C. App. 216, 223, 828 S.E.2d 524, 532 (2019); *see, e.g.*, *Baker*, 224 N.C. App. at 428-30, 737 S.E.2d at 148-49 (emphasis in original) (holding where the relevant statutes (1) gave the constitutionally-created Sheriff the duty to take "care and custody of the jail" and (2) provided the sheriff with authority to "appoint a deputy *or employ others to assist him in performing his official duties*[,]" assistant jailers "are delegated [a] statutory duty . . . by the [S]heriff – a position created by our Constitution" satisfying the first *Isenhour* factor); *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 421-22, 520 S.E.2d 595, 602 (1999) (holding because the relevant statute gave the director of social services the authority to "delegate to one or more members of his staff the authority to act as his representative[,]" social workers were acting as public officials for public official immunity purposes); *Cherry v. Harris*, 110 N.C. App. 478, 480-81, 429 S.E.2d 771, 772-73 (holding a forensic pathologist who conducted an autopsy and prepared reports in response to an official request by a county medical examiner satisfied the first factor of the *Isenhour* test because the medical examiner, a position created by statute, "had the statutory authority pursuant to [N.C.G.S.] § 130A-389(a) [] to order [] an autopsy be performed by a pathologist . . . designated by the Chief Medical Examiner), *disc. rev. denied*, 335 N.C. 171, 436 S.E.2d 371 (1993). In *Baker*, *Hobbs*, and *Cherry*, we pointed directly to a statute that authorized a constitutionally or statutorily created position or organization to delegate its statutory authority to another individual.

¶ 32 The Clines argue N.C.G.S. § 130A-41(b)(12) lacks language to indicate there is a statutory delegation of authority to sufficiently pass the first *Isenhour* factor. Before the trial court, Hopper argued there is "delegation of the authority to enforce the commission for health services sanitation rules as required by the administrative code," and this "delegation of authority to do the very acts of which [the Clines] complained" is sufficient to pass the first *Isenhour* factor. The only support for Hopper's argument before the trial court was a letter dated 8 May 1995 from the North Carolina Department of Environment, Health and Natural Resources ("DEHNR") stating:

> Attached is the authorization/identification card for Mr. Norman Curtis Hopper, Environmental Health Specialist, employed by [Gaston County Health Department].

> Please give the card to Mr. Hopper with instructions that it must be available at all times for identification during official business.
>
> The authorization for On-Site Wastewater delegates authority to administer and enforce the laws in [N.C.G.S.] Chapter 130A, Article 11 and the rules promulgated thereunder in the North Carolina Administrative Code Title 15A- Subchapter 18A.1900 et seq.
>
> Rules governing the "Delegation of Authority to Enforce Commission for Health Services' Sanitation Rules" require, in 15A NCAC 18A.2302(1), that individuals who are delegated authority be employed by a local health department. In the event that Mr. Hopper is no longer employed by [Gaston County Health Department], delegation of authority to enforce state laws and rules in the Gaston County is immediately suspended. At that time, the authorization/identification card must be forwarded to this office.

However, in May 1995, Hopper was employed in the position of Environmental Health Specialist,[5] a role we have previously held to be a public employee. *See Block*, 141 N.C. App. at 282, 540 S.E.2d at 421-22 (citations and marks omitted) ("Our courts have held that a supervisor of the Department of Social Services is a public employee. Similarly, a supervisor for the Health Department is a public employee, as is a specialist, who is a subordinate of the supervisor. As such, these employees may be held personally liable for the negligent performance of their duties that proximately caused foreseeable injury."). The forecasted evidence, to wit Hopper's letter from DEHNR regarding his position as Environmental Health Specialist, does not create a genuine issue of material fact as to Hopper's ability to invoke public official's immunity. As Hopper made no other delegation argument before the trial court, we hold there is no statutory authorization for the delegation of a duty in his position as Environmental Health Administrator.

¶ 33 Since the statutes cited by Hopper neither provide a clear statutory basis for the position of Environmental Health Administrator nor allow

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5. Hopper was employed as an "[E]nvironmental [H]ealth [S]pecialist [I]ntern" in 1990 with Gaston County. In 1992, his role changed to "[E]nvironmental [H]ealth [S]pecialist." Around 1999 or 2000, Hopper became a "supervisor/coordinator," and then in 2002 became "the [D]epartment [A]dministrator for [E]nvironmental [H]ealth," his current role.

a person or organization created by statute to delegate any statutory duties to Environmental Health Administrators, Hopper has failed to establish his position was created by statute. As the first factor is not met, we need not reach the other two *Isenhour* factors. *See Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017) ("Because we hold that [the] defendants' positions are not created by statute, we need not address the remaining elements to reach the conclusion that [the] defendants are not public officials entitled to immunity."). The trial court erred in granting summary judgment to Hopper, in his individual capacity, on the basis of public official's immunity and we reverse.

CONCLUSION

¶ 34 The Clines did not meet their burden of production to show Gaston County and Hopper, in his official capacity, waived governmental immunity through the purchase of liability insurance. The trial court properly granted Appellees' motion for summary judgment in regards to Gaston County and Hopper, in his official capacity.

¶ 35 Hopper is a public employee and not a public official. His position as Environmental Health Administrator was not created by statute and the only argument he advanced at the trial court as to delegation fails based on our decision in *Block*. As such, he is not protected by public official's immunity and the trial court erred in granting summary judgment to Hopper, in his individual capacity, on the basis of public official's immunity.

AFFIRMED IN PART; REVERSED IN PART.

Judges DILLON and ARROWOOD concur.

IN RE K.N.H.

[278 N.C. App. 27, 2021-NCCOA-267]

IN THE MATTER OF K.N.H.

No. COA20-299

Filed 15 June 2021

1. Juveniles—delinquency—probation—conditions—oral

The trial court's order that a delinquent juvenile submit to electronic monitoring for ninety days and comply with all conditions set by his court counselor comported with statutory requirements for juvenile probation, and the court counselor's condition that the juvenile remain in the presence of one of his parents while out of the house on electronic monitoring leave was not required to be in writing. Therefore, the trial court did not err by entering a Level 3 disposition based solely on its finding that the juvenile had violated a condition of his probation for which he received only oral notice from his court counselor.

2. Juveniles—commitment—precise terms—oral pronouncement—prejudice analysis

Although the trial court erred in a juvenile proceeding by failing to state with particularity the precise duration of the juvenile's commitment to a youth development center in open court, the juvenile failed to show that he was prejudiced by the error where the written order clearly indicated the duration and where the juvenile was present when the court selected his disposition and had the opportunity to ask questions.

Appeal by juvenile from orders entered 23 May 2019 by Judge William F. Helms, III in Union County District Court. Heard in the Court of Appeals 11 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Appellant K.N.H. appeals from an order on motion for review (the "Order on Motion for Review") dated 23 May 2020, concluding K.N.H. violated the conditions of probation and ordering an entry of a Level 3

disposition, and from a disposition and commitment order (the "Disposition and Commitment Order") entered 23 May 2020 committing him to a youth development center ("YDC"). On appeal, he argues the trial court erred in imposing a Level 3 disposition based solely on its finding that he had violated an oral condition of probation. Further, he asserts that the trial court erred in entering the Level 3 disposition by failing to orally state the duration of the disposition at the time of commitment to the YDC, as statutorily required. For the following reasons, we affirm.

I. Factual & Procedural Background

¶ 2 In pertinent part, the record reveals the following: on 14 December 2017, an adjudication hearing was held in connection with four juvenile petitions the State filed against K.N.H., including common law robbery. K.N.H. admitted to the lesser offense of larceny from a person for the common law robbery allegation. The State dismissed the remaining three charges against him. The trial court entered a Level 1 disposition and placed K.N.H. on probation for a period of twelve months.

¶ 3 On 3 May 2018, the State filed a juvenile petition against K.N.H. alleging one count of possession of stolen goods. On 28 June 2018, K.N.H. admitted to the offense of possession of stolen goods. The trial court ordered K.N.H. to Level 2 probation for twelve months.

¶ 4 On 23 August 2018, the State filed three additional petitions against K.N.H. alleging attempted robbery with a dangerous weapon, minor in possession of a handgun, and assault by pointing a gun. On 27 September 2018, the court conducted an adjudication hearing. At the hearing, the offense of robbery with a dangerous weapon was amended to the offense of attempted common law robbery pursuant to K.N.H.'s *Alford* plea.[1] K.N.H. admitted to the offense of possessing a handgun, and the State dismissed the remaining charge. The case was continued for disposition until 11 October 2018.

¶ 5 On 11 October 2018, the trial court entered its dispositional order and placed K.N.H. on Level 2 probation for a period of twelve months under the previous terms and conditions as well as the additional conditions imposed by the 11 October 2018 supplemental order for conditions

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1. In *North Carolina v. Alford*, 400 U.S. 25, 37–38, 27 L. Ed. 2d 162, 171–72, 91 S. Ct. 160, 167–68 (1970), the Supreme Court of the United States held a defendant may enter a "plea containing a protestation of innocence" when the defendant intelligently concludes that a guilty plea is in his best interest, and the record "contains strong evidence of actual guilt."

of probation (the "Supplemental Order"), which the court incorporated by reference and attached to the dispositional order. The Supplemental Order required K.N.H. to, *inter alia*, "submit to [e]lectronic [m]onitoring for 90 days and comply with all conditions set by the [c]ourt [c]ounselor."

¶ 6 On 9 January 2019, a juvenile court counselor filed a motion for review alleging K.N.H. had "violated the conditions imposed by the [c]ourt by receiving new delinquent charges that include[d] using a handgun." Further, it was based on K.N.H.'s violations of the conditions imposed by the 11 October 2018 dispositional order, including remaining on good behavior and not violating any laws; not possessing a firearm, explosive device, or other deadly weapon; and submitting to electronic monitoring for ninety days and complying with all conditions set by the court counselor.

¶ 7 On 17 January 2019, the trial court held a probation review hearing, and K.N.H. was ordered to "remain in secure custody" due to his status as a "danger to persons." K.N.H. remained in secure custody until the adjudication and secure hearing on 23 May 2019.

¶ 8 On 23 May 2019, the trial court held a hearing in connection with the motion for review before the Honorable W. Robert Bell Pomeroy in Union County District Court. The prosecutor for the State informed the court that it was proceeding only on the allegation that K.N.H. willfully violated the condition of submitting to electronic monitoring. K.N.H. denied the allegation.

¶ 9 At the hearing, Stephanie Missick ("Ms. Missick"), the juvenile court counselor over K.N.H.'s case, testified K.N.H. and his parent signed a form for the monitoring equipment in case it was damaged and, at that time, they "talked about the [probation] conditions." She mentioned, "[K.N.H.] wasn't to leave unless he was with his parent." If K.N.H. was given "time out," meaning time to be outside of his home on electronic monitoring, Ms. Missick "would have to go in the computer and put time out, he had to be with his parent." According to Ms. Missick, she gave K.N.H. time out near the holidays, including multiple days in December 2018 and on 1 January 2019. She also testified that when K.N.H. was placed on the electronic monitoring, she told him, "If you go anywhere, you've got to be with [a parent]." Finally, Ms. Missick testified that K.N.H. told her that he "did leave" and that "[h]e wasn't with his dad" for the entire "time out" period on 1 January 2019.

¶ 10 K.N.H.'s probation violation in this case occurred on 1 January 2019. Ms. Missick scheduled K.N.H. time out from 11:00 a.m. to 7:00 p.m. in light of the New Year's Day holiday. K.N.H.'s mother testified that she

had K.N.H.'s maternal grandmother take K.N.H. to the Icemorlee area of Monroe to visit his father and family because she did not have a vehicle herself. She further testified that his grandmother saw K.N.H.'s father at a gas station, and she dropped K.N.H. off with him. K.N.H.'s father took him to his aunt's house where they would have dinner with family. When the prosecutor asked K.N.H.'s mother if she "understood that when [K.N.H.] was home with [her] he was supposed to be with [her]", she responded, "[a]nd he was. Yes, ma'am."

¶ 11 According to K.N.H.'s father, once he picked up K.N.H. from the gas station at about 1:00 p.m., they went to K.N.H.'s aunt's house for a dinner with 15 or 16 family members. K.N.H.'s father testified he last saw K.N.H. "standing on the porch" of the house at around 2:00 p.m. He further testified he did not know where K.N.H. was from approximately 2:00 p.m. to 5:00 p.m. When asked if he "knew that [he] had to have eyes on [K.N.H.] and know where he was at all times," K.N.H's father responded, "I didn't have conversations, but I was there. I heard things." K.N.H.'s father acknowledged that both he and K.N.H. were present when Ms. Missick told them that K.N.H. had to be with a parent at all times when he was on time out.

¶ 12 After hearing closing arguments, the court found K.N.H. "was in willful violation of [his] probationary conditions." Consequently, the court committed K.N.H. to a YDC for an indefinite period.

¶ 13 On 23 May 2019, the Honorable Judge Williams F. Helms III entered the Order on Motion for Review, which found the allegations were proven by the greater weight of the evidence. Additionally, Judge Helms entered the written Disposition and Commitment Order, imposing a Level 3 disposition and committing K.N.H. to a YDC for a minimum period of six months and a maximum period until his eighteenth birthday. K.N.H. filed a timely, written notice of appeal from the 23 May 2019 Order on Motion for Review and Disposition and Commitment Order.

II. Jurisdiction

¶ 14 This Court has jurisdiction to address the juvenile's appeal from the final orders pursuant to N.C. Gen. Stat. § 7B-2602 (2019) and N.C. Gen. Stat. § 7B-2604 (2019).

III. Issues

¶ 15 The issues on appeal are whether (1) the trial court erred by entering a Level 3 disposition based solely on its finding that K.N.H. violated a condition of probation for which he did not receive written notice; and (2) the trial court erred by entering a Level 3 disposition without stating

the precise duration of K.N.H.'s commitment to the YDC in its oral order of disposition.

IV. Standard of Review

¶ 16 "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*. Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019) (citations omitted) (emphasis added).

V. Violation of Electronic Monitoring Probation Condition

¶ 17 **[1]** In his first argument, K.N.H. contends the trial court erred in failing to follow N.C. Gen. Stat. § 7B-2512(a), which mandates the court to "state with particularity" the terms and conditions of probation in both the oral and written orders of disposition since probation is a "precise term[ ] of the disposition . . . ." N.C. Gen. Stat. § 7B-2512(a) (2019). Furthermore, he asserts that since the trial court failed to make such written findings, the condition of probation requiring him to be in the presence of one of his parents while on electronic monitoring is invalid and could not be willfully violated; thus, the trial court abused its discretion by entering a Level 3 disposition based on K.N.H.'s violation of that condition of probation. The State argues that this issue was not properly preserved for appellate review. The State contends, even if it were properly preserved, the probation condition imposed by the trial court was valid and enforceable, and the violation of the condition permitted the court to enter a Level 3 disposition.

¶ 18 After careful review, we find K.N.H.'s argument that the trial court failed to follow a statutory mandate is preserved, *see In re E.M.*, 263 N.C. App. at 479, 823 S.E.2d at 676, and agree with the State that the trial court's order of electronic monitoring was consistent with the pertinent statutory requirements.

¶ 19 "The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public." N.C. Gen. Stat. § 7B-2500 (2019). The disposition developed by the trial court for each case is designed to "[p]romote public safety"; "[e]mphasize[ ] accountability and responsibility" of the juvenile's parents and guardians as well as the juvenile; and "[p]rovide[ ] appropriate consequences, treatment, training and rehabilitation" for the juvenile. N.C. Gen. Stat. § 7B-2500 (1)–(3).

¶ 20 N.C. Gen. Stat. § 7B-2512 provides the requirements for the dispositional order:

> [t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

N.C. Gen. Stat. § 7B-2512(a).

¶ 21 A "court exercising jurisdiction over a juvenile who has been adjudicated delinquent" may impose certain dispositional alternatives in accordance with N.C. Gen. Stat. § 7B-2508, including "plac[ing] the juvenile on probation under the supervision of a juvenile court counselor, as specified in [N.C. Gen. Stat. § 7B-2510]." N.C. Gen. Stat. § 7B-2506(8) (2019).

¶ 22 N.C. Gen. Stat. § 7B-2510 provides the conditions of probation for the underlying dispositional alternatives upon which a delinquent juvenile may be placed pursuant to N.C. Gen. Stat. § 7B-2506(8). Under subsection (a), the conditions of probation ordered by a court must be "related to the needs of the juvenile and [be] reasonably necessary to ensure that the juvenile will lead a law-abiding life." N.C. Gen. Stat. § 7B-2510(a). Under subsection (b), the court may impose the "regular conditions of probation specified in subsection (a)," or it may choose from certain other conditions. N.C. Gen. Stat. § 7B-2510(b). One such condition of probation a court may order in a juvenile proceeding under subsection (b) is the juvenile "[c]ooperate with electronic monitoring" so long as the juvenile is "directed to comply by the chief court counselor" and "the juvenile is subject to Level 2 dispositions pursuant to [N.C. Gen. Stat. § 7B-2508] . . . ." N.C. Gen. Stat. § 7B-2510(b)(4).

¶ 23 "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978) (citation omitted).

¶ 24 In this case, the trial court ordered K.N.H. to submit to electronic monitoring for ninety days pursuant to N.C. Gen. Stat. § 7B-2510(b) and to comply with all conditions set by the court counselor in the court's Supplemental Order. The Supplemental Order also specifically stated

that if K.N.H. were to "violate[ ] curfew or any conditions set forth by the court counselor[, then] he shall be placed back in detention."

¶ 25 N.C. Gen. Stat. § 7B-2506(8) "clear[ly] and unambiguous[ly]" allows "place[ment of] the juvenile on probation under the supervision of a juvenile court counselor." *See Id.* at 239, 244 S.E.2d at 389–90; N.C. Gen. Stat. § 7B-2506(8). Furthermore, N.C. Gen. Stat. § 7B-2510(b) allows a court to impose the "[c]ooperat[ion] with electronic monitoring" as a condition of probation in certain circumstances. Here, the statutory requirements were fulfilled for the court to impose electronic monitoring because K.N.H. was subject to a Level 2 disposition, and the chief court counselor directed him to comply with the condition of probation. Based on the plain language of the statute, only the specific condition of probation upon which the juvenile is placed—in this case, electronic monitoring—was required to be precisely identified in the dispositional order. The Juvenile Code does not require that the disposition include the precise terms and conditions or rules of electronic monitoring that the court counselor imposes on the juvenile. Had the General Assembly intended district courts to include such detailed conditions, it would have included such language in the statute. *See e.g.*, N.C. Gen. Stat. § 7B-2506(6) (stating a dispositional alternative may include an order for "the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required").

¶ 26 In arguing that specific juvenile conditions of probation must be in writing to be valid, K.N.H. cities to the parallel adult criminal provision on probation conditions, which specifically requires that "[a] defendant released on supervised probation . . . be given a written statement explicitly setting forth the conditions on which he is being released" as well as a "written statement setting forth [any] modifications." *See* N.C. Gen. Stat. § 15A-1343(c). This argument is without merit. Since the General Assembly did not expressly provide the same requirements for juvenile probation in the Juvenile Code as the Criminal Procedure Act provides for adult criminals, we give the Juvenile Code statute its "plain and definite meaning" without interpolating language from the criminal statutes. *See In re Banks*, 295 N.C. at 239, 244 S.E.2d at 388.

¶ 27 Additionally, "[t]he General Assembly has demonstrated through the Juvenile Code its desire to give the courts a broad range of alternatives in juvenile delinquency cases, with the manifest goal of creating optimal solutions tailored to the particular circumstances of each wayward child." *In re D.L.H.*, 364 N.C. 214, 219, 694 S.E.2d 753, 756 (2010) (holding the adult criminal statute governing credit for time served before

disposition is inapplicable to juvenile proceedings based on the plain language of the Criminal Procedure Act and the Juvenile Code combined with the "legislative policy of affording the courts a wide variety of options in juvenile matters").

¶ 28 Like our Supreme Court in *In re D.L.H.*, we refuse to limit the options of the district courts by subjecting delinquent juveniles to adult criminal statutes where there is no statutory indication that a given criminal statute applies to a juvenile proceeding. Requiring the courts to set forth the specific rules, terms, and conditions of each dispositional alternative or condition of probation when not statutorily mandated would conflict with the goals of the Juvenile Code to provide "a broad range of alternatives" in juvenile proceedings and would interfere with the district court's power to delegate certain tasks and responsibilities to third parties involved in the dispositional plans of delinquent juveniles. *See id.* at 219, 694 S.E.2d at 756. Moreover, in its role as an appellate court, the Court of Appeals is limited to interpreting statutes—not creating or enacting statutes as these are functions reserved for the legislatures. *Share v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012) ("This Court is an error-correcting court, not a law-making court.").

¶ 29 Relying on the unpublished case of *In re E.M.*, K.N.H. next maintains that oral notice of a probation condition was insufficient because "[a] juvenile must receive written notice of a condition of probation for the condition to be valid." We disagree.

¶ 30 In the case of *In re E.M.*, the trial court judge orally announced that the juvenile was to cooperate with electronic monitoring if directed to do so by the chief court counselor. 227 N.C. App. 649, 745 S.E.2d 374, No. COA13-13, 2013 N.C. App. LEXIS 600, at *11-12 (N.C. App. June 4, 2013) (unpublished). Although the oral announcement of the disposition by the trial court judge was properly given, the written disposition did not provide that the juvenile was subject to electronic monitoring at the discretion of the court counselor. *Id.* at *11. Our Court held that "[b]ecause the written disposition order d[id] not require [electronic monitoring as a] condition of probation," the oral order was invalid and inapplicable to the juvenile since it violated the statutory mandate imposed by N.C. Gen. Stat. § 7B-2510(b)(4). *Id.* at *11.

¶ 31 In the instant case, unlike *In re E.M.*, there is a written disposition order requiring K.N.H. to cooperate with electronic monitoring and all conditions set by the court counselor. The parties do not dispute whether K.N.H. received oral notice of the condition to submit to electronic

monitoring. Rather, the parties disagree as to whether "all conditions set by the [c]ourt [c]ounselor" pursuant to the Supplemental Order were required to be in writing to be valid, particularly the condition that K.N.H. had to be in the presence of one of his parents while on electronic monitoring leave. Therefore, we do not find *In re E.M.* on point or persuasive in the case *sub judice*.

¶ 32 Our Court has held that a trial court may allow a juvenile court counselor to impose certain conditions and make certain determinations with respect to the juveniles they supervise so long as the court does not improperly delegate its authority when the statute provides the power and discretion to order a dispositional alternative or condition of probation is with the court. *See In re M.A.B.*, 170 N.C. App. 192, 194–95, 611 S.E.2d 886, 887–88 (2005) (affirming a disposition ordering a juvenile to "cooperate and participate in a residential treatment program as directed by [the] court counselor or mental health agency" where the "specifics of the day-to-day program" were left to the discretion of the court counselor); *In re Hartsock*, 158 N.C. App. 287, 291–92, 580 S.E.2d 395, 398–99 (2003) (reversing in part a dispositional order where the trial court ordered the juvenile to cooperate with placement in a residential treatment facility but vested counselors with the discretion of determining whether to order the placement).

¶ 33 In *In re S.R.S.*, we considered the underlying conditions of probation terms entered pursuant to N.C. Gen. Stat. § 7B-2510 and considered whether the trial court impermissibly delegated its authority in ordering those conditions. 180 N.C. App. 151, 157–60, 636 S.E.2d 277, 282–84 (2006). We noted that although the *S.R.S.* Court considered whether the trial court properly ordered conditions of probation under N.C. Gen. Stat. § 7B-2510, the case of *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2004), which dealt with the trial court's discretion to order dispositional alternatives under N.C. Gen. Stat. § 7B-2506, was nevertheless "persuasive and applicable" to its analysis. *In re S.R.S.*, at 158, 636 S.E.2d at 283. The record in *In re S.R.S.* failed to support placing conditions on the juvenile for an out-of-home placement and cooperation with counseling and assessments as recommended by the court counselor. *Id.* at 159–60, 636 S.E.2d at 283–84. However, we upheld a condition of probation ordered by the trial court which stated that, "the juvenile abide by any rules set out by the Court Counselor and the juvenile's parents . . . ." *Id.* at 158–59, 636 S.E.2d at 283. We reasoned that the condition imposing rules set by a court did "not vary substantially from that allowed per [N.C. Gen. Stat. § 7B-2510(a)(3)]." *Id.* at 159, 636 S.E.2d at 283. We reversed the probation conditions for out-of-home placement and

cooperation with counseling and assessments in the event they were not already mooted by the expiration of the juvenile's probation term. *Id.* at 159–60, 636 S.E.2d at 283–84.

¶ 34 Here, the trial court continued K.N.H.'s Level 2 probation on 11 October 2018 for an additional 12-month period under the previously ordered terms and conditions in addition to new terms and conditions found in the Supplemental Order, including the condition that K.N.H. "submit to [e]lectronic [m]onitoring for 90 days and comply with all conditions set by the [c]ourt [c]ounselor." The trial court did not vary the condition of probation from that allowed by statute. *See In re S.R.S.*, 180 N.C. App. at 159, 636 S.E.2d at 283; *see also* N.C. Gen. Stat. § 7B-2510(b)(4). The trial court properly ordered electronic monitoring and appropriately delegated the task of supervision of the electronic monitoring to K.N.H.'s court counselor. The specific details concerning the electronic monitoring rules, after the condition of probation was ordered by the court, were properly delegated to the juvenile court counselor. *See In re M.A.B.*, 170 N.C. App. at 192, 611 S.E.2d at 886. Therefore, we hold the trial court properly entered a Level 3 disposition solely on K.N.H.'s violation of the specific terms and conditions set forth by the juvenile court counselor with respect to his electronic monitoring condition of probation.

VI. Oral Announcement of YDC Commitment Duration

¶ 35 **[2]** In his second argument, K.N.H. asserts the trial court erred in "fail[ing] to state with particularity the precise duration of [his] commitment to YDC in open court"; thus, "the Level 3 disposition must be vacated." The State contends this argument is moot since K.N.H. was released from the YDC on 1 June 2020 and placed on post-release supervision. Alternatively, the State argues that the trial court substantially complied with N.C. Gen. Stat. § 7B-2512, and K.N.H. cannot show prejudice resulting from the trial court's failure to include his "maximum commitment time in its oral pronouncement during the disposition."

A. Mootness

¶ 36 We first address the State's contention that K.N.H.'s challenge to the Level 3 disposition has been rendered moot on the basis that he was released from the YDC on 1 June 2020. The State argues that any error related to the disposition and commitment order cannot be cured since "[K.N.H.] already served his entire commitment at a [YDC]." We disagree. Although the record is unclear as to whether K.N.H. continues to be subject to post-release supervision, there remains a possibility he is under supervision, or faces another collateral legal consequence,

resulting from the alleged error. *See In re S.R.S*, 180 N.C. App. at 157–58, 636 S.E.2d at 282 (hearing a juvenile's arguments related to conditions of probation even though the Court of Appeals was uncertain whether the issues were mooted due to the juvenile's release from custody and probation).

¶ 37 Generally, "when the terms of a challenged trial court judgment have been carried out, a pending appeal of that judgment is moot because the appellate court decision cannot have any practical effect on the existing controversy." *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (citation and quotation marks omitted). However, in cases where "the continued existence of the judgment itself may result in collateral legal consequences for the appellant" or where there are "[p]ossible adverse consequences flowing from [the] judgment," there continues to be a live controversy, which prevents the case from becoming moot. *Id.* at 452, 628 S.E.2d at 755. For example, a juvenile's appeal from a disposition and commitment order would not become moot where the juvenile served his sentence but faced a possibility of "adverse consequence flowing from a judgment," such as post-release supervision. *See id.* at 452, 629 S.E.2d at 755; *see also In re J.L.H.*, 230 N.C. App. 214, 219, 750 S.E.2d 197, 201 (2013) (holding a juvenile's appeal from a court's denial of his motion to release was not rendered moot by his release from commitment to a YDC where the juvenile had to comply with conditions of post-release supervision).

¶ 38 The State relies on *In re Swindell* as support for its argument that K.N.H.'s challenge to the trial court's oral pronouncement is rendered moot. 326 N.C. 473, 390 S.E.2d 134 (1990). In *In re Swindell*, the juvenile contended that the trial court erred in committing him "without first fully considering possible alternative treatment measures . . . ." *Id.* at 474, 390 S.E.2d at 135. Our Supreme Court held the issue was rendered moot since the juvenile had already been released from custody. *Id.* at 474, 390 S.E.2d at 135. The opinion makes no mention of the juvenile facing post-release supervision or any other "[p]ossible adverse consequences flowing from [the] judgment." *See In re A.K.*, 360 N.C. at 452, 629 S.E.2d at 755. Therefore, *In re Swindell* is distinguishable from the instant case, because here, a potential adverse consequence of the disposition on the juvenile—specifically, the possibility of post-release supervision—has been identified by the appellant, K.N.H.

¶ 39 Here, K.N.H.'s date of commitment was 23 May 2019, and he was released from the YDC on post-release supervision on 1 June 2020. The post-release supervision was to be in effect for a minimum of three months and maximum of one year. However, we are unable to deter-

mine, based on the record and its supplement, whether K.N.H. continues to be subject to post-custody supervision. Since it is possible K.N.H. continues to be on post-release supervision or faces other potentially adverse consequences from the purported sentencing error, we will hear the merits of his appeal although we are aware the "passage of time may have rendered the issue . . . moot." *In re Lineberry*, 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002) (recognizing the "passage of time may have rendered the issue of [a] juvenile's custody pending appeal moot").

B. Failure to Comply with N.C. Gen. Stat. §§ 7B-2513(a4) and 7B-2512(a)

¶ 40 On appeal, K.N.H. argues the trial court committed reversible and prejudicial error by not adhering to the statutory mandates set out in N.C. Gen. Stat. §§ 7B-2513(a4) and 7B-2512(a). Specifically, the trial court judge failed notify K.N.H. of the precise duration of his commitment to the YDC at the 23 May hearing when the court orally announced the disposition. The State concedes "the trial court did not include [K.N.H.'s] maximum commitment time in its oral pronouncement," but contends K.N.H. cannot show any prejudice resulting from the trial court's error. We agree with the State that the juvenile has not sufficiently shown prejudice stemming from the error.

¶ 41 As previously stated above, N.C. Gen. Stat. § 7B-2512 requires, *inter alia*, the courts to "state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind[and] duration . . . ." N.C. Gen. Stat. § 7B-2512(a). Similarly, N.C. Gen. Stat. § 7B-2513 provides, *inter alia*, "[a]t the time of commitment to a youth development center, the court shall determine the maximum period of time the juvenile may remain committed . . . and shall notify the juvenile of that determination." N.C. Gen. Stat. § 7B-2513(a4).

¶ 42 In this case, the trial court made the following pertinent statement in open court when it announced K.N.H.'s disposition:

> In this case, I'm going to commit the juvenile . . . to the Division of Adult Probation of Juvenile Justice for placement in a Youth Development Center for an indefinite period and order that you cooperate with all the recommendations for any counseling while in YDC, as well as on post-release; submit to random drug screens on post-release; and if the Chief Court Counselor requests it, I'll order you to submit to electronic monitoring for at least 60 days when placed on post-release supervision.

¶ 43 Since the trial court only provided the placement in the YDC would be for an "indefinite period," it failed to meet the statutory requirements to "determine the maximum period of time [K.N.H. was to] remain committed" and to state the "precise terms of the disposition including the . . . duration." *See* N.C. Gen. Stat. §§ 7B-2512(a), 7B-2513(a4).

C. Prejudicial Error

¶ 44 K.N.H. argues the trial court's failure in announcing the precise duration of his commitment was prejudicial because it "denied [him] the right to be present when the trial court selected his disposition," thus, he was "deprived of the opportunity to ask the judge questions about the Level 3 disposition."

¶ 45 We recognize North Carolina courts have made clear that the "State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal proceeding." *State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1985) (citation omitted); *see also In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296 (2005); *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975). However, we reject K.N.H.'s contention that any time "[a] trial court violates a statutory mandate at a [juvenile] dispositional hearing, the juvenile is not required to make a[ ] prejudice showing, as the error is prejudicial *per se*." *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 248 (2006) (noting the trial court's violation of N.C. Gen. Stat. § 7B-2605 had "no effect on the juvenile's adjudication or disposition"); *In re J.J.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (holding the trial court's failure to bifurcate its delinquency proceedings was non-prejudicial error).

¶ 46 K.N.H. maintains the trial court's failure to adhere to the statutory mandates constitutes reversible, prejudicial error and cities to *In re W.L.M.*, 218 N.C. App. 455, 721 S.E.2d 764, COA11-723, 2012 N.C. App. LEXIS 169 (N.C. App. Feb. 7, 2012) (unpublished opinion); *In re B.P.*, 169 N.C. App. 728, 612 S.E.2d 328 (2005); *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 248; and *In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296 (2005) as support for his argument. We find each case readily distinguishable from the facts of this case. We hold the trial court's error in failing to orally state the precise duration of the disposition was without prejudice.

¶ 47 In *In re W.L.M.*, which is unpublished, the trial court erred by failing to state in open court the duration of the juvenile's commitment and in erroneously recording the written order. 218 N.C. App. 455, 721 S.E.2d 764, COA11-723, 2012 N.C. App. LEXIS 169, at *2. The trial court initially checked the "indefinite commitment" box on the written disposition or-

der, then attempted to amend the commitment period on the order by crossing out the previously marked box and checking the "definite period" box "without designating a duration for that period." *Id.* at *3. We concluded that the modified written order did "not state the duration of confinement with certainty or particularity." *Id.* Our Court "vacate[d] the disposition portion of the order and remand[ed] for a new hearing." *Id.*

¶ 48 *In re B.P.* does not concern a juvenile dispositional order, but rather the timely entry of dispositional order entered after the court adjudicated a parent's minor children neglected and dependent. 169 N.C. App. at 730, 612 S.E.2d at 329–30 (2005). The pertinent portion of the statute in that case stated, "[t]he dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing . . . ." *Id.* at 735, 612 S.E.2d at 333 (citing N.C. Gen. Stat. § 7B-905(a) (2003). Additionally, the statute required the disposition to state the "duration" and "the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested." *Id.* at 735, 612 S.E.2d at 333; *see also* N.C. Gen. Stat. § 7B-905(a). The oral disposition announced in open court failed to indicate the "person or agency in whom custody is vested" and the "duration" of the order. *Id.* at 736, 612 S.E.2d at 333. Moreover, the written dispositional order was not timely filed as required by statute due to a clerical error. *Id.* at 735, 612 S.E.2d at 332–33. We held the respondent was prejudiced because she was "not provided with necessary information from which she could prepare for future proceedings" and had "no notice of the particular findings of fact or conclusions of law upon which the trial court based its decision." *Id.* at 736, 612 S.E.2d at 333.

¶ 49 In *In re J.L.B.M.*, the trial court properly orally announced the juvenile's commitment would not exceed his eighteenth birthday but omitted the maximum term of commitment from the written order as required under N.C. Gen. Stat. § 7B-2513(a). *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249. We remanded the dispositional order to the trial court for correction of the clerical error. *Id.* at 628, 627 S.E.2d at 248.

¶ 50 In *In re T.E.F.*, our Supreme Court affirmed the Court of Appeal's decision to reverse and remand a matter to the trial court for a new juvenile adjudicatory hearing where the trial court had committed reversible error by not meeting all six requirements enumerated under N.C. Gen. Stat. § 7B-2407. *In re T.E.F.*, 359 N.C. at 572, 614 S.E.2d at 297. The Court reasoned that meeting all six requirements was "paramount and necessary in accepting a juvenile's admission as to guilt"; therefore, if any of the requirements are lacking, an adjudication based on the improper admission must be reversed. *Id.* at 574, 614 S.E.2d at 298. In declining to

adopt the "totality of the circumstances" standard of review, the Court emphasized the importance of ensuring juveniles understand the "consequences of admitting their guilt." *Id.* at 575–76, 614 S.E.2d at 299.

¶ 51 K.N.H. provides no case in which our Court held a reversible error had occurred solely based on the trial court's failure to orally announce the duration of the order of disposition, and we decline to do so here. Here, the written disposition order clearly indicated that K.N.H. was committed to the YDC for a minimum period of six months and a maximum period until his eighteenth birthday despite the trial court's failure to orally state the duration of the commitment. Furthermore, K.N.H. was apprised of the fact that he was being committed to the YDC at the 23 May 2019 hearing. Since only the Level 3 disposition authorizes commitment of a juvenile pursuant to the Juvenile Code, K.N.H. was present when the trial court selected his disposition, and he had the opportunity to ask the trial court judge questions about the disposition. *See* N.C. Gen. Stat. § 7B-2508(e) (2019). Although the trial court erred in orally stating the disposition, K.N.H. has not adequately shown that the statutory violations prejudiced him. *See In re Bullabough*, 89 N.C. App. 171, 178, 183, 365 S.E.2d 642, 646, 649 (1988) (holding the trial court's errors in unlawfully detaining the juvenile before the adjudication and in failing to direct the Clerk of the Superior Court to transcribe the record did not constitute reversible, prejudicial errors); *see also Glenn v. Raleigh*, 248 N.C. 378, 383, 103 S.E.2d 482, 487 (1958) (stating that in order to justify reversible error, a court's ruling must not only be erroneous, but also "material and prejudicial" so that a "different result would likely have ensued" but for the error).

VII. Conclusion

¶ 52 We hold the trial court did not err in basing its entry of the Level 3 disposition solely on K.N.H.'s violation of terms and conditions related to electronic monitoring, for which the juvenile received only oral notice from his court counselor. Furthermore, we hold the trial court erred in failing to follow the statutory mandate of orally stating the precise duration of the disposition at the time of commitment; however, the juvenile has failed to show that he was prejudiced by the error. For the foregoing reasons, we affirm the Order on Motion for Review and the Disposition and Commitment Order.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

IN RE K.P.

[278 N.C. App. 42, 2021-NCCOA-268]

IN THE MATTER OF K.P.

No. COA20-797

Filed 15 June 2021

1. Child Abuse, Dependency, and Neglect—permanency planning—reunification eliminated as part of plan—sufficiency of findings

A permanency planning order granting custody of a child to non-relative custodians was vacated where the trial court effectively eliminated reunification with the mother as a plan without first making the necessary findings of fact pursuant to N.C.G.S. § 7B-906.2(b) and (d) regarding whether reunification would be unsuccessful or inconsistent with the child's safety. Further, the trial court erred by determining that the primary plan had been achieved because the initial primary plan was to give custody to a relative, and instead, the child was placed with non-relatives.

2. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-relatives—understanding of legal significance—findings

In a permanency planning matter, the trial court erred when it awarded custody of the child to non-relative custodians without first ensuring that the custodians understood the legal significance of the placement and had adequate resources to care for the child as required by N.C.G.S. § 7B-906.1(j). Testimony from one of the custodians that he and his wife were willing to care for the child was insufficient.

3. Child Abuse, Dependency, and Neglect—permanency planning—ceasing further review hearings—findings

In a permanency planning matter, the trial court erred by ceasing further review hearings without first making findings of fact addressing each of the factors contained in N.C.G.S. § 7B-906.1(n).

Judge JACKSON concurring in part and dissenting in part.

Appeal by Appellant-Mother from an order entered 21 July 2020 by Judge Christopher B. McLendon in Hyde County District Court. Heard in the Court of Appeals 13 April 2021.

J. Thomas Diepenbrock for Appellant.

IN RE K.P.

[278 N.C. App. 42, 2021-NCCOA-268]

Rodman, Holscher, Peck & Edwards, P.A., by Jacinta D. Jones for Hyde County Department of Social Services.

Keith Karlsson for the Guardian ad Litem.

ARROWOOD, Judge.

¶ 1 Appellant, the mother of K.P. ("Kenneth"),[1] appeals from the trial court's permanency planning order granting legal and physical custody of Kenneth to non-relative custodians. Appellant contends that the trial court erred by (1) eliminating reunification as a primary or secondary permanent plan without making required findings of fact; (2) failing to make findings of fact supported by competent evidence that each of the proposed custodians understood the legal significance of their appointment; and (3) ceasing further reviews without making proper findings. For the following reasons, we vacate and remand.

I. Background

¶ 2 Kenneth, the youngest of Appellant's four children, was born 13 December 2017. Prior to Hyde County Department of Social Services' ("DSS") involvement, Kenneth and his siblings resided with Appellant and her husband, "Mr. Phillips." Mr. Phillips is the father of Kenneth's three siblings and was initially believed to be Kenneth's father.

¶ 3 On 17 March 2018, when Kenneth was three months old, Appellant and Mr. Phillips were involved in a domestic violence incident wherein Mr. Phillips returned home to find Appellant in bed with her paramour ("Mr. Keller"). Mr. Phillips "lunged" at Mr. Keller, who grabbed a nearby knife. Mr. Phillips took the knife from Mr. Keller and a physical altercation ensued, resulting in Mr. Keller being hospitalized. Kenneth and his siblings were present during the incident. As a result of the altercation, Mr. Phillips was arrested and charged with assault with a deadly weapon with a minor present, assault with a deadly weapon, and assault inflicting serious injury. Appellant, who had pending charges for resisting a public officer and probation violation, was also arrested and charged with simple assault. Before her arrest, Appellant arranged for Kenneth to be placed with a maternal aunt.

¶ 4 On 21 March 2018, DSS obtained a nonsecure custody order of Kenneth. DSS subsequently filed a petition alleging Kenneth to be a

1. Pseudonyms are used throughout the opinion to protect the identity of the parties involved.

neglected and dependent juvenile on 22 March 2018. Prior to filing the petition, DSS contacted Mr. Phillips who indicated that he was unsure if he could care for the children. Following a hearing on 27 March 2018, the court issued an order continuing nonsecure custody of Kenneth with DSS. During this time, Kenneth remained in the care of his maternal aunt until 22 May 2018, when the trial court ordered that Kenneth and his siblings be placed in the home of Mr. Phillips' father and stepmother, "Mr. Phillips, Sr." and "Mrs. Phillips," respectively.

¶ 5 At a subsequent nonsecure custody hearing held on 8 August 2018, the district court found that there was an issue as to the paternity of Kenneth and ordered Mr. Phillips to take a DNA test. Notwithstanding the paternity issue, the district court maintained Kenneth's placement with Mr. Phillips, Sr., and Mrs. Phillips. Test results later determined that Mr. Phillips was not Kenneth's biological father. Appellant subsequently named Mr. Keller as a potential father. Mr. Keller was ordered to take a DNA test, which confirmed that Mr. Keller, not Mr. Phillips, was Kenneth's biological father.

¶ 6 Thereafter, Kenneth was adjudicated neglected at an adjudication and disposition hearing on 10 December 2018. Appellant was ordered to participate in substance abuse treatment, domestic violence counseling, and anger management classes. The court also ordered her to maintain stable housing, obtain a valid driver's license and safe transportation, and attend visitation with her children.

¶ 7 Despite Mr. Phillips not being Kenneth's father, Kenneth remained placed with Mr. Phillips, Sr., and Mrs. Phillips until 17 July 2019, when he was moved to the home of his half-siblings' paternal step great-grandparents. During that time, the court held several permanency planning hearings in which it found that Appellant had completed parenting and anger management classes, admitted herself into an inpatient substance abuse treatment program, completed a substance abuse assessment, and maintained her sobriety.

¶ 8 In March 2019, Appellant resumed her romantic relationship with Mr. Phillips, and the two began residing with each other in April 2019 in a home that had "ample space for the parties' children." The couple later enrolled in family counseling. Following a permanency planning hearing on 20 August 2019, the court ordered that Kenneth begin trial home placement with Appellant and Mr. Phillips on 20 September 2019. The parties were scheduled to return to court for another permanency planning hearing on 10 December 2019. Moreover, at this point, the permanent plan for Kenneth remained the same as the court's decree fol-

lowing the 25 March 2019 permanency planning hearing: reunification with a concurrent plan of custody with a relative.

¶ 9 On 25 October 2019, Appellant told her social worker that Mr. Phillips had been physically and verbally abusing her for approximately one month. Appellant also informed the social worker that she had concerns about Mr. Phillips using drugs and the possibility of eviction due to Mr. Phillips' failure to pay rent. Upon further investigation, DSS determined that both Appellant and Mr. Phillips had been the perpetrators of the domestic discord at different times and that the juveniles were present during the altercations. As a result of these findings, the court held a placement review hearing on 29 October 2019 and determined that it was in Kenneth's and his siblings' best interest to terminate the trial home placement. Kenneth was removed and placed in the home of his maternal aunt following the 29 October 2019 hearing. After the termination of the trial home placement, Appellant relocated to Virginia to live with her mother, and Kenneth was returned to the home of Mr. Phillips, Sr., and Mrs. Phillips.

¶ 10 On 13 January 2020, the court held another permanency planning hearing. With regard to Appellant's circumstances, the court found that Appellant reported that she was working two jobs cleaning homes and delivering food, but she did not have a valid driver's license. The court also found that despite Appellant reporting that her monthly income was approximately $1,200.00, she had not provided DSS or the juvenile's placement with any financial assistance. Appellant also refused to submit to two hair follicle drug screens in October and December 2019.

¶ 11 Regarding Mr. Keller, the court found that he had left his inpatient substance abuse treatment program and secured his own housing. The court noted that Mr. Keller planned to find larger housing in order to gain custody of Kenneth and that Mr. Keller reported securing outside employment. The court also found that Mr. Keller had admitted to daily marijuana use to deal with stress and anger issues. Following the hearing, the court changed the primary permanent plan to custody with a relative with concurrent plans of custody to a court-approved caretaker and reunification.

¶ 12 This matter appeared for a final permanency planning hearing on 3 June 2020 in Hyde County Juvenile District Court. The trial court found that Appellant had refused another hair follicle drug test in January 2020, tested negative after submitting a hair follicle test in February 2020, and subsequently refused another drug screen in March 2020. The court also found that Appellant moved to Hertford, North Carolina to live with her

sister in April 2020, continued to clean houses as a source of income, and obtained a valid driver's license in May 2020. The district court acknowledged Appellant's request that Kenneth "be returned to her immediately while she lives in Hertford."

¶ 13 On 21 July 2020, the trial court entered an order granting legal and physical custody of Kenneth to Mr. Phillips, Sr., and Mrs. Phillips (the "Order") with supervised visitation to Appellant. The district court ceased further reviews and effectively ceased reunification efforts as there was no longer a permanent plan of reunification. The district court also released DSS, the *Guardian ad Litem* (the "GAL"), and the attorneys of record for Appellant from the matter. Lastly, the trial court determined that the primary permanent plan of custody had been achieved through the entry of the Order.

¶ 14 Appellant filed a timely notice of appeal of the Order on 18 August 2020.

II. Discussion

¶ 15 Appellant raises three arguments on appeal, asserting that the trial court erred by (1) eliminating reunification as a primary or secondary permanent plan without making required findings of fact; (2) failing to make findings of fact supported by competent evidence that each of the proposed custodians understood the legal significance of their appointment; and (3) ceasing further reviews without making proper findings. We address each argument in turn.

¶ 16 " 'Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law.' " *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation omitted) (quoting another source). "If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). We review the district court's conclusions of law *de novo*. *Id.* (citation omitted). Questions of statutory interpretation are questions of law, which we also review *de novo*. *In re P.A.*, 241 N.C. App. 53, 58, 772 S.E.2d 240, 245 (2015) (citation omitted). Lastly, we note that the trial court's "failure to make statutorily-mandated findings constitutes reversible error." *In re D.C.*, 275 N.C. App. 26, 29, 852 S.E.2d 694, 696 (2020) (citation omitted).

A. Reunification

¶ 17 **[1]** Appellant contends that the trial court erred by eliminating reunification as a primary or secondary permanent plan without first making

required findings of fact, particularly that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety in accordance with N.C. Gen. Stat. § 7B-906.2(b). We agree.

¶ 18 Section 7B-906.2(b) of our General Statutes provides, in part, the following:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. 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), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, 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). In turn, subsections 7B-906.2(d)(1)-(4) of the Juvenile Code read as follows:

> At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (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)(1)-(4). This Court has made clear that when a district court eliminates reunification as either a primary or secondary

permanent plan, it must make findings pursuant to both N.C. Gen. Stat. §§ 7B-906.2(b) and (d). *See generally Matter of K.L.*, 254 N.C. App. 269, 280, 802 S.E.2d 588, 595 (2017). These requirements are coupled with the obligation codified in N.C. Gen. Stat. § 7B-906.1(d)(3), which states, in pertinent part, that, "At each hearing, the court shall consider the following criteria and make written findings regarding those that are relevant . . . [including] [w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3) (2019).

¶ 19 Here, following the 3 June 2020 permanency planning hearing, the court determined that it was in Kenneth's best interest to be placed in the custody of Mr. Phillips, Sr., and Mrs. Phillips and that awarding custody of Kenneth to the couple would achieve the primary permanent plan of custody to a relative. However, in the 3 April 2020 permanency planning order, the district court ordered a primary permanent plan of custody to a relative with concurrent permanent plans of custody to a court-approved caretaker and also required reunification. To subsequently remove reunification as a concurrent permanent plan requires properly admitted evidence to support findings of fact to allow the court to conclude "efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." *See* N.C. Gen. Stat. § 7B-906.1(d)(3); *see also Matter of K.L.*, 254 N.C. App. at 275, 802 S.E.2d at 592. In addition, because the trial court implicitly ceased reunification efforts and omitted reunification from the permanent plan, it was required to satisfy N.C. Gen. Stat. § 7B-906.2(b). *Matter of D.C.*, 275 N.C. App. at 30, 852 S.E.2d at 697. Thus, without making proper findings of fact based on competent evidence pursuant to the aforesaid statutory provisions, the trial court erred by effectively ceasing reunification efforts in the Order.

¶ 20 DSS and the GAL argue, however, that reunification need not have been a primary or secondary plan because the permanent plan had been achieved. The 3 April 2020 order states that "[t]he primary permanent plan for the juvenile shall be custody to a ***relative*** with concurrent permanent plans of custody to a court-approved caretaker and reunification." (Emphasis added). Following the 3 June 2020 final permanency planning hearing, the district court concluded that the "primary permanent plan for the juvenile . . . ha[d] been achieved through the entry of th[e] [O]rder." The trial court's findings of fact do not support this conclusion; in fact, the district court's findings directly refute it. The

"primary permanent plan" for Kenneth was custody with a "***relative***." As noted above, after the 3 June 2020 hearing, the trial court awarded legal and physical custody to ***non-relatives*** Mr. Phillips, Sr., and Mrs. Phillips.[2] Thus it is implausible to conclude that the primary permanent plan had been achieved as the juvenile was placed in the custody of persons without any biological connection to Kenneth.

¶ 21 Moreover, the 3 April 2020 order suffers the same defect as the Order—it fails to address the ultimate question of whether reunification would be unsuccessful or inconsistent with Kenneth's safety. Because the trial court ceased reunification efforts without making sufficient findings pertinent to N.C. Gen. Stat. § 7B-906.2(d) and the ultimate findings required by N.C. Gen. Stat. §§ 7B-906.2(b) and 7B-906.1(d)(3), and because the trial court erroneously concluded that the primary permanent plan had been achieved through entry of the Order, we vacate and remand for further proceedings. *See Matter of D.A.*, 258 N.C. App. 247, 254, 811 S.E.2d 729, 734 (2018) (vacating order ceasing reunification efforts due to trial court's failure to include findings embracing the requisite ultimate question of whether reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety); *cf. In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) ("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.").

B. Verification

¶ 22 **[2]** Next, Appellant asserts that the trial court erred when it failed to make findings of fact supported by competent evidence that each of the proposed custodians (Mr. Phillips, Sr., and Mrs. Phillips) understood the legal significance of Kenneth's placement in their care. We agree and conclude that the trial court failed to fulfill its statutory obligation to verify that Mr. Phillips, Sr., and Mrs. Phillips (non-parents and non-relatives) understood the legal significance of their appointment as Kenneth's custodians. Section 7B-906.1(j) of our Juvenile Code states the following:

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify

2. Because Mr. Phillips is not Kenneth's biological father, neither Mrs. Phillips nor Mr. Phillips, Sr., are "relatives."

> that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j). DSS and the GAL argue that this verification requirement was met in light of testimony from a DSS social worker and Mr. Phillips, Sr. We disagree.

¶ 23 This Court has explained "that N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to 'make any specific findings in order to make the verification.' " *Matter of J.D.M.-J.*, 260 N.C. App. 56, 65, 817 S.E.2d 755, 761 (2018) (citation omitted) (quoting another source). "However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship." *Id.* (citations omitted). In the *Matter of J.D.M.-J.*, this Court vacated the award of custody because neither of the custodians testified at the permanency planning hearing and because no evidence was offered by DSS confirming that the custodians understood the legal significance of assuming custody of the juveniles. *Id.* at 260 N.C. App. at 68, 817 S.E.2d at 757. Here, Mrs. Phillips did not testify at the final permanency planning hearing, and testimony elicited from Mr. Phillips, Sr., did not demonstrate that he understood the legal significance of Kenneth's placement nor that the couple had the adequate resources to care appropriately for the juvenile. During the 3 June 2020 permanency planning hearing, a DSS social worker testified as follows:

> Q: And have [Mr. Phillips, Sr., and Mrs. Phillips] expressed a desire to accept legal custody of [Kenneth]?
>
> A: Yes, they have.

Mr. Phillips, Sr., in turn, testified to the following:

> Q: And do you recall having conversations with the Department regarding taking custody of [Kenneth]?
>
> A: Yes, ma'am.
>
> Q: And are you and your wife willing to do that at this time?
>
> A. Yes, ma'am.

Q: And are you and your wife willing to provide permanence for [Kenneth] through a custody order?

A: Yes, ma'am.

As demonstrated above, Mr. Phillips, Sr., simply stated that he was willing to take custody of Kenneth. This testimony, even when coupled with the social worker's testimony that Mr. Phillips, Sr., and Mrs. Phillips "expressed a desire to accept legal custody" of Kenneth is insufficient to satisfy N.C. Gen. Stat. § 7B-906.1(j).

¶ 24 In short, neither the record at a whole nor the district court's findings of fact support the conclusion that Kenneth's custodians understood the legal significance of the placement or that they would have the adequate resources to care appropriately for the juvenile. Indeed, the Order is devoid of any mention of the matter. For these reasons, we vacate and remand for further evidentiary findings pursuant to N.C. Gen. Stat. § 7B-906.1(j). *See In re L.M.*, 238 N.C. App. 345, 348, 767 S.E.2d 430, 433 (2014) (concluding that evidence did not support a finding that the other potential guardian understood the legal significance of guardianship where she did not testify, sign a guardianship agreement, or otherwise demonstrate that she had accepted responsibility for the child); *see also Matter of E.M.*, 249 N.C. App. 44, 55, 790 S.E.2d 863, 872 (2016) (vacating award of legal custody and remanding where record was devoid of evidence indicating that custodian couple understood the legal significance of the juvenile's placement: "Here, the husband in the custodial couple did not testify, and there is no evidence to indicate that he understood the legal significance of taking custody of [juvenile]. Further, although his wife testified at the hearing, she never testified regarding her understanding of the legal relationship, and the court never examined her to determine whether she understands the legal significance of the relationship.").

C. Cessation of Further Review Hearings

¶ 25 **[3]** Appellant's final challenge is that because the Order provided that "[t]here shall be no further reviews of this matter[,]" the district court was statutorily obliged to make the required relevant findings of fact pursuant to N.C. Gen. Stat. § 7B-906.1(n). Because the district court failed to do so, Appellant assigns error to this portion of the Order, as well. DSS and the GAL concede this error on appeal.

¶ 26 "Review hearings after the initial permanency planning hearing shall be designated as permanency planning hearings." N.C. Gen. Stat. § 7B-906.1(a). Generally, "[p]ermanency planning hearings shall be held

at least every six months thereafter or earlier as set by the court 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.* In addition, N.C. Gen. Stat. § 7B-906.1(n) reads as follows:

> Notwithstanding other provisions of this Article, the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following:
>
> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to 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).

¶ 27 "Our statutes and cases require the trial court to address all five criteria, make findings of fact to support its conclusion, and hold its failure to do so is reversible error." *Matter of K.L.*, 254 N.C. App. at 284, 802 S.E.2d at 598 (citations omitted). DSS and the GAL concede that the trial court failed to comply with the mandatory provisions of this statute. This uncontested error provides an additional, disjunctive reason to vacate the Order.

III. Conclusion

¶ 28 For the foregoing reasons, we vacate the district court's 21 July 2020 permanency planning order and remand for further findings consistent with this opinion.

VACATED AND REMANDED.

Chief Judge STROUD concurs.

Judge JACKSON concurs in part and dissents in part.

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

¶ 29 I join the portion of the majority's opinion holding that the trial court's order failed to comply with the mandatory making of findings of fact pursuant to N.C. Gen. Stat. § 7B-906.1(n) before concluding that there should be no further reviews of the matter, as DSS and the GAL concede. However, I respectfully dissent from the portions of the majority opinion concerning reunification and verification.

¶ 30 The majority opinion does a good job of listing out the relevant facts contained in the record with one exception: that Kenneth was thriving in his current placement and received appropriate care and supervision, and that Mr. Phillips Sr. and Mrs. Phillips had demonstrated a commitment to serving as a permanent placement for the child.

I. Analysis

¶ 31 Generally, "[t]his 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). "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) (internal marks and citations omitted), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). "The trial court's conclusions of law are reviewed *de novo* on appeal." *In re K.L.*, 254 N.C. App. 269, 272-73, 802 S.E.2d 588, 591 (2017). "The failure to make statutorily-mandated findings constitutes reversible error." *In re D.C.*, 852 S.E.2d 694, 696 (N.C. Ct. App. 2020).

A. Cessation of Reunification

¶ 32 Respondent contends that the trial court was required to make written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety in accordance with N.C. Gen. Stat. § 7B-906.2(b). The majority agrees and additionally finds that the trial court failed to include findings that correspond with the requirements of N.C. Gen. Stat. § 7B-906.2(d). DSS and the GAL, on the other hand, argue that the court was not required to make findings pursuant to § 7B-906.2(b), because the court found that the primary permanent plan was achieved by entry of the 3 June 2020 order. I agree with DSS and the GAL that the trial court's order fully complied with § 7B-906.2(b) and further agree with Respondent that the order includes sufficient findings that correspond to the requirements of § 7B-906.2(d).

¶ 33 Section 7B-906.2(b) of the North Carolina General Statutes provides that

> [r]eunification 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), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, *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 added).

¶ 34 This Court has recognized that "or" signifies an option in the statute. *See In re D.C.*, 852 S.E.2d at 697. Thus, reunification shall be a primary or secondary plan unless one of three circumstances exist: (1) the court made findings under N.C. Gen. Stat. §§ 7B-901(c) or 7B-906.1(d)(3); (2) the permanent plan is or has been achieved; or (3) the court makes written findings that reunification efforts clearly would be unsuccessful. N.C. Gen. Stat. § 7B-906.2(b) (2019).

¶ 35 Circumstance two, as outlined in the statute, is relevant here and provides that the court may cease reunification efforts if "the permanent plan is or has been achieved in accordance with subsection (a1) of this section[.]" N.C. Gen. Stat. § 7B-906.2(b) (2019). To that end, subsection (a1) provides that "[c]oncurrent planning shall continue until a permanent plan is or has been achieved." *Id.* § 7B-906.2(a1). In interpreting this portion of the statute, our Court has previously held, in an unpublished opinion, that "under § 7B-906.2(a1), reunification efforts may be ceased

simply upon completion of one of the juvenile's permanent plans—and consequently, that completion of a permanent plan means that no specific factual findings are required under § 7B-906.2(b)." *In re E.Y.B. & G.*, 2021-NCCOA-64, 2021 N.C. App. LEXIS 209, at *55 (2021).

¶ 36 Here, after the first permanency planning hearing on 25 March 2019, Kenneth was assigned a primary permanent plan of reunification, with a concurrent plan of custody with a relative. In a subsequent permanency planning hearing on 20 August 2019, the permanent plan remained the same. Following the 13 January 2020 permanency planning hearing, however, Kenneth was assigned a primary permanent plan of custody to a relative, with a concurrent permanent plan of custody to a court-approved caretaker and reunification. Finally, during the 3 June 2020 permanency planning hearing, the court determined that it was in Kenneth's best interest to be placed in the custody of Mr. Phillips Sr. and Mrs. Phillips, and that awarding custody of Kenneth to the couple would achieve the primary plan of custody to a court-approved caretaker.[1]

¶ 37 In making its decision, the trial court considered a number of factors, including "[w]hether efforts to reunite the juvenile with either parent would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable time." N.C. Gen. Stat. § 7B-906.1(d)(3) (2019). Specifically, the trial court found:

> a. The juvenile is currently placed in the home of paternal step-grandfather and step-grandmother[.] . . . He has been in the [Phillips Sr.] home since November 1, 2019, but was also previously placed in their home prior to Respondent-Mother beginning a trial home placement in August 2019. The juvenile is receiving appropriate care in his current placement and is in

1. The majority contends that it was implausible to grant non-relative custody of Kenneth when the court had previously determined in a prior permanency planning hearing that the primary plan for Kenneth was custody to a relative. However, the majority overlooks failed attempts by the court to place Kenneth with his parents and relatives. Specifically, the court arranged for a home placement with Respondent, which lasted for approximately two months. Thereafter, the court removed Kenneth due to abuse in Respondent's household and placed him with his maternal aunt. Kenneth remained with his aunt for approximately one month before the court ordered that Kenneth be placed with Mr. Phillips Sr. and Mrs. Phillips. Kenneth's biological father also expressed his consent to Kenneth being placed in the legal and physical custody of the Phillips and believes their home is appropriate. Thus, given the history of this case, and the discretion given to courts to adopt a permanent plan in the juvenile's best interest, it was not implausible for the court to change the permanent plan from custody with a relative to custody by an approved caretaker.

> the least restrictive, most family-like setting available to him.
>
> b. The present risk of harm to the juvenile if returned [to] either of the [R]espondent parents' homes is high. Respondent-[F]ather continues to struggle with substance abuse issues despite obtaining stable housing and employment. Respondent-Mother continues to have instability of housing and employment. She has not been compliant with all requests for random drug screens. It is not possible for the juvenile to be returned to the home of either parent immediately, not is it possible that the juvenile could be returned to the home of either parent within the next six (6) months.
>
> c. While these placement [sic] was determined based upon the needs of the juvenile and factors concerning the juvenile's health and welfare, the circumstances are such that they should continue as previously established until a permanent plan is achieved.

¶ 38 Thus, by awarding custody of Kenneth to court-approved caretakers, Mr. Phillips Sr. and Mrs. Phillips, and achieving Kenneth's permanent plan in accordance with § 7B-906.2(a1), the trial court was not required to also find that reunification efforts clearly would be unsuccessful or would be inconsistent with Kenneth's health or safety pursuant to § 7B-906.2(b).[2] Accordingly, the trial court's order satisfied § 7B-906.2(b) and no additional findings were required.

¶ 39 By eliminating reunification as the primary or secondary permanent plan, the court was required to also make findings pursuant to of N.C. Gen. Stat. § 7B-906.2(d). *In re K.L.*, 254 N.C. App. 269, 280-282, 802 S.E.2d 588, 595-596 (2017). N.C. Gen. Stat. § 7B-906.2(d) provides:

> At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:

---

2. Although the court was not required to make findings that efforts to reunite Kenneth with his parents would be unsuccessful or inconsistent with Kenneth's health or safety pursuant to § 7B-906.2(b), the court did, in fact, address this factor—satisfying § 7B-906.1(d)(3), contrary to the majority's conclusion.

> (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).

¶ 40 While Respondent concedes that the order includes findings that correspond to § 7B-906.2(d), the majority found that said findings were omitted from the order. The trial court did, however, make sufficient findings pertinent to § 7B-906.2(d). Below, the language from the statute is compared side-by-side with the corresponding findings of fact from the trial court's order (in italics):

(1) Whether the parent is making adequate progress within a reasonable period of time under the plan.	*Respondent-Father continues to struggle with substance abuse issues despite obtaining stable housing and employment. Respondent-Mother continues to have instability of housing and employment. She had not been compliant with all requests for random drug screens . . . Neither parent has made sufficient progress in a reasonable period of time such that the juvenile can be returned to them immediately or within the next six (6) months.*
(2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.	*The respondent parents have attended services but they have been unable to demonstrate changes such that they can immediately care for the juvenile,*

(3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.	*The parents are generally available to the Court, DSS, or the GAL to work their case plan*
(4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.	*The respondent parents have acted inconsistent with the juveniles' health and safety.*[3]

¶ 41 I believe this chart demonstrates that the trial court's order contained all the key factors from § 7B-906.2(d), even though the majority holds otherwise. Accordingly, the trial court's order also satisfied § 7B-906.2(d). Thus, I would affirm the trial court's order on the issue of reunification.

B. Verifying Legal Significance and Adequate Resources

¶ 42 Next, Respondent asserts that because the trial court placed Kenneth in the custody of Mr. Phillips Sr. and Mrs. Phillips, non-parents, the court was required to verify that the couple understood the legal significance of the placement. The majority agrees and concludes the trial court failed to do this properly, adding that the trial court also failed to verify that the guardians had adequate resources to care for Kenneth. This argument, however, is unavailing because testimony from the social worker and Mr. Phillips Sr. demonstrates that the couple understood the legal significance of the appointment, and Kenneth's stable placement with Mr. Phillips Sr. and Mrs. Phillips for seven consecutive months demonstrates the couple had adequate resources to care for Kenneth.

¶ 43 Section 7B-906.1(j) provides:

> [i]f the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile. *The fact that the prospective custodian*

3. In support of this finding, the trial court detailed the progress and shortcomings of each parent in the order.

> *or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.*

N.C. Gen. Stat. § 7B-906.1(j) (2019) (emphasis added).

¶ 44 Our Court has explained

> that N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to make any specific findings in order to make the verification. However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship.

In re J.D.M.-J., 260 N.C. App. 56, 65, 817 S.E.2d 755, 761 (2018) (internal marks and citation omitted).

> Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship.

Id. at 68, 817 S.E.2d at 763.

¶ 45 Here, during the 3 June 2020 permanency planning hearing, the social worker testified as follows:

> Q: And have [Mr. Phillips Sr. and Mrs. Phillips] expressed a desire to accept legal custody of [Kenneth]?
>
> A: Yes, they have.

¶ 46 Mr. Phillips Sr. also testified as follows:

> Q: And do you recall having conversations with the Department regarding taking custody of [Kenneth]?
>
> A: Yes, ma'am.
>
> Q: And are you and your wife willing to do that at this time?

A: Yes, ma'am.

Q: And are you and your wife willing to provide permanence for [Kenneth] through a custody order?

A: Yes, ma'am.

¶ 47 The testimony of Mr. Phillips Sr., coupled with the testimony from the social worker, demonstrate that Mr. Phillips Sr. and Mrs. Phillip understood the legal significance of the appointment—as both the social worker and Mr. Phillips Sr. testified as to the couple's understanding of the appointment. Mrs. Phillips was not required to testify—indeed, Mr. Phillips Sr. was not required to testify either, as a social worker's testimony regarding a caretaker's understanding, alone, is sufficient evidence to support a factual finding that a potential guardian understands the legal significance of the appointment. *See In re J.D.M.-J.*, 260 N.C. App. at 68, 817 S.E.2d at 763 (emphasizing that testimony from a social worker that the potential guardian was willing to assume legal guardianship is sufficient evidence to support a factual finding that a potential guardian understands the legal significance of the guardianship); *See also* N.C. Gen. Stat. § 7B-906.1(c) (2019) ("The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.").

¶ 48 Because the court was not required to make specific findings regarding the couple's understanding, and the record contained testimony from the social worker and Mr. Phillips Sr. acknowledging the couple's understanding of the legal significance of custody, I believe the court properly verified that Mr. Phillips Sr. and Mrs. Phillips understood the legal significance of their appointment in compliance with N.C. Gen. Stat. § 7B-906.1(j).

¶ 49 The majority also finds that the trial court failed to determine if Mr. Phillips Sr. and Mrs. Phillips possessed adequate resources to care appropriately for the juvenile. In making this determination, the majority omits the last sentence of N.C. Gen. Stat. § 7B-906.1(j), which provides that "[t]he fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." N.C. Gen. Stat. § 7B-906.1(j) (2019).

¶ 50 Here, prior to the 3 June 2020 permanency planning hearing, Kenneth had resided with Mr. Phillips Sr. and Mrs. Phillips for seven consecutive months (beginning 1 November 2019), after the court had

terminated Respondent's trial home placement. During Kenneth's time with the Phillips, the court found that Kenneth was "receiving appropriate care in his current placement and [wa]s in the least restrictive, most family-like setting available to him." Moreover, during the permanency planning hearing, Mr. Phillips Sr. provided the following testimony regarding his finances:

> Q: And if I may ask, Mr. Phelps, what is an estimate of your annual salary?
>
> A: It depends year to year. I think last year was fifty-six, I think, something like that.
>
> Q: And since having [Kenneth] in your home, have you and your wife experienced any difficulty in financially caring for him?
>
> A: No.
>
> Q: Do you anticipate having any financial difficulty in continued care of [Kenneth]?
>
> A: No; no, ma'am.
>
> Q: And have you been caring for [Kenneth] without any substantial financial contributions from the parents?
>
> A: No.
>
> Q: No contributions?
>
> A: No.

¶ 51 Again, the trial court was not required to make specific findings regarding the Phillips' ability to provide adequate resources. Indeed, the record demonstrated that Kenneth retained a stable placement with the Phillips for at least six consecutive months—establishing that the couple possessed adequate resources to care for Kenneth—and Mr. Phillips Sr. was gainfully employed with resources to support Kenneth, without any help from Respondent or Kenneth's biological father. *See* N.C. Gen. Stat. § 7B-906.1(j) (2019). Thus, I would affirm the trial court's order on this issue of verification.

II. Conclusion

¶ 52 Altogether, the trial court did not err in eliminating reunification as a primary or secondary permanent plan, because the order contained all the statutorily required findings of fact. Moreover, the court did not

err in placing Kenneth with Mr. Phillips Sr. and Mrs. Phillips because testimony in the record revealed that the couple understood the legal significance of their appointment and possessed adequate resources to care for Kenneth. Because the majority has concluded otherwise on both issues, I respectfully dissent as to the Court's holdings on reunification and verification.

CATHERINE KINCHELOE (WILKINSON), PLAINTIFF
v.
JOHN KINCHELOE, DEFENDANT

No. COA20-34

Filed 15 June 2021

1. Child Custody and Support—child support—N.C. Child Support Guidelines—deviation—required findings of fact

A child support order was reversed and remanded where the trial court deviated from the N.C. Child Support Guidelines—by excluding the father's substantial work bonuses from his gross income for purposes of calculating child support—but failed to enter the factual findings required under N.C.G.S. § 50-13.4(c) to support the deviation and to permit appellate review of the child support calculation. Specifically, the court entered insufficient findings regarding the reasonable needs of the children, and its finding regarding the presumptive child support amount under the Guidelines was incomplete because it was based on an incorrect calculation of the father's gross income.

2. Child Custody and Support—child support—calculation—mother's gross income—double-counting expenses—insufficient findings

The trial court's child support calculation was reversed and remanded where, although the court correctly treated housing and utilities support that the maternal grandmother provided the mother as part of the mother's gross income, the court's minimal findings of fact made it impossible to determine on appeal whether the trial court improperly double counted the grandmother's financial support as both the mother's income and a reduction of her living expenses, which in turn precluded appellate review of the court's deviation from the N.C. Child Support Guidelines.

3. Child Custody and Support—child support—consent order—arrears calculation—insufficient findings

In a child support action, where the parents had previously entered into a consent order requiring the father to pay monthly child support, alimony, the children's uninsured medical expenses, and the costs of "agreed-upon extracurricular activities" for the children, the trial court's child support order was reversed and remanded where the court held that the mother owed the father for overpayment of child support and unreimbursed expenses but failed to enter sufficient factual findings to support its calculation of arrears.

Appeal by plaintiff from order entered 10 July 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2020.

Plumides, Romano, Johnson & Cacheris, P.C., by Richard B. Johnson, for plaintiff-appellant.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Mother appeals an order modifying child support. Mother argues the trial court abused its discretion by excluding Father's bonus income from his gross income for purposes of calculation of child support and by double-counting support provided by her mother as both income and a reduction of her living expenses. Mother contends the trial court erred by deviating from the North Carolina Child Support Guidelines without making the required findings. In addition, Mother contends the trial court erred by determining Mother owed Father for overpayment of child support and reimbursement of expenses not supported by the evidence. We conclude the trial court erred by failing to make sufficient findings to support deviation from the North Carolina Child Support Guidelines and by failing to make sufficient findings to allow appellate review of the child support amount and arrears established. We reverse and remand the trial court's order for entry of a new order with appropriate findings and conclusions of law.

I. Background

¶ 2 Mother and Father had two children during their marriage. In 2013, the parties separated. Mother filed a complaint with claims for child

custody, child support, post-separation support, alimony, and equitable distribution. Father filed an answer and counterclaims for custody, child support, and equitable distribution. In December 2013, Mother and Father entered into a consent order resolving their claims of child custody, child support, and equitable distribution ("2013 Consent Order"). The 2013 Consent Order did not include detailed findings regarding the parties' incomes and calculation of child support but noted the parties had agreed upon the calculation based upon their incomes and the costs of medical and dental insurance provided by Father. The parties stipulated that the child support of $820.00 per month was "a compromise and shall not be deemed to be a deviation from the Guidelines." Father was ordered to pay the child support "bi-weekly by bank transfer." The 2013 Consent Order also provided for Father to maintain medical and dental insurance for the children; to pay 60% of any uninsured expenses; and to pay 60% of "the costs of all agreed-upon extracurricular activities." The 2013 Consent Order also noted that the parties would enter into a separate agreement regarding post-separation support and alimony and Mother would dismiss these claims.

¶ 3 On 23 May 2017, Mother filed a motion to modify child custody, to increase child support, and to appoint a parenting coordinator. Mother alleged the existing child support order was over three years old and she believed child support would increase by more than 15% based upon "the parties' incomes and child-related expenses." Father filed a response, alleging upon information and belief that the child support amount should be decreased. The parties agreed to a temporary consent order modifying child custody and appointing a parenting coordinator. Father filed a motion to deviate from the child support guidelines, alleging that guideline child support "may exceed the reasonable needs of the children or would otherwise be unjust or inappropriate." Mother filed a motion for wage garnishment and to determine child support arrears and attorney's fees. She alleged Father had failed to pay the full amount of his child support in various months when he deducted "what he believes, [Mother] owes him for various medical and extracurricular expenses."

¶ 4 There were multiple hearings on the various motions before the trial court. The trial court heard the motions of both parties regarding child support, wage garnishment, determination of arrears, and deviation from the Child Support Guidelines on 26 June and 14 September 2018. The trial court entered its order addressing these motions on 10 July 2019 ("2019 Order"). The 2019 Order reduced Father's monthly child support to $471.36 per month as of 1 October 2018 and also re-

quired him to pay 2% of his annual bonus within 30 days of receipt. The order determined Mother owed Father $5,313.44 for overpayment of child support and unreimbursed expenses. The order also changed the allocation of the uninsured medical expenses and "agreed-upon extra-curricular activities" to 66% paid by Father and 34% paid by Mother. Mother timely appealed.

II. North Carolina Child Support Guidelines

¶ 5 Mother argues many of the trial court's findings are not supported by the evidence and that the trial court failed to make the findings necessary to support its decision to deviate from the Child Support Guidelines and findings adequate to permit review of the trial court's calculation of child support.

A. Standard of Review

¶ 6 This Court's standard of review of an order establishing child support based upon a deviation from the child support guidelines is well established:

> A trial court's deviation from the Guidelines is reviewed under an abuse of discretion standard.
>
> Nevertheless, in deviating from the Guidelines, a trial court must follow a four-step process:
>
> > First, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each

> party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Spicer v. Spicer, 168 N.C. App. 283, 292, 607 S.E.2d 678, 685 (2005) (citation omitted) (quoting *Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999)).

B. Deviation

¶ 7 **[1]** The findings of fact and conclusions of law required in an order setting child support based upon the reasonable needs of the child and relative abilities of the parents to pay support are more detailed than those required for an order based upon the Child Support Guidelines:

> "If the trial court imposes the presumptive amount of child support under the Guidelines, it is not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support.' " "However, upon a party's request that the trial court deviate from the Guidelines . . . or the court's decision on its own initiative to deviate from the presumptive amounts . . . [,] the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." In other words, "evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay." In the course of making the required findings, "the trial court must consider 'the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.' " "These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " As a result, given that Defendant requested the trial court to deviate from the child support guidelines, the trial court was required to "hear evidence and find facts

> related to the reasonable needs of the child for support and the parent's ability to pay."

Ferguson v. Ferguson, 238 N.C. App. 257, 260-61, 768 S.E.2d 30, 33-34 (2014) (alterations in original) (citations omitted).

¶ 8 Mother argues, "the trial court abused its discretion by deviating from the North Carolina Child Support Guidelines by reducing [Father's] payment from his annual bonus from 5.1% to 2%."[1] (Original in all caps.) Although the trial court has substantial discretion in setting the amount of child support, if the child support is based upon a deviation from the child support guidelines, the trial court must follow the "four-step process" for this determination. *Spicer*, 168 N.C. App. at 292, 607 S.E.2d at 685. The findings of fact must be sufficient to allow appellate review of the calculation. *Id.*

> Our Supreme Court has explained that "an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." These conclusions must in turn be based on factual findings "specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents." Without sufficient findings, an appellate court has no means of determining whether the order is adequately supported by competent evidence. The Court stressed that "[i]t is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . ."

Id. at 293, 607 S.E.2d at 685 (alterations in original) (citations omitted) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)).

¶ 9 Here, the 2019 Order addresses only part of the first step of the four-step process described in the Child Support Guidelines. The trial

1. The trial court found Guideline Child support based upon Father's *base* monthly income of $9,216.00 would be $471.364. The trial court found "[i]f Father were to pay 5.1% of his 2017 bonus to Mother, the amount would have been $9,690.00." The trial court determined that 5.1% of Father's bonus "would exceed the reasonable needs of the children" and ordered that he pay 2% of his bonus.

court did not follow the statutory procedure for establishing child support set forth in North Carolina General Statute § 50-13.4.

> The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

N.C. Gen. Stat. § 50-13.4(c) (2019).

¶ 10 North Carolina General Statute § 50-13.4 sets forth two methods of determining child support. The first and presumptive method is the Child Support Guidelines. N.C. Gen. Stat. § 50-13.4(c). There is a presumption that child support will be established under the Child Support Guidelines in cases where the parties' incomes fall within the range addressed by the Guidelines. N.C. Child Support Guidelines, AOC-A-162, at 1 (2019) ("North Carolina's child support guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent . . . ."). The Guidelines define "gross income" and if the parties' joint gross incomes fall above the Guidelines, the Guidelines do not apply. *Id*. at 2 ("In cases in which the parents' combined adjusted gross income is more than $30,000 per month ($360,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule.").

> If the trial court imposes the presumptive amount of child support under the Guidelines, it is
>
> > not . . . required to take any evidence, make any findings of fact, or enter any conclusions

> of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support."

Biggs v. Greer, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (alterations in original) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)).

¶ 11 The trial court must use the second method to calculate child support when the Guidelines do not apply because the parties' incomes fall above the Guidelines or when the trial court determines deviation from the Guidelines is necessary because "after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate . . . . N.C. Gen. Stat. § 50-13.4 (c). In this instance, the trial court "must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay[.]" *Biggs v. Greer*, 136 N.C. App. at 297, 524 S.E.2d at 581 ("However, upon a party's request that the trial court deviate from the Guidelines, G.S. § 50–13.4(c), or the court's decision on its own initiative to deviate from the presumptive amounts, the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay, G.S. § 50–13.4(c)." (citation omitted)).

¶ 12 The North Carolina Child Support Guidelines define income as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, *bonuses*, dividends, severance pay, etc.)[.]" N.C. Child Support Guidelines at 3 (emphasis added). For non-recurring income, "the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income *that is equivalent to the percentage of his or her recurring income paid for child support*." *Id.* (emphasis added).

> The court upon its own motion or upon motion of a party may deviate from the guidelines if, after hearing evidence and making findings regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, it finds by the greater weight of the evidence that application of the guidelines would not meet, or would exceed, the reasonable needs of the child considering the relative

> ability of each parent to provide support, or would otherwise be unjust or inappropriate. *If the court deviates from the guidelines, the court must make written findings (1) stating the amount of the supporting parent's presumptive child support obligation determined pursuant to these guidelines, (2) determining the reasonable needs of the child and the relative ability of each parent to provide support, (3) supporting the court's conclusion that the presumptive amount of child support determined under the guidelines is inadequate or excessive or that application of the guidelines is otherwise unjust or inappropriate, and (4) stating the basis on which the court determined the amount of child support ordered.*

Id. (emphasis added).

¶ 13 The trial court found Father's "gross monthly income" was "$9,216" or $110,592.00 per year, but this amount was only his base income. Father regularly received substantial bonuses which sometimes exceeded his base income. Father's evidence showed his bonus in 2013 was $71,550.91; in 2014 it was $95,930.00; in 2015 it was $127,543.55; in 2016 it was $123,932.89, and in 2017 it was $190,000.00. Mother's gross monthly income from her job was $3,713.00. The trial court also found Mother's gross monthly income should be increased by $1,041.77 because "Mother lives with her mother and does not pay rent or utilities." This brings mother's total annual income to $57,057.24.

¶ 14 Here, the trial court used a hybrid of a Guideline child support calculation and a deviation from the Guidelines, while making only minimal findings as would be appropriate in a Guideline child support determination but not sufficient to allow appellate review of an order deviating from the Guidelines. Specifically, the trial court applied the Guidelines to Father's base income only, excluding his bonuses from the gross income calculation and calculating Guideline support using only his base income, and then deviated from the Guidelines only as to Father's income from his bonuses. While the trial court found that Father's yearly bonus was non-recurring income, bonuses are included in the definition of income:

> First, we note that the plain language of the Guidelines clearly includes bonus income in the definition of "income." Should certain bonus or other

> income be deemed irregular or nonrecurring, *the Guidelines further instruct the trial court to average or pro-rate the income or order the obligor to pay a percentage of his or her non-recurring income equivalent to the percentage of his or her recurring income for child support. There is no provision in the Guidelines that instructs the trial court to completely separate irregular or non-recurring bonus income from its calculations*. Second, we can infer that the trial court found that the bonus income was not irregular or non-recurring given that the order specifically stated each party had received and could expect an annual bonus. After reviewing the record, we agree that the bonus income did not constitute irregular or non-recurring income as contemplated by the Guidelines. *Finally, there is no provision in the Guidelines which instructs the trial court that it may elect to opt out of including bonus income in its calculations based solely on the premise that the reasonable needs and expenses of the children are otherwise satisfied without its inclusion*. Because the Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or nonrecurring, the trial court was required to include the bonus income in calculating the parties' base income and the overall child support award. Its failure to do so constituted an abuse of discretion.

Hinshaw v. Kuntz, 234 N.C. App. 502, 506-07, 760 S.E.2d 296, 300 (2014).

¶ 15 The first step of the four-step process was to "determine the presumptive child support amount under the Guidelines." *Spicer*, 168 N.C. App. at 292, 607 S.E.2d at 685. The trial court made some findings relevant to this first step but did not complete the first step. To complete the first step, the trial court must first make findings of Father's gross income as defined by the Guidelines. Since Father's bonus income varied over the years, the trial court may consider an average based upon Father's income history or it may determine the entire gross income, including bonus income, in some other manner, but the findings of fact must address this issue. There is evidence in the record to support this type of finding, but only the trial court may make that determination. *See Hinshaw v. Kuntz*, 234 N.C. App. at 506-07, 760 S.E.2d at 300. Once the trial court has determined Father's and Mother's gross incomes, it must

calculate "the presumptive child support amount under the Guidelines." *Spicer*, 168 N.C. App. at 292, 607 S.E.2d at 685. Since the trial court's finding as to Father's gross income did not include his bonuses, the trial court could not calculate "the "presumptive child support amount under the Guidelines," *id.*, and we cannot review the trial court's determination to deviate from the Guidelines.

¶ 16 As to the second step, the trial court did "hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support." *Id.* But the trial court did not make sufficient findings regarding the reasonable needs of the child for support for this Court to be able to review this portion of the order. The findings state only that "[t]he listed expenses for the children are reasonable." Although both parties presented evidence regarding the children's expenses and which expenses they paid, the trial court did not explain which expenses it considered as reasonable or make any findings as to which party paid which expenses. In addition, the parties' expenditures for the "agreed-upon extracurricular activities" for the children was a major factual issue but the order fails to resolve this issue. The parties clearly did not agree on all of the "agreed-upon" expenses.[2]

¶ 17 As to the third and fourth steps, the trial court determined the presumptive support amount "would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate." *Id.* But the trial court did not make the findings required by the fourth step:

> Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would

2. The issues regarding custody and appointment of a parenting coordinator are not presented on appeal, but some of these issues are related to child support. Part of the dispute regarding custody and the need for a parenting coordinator was based upon the parties' pattern of disagreements as to which sports and other activities the children should participate in and which parent should bear the cost of these expenses. Mother contended that based on the substantial income disparity between the parents, Father should not be allowed to have the children participate in certain events and then seek reimbursement from her. In addition, the parties agreed at times to certain activities, such as golf, and then later disagreed as to payment for particular golf-related events. Both children were involved in a wide variety of sports and other extracurricular activities.

> exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Id. Without adequate findings as to the reasonable needs of the children or the presumptive child support as calculated based on the correct gross income of Father, we cannot discern why the trial court deviated from the Guidelines. We also note that Guideline child support normally does not take into account the vast array of extracurricular expenses involved in this case, which included soccer, baseball, golf, Boy Scouts, lacrosse, skiing, etiquette classes, tennis, and various summer camps. These types of expenses can also be considered as "extraordinary expenses" under the child support Guidelines. *See Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581-82 (" '[D]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court[.]' Based upon the Guideline language above, 'the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses.' However, incorporation of such adjustments into a child support award does *not* constitute deviation from the Guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the Guidelines. In short, absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." (first, second, and fourth alterations in original) (citations omitted)). However, in this case, the trial court did not treat the extra-curricular expenses as "extraordinary expenses" for purposes of calculating Guideline child support under the first step of the analysis for deviation from the Guidelines, nor did the trial court consider the extraordinary expenses as part of the "reasonable needs" of the children based upon North Carolina General Statute § 50-13.4(c). Whether child support is calculated based upon the reasonable needs of the children and ability of the parties to provide support or upon the Guidelines, these expenses should be addressed by the trial court.

¶ 18 The trial court is required to make detailed "findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." N.C. Gen. Stat § 50-13.4(c); *see Beamer v. Beamer*, 169 N.C. App. 594, 599, 610 S.E.2d 220, 224 (2005) ("[O]ur Supreme Court has stressed that '[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . .' Because the trial court failed to include the necessary findings of fact regarding the children's reasonable needs, this Court must reverse and remand for further proceedings. *See also* 2 Suzanne Reynolds, Lee's North Carolina Family Law § 10.15 (5th

ed. 1999) ('If the trial court fails to make findings regarding the child's reasonable needs, it cannot determine whether the application of the [G]uidelines would not meet the reasonable needs of the child, and deviation is improper.')." (second and third alterations in original) (citations omitted)). The trial court has discretion in making the child support calculation, but the trial court does not have the discretion to establish child support by a method other than that established by North Carolina General Statute § 50-13.4, and it must make findings sufficient to allow appellate review of the child support calculation. We must therefore reverse the 2019 Order and remand for additional proceedings.

C. Mother's Income

¶ 19 **[2]** Mother argues, "the trial court abused its discretion when it added $1,041.77 per Month to [Mother's] monthly income and then deviated from the North Car[o]lina Child Support Guidelines." Although we have already determined we must reverse the 2019 Order, we will also address Mother's argument regarding the trial court's findings regarding her income as the trial court must also make findings regarding Mother's income to calculate child support on remand.

¶ 20 Here, as to Mother's income and expense, the trial court found,

> 12. Mother lives with her mother and does not pay rent or utilities. Her gross monthly income should be increased by $1,041.77 because the payment of these expenses by her mother substantially reduces her living expenses.
>
> . . . .
>
> 26. Mother's income, her paying few living expenses, and her receiving monthly child support of $471.36 plus 2% of Father's bonus, allows her to meet her share of the needs of the children.

¶ 21 The North Carolina Child Support Guidelines include "maintenance received from persons other than the parties to the instant action" as income, and the value of housing falls within this definition. *Spicer*, 168 N.C. App. at 289, 607 S.E.2d at 683 ("We therefore hold that the trial court did not err in including the $300.00 per month value of Mr. Spicer's housing as income.").

¶ 22 The trial court did not err by treating housing and utilities provided by Mother's mother as part of Mother's income and increasing Mother's income by $1,041.77. But because the trial court failed to make sufficient

findings regarding Mother's expenses, we are unable to determine to what extent Mother's "few living expenses" resulted in the deviation from the child support Guidelines. Mother argues the trial court both added the housing and utilities provided by her mother to her income and then used her "reduced shared expenses (not paying rent and utilities) as a reason to deviate from the North Carolina Child Support Guidelines," resulting in a "double-dip" to Mother's detriment. Mother's argument is plausible, but the trial court's findings of fact are too minimal for us to determine if the trial court double-counted these numbers.[3] Since we are unable to determine whether the trial court counted the value of Mother's "living expenses" twice, and we are reversing based on insufficient findings for deviation, we reverse the entire child support calculation and remand for a new order.

D. Determination of Arrears

¶ 23 **[3]** Because we are reversing the child support order, we must also reverse the order as to the calculation of arrears. Since the trial court based the arrears determination upon the child support obligation, at least in part, the entire arrears amount must be recalculated. However, Mother also argues that the trial court failed to make sufficient findings to allow appellate review of the arrears calculation. Specifically, the 2013 Consent Order required Mother and Father to pay portions of uninsured medical expenses and agreed-upon extracurricular expenses. Father also paid Mother alimony until August 2016. Thus, the sums Father was obligated to pay to Mother included monthly child support; alimony; 60% of unreimbursed medical expenses; and 60% of "agreed-upon" extracurricular expenses. The period of time addressed by the motion regarding arrears covered from December 2013 to September 2018. In any month in which Father failed to pay the full amount of child support, alimony, or other reimbursement sums owed, he would owe Mother arrears for that month. In any month he overpaid his obligations, Mother would owe this overpayment back to Father. Father also contended Mother owed him for 40% of unreimbursed medical expenses he had paid and 40% of agreed-upon extracurricular expenses he had paid.[4] To the extent

3. Mother also challenged many of the trial court's findings of fact as unsupported by the evidence. We have not addressed each of these challenges since we have determined the findings did not address the factors as required by North Carolina General Statute § 50-13.4(c) and the Child Support Guidelines and are not sufficient to allow appellate review.

4. Mother and Father had substantial disputes regarding the children's extracurricular activities, so the trial court must also determine which expenses were actually "agreed upon" as extracurricular expenses covered by the 2013 Consent Order. If either party sought reimbursement for extracurricular expenses not covered by the 2013 Consent Order, those expenses should not be included in the arrears calculation.

Mother failed to reimburse Father for these expenses, she would owe him arrears. The trial court may offset these amounts owed, assuming Father underpaid his child support and other obligations and Mother also underpaid her obligations.

¶ 24 Mother presented voluminous financial evidence including detailed evidence of the amounts Father paid in each month in question and the expenditures for which each party sought reimbursement, but the trial court did not make findings as to these sums. Instead, the trial court found "[t]here is insufficient evidence to support Mother's claims. Based upon the competent evidence presented, any reduced payments to Mother for child support were reduced for Mother's share of expenses Father paid for the children. Father does not owe Mother any arrears." Father did not present evidence refuting the amounts of the payments Mother contended he had made but argues on appeal that Mother focuses on the "quantity of evidence she presented," but "the quality of evidence is what is important." We agree quality is more important than quantity, but without findings of fact addressing the factual issues raised, we cannot perform proper appellate review of the order.

¶ 25 Making matters more complicated, Father sometimes paid by bank transfer—the method dictated by the 2013 Consent Order—but sometimes paid by check or Venmo. According to Mother, she sometimes paid extracurricular expenses at Father's behest directly and sometimes Father reduced his payment to Mother. Father did not present evidence explaining the reduced payments of child support as listed by Mother but simply testified that "every deduction has always been for some expense for the children." He testified "it would take incredible forensics to go back in 2014 for the emails and bank accounts and everything else at this point so I'm a little caught off guard." Father argues that some of Mother's testimony and evidence regarding payments and expenses was "confusing and not complete."

¶ 26 The trial court's findings do not explain how the trial court calculated the precise number of $5,313.44 owed by Mother to Father. Although the trial court determines the credibility and weight of the evidence, here the findings are simply not adequate to allow appellate review of the issues presented and calculation of arrears. On remand, the trial court must make findings resolving the many factual disputes, including which extra-curricular expenses were "agreed upon" and thus covered by the 2013 Consent Order, and make findings adequate for appellate review of the order as to any arrears owed by either party.

III. Conclusion

¶ 27 For the foregoing reasons, the trial court's order is reversed and remanded for entry of a new order which complies with North Carolina General Statute § 50-13.4. If either party requests additional hearing after remand, the trial court shall receive additional evidence prior to entry of a new order. If neither party requests additional hearing, the trial court may enter a new order based solely upon the existing record.

REVERSED AND REMANDED.

Judges MURPHY and COLLINS concur.

RICHARD P. MEABON, PLAINTIFF
v.
MICHAEL K. ELLIOTT; ELLIOTT LAW FIRM, P.C., DEFENDANTS

No. COA20-559

Filed 15 June 2021

Civil Procedure—Rule 41 dismissal—failure to prosecute—four-year delay in service of summons and complaint—deliberate or unreasonable delay

The trial court properly dismissed plaintiff's legal malpractice claim pursuant to Civil Procedure Rule 41—for failure to prosecute—based on plaintiff's four-year delay in serving defendants with the summons and complaint, during which time one of the defendant attorneys died and a legal assistant moved to another state. Although plaintiff argued he had been waiting for the resolution of a related federal bankruptcy matter, he still waited over eighteen months after the end of that case, and only after being directed by the trial court, to serve defendants. Therefore, evidence supported the trial court's findings that the delay was deliberate or unreasonable, that defendants were prejudiced by the delay, and that lesser sanctions than dismissal were not adequate.

Appeal by plaintiff from order entered 19 December 2019 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 May 2021.

Hausler Law Firm, PLLC, by Kurt F. Hausler, for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by Kimberly Sullivan and M. Elizabeth O'Neill, for defendants-appellees.

TYSON, Judge.

¶ 1 Richard P. Meabon ("Plaintiff") appeals from an order entered 19 December 2019. We affirm.

I. Background

¶ 2 Plaintiff petitioned for bankruptcy protection under Chapter 7 of the U.S. Bankruptcy Code on 23 February 2010. Plaintiff was represented by G. Martin Hunter. Prior to his representation by attorney Hunter, Plaintiff had consulted with attorney Rick Mitchell. Plaintiff ultimately decided not to hire attorney Mitchell after being told he would have to disclose a trust account ("1985 Trust") in his bankruptcy schedules. The 1985 Trust, created by Plaintiff's father, had an approximate value of $425,000 at the time of Plaintiff's bankruptcy petition. Plaintiff did not disclose the 1985 Trust account to attorney Hunter. Attorney Hunter filed the Chapter 7 petition and schedules on behalf of Plaintiff without disclosing the trust on the schedules.

¶ 3 Soon thereafter, attorney Mitchell informed attorney Hunter of the existence of the 1985 Trust. Attorney Hunter immediately demanded of Plaintiff to amend the schedules and disclose the 1985 Trust to the bankruptcy court, which Plaintiff eventually did. Plaintiff terminated representation by attorney Hunter as his counsel.

¶ 4 Plaintiff then retained Defendants as counsel in August 2011. On 20 September 2011, the bankruptcy trustee filed an Adversary Proceeding to determine ownership of the 1985 Trust. On 12 January 2012, the bankruptcy court determined the assets of the 1985 Trust were property of the bankruptcy estate.

¶ 5 Martha Medlin, Plaintiff's sister, transferred the money in the 1985 Trust account to Plaintiff's father on 1 March 2012. On 24 April 2012, Defendants notified the bankruptcy trustee of the funds removal and sent the bankruptcy trustee a check for the remaining balance in the account for $1,700.00. On 3 May 2012, an emergency hearing was scheduled by the bankruptcy trustee regarding Medlin's removal of the 1985 Trust money. On 15 May 2012, another Adversary Proceeding was filed to recover the funds moved out of the 1985 Trust.

¶ 6 On 24 September 2012, the bankruptcy trustee filed an Adversary Proceeding to revoke Plaintiff's bankruptcy discharge pursuant to

11 U.S.C. § 727(d)(1), which states the court shall revoke a discharge "if such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge." 11 U.S.C. § 727(d)(1).

¶ 7 The bankruptcy court found Plaintiff had also failed to schedule and hidden the existence of another trust account ("1991 Trust"). On 8 April 2014, the bankruptcy court entered an order revoking Plaintiff's discharge for failing to schedule and attach the 1985 Trust.

¶ 8 Criminal contempt charges were filed against Plaintiff. Plaintiff pled guilty to contempt of court for failing to disclose the 1985 Trust. Plaintiff served a sixty-day prison sentence. The revocation of Plaintiff's discharge was upheld by the United States District Court for the Western District of North Carolina on 6 June 2016, and by the United States Court of Appeals for the Fourth Circuit on 28 September 2017.

¶ 9 Plaintiff commenced this action on 20 January 2015, alleging legal malpractice against Defendants in their representation of the aforementioned proceedings. Plaintiff asserted Defendants' malpractice caused Plaintiff's discharge to be revoked and caused him to be held criminally liable for contempt. Plaintiff filed an order extending time to file a complaint, and a civil summons to be served with the order extending time to file complaint was issued. On 9 February 2015, Plaintiff filed his complaint and was issued a delayed service of complaint. Plaintiff did not serve the summons and complaint on Defendants at that time. Plaintiff filed an alias and pluries summons on 20 April 2015, and continued to file alias and pluries summonses approximately every ninety days, until 8 February 2019.

¶ 10 On 14 March 2019, the trial court entered an Order Directing Action in Case instructing Plaintiff to serve Defendants or the case would be eligible for administrative dismissal on 15 April 2019. On 8 April 2019, Plaintiff served Defendants.

¶ 11 Between 20 April 2015 and 8 February 2019, Plaintiff did not attempt to serve Defendants, who maintained the same law office and address throughout those four years. Attorney Hunter died in June 2017. During the four-year delay, Defendants had changed computer and software systems, losing certain time entries, documents, and conference room reservation information, which may have pertained to the case. Mindy Holt, Defendants' legal assistant, had worked with attorney Hunter on Plaintiff's bankruptcy case, and later for Defendants. She had left their employment and moved to Missouri.

¶ 12 On 6 November 2019, Defendants filed a motion to dismiss for the failure to prosecute under Rule 41(b). The trial court heard the motion on 19 December 2019. The trial court found Plaintiff's excuse of being "gutted" and "devastated" after the Fourth Circuit's opinion was not good cause justifying his eighteen-to-twenty-month delay in serving Defendants.

¶ 13 The trial court concluded the Plaintiff had acted in a manner that deliberately and unreasonably delayed the matter, preventing the preservation of evidence that could assist a jury in determining if malpractice had occurred. The trial court determined dismissal with prejudice was the only appropriate sanction and dismissed Plaintiff's complaint. Plaintiff appeals.

II. Jurisdiction

¶ 14 This Court has jurisdiction over a final judgment regarding a motion to dismiss for failure to prosecute pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issue

¶ 15 Plaintiff argues the trial court erred in granting Defendants' motion to dismiss for failure to prosecute under N.C. Gen. Stat. § 1A-1, Rule 41(b) (2019).

IV. Standard of Review

¶ 16 "The standard of review for a Rule 41(b) dismissal is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (citation and internal quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Id.* (citations and internal quotation marks omitted). If competent evidence supports the findings, they are binding upon appeal. *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996).

¶ 17 "[I]n reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses concentrates the court's discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Egelhof v. Szulik*, 193 N.C. App. 612, 619, 668 S.E.2d 367, 372 (2008) (*quoting Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)). The trial

court's "conclusions of law are reviewable *de novo* on appeal." *Starco*, 124 N.C. App. at 336, 477 S.E.2d at 215.

V. Analysis

¶ 18 Plaintiff argues the trial court erred in granting Defendants' motion to dismiss for failure to prosecute pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). Rule 41(b) provides, in relevant part, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b).

¶ 19 Prior to dismissing a claim for failure to prosecute, the trial court is to determine three factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and, (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001). The trial court considered all three factors prior to dismissing Plaintiff's complaint. Plaintiff argues he did not deliberately delay the matter, Defendants would not be prejudiced, and the judge should have considered lesser sanctions other than dismissal. We disagree and address each factor below.

A. Deliberate or Unreasonable Delay

¶ 20 Plaintiff argues he neither deliberately nor unreasonably delayed the matter by failing to serve the complaint to Defendants for over four years. N.C. Gen. Stat. § 1A-1, Rule 4(a) states, "The complaint and summons shall be delivered to some proper person for service." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2019).

¶ 21 Plaintiff repeatedly extended the time allowed for service by serving alias and pluries summons every ninety days until they could serve Defendants. *See* N.C. Gen. Stat. § 1A-1, Rule 4(d) (2019). This Court has recognized alias and pluries summons are an appropriate tool for extending the time for service, yet also determined delays of service for less than a year have been deliberate and unreasonable. *See Smith v. Quinn*, 324 N.C. 316, 319, 378 S.E.2d 28, 30 (1989).

¶ 22 In *Smith v. Quinn*, our Supreme Court determined an eight-month delay by use of alias and pluries summons was a violation of the spirit of the rules of civil procedure for the purpose of delay or obtaining an unfair advantage. *Id.* In *Smith*, the plaintiff filed a complaint for an alleged injury from a fall on defendant's property. *Id.* at 317, 378 S.E.2d at 29. She used alias and pluries summons to delay service for eight months. *Id.*

¶ 23 The Court reasoned the failure to serve the defendant for eight months prevented defendant from critical knowledge of the alleged incident. The alleged event had then occurred three years prior. *Id.* at 319, 378 S.E.2d at 30. The Court held dismissal "pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for the purposes of delay and in order to gain an unfair advantage over the defendant" was appropriate. *Id.* at 319, 378 S.E.2d at 31.

¶ 24 Plaintiff delayed service for over four years, well beyond the delays allowed by our Supreme Court. The four-year delay, as in *Smith*, prevented Defendants' knowledge of the suit, they were not on notice to preserve evidence and prepare for the action. Knowledge, personnel, and records of the events faded and were lost over the four years. The attorney representing Plaintiff had died and a staff assistant of the firm had moved out of state. In addition, Plaintiff eventually served Defendants only after receiving an Order Directing Action in Case from the trial court.

¶ 25 Where the Rules of Civil Procedure are violated for the purpose of delay or gaining an unfair advantage, dismissal of the action is an appropriate remedy. *See Stocum v. Oakley*, 185 N.C. App. 56, 65, 648 S.E.2d 227, 234 (2007) (citation omitted). Plaintiff argues he did not delay to gain unfair advantage. He offers no showing or support to the contrary. The trial court's findings of fact are supported by competent evidence.

¶ 26 Plaintiff argues he did not deliberately or unreasonably delay the matter because he was attempting to mitigate his damages, while awaiting the decision on his Rule 60 motion from the United States Court of Appeals for the Fourth Circuit.

¶ 27 Our Court has held:

> Although the general rule in North Carolina is that attorneys' fees and other costs associated with litigation are not recoverable in a legal malpractice action absent statutory liability, this rule does not apply to bar recovery for costs, including attorneys' fees, incurred by a plaintiff to remedy the injury caused by the malpractice.

Gram v. Davis, 128 N.C. App. 484, 489, 495 S.E.2d 384, 387 (1998).

¶ 28 Plaintiff argues he waited to serve the complaint until he was sure of the total amount of his damages from the alleged malpractice. The Fourth Circuit upheld the federal district court's denial of Plaintiff's appeal of his Rule 60 motion on 28 September 2017. Plaintiff filed

on 9 February 2015, but did not serve the complaint on Defendants until 9 April 2019. At hearing, the court asked Plaintiff why he had waited eighteen to twenty months to file the complaint after receiving the opinion from the Fourth Circuit. Plaintiff replied that he was "gutted" and "devasted" by that decision.

¶ 29 Our Court has consistently dismissed similar cases for delays of significantly shorter length than Plaintiff's delay of four years. *Sellers v. High Point Mem'l Hosp., Inc.*, 97 N.C. App. 299, 388 S.E.2d 197 (1990) (dismissal with prejudice for six-month delay in service of summons was the appropriate sanction); *Melton v. Stamm*, 138 N.C. App. 314, 530 S.E.2d 622 (2000) (dismissal with prejudice for failure to serve defendant after serving alias and pluries summons for fourteen months before service). Plaintiff's delay in service of the complaint is unreasonable, if not also deliberate. The trial court's conclusions are supported by findings that are based upon competent evidence. *Cohen*, 208 N.C. App. at 498, 704 S.E.2d at 524.

B. Prejudice to Defendant

¶ 30 Plaintiff argues the court's conclusion of law that Defendants would be prejudiced by having to participate in the suit is unsupported. Plaintiff contends no evidence tends to show attorney Hunter or Holt would have any information that is needed in the suit. "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972).

¶ 31 The trial court found the delay prejudiced Defendants because, attorney Hunter had died and Holt had moved to Missouri. Had Plaintiff served Defendants within a reasonable amount of time, records would have been accessible and preserved, and attorney Hunter, Plaintiff's former attorney in the bankruptcy matter, may have been able to testify about the representation and proceedings. Plaintiff's inordinate delays increased Defendants' costs and ability to preserve and present their defense to Plaintiff's claims. The trial court correctly concluded Plaintiff's inordinate delays in service prejudiced Defendants.

C. Dismissal the Appropriate Sanction

¶ 32 Plaintiff argues the trial court's conclusion of law stating nothing short of dismissal with prejudice will suffice, is not supported by reason. Plaintiff does not offer any showing or support tending to show a lesser sanction would be appropriate under these circumstances.

¶ 33 "The trial court in its discretion found that no lesser sanction would better serve the interests of justice in this case. We find no basis

for concluding that the trial court abused its discretion." *Sellers*, 97 N.C. App. at 303, 388 S.E.2d at 199 (dismissal under Rule 41(b) appropriate for six-month delay in service, where the delay was deliberate and unreasonable).

¶ 34 The trial court's choice of sanction was proper and certainly not an abuse of discretion. *Id.* A four-year delay in service, found to be deliberate and unreasonable, coupled with the death of attorney Hunter and moving of Holt out of state, prejudiced Defendants. *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.

VI. Conclusion

¶ 35 The trial court correctly considered the *Wilder* factors and determined Plaintiff deliberately and unreasonably delayed service of process, and the delay had prejudiced Defendants. The trial court did not err and certainly did not abuse its discretion in granting Defendants' motion to dismiss for failure to prosecute under Rule 41(b). Dismissal was the most appropriate sanction. *Id.* The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and JACKSON concur.

STATE OF NORTH CAROLINA
v.
AMY REGINA ATWELL

No. COA20-496

Filed 15 June 2021

1. Indictment and Information—facial validity—purchasing a firearm while subject to a domestic violence protective order—elements

The indictment charging defendant with purchasing a firearm while subject to a domestic violence protective order (DVPO), as defined in N.C.G.S. § 14-409.39(2), was facially valid where it specifically referenced defendant's attempt to purchase a firearm, the existence of a DVPO against her, and the fact that the DVPO was in effect at the time defendant attempted the firearm purchase.

2. Constitutional Law—right to appointed counsel—forfeiture—colloquy required by N.C.G.S. § 15A-1242

The trial court in a criminal prosecution properly concluded that defendant had forfeited her right to appointed counsel, where defendant would repeatedly fire her court appointed attorneys (often within days of their appointment), then waive her right to appointed counsel, and then withdraw those waivers while requesting either new appointed counsel or additional time to acquire enough funds to hire an attorney. Moreover, the court properly required defendant to proceed to trial without assistance of counsel after informing her—as required by N.C.G.S. § 15A-1242—of her right to counsel, the consequences of proceeding pro se, the nature of the charges and proceedings, and the range of permissible punishments.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered on 29 January 2020 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David D. Lennon, for the State.

W. Michael Spivey for the Defendant.

ARROWOOD, Judge.

¶ 1 Amy Regina Atwell ("defendant") appeals from judgment entered upon a jury verdict finding her guilty of attempting to purchase a firearm while subject to a domestic violence protective order ("DVPO") prohibiting the same, a violation of N.C. Gen. Stat. § 14-269.8. Defendant contends that the indictment charging her with this crime was fatally defective and that the trial court erred in concluding that she had forfeited her right to counsel. For the following reasons, we affirm the trial court.

I. Background

¶ 2 On 9 August 2013, Judge Hunt Gwyn entered an *ex parte* DVPO against defendant in Union County District Court. The order required that defendant "surrender to the Sheriff . . . [any] firearms, ammunition, and gun permits . . . in [her] . . . ownership or control." The order further provided that failing to surrender her firearms or "possessing, purchasing, or receiving a firearm, ammunition or permits to purchase or carry

concealed firearms . . . is a crime." The order also stated in a portion captioned, "Notice to Parties," as follows:

> TO THE DEFENDANT:
>
> 1. If this Order prohibits you from possessing, receiving or purchasing a firearm and you violate or attempt to violate that provision, you may be charged with a Class H felony pursuant to North Carolina G.S. 14-269.8 and may be imprisoned for up to 30 months.
>
> 2. If you have been ordered to surrender firearms, ammunition, and gun permits and you fail to surrender them as required by this Order, or if you failed to disclose to the Court all information requested about possession of these items or provide false information about any of these items you may be charged with a Class H felony and may be imprisoned for up to 30 months.

¶ 3 The DVPO was renewed annually and was in effect on 9 August 2017 when defendant unsuccessfully attempted to purchase a .22 caliber rifle at the Tennessee Kentucky Pawn in Scott County, Tennessee. A warrant was issued for her arrest on 10 August 2017. On 5 February 2018, defendant was indicted by a Union County grand jury with attempting to purchase a firearm while subject to a DVPO prohibiting the same.

¶ 4 The case was continued twice and came on for hearing on 18 September 2019 in Union County Superior Court, the Honorable William A. Wood presiding. At the 18 September 2019 hearing, defendant appeared without representation after her fifth attorney had withdrawn. Defendant's case had been continued to allow time for defendant to hire an attorney. When the trial court asked defendant what she was "going to do about a lawyer[,]" defendant explained that she could not afford a lawyer and wanted another court appointed attorney. Judge Wood responded:

> THE COURT: Well, quite frankly I've never seen a file like this as far as your attorney situation goes. This all started back in August 19, 2017, which is the date of offense in these charges. And it looks like you got indicted in February of 2018, a year and a half ago, and were appointed an attorney who you promptly fired on February 12th, 2018. Then you waived your right to a court appointed lawyer. I believe you signed

> another waiver of your right to a court appointed lawyer. Those were on April 17th, 2018 and May 15th, 2018. You were given a continuance on June the 12th at your own request and then you were appointed another attorney on September the 11th, 2018 who withdrew from your case, it doesn't really say why in the file. You filed another waiver on October 11th, 2018. You were appointed another attorney on December the 13th, 2018 who you promptly fired in June of 2019. And then you signed another waiver and asked for a continuance to hire your own lawyer. Don't you think it's gone on long enough?

¶ 5 Defendant reiterated that she could not afford a lawyer on the date of the hearing and had asked for a continuance due to her disability and low income. When Judge Wood asked why defendant had fired her prior attorneys, defendant explained that one had withdrawn due to a conflict of interest, and "two other attorneys were totally going in two different ways of defense[,]" such that defendant did not feel that the attorneys represented her interests.

¶ 6 The trial court next asked the State "what's your pleasure with this case[?]" The State responded that they were "ready to move forward with the case at this point[,]" that the case "just needs to be arraigned and we'll move it to a trial calendar[,]" while defendant could "still possibly retain[ ] counsel if she chooses to do so."

¶ 7 The following colloquy then transpired:

> THE COURT: Well, what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney. If you would like to hire your own attorney, that will be fine, but based on these – the history of this file, it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, that doesn't preclude you from hiring your own attorney. You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?

THE DEFENDANT: Representing myself.

THE COURT: Yes.

THE DEFENDANT: It means representing myself.

THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the Discovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

THE DEFENDANT: No, because I've already requested a jury trial.

THE COURT: Well what is it about that that you don't understand?

THE DEFENDANT: You said if I get a jury trial.

THE COURT: You're welcome – I mean, nobody's going to make you plead guilty. You can have a jury trial.

THE DEFENDANT: Thank you.

THE COURT: There's other ways for a case to go away. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: I don't know what's ultimately going to have happen to this case but you are entitled to a jury

> trial most definitely. What I want you to understand is that if you represent yourself, you're going to be held to the same standards of an attorney. Do you understand that?
>
> THE DEFENDANT: You're giving me no choice. I mean, I asked for another court appointed attorney and you said no, so –
>
> THE COURT: You've had choice after choice after choice. You've been given a court appointed attorney on three[1] occasions, which is two more than you usually get.
>
> THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.
>
> THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the other took – you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: You've denied me a court appointed attorney. Yes, I understand that.
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

Judge Wood concluded in a 20 September 2019 order that defendant had forfeited her right to counsel.

¶ 8 The case came on for trial before the Honorable Jeffrey K. Carpenter on 13 January 2020. Defendant was present during the first two days of trial, but on the second day, disappeared. On 14 January 2020, the court recessed for lunch at 12:16 p.m. and reconvened at 2:01 p.m. but defendant never returned from the lunch break. The court then recessed for the day and issued an order for defendant's arrest.

¶ 9 The following morning, defendant did not appear, and the trial court decided to proceed in her absence. Due to Judge Wood's conclusion that defendant had forfeited her right to counsel, neither defendant nor her

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1. As Judge Wood's 20 September 2019 order reflects, the correct number at that point was five.

counsel were present for the remainder of the trial, which took place over the course of the third day. At the conclusion of the trial, the jury found defendant guilty.

¶ 10 Defendant was located about two weeks later. On 28 January 2020, the trial court sentenced her to a term of 5 to 15 months in prison. Defendant gave notice of appeal in open court.

II. Discussion

¶ 11 Defendant contends that the indictment charging her with this crime was fatally defective and that the trial court erred in concluding that she had forfeited her right to counsel. We disagree.

A. Validity of Indictment

¶ 12 **[1]** "[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivan*t, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). A valid indictment, among other things, serves to "identify the offense" being charged with certainty, to "enable the accused to prepare for trial," and to "enable the court, upon conviction, to pronounce the sentence." *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (citing *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978)).

¶ 13 A sufficient indictment must include "[a] plain and concise factual statement" asserting "facts supporting every element of a criminal offense and the defendant's commission thereof." N.C. Gen. Stat. § 15A-924(a)(5) (2019). If the indictment fails to state an essential element of the offense, any resulting conviction must be vacated. *See, e.g.*, *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443; *see also State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (per curiam). The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed. *See State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

¶ 14 In *State v. Mostafavi*, the defendant argued that the indictment charging him with obtaining property by false pretenses omitted an essential element of the crime because it failed to allege the precise amount of money the defendant received when he pawned the property obtained. 370 N.C. 681, 683, 811 S.E.2d 138, 140 (2018). Our Supreme Court held that the indictment was facially valid because it clearly identified "the conduct which [was] the subject of the accusation" by alleging that the defendant received United States currency by pawning stolen

property as if it were his own. *Id.* at 687, 811 S.E.2d at 142 (quoting N.C. Gen. Stat. § 15A-924(a)(5)).

¶ 15 Here, the indictment charged that defendant "willfully and feloniously did attempt to purchase a firearm, as defined in [N.C. Gen. Stat. §] 14-409.39(2), knowing that a protective order was entered against her, pursuant to Chapter 50B of the General Statutes and was in effect at the time she attempted to purchase the firearm." The indictment specifically references the attempt to purchase a firearm, the existence of a protective order against defendant, and that the order "was in effect at the time she attempted to purchase the firearm." The indictment adequately expressed the charge against defendant within a reasonable certainty to enable defendant to prepare for trial and for the court to pronounce the sentence. Accordingly, we hold that the indictment was valid.

B. Forfeiture of Right to Counsel

¶ 16 **[2]** "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016) (citations omitted). "This includes the right of indigent defendants to be represented by appointed counsel." *State v. Harvin*, 268 N.C. App. 572, 590, 836 S.E.2d 899, 909 (2019) (citation omitted).

¶ 17 There are several circumstances where an indigent defendant may lose the right to appointed counsel. *State v. Curlee*, 251 N.C. App. 249, 252, 795 S.E.2d 266, 269 (2016) (citation omitted). The first is waiver of the right to counsel, which must be made knowingly, intelligently, and voluntarily. *Id.* at 253, 795 S.E.2d at 269 (citation omitted). Once given, "a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court" that they desire to withdraw the waiver and have counsel appointed. *Id.* (citation omitted). The burden of establishing a change of desire for the assistance of counsel rests upon the defendant. *Id.* (citation omitted).

¶ 18 Additionally, a defendant may forfeit the right to counsel "in situations evincing egregious misconduct by a defendant[.]" *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 446 (2020). This conduct must be "egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel." *Id.* at 541, 838 S.E.2d at 449. "There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel[,]" but forfeiture has been found in cases where the defendant engaged in

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Blakeney, 245 N.C. App. at 461-62, 782 S.E.2d at 94 (referencing several published cases concerning forfeiture of the right to counsel).

¶ 19 In *Simpkins*, our Supreme Court discussed various categories of conduct sufficient to constitute forfeiture, including where "the defendant is attempting to obstruct the proceedings and prevent them from coming to completion." *Simpkins*, 373 N.C. at 538, 838 S.E.2d at 447. Regarding obstruction, the Court included examples such as a defendant who "refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings[.]" *Id.* In these circumstances, the obstructionist actions must "completely undermine the purposes of the right to counsel." *Id.* If the defendant's actions also prevent the trial court from fulfilling the mandated inquiries of N.C. Gen. Stat. § 15A-1242, "the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver." *Id.*

¶ 20 "Another situation that arises with some frequency in criminal cases is that of the defendant who waives the appointment of counsel and whose case is continued in order to allow [them] time to obtain funds with which to retain counsel." *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270. A defendant's case may be continued several times before the defendant realizes they cannot afford to hire an attorney, which may cause judges and prosecutors to be "understandably reluctant to agree to further delay of the proceedings," or to "suspect that the defendant knew that [they] would be unable to hire a lawyer and was simply trying to delay the trial." *Id.* In such a situation, the trial court must inform the defendant that, if they do not want to be represented by appointed counsel and are unable to hire an attorney by the scheduled trial date, they "will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242." *Id.* (emphasis in original).

¶ 21 Under N.C. Gen. Stat. § 15A-1242, "a defendant must be advised of the right to counsel, the consequences of proceeding without counsel, and 'the nature of the charges and proceedings and the range of permissible punishments' before the defendant can proceed without counsel." *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449 (quoting N.C. Gen. Stat. § 15A-1242 (2019)). "The record must affirmatively show that the inquiry was made and that the defendant, by [their] answers, was literate, competent, understood the consequences of [their] waiver, and voluntarily exercised [their] own free will." *State v. Pena*, 257 N.C. App. 195, 204, 809 S.E.2d 1, 7 (2017) (citation omitted). "A trial court's failure to conduct [this] inquiry entitles [the] defendant to a new trial." *State v. Seymore*, 214 N.C. App. 547, 549, 714 S.E.2d 499, 501 (2011). A trial court is only relieved of its obligation to conduct the colloquy required by N.C. Gen. Stat. § 15A-1242 when the defendant's conduct makes doing so impossible. *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449.

¶ 22 The transcript of the 18 September 2019 hearing demonstrates that the court determined this case to be one of the situations contemplated in *Curlee*. Accordingly, defendant was "required to proceed to trial without the assistance of counsel, *provided that* the trial court inform[ed] the defendant of the consequences of proceeding *pro se* and conduct[ed] the inquiry required by N.C. Gen. Stat. § 15A-1242." *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270.

¶ 23 For the trial court's inquiry to satisfy the requirements of N.C. Gen. Stat. § 15A-1242, the trial court was required to advise defendant of the right to counsel, the consequences of proceeding without counsel, and "the nature of the charges and proceedings and the range of permissible punishments" before defendant could proceed without counsel. *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449 (quoting N.C. Gen. Stat. § 15A-1242 (2019)). Here, defendant was clearly advised of the right to counsel, as she had already been represented by several court appointed attorneys and had entered and withdrawn multiple waivers of the right to counsel. The trial court also reiterated that the order "doesn't preclude you from hiring your own attorney." With respect to the consequences of proceeding *pro se*, the trial court informed defendant that she would be responsible for negotiating any plea deal with the prosecutor, proceeding with discovery, jury selection, and any motions and trial, and that she would be "held to the same standard as an attorney." This portion of the colloquy also informed defendant of the nature of the proceedings and the range of permissible punishments. Therefore, we hold that the colloquy was sufficient. Because we hold that the colloquy was sufficient for the purposes of N.C. Gen. Stat. § 15A-1242, we further hold that the

trial court's order that defendant had "forfeited or effectively waived her right to be represented by counsel in this matter" was appropriate and not violative of the standards set out in *Simpkins*.

¶ 24 Assuming *arguendo* that the trial court's colloquy was insufficient for the purposes of N.C. Gen. Stat. § 15A-1242 and that an effective waiver did not occur, we hold that defendant forfeited the right to counsel. Although there is no bright-line definition on the degree of misconduct to justify forfeiture, several of the types of conduct contemplated in *Blakeney* and *Simpkins* occurred in this case. Defendant repeatedly fired appointed counsel, often within several days of their appointment. Defendant continued to alternatively seek appointed counsel or additional time to hire an attorney while filing and withdrawing multiple waivers of the right to appointed counsel.[2] Under these circumstances, defendant's actions completely frustrated the purpose of the right to counsel and prevented the trial court from moving the case forward. Accordingly, we hold that the trial court's finding that defendant forfeited the right to appointed counsel was warranted.

III. Conclusion

¶ 25 For the foregoing reasons, we hold the indictment was facially valid and the trial court did not err in concluding that defendant had forfeited her right to appointed counsel.

AFFIRMED.

Chief Judge STROUD concurs.

Judge JACKSON concurs in part and dissents in part.

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

¶ 26 I join the portion of the majority's opinion holding that the indictment charging Amy Regina Atwell ("Defendant") with attempting to purchase a firearm while subject to a domestic violence protective order prohibiting the same is facially valid. However, I respectfully dissent from the portion of the majority opinion holding that Defendant waived the right to counsel, or in the alternative, forfeited it.

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2. Although our courts have not directly considered the effect of multiple filed and withdrawn waivers of the right to appointed counsel in the context of forfeiture, we view this conduct as analogous to repeated firing of appointed counsel and consider this conduct in determining whether a defendant is engaged in "flagrant or extended delaying tactics."

¶ 27 North Carolina General Statute § 15A-1242 provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2019). Our Supreme Court has held that trial courts are only relieved of the obligation to conduct the colloquy required by N.C. Gen. Stat. § 15A-1242 "in situations evincing egregious misconduct by a defendant[,]" *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 446 (2020), where the "defendant may be deemed to have forfeited the right to counsel because . . . the defendant has totally frustrated that right[,]" *id.* at 536, 838 S.E.2d at 446. "[A]bsent egregious conduct by the defendant, a defendant must be advised of the right to counsel, the consequences of proceeding without counsel, and 'the nature of the charges and proceedings and the range of permissible punishments' before the defendant can proceed without counsel." *Id.* at 541, 838 S.E.2d at 449 (quoting N.C. Gen. Stat. § 15A-1242).

¶ 28 Neither the trial court, nor Judge William A. Wood—who presided over a pretrial hearing on 18 September 2019—completed the colloquy required by N.C. Gen. Stat. § 15A-1242. Instead, Judge Wood concluded in a 20 September 2019 order that Defendant had forfeited the right to counsel. However, the record before us does not support Judge Wood's forfeiture conclusion. The majority erroneously concludes that Judge Wood's colloquy with Defendant on 18 September 2019 "was sufficient for purposes of the statute[,]" *State v. Atwell*, *supra* at 93, or alternatively, "that [D]efendant forfeited the right to counsel[,]" *id.* at 94. I disagree, and therefore respectfully dissent.

I. Standard of Review

The right to counsel in a criminal proceeding is protected by both the federal and state constitutions. Our

> review is *de novo* in cases implicating constitutional rights. Accordingly, we review *de novo* a trial court's determination that a defendant has either waived or forfeited the right to counsel.

Simpkins, 373 N.C. at 533, 838 S.E.2d at 444 (internal marks and citation omitted).

II. Waiver

¶ 29 As our Court has previously observed, the requirements of N.C. Gen. Stat. § 15A-1242 "are clear and unambiguous." *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). "The inquiry is mandatory and must be made in every case in which a defendant elects to proceed without counsel[,]" *id.* (citation omitted), unless the defendant "forfeit[s] the right to counsel . . . and prevents the trial court from complying with N.C.G.S. § 15A-1242[,]" *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449. In the case of a valid waiver, "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." *Callahan*, 83 N.C. App. at 324, 350 S.E.2d at 129 (citation omitted). "The purpose of the colloquy required by N.C. Gen. Stat. § 15A-1242 is to comply with the constitutional requirement that a waiver of the right to counsel be made 'knowingly, intelligently, and voluntarily.' " *State v. Harvin*, 268 N.C. App. 572, 593, 836 S.E.2d 899, 911 (2019) (quoting *State v. Blakeney*, 245 N.C. App. 452, 459-60, 782 S.E.2d 88, 93 (2016)).

¶ 30 The record of the 18 September 2019 hearing demonstrates not only that Defendant did *not* wish to proceed without counsel—Defendant requested that another attorney be appointed to represent her, not that she be allowed to proceed pro se—but also that Defendant did not waive her constitutional right to counsel "knowingly, intelligently, and voluntarily[.]" *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93. Judge Wood asked her, "What are you going to do about a lawyer?" She replied, "I can't afford to get a lawyer and still pay my rent and the living expenses. I thought one would take payments from me, but they won't. So at this time I would like to get another court appointed attorney." Judge Wood then summarized what he saw in the file related to the appointment of the attorneys that had withdrawn, whereupon Defendant explained, "I asked for a six month's continuance because I'm disabled and I'm low income. I knew that I would need at least a couple months. I can't pay my rent and my living expenses plus pay a lawyer in four weeks." Judge Wood responded, "Well I can see at least two occasions, perhaps three

you've requested a court appointed attorney and you've promptly fired that lawyer." Defendant replied:

> Two of them, yeah, for valid, valid reasons. And one of them that I had personal – that was taking payments for four months. The fourth month he up and said there was a conflict with another client, Vernon Clauser (ph). I don't know what the conflict is. I don't have any proceedings with him. And he said that I hadn't paid him. He was taking payments from me every month for four months. So that set me back for a while. And then this – the two other attorneys were totally going in two different ways of defense. Just to me they seemed like they were more on the Plaintiff's side than mine. I don't need an attorney like that. I've asked for a jury trial. I mean, I haven't seen anything filed. I did see where Peter Dwyer seemed to do the best work, in my opinion, because he did file for an arraignment back in June of 2018. He did file a motion for Discovery. I mean, he seems to be the most – I regret letting him go, but – just put it that way.

¶ 31 Judge Wood then asked the prosecutor, "Mr. [Prosecutor], what's your pleasure with this case, sir?" The prosecutor explained that Defendant had been offered to plead as charged and serve probation but that she had declined, and the State was ready to proceed. The following colloquy then transpired:

> THE COURT: Well, what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney. If you would like to hire your own attorney, that will be fine, but based on these – the history of this file, it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?
>
> THE DEFENDANT: Yes.

THE COURT: Now, that doesn't preclude you from hiring your own attorney. You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?

THE DEFENDANT: Representing myself.

THE COURT: Yes.

THE DEFENDANT: It means representing myself.

THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the Discovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

THE DEFENDANT: No, because I've already requested a jury trial.

THE COURT: Well what is it about that that you don't understand?

THE DEFENDANT: You said if I get a jury trial.

THE COURT: You're welcome – I mean, nobody's going to make you plead guilty. You can have a jury trial.

THE DEFENDANT: Thank you.

THE COURT: There's other ways for a case to go away. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: I don't know what's ultimately going to have happen to this case [sic] but you are entitled to a jury trial most definitely. What I want you to understand is that if you represent yourself, you're

> going to be held to the same standards of an attorney. Do you understand that?
>
> THE DEFENDANT: You're giving me no choice. I mean, I asked for another court appointed attorney and you said no, so –
>
> THE COURT: You've had choice after choice after choice. You've been given a court appointed attorney on three[1] occasions, which is two more than you usually get.
>
> THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.
>
> THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the other took – you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: You've denied me a court appointed attorney. Yes, I understand that.
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

¶ 32 The record of the 18 September 2019 hearing thus shows that Judge Wood attempted to conduct the colloquy required by N.C. Gen. Stat. § 15A-1242 but did not complete it. It does *not* "show that . . . [D]efendant . . . understood the consequences of h[er] waiver, and voluntarily exercised h[er] own free will." *Callahan*, 83 N.C. App. at 324, 350 S.E.2d at 129. Instead, when Judge Wood asked Defendant whether she understood "that if you represent yourself, you're going to be held to the same standards of an attorney[,]" Defendant replied, "You're giving me no choice. I mean, I asked for another court appointed attorney and you said no[.]" Any purported waiver resulting from the 18 September 2019 hearing was not knowing, intelligent, and voluntary. *See Blakeney*, 245 N.C. App. at 459-60, 782 S.E.2d at 93. Accordingly, I would hold that the colloquy between Judge Wood and Defendant on 18 September 2019 did not suffice for purposes of N.C. Gen. Stat. § 15A-1242 because Judge Wood did not complete the colloquy, and the colloquy that did occur

1. As the majority notes, the correct number at that point was five.

demonstrates that any purported waiver resulting from the hearing was not knowing, intelligent, and voluntary. *See id.*

¶ 33 The majority asserts that this case is similar to a situation we described in *State v. Curlee*, 251 N.C. App. 249, 795 S.E.2d 266 (2016), where a

> defendant [] waives the appointment of counsel and [the] case is continued . . . [and] [b]y the time [] [the] defendant realizes that he cannot afford to hire an attorney, . . . judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial.

Id. at 253, 795 S.E.2d at 270. In *Curlee*, we described a prophylactic measure a trial court could employ to prevent a delay of proceedings because of a defendant's failure to fully appreciate the cost of retaining private counsel and any associated logistical challenges that might present themselves until after some unsuccessful attempts to retain counsel had been made by a defendant:

> It is not improper in such a situation for the trial court to inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

Id. (emphasis in original).

¶ 34 I believe the majority's comparison of this case to the situation described in *Curlee* is inapt for two reasons: (1) the procedure described in *Curlee* requires that "the trial court inform[] the defendant of the consequences of proceeding *pro se* and conduct[] the inquiry required by N.C. Gen. Stat. § 15A-1242[,]" *id.*, which did not happen here; (2) the procedure described in *Curlee* is to be used by trial courts when the defendant "*does not want to be represented by appointed counsel* and is unable to hire an attorney[,]" *id.* (emphasis added). It is clear from the record of the 18 September 2019 hearing that Defendant wanted to be represented by counsel—to that end, she requested the appointment of counsel be-

cause she could not afford to retain counsel. When Judge Wood asked Defendant what she was going to do about a lawyer, for example, she replied that she could not "afford to get a lawyer and still pay [her] rent and [] living expenses[,]" and requested that he appoint her counsel.

¶ 35 Without offering explanation or citing support in the record, the majority asserts that Judge Wood "determined this case to be one of the situations contemplated in *Curlee*." *State v. Atwell*, *supra* at 93. This unsupported assertion is belied by the transcript of the hearing before Judge Wood on 18 September 2019, as the portions of the transcript reproduced above reveal. The import of *Curlee* in this case is not that this case is an example of the successful use of the prophylactic measure we described in *Curlee*, but instead that *Curlee* outlines a procedure trial judges can employ in situations like the one that faced Judge Wood on 18 September 2019, provided, however, that the defendant (1) "does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date"; and (2) "the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242." *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270. I would therefore hold that the situation described in *Curlee* is distinguishable.

III. Forfeiture

¶ 36 In *Simpkins*, our Supreme Court held for the first time that "a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right." 373 N.C. at 536, 838 S.E.2d at 446. Our Court has since recognized that in *Simpkins*, "[t]he Supreme Court synthesized our precedent and announced the test to apply in forfeiture cases: 'A finding that a defendant has forfeited the right to counsel requires egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel.' " *State v. Patterson*, 846 S.E.2d 814, 818 (N.C. Ct. App. 2020) (quoting *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449). "Importantly, the Supreme Court rejected this Court's precedent holding that 'willful actions on the part of the defendant that result in the absence of defense counsel,' standing alone, can support forfeiture." *Id.* (quoting *Simpkins*, 373 N.C. at 539, 838 S.E.2d at 448).

¶ 37 The forfeiture conclusion in Judge Wood's order does not meet the *Simpkins* standard. Defendant's conduct, like Mr. Simpkins's conduct, "while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself." *Simpkins*, 373 N.C. at 539, 838 S.E.2d at 448. Nothing in the record indicates how many

times the State continued the case or was not ready to proceed. In fact, the State waited almost six months from charging Defendant to secure an indictment. Further, nothing in the record indicates that any of the lawyers who had previously represented Defendant withdrew because Defendant was refusing to *participate* in preparing a defense. We also do not know why several of the attorneys withdrew, other than one having a conflict with another client according to Defendant. Instead, to the extent it discloses any information on the subject, the record tends to show that Defendant had differences with her prior lawyers related to the preparation of her defense and defense strategy. For example, her differences with her first lawyer appear to have been related to a jurisdictional argument she raised in a pro se motion filed on 8 May 2018 regarding the subject matter jurisdiction of Union County Superior Court over a crime she committed in Tennessee while residing in Tennessee—an argument that does not appear to have ever been addressed below and is not patently frivolous.

¶ 38 The American Bar Association has put forth standards for conduct of attorneys for over 50 years. These standards have been cited in hundreds of court opinions, including at least 120 United States Supreme Court opinions. In particular, Standard 4-5.2 entitled "Control and Direction of the Case" provides:

> Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

ABA Standards for Criminal Justice 4-5.2 (4th ed. 2017) ("The Defense Function"). The record before this Court contains no reasons for the withdrawal of counsel other than that Defendant had some strongly held views that she did not wish to plead guilty in exchange for probation and that she wanted to challenge some jurisdictional elements of the State's case. Defendant's strongly held views about the case were not a basis for concluding that she forfeited the right to counsel because she did not engage in any "egregious dilatory or abusive conduct . . . [that] undermine[d] the purposes of the right to counsel and prevent[ed] the trial court from complying with N.C.G.S. § 15A-1242." *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449.

¶ 39 Further, nothing in the record indicates that Defendant mistreated her prior attorneys by physically assaulting them or even by being verbally abusive. The defendant in *Simpkins* refused to acknowledge the authority of the court. *Id.* at 539, 838 S.E.2d at 448. He refused to answer the trial court's questions and posed his own repeated questions to the court. *Id.* He spoke out of turn and challenged the court with extraneous statements. *Id.*

¶ 40 The transcript of the 18 September 2019 hearing before Judge Wood demonstrates that Defendant was polite at the hearing. When in court, Defendant normally answered questions appropriately, even saying yes sir or no sir to the court on occasion. The only instance in the record of Defendant being less than courteous toward the court is in the transcript of the day of her sentencing, over three months after Judge Wood entered his order regarding forfeiture. Defendant's requests for the court to appoint her a sixth lawyer and for a third continuance on 18 September 2019 did not "totally frustrat[e] the ability of the trial court to reach an outcome[.]" *Id.* at 536, 838 S.E.2d at 446. In fact, if the court had simply appointed her an attorney at that point, counsel would have had over three months to prepare for the trial of the matter without the need for further continuance.

¶ 41 While the majority's assertion that Judge Wood "determined this case to be one of the situations contemplated in *Curlee*[,]" *State v. Atwell*, *supra* at 93, is unsupported by the record, Defendant's history of requesting continuances and the appointment of new counsel is certainly reminiscent of the situation described in *Curlee*: "[D]efendant [] waive[d] the appointment of counsel and [her] case [was] continued in order to allow [her] time to obtain funds with which to retain counsel." 251 N.C. App. at 253, 795 S.E.2d at 270. "By the time . . . [she] realize[d] that [she] [could] []not afford to hire an attorney, [her] case [] ha[d] been continued" twice. *Id.* "At that point, [the] judge[] and prosecutor[] [were] understandably reluctant to agree to further delay of the proceedings, or may [have] suspect[ed] that [] [D]efendant knew that [she] would be unable to hire a lawyer and was simply trying to delay the trial." *Id.* However, nothing in the record indicates that Judge Wood or any other judge presiding over a hearing in this case followed our suggestion in *Curlee* to "inform [] [D]efendant that, if [she] does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, [she] w[ould] be required to proceed to trial without the assistance of counsel, . . . inform[ing] [] [D]efendant of the consequences of proceeding *pro se* and conduct[ing] the inquiry required by N.C. Gen. Stat. § 15A-1242." *Id.*

¶ 42 Under *Simpkins*, forfeiture requires egregious misconduct that obstructs or delays the proceedings and the record before this panel simply does not support that determination here. *See* 373 N.C. at 541, 838 S.E.2d at 449. Instead, the record before us suggests that appointing Defendant a lawyer would have facilitated reaching an outcome in the case rather than frustrating it and therefore, I would hold that Judge Wood's forfeiture conclusion was error. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CHRISTOPER GENE CRAWFORD, DEFENDANT

No. COA20-180

Filed 15 June 2021

1. Criminal Law—withdrawal of a guilty plea—Alford plea—fair and just reason to withdraw—consideration of factors

After defendant entered an *Alford* plea to charges of felony larceny of a motor vehicle and felony possession of a stolen motor vehicle, the trial court properly denied defendant's motion to withdraw the plea where defendant failed to demonstrate a fair and just reason for permitting withdrawal under the factors stated in *State v. Handy*, 326 N.C. 532 (1990). Although the State's proffered evidence of defendant's guilt was not significant, defendant did not assert his innocence until after the court denied his motion to withdraw the plea, defendant waited two months before filing that motion, and nothing in the record indicated that defendant wavered on his decision to enter an *Alford* plea or that his desire to withdraw the plea resulted from a "swift change of heart."

2. Criminal Law—guilty plea—Alford plea—factual basis

The trial court did not err in accepting defendant's *Alford* plea to charges of felony larceny of a motor vehicle and felony possession of a stolen motor vehicle, where the indictments provided sufficient factual descriptions of defendant's particular alleged conduct—which included significant factual details beyond the charges alleged—such that, taken together with the Transcript of Plea, the court was able to make an independent judicial determination as to whether a factual basis existed for defendant's plea, as required by N.C.G.S. § 15A-1022(c).

STATE v. CRAWFORD

[278 N.C. App. 104, 2021-NCCOA-272]

Appeal by Defendant from judgment entered 30 July 2019 by Judge David A. Phillips in Burke County Superior Court. Heard in the Court of Appeals 3 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Stephanie C. Lloyd, for the State.

Charlotte Gail Blake for defendant-appellant.

MURPHY, Judge.

¶ 1 When a defendant moves to withdraw his guilty plea, he must demonstrate there is a fair and just reason to do so. Here, Defendant did not demonstrate he had a fair and just reason to withdraw his plea and the trial court did not err in denying Defendant's motion to withdraw his *Alford* plea.[1]

¶ 2 Additionally, when accepting a plea agreement, there must be a factual basis pursuant to N.C.G.S. § 15A-1022(c). The indictments in this matter provided a factual description of Defendant's particular alleged conduct such that, when taken together with the *Transcript of Plea*, the Record was sufficient to satisfy the requirements of the statute. The trial court was able to make an independent judicial determination that there was a factual basis for Defendant's *Alford* plea and did not err in accepting the plea.

BACKGROUND

¶ 3 Defendant Christopher Gene Crawford ("Defendant") was indicted on one count of felony larceny of a motor vehicle, alleging he "unlawfully, willfully, and feloniously did steal, take and carry away a vehicle, a 2004 Toyota Tundra Truck, the personal property of Julie Cline and/or Timothy Cline, such property having a value in excess of One Thousand Dollars ($1,000.00)." Defendant was also indicted on one count of felony possession of a stolen motor vehicle, alleging he

> unlawfully, willfully, and feloniously did possess a vehicle, a 2011 White Chevy Silverado, the personal

1. An *Alford* plea allows a defendant to "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970). A defendant enters into an *Alford* plea when he proclaims he is innocent, but "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.*

> property of R.H. Barringer D/B/A Best of Beers, located at 1613 Main Avenue Drive NW, Hickory NC 28601, which was stolen property and which [Defendant] knew and had reason to believe had been stolen and unlawfully taken.

Following a mistrial in March 2019 before the Honorable Lisa C. Bell, Defendant entered an *Alford* plea to both charges on 13 May 2019 by signing and swearing to a transcript of plea before the Honorable Joseph N. Crosswhite. Pursuant to the plea agreement, Defendant's convictions were consolidated for sentencing, which was set for 3 June 2019. Defendant failed to appear on 3 June 2019 and a warrant was issued for his arrest.

¶ 4 After his arrest, Defendant appeared for sentencing on 30 July 2019 before the Honorable David A. Phillips. The trial court allowed Defendant to be heard, and he moved to withdraw his *Alford* plea, arguing he was subjected to "[e]xcessive bail, ineffective counsel, insufficient evidence, selective prosecution, prosecutorial misconduct, due process of law, [and] a fast and speedy trial." Defendant also claimed his signature on the plea transcript did not include his full name and his counsel was ineffective because he did not ask a witness a certain question. The trial court denied Defendant's motion and imposed an active sentence of 20 to 33 months. Defendant orally gave notice of appeal and later filed a *Petition for Writ of Certiorari* asking us "to review whether the trial court erred in accepting the [*Alford*] plea . . . because there is not a factual basis of record for either of the charges."

ANALYSIS

¶ 5 Defendant argues two issues on appeal: (A) the trial court erred in denying his motion to withdraw his *Alford* plea; and (B) the trial court erred in accepting his *Alford* plea when there was no factual basis for the plea.

A. Motion to Withdraw the *Alford* Plea

¶ 6 **[1]** Defendant argues the trial court erred in denying the motion to withdraw his *Alford* plea. Defendant contends the trial court was required to grant his motion because he presented fair and just reasons for withdrawal. We disagree.

> In reviewing a decision of the trial court to deny [a] defendant's motion to withdraw, the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record.

> That is, the appellate court must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.

State v. Marshburn, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (internal citation and marks omitted). We perform the same analysis, whether a defendant pleas guilty or pleas guilty pursuant to *Alford*. *See State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010) ("[W]e hold that for purposes of our analysis in the instant case that there is no material difference between a no contest plea and an *Alford* plea."); *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (internal marks omitted) ("[A]n '*Alford* plea' constitutes a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea."); *Alford*, 400 U.S. at 37, 27 L. Ed. 2d at 171 (stating there is no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence").

¶ 7 "Although there is no absolute right to withdraw a guilty plea, withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality." *State v. Meyer*, 330 N.C. 738, 742-43, 412 S.E.2d 339, 342 (1992) (internal marks omitted); *see State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) ("In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason."). It is well settled that "[t]he defendant has the burden of showing that his motion to withdraw is supported by some 'fair and just reason.' " *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 717 (quoting *Meyer*, 330 N.C. at 743, 412 S.E.2d at 342).

> Whether the reason is "fair and just" requires a consideration of a variety of factors. Factors which support a determination that the reason is "fair and just" include: the defendant's assertion of legal innocence; the weakness of the State's case; a short length of time between the entry of the guilty plea and the motion to withdraw; that the defendant did not have competent counsel at all times; that the defendant did not understand the consequences of the guilty plea; and that the plea was entered in haste, under coercion or at a time when the defendant was confused. If the defendant meets his burden, the [trial] court must then consider any substantial prejudice to the State caused by the withdrawal of the plea.

Id. at 108, 425 S.E.2d at 717-18 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163). This list is non-exclusive. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163.

¶ 8 These factors were first enumerated in *Handy*, and have subsequently been applied by our appellate courts in determining whether the denial of a defendant's motion to withdraw an *Alford* plea was proper. *Id.*

> In considering each *Handy* factor individually, a court is not required to expressly find that a particular factor benefits either the defendant or the State in assessing whether a defendant has shown any fair and just reason for the withdrawal of a guilty plea. In *Handy*, [our Supreme Court] listed "[s]ome of the factors which favor withdrawal." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. This depiction of the identification of the *Handy* factors inherently illustrates that the slate of them is not intended to be exhaustive nor definitive; rather, they are designed to be an instructive collection of considerations to aid the court in its overall determination of whether sufficient circumstances exist to constitute any fair and just reason for a defendant's withdrawal of a guilty plea.

State v. Taylor, 374 N.C. 710, 723, 843 S.E.2d 46, 55 (2020). We address each of the *Handy* factors below.

1. Strength of the State's Case

¶ 9 Defendant argues the Record is silent regarding the strength of the State's case because the trial court did not inquire about the State's forecasted evidence.

¶ 10 We previously analyzed this factor in *State v. Davis*. *State v. Davis*, 150 N.C. App. 205, 207-08, 562 S.E.2d 590, 592 (2002). In *State v. Davis*, the defendant was indicted for second-degree murder, driving while impaired, and felony hit and run. *Id.* at 205, 562 S.E.2d at 591. The defendant pled guilty to all the charges, then filed a motion to withdraw his plea the day before his sentencing hearing. *Id.* On appeal, the defendant argued the trial court erred in denying his motion to withdraw his guilty plea. *Id.* We held the strength of the State's case was "significant" because

> the State was prepared to offer several eyewitnesses who would have testified to [the] defendant's drunken condition at the time the accident occurred and his erratic driving. The State was also prepared to enter

> evidence of [the] defendant's blood alcohol content being .23 at the time of the accident, along with [the] defendant's two prior convictions for drunk driving.

Id. at 207-08, 562 S.E.2d at 592. Additionally, a strong, uncontested forecast of evidence weighs against allowing a defendant to withdraw his plea. *Chery*, 203 N.C. App. at 315-16, 691 S.E.2d at 45.

¶ 11 "We must view the State's proffer based upon what was presented to the [trial] court at the plea hearing." *Id.* at 315, 691 S.E.2d at 45. However, we are not able to apply this concept from *Chery* to this case as the trial court judge, Judge Phillips, considering the motion to withdraw the guilty plea and in turn the strength of the State's case, was not privy to the State's forecast of evidence to Judge Crosswhite at the time of taking the plea. Even if we were able to consider the forecasted evidence presented at the plea hearing, it too is devoid of forecasted evidence or witnesses that would show the State had a strong case against Defendant. At the plea hearing, the State was prepared to offer a witness who would have testified against Defendant, but she failed to appear:

> [THE STATE]: . . . . We have had in-chambers conference about this case. Given where we are right now, Your Honor, the State would ask to show cause the witness in this case who has been personally served. Her name is Laura Jean Williams. The subpoena with personal service should appear in the court file.
>
> Laura Jean Williams. She had notice to be here this morning, Your Honor. She has yet to appear in the courthouse.
>
> THE COURT: We will certainly allow that request.
>
> . . .
>
> [THE STATE]: Your Honor, I know the [c]ourt is aware of the reason for the plea, but for the purposes of the record without the witness that has now been show caused, the State would have a difficult time proving this case; thus, the plea.

¶ 12 Due to Laura Jean Williams' failure to appear at the sentencing hearing, we are unable to determine what she would testify to, and unable to determine whether the State's case against Defendant was weak or strong. Unlike the State's proffer in *Davis*, the State's proffer here is not

significant because "the State would have a difficult time proving this case[.]" This factor weighs in favor of Defendant.

2. Defendant's Assertion of Legal Innocence

¶ 13 Defendant argues because "he had entered an *Alford* plea, [Defendant] had never admitted that he was guilty."

¶ 14 We have previously held "the fact that the plea that [a] defendant seeks to withdraw was a no contest or an *Alford* plea does not conclusively establish the factor of assertion of legal innocence for purposes of the *Handy* analysis." *Chery*, 203 N.C. App. at 315, 691 S.E.2d at 44. Defendant has failed to show how entering an *Alford* plea weighs in favor of withdrawal.

¶ 15 During sentencing, the following exchange occurred:

> [DEFENSE COUNSEL]: . . . . [Defendant] says that he desires to try - - or to withdraw his plea. He says he didn't sign the plea transcript, although he swore to it in open court. . . . [Defendant] thinks that he's been - - was held without bond, or excessive bond and wants to address the court on a number of issues that I've just touched on. I may not have touched on what he wanted to address the court about.
>
> THE COURT: Sir, I'll hear you on the sentencing on this case today. Are there any issues concerning that?
>
> [DEFENDANT]: No, sir, I'd like to withdraw that plea, sir, and take it back to trial if that's what the prosecutor would like to do. Like I said, I've been violated on a lot of constitutional rights. I have been. Excessive bail, ineffective counsel, insufficient evidence, selective prosecution, prosecutorial misconduct, due process of law, a fast and speedy trial. I mean, I've been violated on all kinds of constitutional violations. And I'm not - - I'm not admitting guilty to this charge. I'm not.
>
> . . . .
>
> But anyway, nevertheless, I have changed. And you know, my rights have been violated. And Your Honor, if you, you know, if - - you would like to address some of these motions that I have filed, that would be awesome. But as to [the felony larceny of a motor

> vehicle and felony possession of a stolen motor vehicle charges], I'm not going to plead guilty to it.

Defendant told the trial court, "I'm not admitting guilty to this charge. I'm not" and "I'm not going to plead guilty to it." Although at first glance this portion of the transcript appears to be a protestation of innocence, upon reading the entire Record we cannot determine whether Defendant was claiming actual innocence of the charges to which he entered an *Alford* plea.

¶ 16 It was only *after* the trial court denied Defendant's motion to withdraw his *Alford* plea that Defendant stated, "No, no, no, that's the thing. I'm not guilty of this charge." Reviewing the entire Record, we are not convinced Defendant protested his innocence of the relevant charges in his motion to withdraw his plea. *See State v. Lankford*, 266 N.C. App. 211, 215-16, 831 S.E.2d 109, 113 (holding the defendant did not claim actual innocence when he told the trial court "I'm not guilty of these charges that they've charged me with" and "I just feel like if everything is brought out in every case that every officer has charged me with, I know what I'm guilty of and I know what I'm not guilty of. I'm not guilty of all these charges"), *disc. rev. denied*, 373 N.C. 176, 833 S.E.2d 625 (2019). Defendant has failed to show how this factor supports withdrawal of his *Alford* plea.

3. Timeliness of the Motion

¶ 17 Prior cases have "placed heavy reliance on the length of time between a defendant's entry of a guilty plea and motion to withdraw the plea." *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 255 (2006). Our Supreme Court articulated the rationale behind this heavy reliance in *Handy*:

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

Handy, 326 N.C. at 539, 391 S.E.2d at 163. *Handy* also instructs a defendant's motion to withdraw his plea "at a very early stage of the proceedings[] should be granted with liberality[.]" *Id.* at 537, 391 S.E.2d at 162.

¶ 18 In *Handy*, the defendant successfully moved to withdraw his plea less than 24 hours after it was entered because he "had an opportunity to more fully consider [the] decision and pray about it overnight, as well as discuss it with his mother and with his attorneys." *Id.* at 540-41, 391 S.E.2d at 163-64. The defendant there testified he "felt that he 'was under pressure under the circumstances' " and expressed he "had misgivings about [entering the plea] at the time the plea was entered." *Id.* Our Supreme Court held the defendant "made a sufficient showing of a fair and just reason to withdraw his plea of guilty" because the evidence showed the defendant changed his mind "at a very early stage of the proceedings," after praying about his decision and speaking with his mother. *Id.* at 542, 537, 391 S.E.2d at 164, 162.

¶ 19 Conversely, the defendant in *Robinson* unsuccessfully made his motion to withdraw his guilty plea three-and-a-half-months after it was entered. *Robinson*, 177 N.C. App. at 230, 628 S.E.2d at 255. We distinguished *Robinson* from *Handy* by noting a delay of three-and-a-half-months is longer than a 24-hour delay and closer to circumstances in past cases where motions to withdraw had been made, and subsequently denied, one month and eight months after entry of the guilty plea. *Id.* at 230, 628 S.E.2d at 255 (citing *State v. Graham*, 122 N.C. App. 635, 637-38, 471 S.E.2d 100, 101-02 (1996) and *Marshburn*, 109 N. C. App. at 109, 425 S.E.2d at 718).

¶ 20 Here, it is undisputed Defendant waited until the sentencing hearing on 30 July 2019 to file a motion to withdraw his *Alford* plea, over two months after entering the *Alford* plea on 13 May 2019. Unlike in *Handy*, Defendant does not argue, and there is nothing in the Record to indicate Defendant's desire to withdraw his *Alford* plea was based upon "[a] swift change of heart," such as "an opportunity to more fully consider [the] decision and pray about it overnight, as well as discuss it with his mother and with his attorneys." *Handy*, 326 N.C. at 539, 541, 391 S.E.2d at 163, 164. Defendant executed the plea transcript approximately two months prior to the plea hearing. There is no indication in the Record that during this time Defendant wavered on his decision. Defendant has failed to show how this factor supports withdrawal of his *Alford* plea.

4. Ineffective Assistance of Counsel

¶ 21 Defendant argues he "did not believe that he had competent counsel throughout the proceedings. [Defendant] even asked Judge Phillips whether he could fire his attorney during the sentencing hearing."

¶ 22 In order to show ineffective assistance of counsel ("IAC"), "a defendant must show that (1) counsel's performance was deficient and (2)

the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (internal marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

> 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 (internal citation and marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

¶ 23 "In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524, *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). If an appellate court determines an IAC claim has been improperly asserted on direct appeal, "it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

¶ 24 Here, Defendant argues he had incompetent counsel and the trial court erred by "summarily den[ying] [Defendant's] motion [to withdraw his *Alford* plea] without . . . giving [Defendant] the opportunity to address his concerns." Based on the cold Record before us, we are unable to adequately assess Defendant's IAC claim. We "express no opinion as to whether this factor weighs in favor of Defendant or the State for purposes of the *Handy* factors." *Taylor*, 374 N.C. at 722, 843 S.E.2d at 54.

5. Comprehension of the *Alford* Plea's Terms, Coercion, Haste, and Confusion

¶ 25 The final *Handy* factors to be considered are "that the defendant did not understand the consequences of the guilty plea [] and that the plea was entered in haste, under coercion or at a time when the defendant

was confused." *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 718 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163). Defendant does not argue he did not understand the consequences of his *Alford* plea or that the *Alford* plea was entered in haste, under coercion or at time when he was confused. We consider any argument regarding these factors to be abandoned. *See Chery*, 203 N.C. App. at 313, 691 S.E.2d at 44 ("We confine our analysis to those factors set out in [the] defendant's brief."); N.C. R. App. P. 28(b)(6) (2021) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

6. Consideration of the *Handy* Factors

¶ 26 The *Handy* factors "are designed to be an instructive collection of considerations to aid the court in its overall determination of whether sufficient circumstances exist to constitute any fair and just reason for a defendant's withdrawal of a guilty plea." *Taylor*, 374 N.C. at 723, 843 S.E.2d at 55. "No one of these factors is determinative." *Chery*, 203 N.C. App. at 313, 691 S.E.2d at 43. However, our appellate courts have historically placed a "heavy reliance on the length of time between a defendant's entry of [a] guilty plea and [a] motion to withdraw the plea." *Robinson*, 177 N.C. App. at 229, 628 S.E.2d at 255.

¶ 27 As discussed above, Defendant has failed to show that the timeliness of his motion supports withdrawal; Defendant did not indicate that his desire to withdraw his *Alford* plea was based upon a swift change of heart, such as in *Handy*, nor is there anything in the Record to indicate during the time before Defendant made his motion to withdraw that he wavered on his decision to plead guilty pursuant to *Alford*. In addition, Defendant did not assert innocence until *after* the trial court had denied Defendant's motion to withdraw his *Alford* plea. Although the State's proffer of evidence was not significant here, the other *Handy* factors, namely Defendant's assertion of legal innocence and timeliness of the motion, weigh in favor of the denial of Defendant's motion to withdraw. As for ineffective assistance of counsel, we express no opinion as to whether this factor weighs in favor of Defendant or the State and we do not consider it for the purposes of our analysis.

¶ 28 Having examined each of the factors identified in *Handy*, we hold Defendant has failed to show there is a fair and just reason for the withdrawal of his plea.

B. Factual Basis for the *Alford* Plea

¶ 29 **[2]** Defendant argues the trial court erred in accepting his *Alford* plea because "there was nothing of record presented to the trial court to allow the

[trial] court to make an independent judicial determination as to whether there was a factual basis for [Defendant's] plea[.]" As Defendant raises an alleged statutory violation, we review his argument de novo. *See State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (internal citation omitted) ("Alleged statutory errors are questions of law and as such, are reviewed *de novo*."), *disc. rev. denied*, 365 N.C. 193, 707 S.E.2d 246 (2011).

1. Appellate Jurisdiction

¶ 30 Contemporaneously with his appeal, Defendant filed a *Petition for Writ of Certiorari* regarding the lack of a factual basis to support his *Alford* plea. However, we dismiss the petition as moot as Defendant is entitled to appellate review as a matter of right.

¶ 31 N.C.G.S. § 15A-1444(e) provides, in pertinent part:

> Except as provided in subsections (a1) and (a2) of this section and [N.C.G.S. §] 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the [S]uperior [C]ourt, but he may petition the appellate division for review by writ of certiorari.

N.C.G.S. § 15A-1444(e) (2019). Pursuant to N.C.G.S. § 15A-1444(e), a defendant who has entered a guilty plea is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. *Id.*; *see State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) ("When the language of [N.C.G.S. § 15A-1444(e)] is read conversely, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the [S]uperior [C]ourt.").

¶ 32 Here, Defendant made a motion to withdraw his *Alford* plea, which was subsequently denied. He is entitled to appellate review as a matter of right and we dismiss his *Petition for Writ of Certiorari* as moot. We now address the merits of Defendant's arguments.

2. Independent Judicial Determination

¶ 33 "Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws

to ensure guilty pleas are informed and voluntary." *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007). One of those laws, N.C.G.S. § 15A-1022(c), requires that prior to accepting a plea of guilty, the trial court must determine there is a factual basis for the plea:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2019).

"The five sources listed in [N.C.G.S. § 15A-1022(c)] are not exclusive, and therefore the trial judge may consider any information properly brought to his attention." *State v. Collins*, 221 N.C. App. 604, 606, 727 S.E.2d 922, 924 (2012). Further, in enumerating these five sources, the statute "contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that [the] defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421-22 (1980). Such information "must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Id.* at 198, 270 S.E.2d at 421.

¶ 34 Defendant argues the trial court erred in accepting his *Alford* plea because "there was nothing of record presented to the trial court to allow the [trial] court to make an independent judicial determination as to whether there was a factual basis for [Defendant's] plea." The State argues the *Transcript of Plea*, the indictments, and the transcript of testimony from Defendant's mistrial provide a sufficient factual basis for us to affirm the trial court's acceptance of Defendant's *Alford* plea. However, we cannot consider the mistrial transcript in our review as that was not before the trial court when taking Defendant's plea. Judge Bell presided over Defendant's mistrial in March 2019, while Judge Crosswhite presided over Defendant's plea hearing on 13 May 2019. The Record does not indicate Judge Crosswhite was provided and/or reviewed the "over one-hundred pages of testimony and

eight entered exhibits that supplement [D]efendant's indictments and plea transcript." *See State v. Flint*, 199 N.C. App. 709, 726, 682 S.E.2d 443, 453 (2009) (explaining that when it is unclear if information was before the trial court during the defendant's plea hearing, then that information cannot be considered in a factual basis determination, even when contained in the record on appeal). Without the mistrial transcript, we are left with the *Transcript of Plea* and the indictments.

¶ 35 Our Supreme Court has previously held a *Transcript of Plea*, in and of itself, cannot provide the factual basis for an *Alford* plea. *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421 ("[T]he Transcript of Plea itself [does not] provide a factual basis for the plea. A defendant's bare admission of guilt, or plea of no contest, always contained in such transcripts, does not provide the 'factual basis' contemplated by [N.C.G.S. §] 15A-1022(c)."). Further, in *State v. Agnew*, our Supreme Court held an "indictment [that] simply stated the charge and did not provide any further factual description of [the] defendant's particular alleged conduct[,]" taken together with the *Transcript of Plea*, was insufficient to serve as a factual basis for accepting the plea. *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584. In *Agnew*, the indictment alleged:

> On or about 23 April 2003 and in Pitt County the defendant named above unlawfully, willfully and feloniously did traffick cocaine by possession of in excess of 200 grams but less than 400 grams of a mixture containing cocaine, a controlled substance, included in Schedule II of the North Carolina Controlled Substance Act.

Id. at 334, 643 S.E.2d at 582.

¶ 36 Here, the indictments provide significant factual details beyond the charge alleged and provided the trial court with a "factual description of [D]efendant's particular alleged conduct." *Id.* at 337, 643 S.E.2d at 584. Defendant's indictment for felony larceny of a motor vehicle alleged:

> The jurors for the State upon their oath present that on or about [20 November 2017] and in [Burke County] [Defendant] unlawfully, willfully, and feloniously did steal, take and carry away a vehicle, a 2004 Toyota Tundra Truck, the personal property of Julie Cline and/or Timothy Cline, such property having a value in excess of One Thousand Dollars ($1,000.00). This act was in violation of N.C.G.S. § 14-72.

Further, Defendant's indictment for felony possession of a stolen motor vehicle alleged:

> The jurors for the State upon their oath present that on or about [20-21 November 2017] and in [Burke County] [Defendant] unlawfully, willfully, and feloniously did possess a vehicle, a 2011 White Chevy Silverado, the personal property of R.H. Barringer D/B/A Best of Beers, located at 1613 Main Avenue Drive NW, Hickory NC 28601, which was stolen property and which [Defendant] knew and had reason to believe had been stolen and unlawfully taken. This act was in violation of N.C.G.S. [§] 20-106.

¶ 37 Unlike the indictment in *Agnew*, the indictment for felony larceny of a motor vehicle here provided a "factual description of [D]efendant's particular alleged conduct." *Id.* The indictment went further than providing the charge alleged by providing the year, make, and model of the vehicle, a "2004 Toyota Tundra Truck." The indictment also provided the rightful owners' first and last names, "Julie Cline and/or Timothy Cline." This factual information goes beyond the generic language of the indictment in *Agnew* that simply alleged the charge to be indicted. *Id.* at 334, 643 S.E.2d at 582.

¶ 38 The indictment for felony possession of a stolen motor vehicle also provided a "factual description of [D]efendant's particular alleged conduct." *Id.* at 337, 643 S.E.2d at 584. The indictment went further than providing the charge alleged by providing the year, color, make, and model of the vehicle, a "2011 White Chevy Silverado." The indictment also provided the rightful owner's first and last name, "R.H. Barringer D/B/A Best of Beers." This factual information goes beyond the generic language of the indictment in *Agnew* that simply alleged the charge to be indicted. *Id.* at 334, 643 S.E.2d at 582.

¶ 39 The factual information contained in the indictments, coupled with the *Transcript of Plea*, contained enough information for an independent judicial determination of Defendant's actual guilt in this case, as required by N.C.G.S. § 15A-1022(c). The trial court did not err in accepting Defendant's *Alford* plea.

CONCLUSION

¶ 40 Defendant did not demonstrate he had a fair and just reason for withdrawing his *Alford* plea. Nor did the trial court err in accepting Defendant's *Alford* plea as there was sufficient information in the Record

to support an independent judicial determination of a factual basis for the plea in accordance with N.C.G.S. § 15A-1022(c). We affirm the trial court's order denying Defendant's motion to withdraw his *Alford* plea and the trial court's acceptance of Defendant's *Alford* plea.

AFFIRMED.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
SPANOLA SHUNDU GORDON, DEFENDANT

No. COA20-461

Filed 15 June 2021

1. Jury—question regarding unanimity—re-instruction—section 15A-1235

In a trial for sexual offenses, there was no plain error in the trial court's *Allen* charge, pursuant to N.C.G.S. § 15A-1235(a), in response to the jury's question on whether its decision needed to be unanimous. Where the jury's note did not indicate it was deadlocked but merely sought clarification, it was within the court's discretion to provide re-instruction on unanimity pursuant to subsection (a) without also giving the instructions contained in subsection (b).

2. Appeal and Error—satellite-based monitoring order—oral notice insufficient—writ of certiorari

Where defendant's oral notice of appeal from an order requiring him to enroll in lifetime satellite-based monitoring (SBM) was insufficient because the order was civil in nature, but defendant's petition for writ of certiorari showed merit, the Court of Appeals granted the petition to review the order. However, where defendant failed to raise a constitutional objection to the SBM order before the trial court, the Court of Appeals declined to invoke Appellate Rule 2 to review defendant's unpreserved constitutional arguments.

3. Satellite-Based Monitoring—effective assistance of counsel—statutory right—counsel's failure to object or raise constitutional issue

The trial court's order requiring defendant to enroll in lifetime satellite-based monitoring (SBM) was vacated where defendant received ineffective assistance of counsel pursuant to N.C.G.S. § 7A-451(a)(18) because his counsel's deficient performance—for failing to raise any objection to the imposition of SBM despite the State's lack of evidence on reasonableness under the Fourth Amendment, or to raise a constitutional argument, or to file a written notice of appeal from the order—caused prejudice to defendant.

Appeal by Defendant from judgments and order entered 23 January 2020 by Judge R. Stuart Albright in Davidson County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State-Appellee.

Sarah Holladay for Defendant-Appellant.

GORE, Judge.

¶ 1 Spanola Shundu Gordon ("Defendant") was sentenced to a total of 921 to 1204 months' imprisonment for one count of statutory sexual offense with a child by an adult and three counts of indecent liberties. The trial court ordered his enrollment in satellite-based monitoring ("SBM") for the remainder of his natural life. On appeal, Defendant argues that the trial court plainly erred in instructing the jury with an incomplete Allen charge. Also, Defendant argues that (1) the trial court erred when it ordered his lifetime SBM enrollment, and (2) his counsel rendered ineffective assistance by failing to challenge the trial court's SBM Order. We hold that the trial court did not plainly err in giving its instruction to the jury. In our discretion, we issue writ of certiorari to review the trial court's SBM order but decline to invoke Rule 2 to address Defendant's unpreserved constitutional challenge to lifetime SBM enrollment. While a constitutional ineffective assistance of counsel claim is unavailable on appeal, we find that Defendant received statutory ineffective assistance of counsel during the imposition of lifetime SBM. Accordingly, we find no error in part, dismiss in part, and vacate the SBM order without prejudice.

I. Factual and Procedural Background

¶ 2 On 22 January 2020, a jury found Defendant guilty of statutory sex offense with a child by an adult and three counts of indecent liberties. Defendant perpetrated these offenses in July 2016 on his then nine-year-

old daughter while she was visiting him for the weekend. On 23 January 2020, a jury found Defendant guilty of obtaining habitual felon status.

¶ 3 The jury began its deliberations at approximately 3:28 p.m. on 22 January 2020. At about 4:40 p.m., the jury sent out the following question:

> Clarification of Guilty- in order to be guilty vote must be UNANIMOUS? [I]f not unanimous then NOT GUILTY must be rendered?

The trial judge asked the State and defense counsel for suggestions as to how it should respond to the jury's question. Both parties concurred in requesting that the jury be reinstructed on the necessary charge for unanimity of verdict, and to further ask that the jury try to achieve a unanimous verdict. The trial judge responded to the jury as follows:

> [THE COURT]: It is your duty to find the facts and to render a verdict reflecting the truth. All twelve of you must agree to your verdict. You cannot reach a verdict by majority vote.

Neither party objected to this instruction.

¶ 4 After the jury was released, the trial court addressed the matters of sentencing and SBM. As to SBM, the State asserted that "the statute requires in this type of an offense," that Defendant be subject to lifetime monitoring. The State produced a STATIC-99 form prepared by Assessor Bart Leonard, who was not called to testify, which indicated that Defendant had an individual risk factor of "-1," placing him in level "II- Below Average Risk" for recidivism.

¶ 5 The trial court sentenced Defendant to a term of 483 to 640 months' imprisonment for statutory sex offense to run consecutively with three sentences of 146 to 188 months for indecent liberties. The trial court also ordered Defendant to register as a sex offender for 30 years and, upon release, submit to SBM for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

II. Analysis

¶ 6 Defendant raises two issues on appeal. First, Defendant argues that the trial court plainly erred when it responded to the jury's question on unanimity with an incomplete instruction. Second, Defendant argues that the trial court erred in ordering him to submit to SBM for the remainder of his natural life. In the alternative, Defendant contends his trial counsel rendered ineffective assistance by failing to challenge the SBM Order.

A. Allen charge

¶ 7 **[1]** "The term 'Allen charge' is derived from the case of *Allen v. United States*, in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court." *State v. Gettys*, 219 N.C. App. 93, 101 n.1, 724 S.E.2d 579, 585 n.1 (2012) (citation omitted). North Carolina General Statutes Section 15A-1235 provides instructions a trial court may issue to a deadlocked jury.

¶ 8 Defendant argues that the trial court plainly erred when it responded to the jury's question with N.C. Gen. Stat. § 15A-1235(a), but omitted the instructions found in N.C. Gen. Stat. § 15A-1235(b). Defendant contends that because the jury was clearly unable to reach a unanimous verdict, the trial judge was required to fully instruct the jury as to both subsections (a) and (b) of the statute. However, we disagree that there was any indication the jury was deadlocked or having difficulty reaching unanimity. Thus, the specific requirements of § 15A-1235 were not invoked in this case.

¶ 9 "The decision *to give* an *Allen* charge is discretionary and therefore reviewed for abuse of discretion." *Gettys*, 219 N.C. App. at 101, 724 S.E.2d at 585-86 (citation omitted). "Whether the *Allen* charge provides the instructions required by N.C. Gen. Stat. § 15A-1235(b) is a question of law we review *de novo*." *Id.* at 101, 724 S.E.2d 586 (citation omitted). Because Defendant failed to object to the trial court's *Allen* instruction, he must establish that the alleged errors amounted to plain error. *Id.* at 101, 724 S.E.2d 586 (citation omitted). "Under the plain error standard of review, defendant has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Wilson*, 203 N.C. App. 547, 551, 691 S.E.2d 734, 738 (2010) (citations and quotation marks omitted).

¶ 10 It is unnecessary to provide the precise language of N.C. Gen. Stat. § 15A-1235 here. However,

> [w]e note that the language of the statute is permissive rather than mandatory—a judge "may" give or repeat the instructions in N.C.G.S. § 15A-1235(a) and (b) if it appears to the judge that a jury is unable to agree. Furthermore, it has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider

> the circumstances under which the instructions were made and the probable impact of the instructions on the jury.

State v. Peek, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985) (internal citations omitted).

¶ 11 Subsection (c) of the statute provides in pertinent part, "*If it appears to the judge that the jury has been unable to agree*, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)." N.C. Gen. Stat. § 15A-1235(c) (emphasis added). Here, the jury had been deliberating for approximately one hour and ten minutes before sending out a note requesting clarification from the trial judge. The note did not clearly indicate that the jury was deadlocked, suggest disagreement, or declare an impasse.

¶ 12 Instead, the plain text of the note states it is a request for "clarification." As this Court stated in *State v. Hunter*, "[w]e do not concede . . . that the legislature intended to require a trial judge, without regard to the circumstances then existing, to either recite G.S. 15A-1235(b) every time a jury returns to the courtroom without a verdict or discharge the jury." 48 N.C. App. 689, 692, 269 S.E.2d 736, 738 (1980). "[I]nstead, . . . the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial." *Id.* at 692-93, 269 S.E.2d at 738 (internal citation omitted).

¶ 13 Absent the appearance of deadlock or impasse in the jury's deliberations, we find that the trial court did not err in reciting its instruction on unanimity pursuant to subsection (a) of N.C. Gen. Stat. § 15A-1235 without also providing the additional instructions of subsection (b).

B. Satellite-Based Monitoring

¶ 14 **[2]** Defendant next argues that the trial court erred in ordering him to submit to SBM for the remainder of his natural life. However, Defendant concedes that oral notice of appeal was insufficient to preserve this issue for appellate review, and he was required to provide written notice of appeal from the order imposing lifetime SBM. "Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (*purgandum*). Accordingly, "oral notice pursuant to N.C. R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a) as is proper "in a civil action or special proceeding[.]"

Id. at 194-95, 693 S.E.2d at 206 (quoting N.C. R. App. P. 3(a)). Rule 3 provides that

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal *by filing notice of appeal* with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C. R. App. P. 3(a) (emphasis added).

¶ 15 Defendant petitions this Court to issue writ of certiorari as to permit review of the trial court's SBM order. "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. Rule 21(a). However, "[a] writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017). "A petition for the writ must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). We find that Defendant has shown merit on his claim. In our discretion, we issue writ of certiorari to permit review of the trial court's SBM order.

¶ 16 Defendant argues that the trial court erred in ordering lifetime SBM because the State failed to present any evidence that SBM is a reasonable search under the Fourth Amendment. Specifically, Defendant contends that the trial court mistakenly concluded that SBM was required by statute as applied to his convictions for statutory sex offense with a child and three counts of indecent liberties.

¶ 17 There was no separate hearing held on this matter. Rather, the SBM discussion was incorporated into the sentencing proceeding. During that proceeding, Defendant made no constitutional objection to the SBM order on grounds that it constituted an unreasonable search. Having failed to preserve a Fourth Amendment challenge to the SBM enrollment order, Defendant asks this Court to take the extraordinary measure of invoking Rule 2 to reach the merits of his unpreserved constitutional argument.

> As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because "inconsistent application" of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not.

Bishop, 255 N.C. App. at 770, 805 S.E.2d at 370 (citation omitted).

¶ 18 Here, Defendant did not comply with the procedure necessary to preserve his SBM issue on appeal and has not demonstrated how his failure to object to SBM enrollment at trial "resulted in a fundamental error or manifest injustice[ ]" that necessitates this Court's invocation of Rule 2. *State v. Cozart*, 260 N.C. App. 96, 101, 817 S.E.2d 599, 603 (2018). In our discretion, we decline to invoke Rule 2 and dismiss Defendant's unpreserved SBM argument on appeal.

C. Ineffective Assistance of Counsel

¶ 19 **[3]** Alternatively, Defendant asserts a constitutional claim for ineffective assistance of counsel due to his attorney's failure to hold the State to its burden of proving his constitutional eligibility for lifetime SBM. However, SBM is a civil regulatory scheme, and this Court has previously held that a claim for ineffective assistance of counsel based on Defendant's Sixth Amendment right is not available when challenging an SBM order. *See State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) (finding that "a claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that SBM is not a criminal punishment."). "As a result, since an SBM proceeding is not criminal in nature, defendants required to enroll in SBM are not entitled to challenge the effectiveness of the representation that they received from their trial counsel based on the right to counsel provisions of the federal and state constitutions." *State v. Clark*, 211 N.C. App. 60, 77, 714 S.E.2d 754, 765 (2011) (citation omitted). Accordingly, Defendant's constitutional challenge to lifetime SBM enrollment based on ineffective assistance of counsel is unavailable on appeal, and his argument is without merit.

¶ 20 However, Defendant also argues that he has a statutory right to counsel in an SBM proceeding pursuant to N.C. Gen. Stat. § 7A-451(a)(18), which provides that "[a]n indigent person is entitled to services of counsel in the following actions and proceedings . . . [in] [a] proceeding involving placement into satellite monitoring[.]" N.C. Gen. Stat. § 7A-451(a)(18) (2020). "This Court has also recognized that, where

a statutory right to counsel exists, that right includes the right to effective assistance of counsel as set forth in *Strickland*[.]" *State v. Velasquez-Cardenas*, 259 N.C. App. 211, 223, 815 S.E.2d 9, 17 (2018).

¶ 21 This Court has previously addressed the statutory right to effective assistance of counsel as applied to a termination proceeding.

> The parents' right to counsel in a proceeding to terminate parental rights is now guaranteed in all cases by statute. A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation. If no remedy is provided for inadequate representation, the statutory right to counsel will become an "empty formality." Therefore, the right to counsel provided by [statute] includes the right to effective assistance of counsel.

In re Bishop, 92 N.C. App. 662, 664-65, 375 S.E.2d 676, 678 (1989) (internal citations omitted). Defendant contends, and we agree, that this analysis applies to SBM equally as well as it does to the termination of parental rights, juvenile delinquency, or the revocation of probation or parole.

¶ 22 "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). As this Court recently discussed in *State v. Spinks*, we evaluate Defendant's statutory ineffective assistance of counsel claim using a two-pronged standard as articulated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, (1984) and *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). 2021-NCCOA-218.

> [T]o assert a statutory ineffective assistance of counsel claim on appeal from the imposition of satellite-based monitoring, a defendant must show "that counsel's performance was deficient and that this deficiency was so serious as to deprive the party of a fair hearing." In determining whether counsel's performance was deficient, we accord great deference to matters of strategy, and we "evaluate the conduct from counsel's perspective at the time[.]"

> To demonstrate prejudice, the defendant must establish "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."

Id. at ¶61 (internal citations omitted).

¶ 23 In this case, as in *Spinks*, trial counsel for Defendant failed to object to the imposition of lifetime SBM enrollment, did not raise a constitutional objection, and failed to file written notice of appeal from the SBM order. *See id.* at ¶62. The State speculates that, "It may have been a strategy or even the express wishes of Defendant for counsel to remain quiet at the sentencing phase, including with respect to SBM." However, it is entirely unclear what strategic purpose would be served by failing to object to SBM enrollment during the sentencing proceeding or not filing written notice of appeal from the SBM order. Further, there is no discernable strategic reason that Defendant wished for his counsel to remain quiet and not hold the State to its burden of establishing reasonableness under the Fourth Amendment.

¶ 24 However, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). Here, the trial court made its SBM determination during the sentencing proceeding and did not conduct a separate hearing on reasonableness of lifetime SBM enrollment. While Defendant was convicted of Statutory Sexual Offense with a Child by an Adult pursuant to N.C. Gen. Stat. § 14-27.28, and under N.C. Gen. Stat. § 14-208.40A(c), [i]f the court finds that the offender has been . . . convicted of G.S. 14-27.28, the court shall order the offender to enroll in a satellite-based monitoring program for life[,]" § 14-208.40A(a)-(c) (2020), "the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the [SBM] program[.]" *State v. Ricks*, 271 N.C. App. 348, 362, 843 S.E.2d 652, 664 (2020) (citation omitted). Here, trial counsel for Defendant failed to raise any objection to the imposition of lifetime SBM enrollment when the State presented no evidence regarding reasonableness under the Fourth Amendment, and Defendant was prejudiced as a result. Accordingly, we find that Defendant received statutory ineffective assistance of counsel and vacate the imposition of lifetime SBM enrollment without prejudice to the State's ability to conduct further SBM proceedings.

III. Conclusion

¶ 25 We find that the trial court did not err by reinstructing the jury in accordance with N.C. Gen. Stat. § 15A-1235(a) on unanimity of verdict while omitting the additional instructions of N.C. Gen. Stat. § 15A-1235(b) because there was no indication that the jury was deadlocked. In our discretion, we issue writ of certiorari but decline to invoke Rule 2 to review Defendant's unpreserved constitutional challenge to lifetime SBM enrollment. While Defendant's claim for constitutional ineffective assistance of counsel regarding the trial court's SBM Order is not available on appeal, we hold that Defendant received statutory ineffective assistance of counsel. We vacate the imposition of SBM without prejudice to the State's ability to file a subsequent SBM application.

NO ERROR IN PART; DISMISSED IN PART; VACATED IN PART.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
LORI JEAN WARD

No. COA20-552

Filed 15 June 2021

Probation and Parole—subject matter jurisdiction—statutory conditions—multiple counties

The trial court in Watauga County lacked subject matter jurisdiction pursuant to N.C.G.S. § 15A-1344 to revoke defendant's probation in two cases where defendant's probation sentences were not imposed in Watauga County, defendant's probation violations did not occur in Watauga County, and defendant did not reside in Watauga County. The State's argument, that the administrative assignment of the two cases to a probation officer in Watauga County caused defendant's violations for absconding to occur in Watauga County, was rejected.

Appeal by Defendant from Judgments entered 3 March 2020 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nathan D. Childs, for the State.

Blass Law, PLLC, by Danielle Blass, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Lori Jean Ward (Defendant) appeals from Judgments and Commitments Upon Revocation of Probation entered in Watauga County Superior Court revoking her probation and activating sentences arising from two separate criminal cases: one from Lincoln County and one from Catawba County. The Record tends to show the following:

¶ 2 On 29 October 2019, Watauga County Probation Officer Scottie Maltba (Officer Maltba) swore out two Probation Violation Reports against Defendant. Both reports were filed in Watauga County Superior Court on 1 November 2019. The first report, filed in Watauga County file number 19 CRS 633, alleged Defendant had violated terms of a probationary sentence imposed in Lincoln County (the Lincoln County Case) by absconding from probation after being released from custody in Catawba County on 18 September 2019. The second report filed in Watauga County file number 19 CRS 634 alleged Defendant had violated terms of a probationary sentence imposed in Catawba County (the Catawba County Case) by absconding from probation after being released from custody in Catawba County on 18 September 2019. Both Reports reflect Defendant was located in Hickory, North Carolina at the time of the alleged violations.

¶ 3 On 4 February 2020, Defendant, through trial counsel, filed a written Motion to Dismiss alleging the trial court in Watauga County lacked jurisdiction under N.C. Gen. Stat. § 15A-1344 to revoke Defendant's probation in both cases because Defendant was not a resident of Watauga County or the Judicial District in which Watauga County is located, probation had not been imposed in either case in Watauga County or its Judicial District, and Defendant was not alleged to have violated probation in Watauga County or its Judicial District. The matter came on for hearing in Watauga County Superior Court on 10 March 2020. The trial court first heard Defendant's Motion to Dismiss on jurisdictional grounds and then proceeded to hear evidence on the merits of the violation reports. Officer Maltba was the only witness to testify. He testified both during the preliminary hearing of the Motion to Dismiss and the hearing on Defendant's alleged probation violations.

¶ 4 Officer Maltba's testimony over the course of the two phases establishes that on 14 June 2019, Defendant was convicted, in a case unrelated to this appeal, of Misdemeanor Larceny in Watauga County and placed on probation (the Watauga County Case). The same day, Defendant submitted a request to the Judicial Services Coordinator, who conducted the probation intake, that her probation be supervised in Catawba County. At the time, Defendant was in custody—it appears in Catawba County[1]—awaiting trial on the pending charges in the Catawba and Lincoln County Cases. Defendant informed the Judicial Services Coordinator that, after being released from custody, Defendant intended to live in Catawba County at the Salvation Army Center, which served as a homeless shelter. Defendant further advised she eventually intended to live with her sister in Newton, Catawba County and provided her mother's phone number as contact information. The Judicial Services Coordinator provided Defendant reporting instructions for Catawba County and told Defendant to report to the Catawba County probation office within three days pending her release from custody.

¶ 5 On 25 June 2019, unbeknownst at the time to Defendant, the Chief Probation Officer in Catawba County provided a narrative report declining to accept supervision of Defendant's probation in the Watauga County Case on the basis the address Defendant provided was not a valid living address because it was a "homeless address" and that Defendant presently remained in custody. Consequently, Officer Maltba, in Watauga County, was assigned to monitor Defendant's probation in the Watauga County Case. Officer Maltba did not meet with Defendant but testified he simply monitored where Defendant was because she remained in custody.

¶ 6 Subsequently, on 10 July 2019, Defendant entered a plea arrangement in the Lincoln County Case. Defendant agreed to plead guilty to one count of Felony Possession of Heroin. In exchange, the State agreed to dismiss a second charge of Possession of Drug Paraphernalia. The written plea arrangement further stated: "Defendant's probation shall be transferred to Catawba County + she shall comply with drug treatment court." The trial court in Lincoln County accepted the plea and ordered it recorded. The same day, the Lincoln County trial court entered Judgment sentencing Defendant to a term of five-to-fifteen months imprisonment suspended upon completion of fifteen months of probation with the ad-

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1. The record is not expressly clear as to where Defendant was in custody at this time, but it is a fair inference from the Record custody was in Catawba County. The State, without record support, asserts Defendant was in custody in Watauga County. Defendant claims she was in custody in Catawba County at the time.

ditional special probation requirement Defendant serve fifty days in custody. The Judgment in the Lincoln County Case further provided as a special condition of probation: "[m]ay transfer to CATAWBA County for supervision." According to Officer Maltba's testimony, a narrative report from Lincoln County dated 11 July 2019 indicated the Lincoln County Judicial Service Coordinator (Lincoln County JSC) informed Defendant of the conditions of supervised probation and instructed Defendant to contact the Lincoln County JSC within one day of Defendant's release from custody. The narrative report further noted Defendant was currently on probation with Officer Maltba in Watauga County.

¶ 7 Then, on 19 July 2019, Defendant entered an *Alford* plea to one count of Felony Larceny and one count of Misdemeanor Larceny in the Catawba County Case. In exchange for the *Alford* plea, the State agreed to consolidate the charges and that Defendant would receive an intermediate sentence in the presumptive range. The trial court in Catawba County accepted the plea and ordered it recorded. The same day, the Catawba County trial court entered Judgment sentencing Defendant to a term of ten-to-twenty-one months imprisonment, suspended upon completion of twenty-four months of supervised probation, with the Special Probation requirement consistent with an intermediate punishment Defendant serve an active term of sixty days in custody of the Catawba County Sheriff. Also on 19 July 2019, a Catawba County Probation Officer conducted an intake interview with Defendant. According to Officer Maltba, the narrative report entered by that Catawba County Probation Officer stated "[D]efendant advised him that she was going to live at the Salvation Army and maybe Black Mountain." Defendant also apparently advised the Catawba County Probation Officer her probation in the Watauga County Case was supposed to be transferred to Catawba County. It was only then Defendant was informed the transmittal of her probation to Catawba County had been denied, and the Catawba County Probation Officer "advised her to call [Officer] Maltba in Watauga County upon her release."

¶ 8 On 4 August 2019, Defendant was released from custody. On 30 September 2019, Officer Maltba conducted a "records check" on Defendant, which showed Defendant had been charged with a new crime in Catawba County on 18 September 2019 and been released on bond the same day. Having not heard from Defendant, Officer Maltba "began to investigate as to why . . . [D]efendant hadn't reported."

¶ 9 Having failed to locate Defendant, Officer Maltba filed the two Probation Violation Reports, dated 1 November 2019, in Watauga County Superior Court, alleging Defendant had absconded and failed to report

as directed in her Lincoln and Catawba County cases. On the Record before us, there is no report Defendant violated probation in the Watauga County Case. Officer Maltba testified Defendant was "picked up" on 17 December 2019 in Catawba County, and on 30 December 2019 she was transferred to Watauga County, where Officer Maltba served her with the Probation Violation Reports; this was the first time Officer Maltba met with Defendant in-person since being assigned to her six months prior.

¶ 10 At the hearing on Defendant's Motion to Dismiss, Officer Maltba testified policies issued by the North Carolina Department of Public Safety required, when a probationer is on probation in one county, that any subsequent probationary sentence entered in another county be assigned to be supervised by the same probation officer in the first county as a "subsequent case." Thus, here, Officer Maltba explained he was automatically assigned to supervise Defendant's probation in the Lincoln and Catawba County Cases because he was already supervising probation in the Watauga County Case. Officer Maltba, however, also testified the same policies required:

> Offenders must be supervised in the county of residence. If at the time the sentencing offender resides in a county other than the county of conviction, the case must be, upon completion of a[n] intake interview, be transmitted to that county of residence. The county of residence must accept the case unless it shows that the offender does not live there and that the intake officer will give the defendant reporting instructions to the Chief Probation and Parole Officer of the county of residence within three calendar days.

Officer Maltba conceded there was no evidence Defendant resided in Watauga County. Indeed, the Record, including charging documents in both the Lincoln and Catawba County Cases, the two Probation Violation Reports, and an Affidavit of Indigency filed by Defendant prior to hearing, reflects the only actual addresses, locations, or places of residence given for Defendant were in Catawba County.

¶ 11 At the conclusion of the hearing on the Motion to Dismiss, the trial court denied Defendant's motion on the basis: "her probation violations, as alleged in the violation report, occurred in Watauga County because she absconded by making her whereabouts unknown to this probation officer and avoided supervision of this probation officer in Watauga County." The trial court proceeded to arraign Defendant on the probation violations and heard further testimony from Officer Maltba

on Defendant's alleged absconding from probation. At the conclusion of the hearing, Defendant, through counsel, renewed her jurisdictional objection and further moved to dismiss on the basis the State had failed to produce sufficient evidence of probation violations to support revocation of probation. The trial court denied these motions, found Defendant in violation of her probation in both the Lincoln County Case and Catawba County Case, revoked probation in both cases, and activated both sentences with the sentence in the Catawba County Case (19 CRS 634) to run consecutively after the sentence in the Lincoln County Case (19 CRS 633). The trial court entered written Judgments the same day: 10 March 2020. Defendant timely filed written Notice of Appeal on 17 March 2020.

Issue

¶ 12 The dispositive issue on appeal is whether Defendant's alleged probation violations in the Lincoln County Case and Catawba County Case occurred in Watauga County for purposes of establishing the Watauga County trial court's jurisdiction to revoke Defendant's probation in both cases pursuant to N.C. Gen. Stat. § 15A-1344(a).

Standard of Review

> "[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." "It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." "[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* 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. Tincher, 266 N.C. App. 393, 395, 831 S.E.2d 859, 861-62 (2019) (alterations in original) (citations omitted).

¶ 13 "The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (lack of jurisdiction to revoke probation). " 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order

entered without authority.' " *Id.* (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

Analysis

¶ 14 N.C. Gen. Stat. § 15A-1344 governs the authority of trial courts to alter or revoke probation in response to violations. N.C. Gen. Stat. § 15A-1344 (2019). Relevant to this case, Section 15A-1344(a) provides:

> probation may be reduced, terminated, continued, extended, modified, or *revoked* by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, *where the sentence of probation was imposed*, *where the probationer violates probation*, *or where the probationer resides*.

N.C. Gen. Stat. § 15A-1344(a) (2019) (emphasis added). Here, Defendant contends the trial court erred in denying her Motion to Dismiss for lack of subject-matter jurisdiction, arguing the State presented insufficient evidence to establish: Defendant's probation in the Lincoln and Catawba County Cases was imposed in Watauga County; Defendant violated probation in the Lincoln and Catawba County Cases in Watauga County; or Defendant resided in Watauga County. The State effectively concedes the evidence does not support a determination probation in the Lincoln County Case or the Catawba County Case was imposed in Watauga County and, further, that there is no evidence Defendant was a resident of Watauga County. In addition, there is no argument Watauga County is in the same judicial district or set of districts as either Lincoln or Catawba Counties.[2] Rather, consistent with the trial court's ruling, the State solely argues Defendant violated the terms of her probation in the Lincoln and Catawba County Cases in Watauga County because those cases had been administratively assigned to Officer Maltba for supervision in Watauga County; thus, the State contends Defendant's failure to report to Officer Maltba for supervision in Watauga County constituted absconding from probation in Watauga County.

The Lincoln County Case

¶ 15 As an initial matter, Officer Maltba's Probation Violation Report filed in the Lincoln County Case (19 CRS 633) does not expressly allege

2. Catawba County is in District 25B. Lincoln County is in District 27B. Watauga County is in District 24. N.C. Gen. Stat. § 7A-41(a) (2019).

Defendant absconded from probation in Watauga County. Moreover, the terms of Defendant's plea arrangement in the Lincoln County Case specifically included: "Defendant's probation shall be transferred to Catawba County . . . ." The State, however, contends because the Judgment entered by the Lincoln County trial court includes as a special condition that probation "[m]ay transfer to CATAWBA County for supervision[,]" it converted the plea arrangement such that any transfer became a "permissive" term of the plea arrangement and the State was not required to transfer Defendant's probation in the Lincoln County Case to Catawba County. Thus, the State essentially posits, it was not required to abide by its own representation to a Superior Court Judge of an express term in a written plea arrangement with Defendant that was accepted by that Superior Court Judge.

¶ 16 "A plea agreement is treated as contractual in nature, and the parties are bound by its terms." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). "Normally, plea agreements are in the form of unilateral contracts and the 'consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading.' " *State v. King*, 218 N.C. App. 384, 388, 721 S.E.2d 327, 330 (2012) (quoting *State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980)). "Once defendant begins performance of the contract 'by pleading guilty or takes other action constituting detrimental reliance upon the agreement[,]' the prosecutor can no longer rescind his offer." *Id.* (alteration in original) (quoting *Collins*, 300 N.C. at 149, 265 S.E.2d at 176). "Due process requires strict adherence to a plea agreement and 'this strict adherence requires holding the State to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements.' " *Id.* (alteration in original) (quoting *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999)).

¶ 17 Here, once Defendant entered her guilty plea in the Lincoln County Case, the State was bound by the unambiguous terms of its plea arrangement with Defendant to transfer the probationary aspect of Defendant's split sentence to Catawba County. *See id.* Indeed, the trial court's statement in the actual Judgment that probation "[m]ay transfer to CATAWBA County for supervision" cannot, in this context, reasonably be construed as granting the State unilateral authority to decide whether to transfer supervision to Catawba County. *See id.* Rather, in light of the plea arrangement in the Lincoln County Case, the trial court's use of the term "may" can only be construed as a grant of authority or judicial authorization to the State for purposes of implementing the mandatory provision

of the plea agreement to transfer Defendant's probation in the Lincoln County Case to Catawba County. *Cf. Jones v. Madison Cnty. Comm'rs*, 137 N.C. 579, 591 50 S.E. 291, 295 (1905) (citing Black, Henry Campbell, *Handbook on the Construction and Interpretation of the Laws*, West Publishing Co. (1896)) (recognizing use of generally permissive terms in a statute "will be construed as mandatory, and the execution of the power may be insisted upon as a duty" where it "provides for the doing of some act which is required by justice or public duty, as where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interests or the rights of individuals" and referencing cases "in which the term 'may' and 'authorized and empowered' and 'authorized' are respectively held to be imperative").

¶ 18 The State also argues the plea arrangement in the Lincoln County Case could not impose a condition of probation changing statutory venue for Defendant's probation. The State, however, fails to offer any support for its assertion, let alone identify any particular statute. Moreover, N.C. Gen. Stat. § 15A-1343(a) provides: "The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a) (2019); *see also* § 15A-1343(b)(2-3) ("As regular conditions of probation, a defendant must: . . . Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer. Report as directed by the court or his probation officer . . . ."). Indeed, the statute further provides the following:

> Regular conditions of probation apply to each defendant placed on supervised probation *unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court*. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

§ 15A-1343 (emphasis added).

¶ 19 In any event, even if the provision of the plea arrangement was not enforceable, the State has failed to offer any legal basis for probation to be supervised in Watauga County for a probationary sentence imposed in Lincoln County in the absence of evidence Defendant was resident in Watauga County or even located in Watauga County when she allegedly absconded. Thus, the State failed to meet its burden to show Defendant

was properly being supervised on probation in Watauga County resulting from the Lincoln County Case such that any absconding from probation occurred in Watauga County. Therefore, the trial court lacked jurisdiction to revoke Defendant's probation in Watauga County. Consequently, we vacate the trial court's Judgment revoking Defendant's probation in the Lincoln County Case (Watauga County file number 19 CRS 633).

The Catawba County Case

¶ 20 Defendant further contends the Watauga County trial court erred in determining it had jurisdiction to revoke probation for the Catawba County Case on the basis Defendant absconded from probation in Watauga County. Specifically, Defendant argues the State's own evidence showed Department of Public Safety policies required probation to be supervised in the county of the probationer's residence and Officer Maltba conceded in his testimony there was no evidence Defendant resided in Watauga County. Again, there is no express allegation in the violation report filed with respect to the Catawba County Case that Defendant absconded from probation in Watauga County. Further, the materials in the Record have a tendency to reflect Defendant was, in fact, resident in Catawba County at all times relevant to this appeal.

¶ 21 The State, nevertheless, contends this case is analogous to our decision in *State v. Regan*, 253 N.C. App. 351, 800 S.E.2d 436 (2017), *overruled on other grounds by State v. Morgan*, 372 N.C. 609, 831 S.E.2d 254 (2019), in that Defendant was on probationary sentences originating from multiple jurisdictions and Officer Maltba was simply trying to coordinate the three different probationary sentences in Watauga County. *Regan* is, however, inapposite.

¶ 22 In *Regan*, the defendant was put on probation in Harnett County. *Id.* at 352, 800 S.E.2d at 437. Subsequently, the defendant was placed on probation for a conviction in Sampson County. *Id.* The Sampson County probation was assigned to the same Harnett County probation officer. *Id.* The defendant absconded and her probation was subsequently revoked by a Harnett County Superior Court. *Id.* at 353, 800 S.E.2d at 438. On appeal, the defendant "argue[d] that the trial court in Harnett County lacked subject matter jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County." *Id.* at 352, 800 S.E.2d at 437. Specifically, the defendant claimed:

> the State did not meet its burden of showing that 1) the Sampson County probation was transferred to Harnett County Superior Court and the Harnett County Superior Court thereafter issued its own

> probation order authorizing supervision of Defendant; 2) Defendant violated her probation in Harnett County; or 3) Defendant resided in Harnett County at the time of the violations.

Id. at 355, 800 S.E.2d at 438-39. However, this Court concluded:

> Defendant's argument [wa]s refuted by evidence that at the time she violated her probation by failing to pay supervision fees and by leaving the state, her residence was in Harnett County. Defendant's argument also [wa]s refuted by evidence that she violated her probation by failing to report for an appointment with her probation officer in Harnett County, thus vesting Harnett County Superior Court with jurisdiction to revoke Defendant's probation.

Id. at 355, 800 S.E.2d at 439. Our Court further pointed out:

> the trial court also could have found as a fact, based on a reasonable inference from the evidence, that Defendant violated the terms of her probation in Harnett County when she failed to meet with Officer Wiley on 5 April 2011 . . . . By failing to appear for her appointment with Officer Wiley of the Harnett County Probation Office, Defendant committed a probation violation in Harnett County.

Id.

¶ 23 Thus, in that case, Defendant was a resident of Harnett County and absconded from Harnett County, including failing to keep appointments in Harnett County. *See id.* Here, however, there is, again, no evidence Defendant was a resident of Watauga County and no evidence Defendant, in fact, absconded from Watauga County or missed any scheduled appointments in Watauga County. Indeed, here, unlike in *Regan*, there never was any supervisory contact between Defendant and Officer Maltba in Watauga County—in fact, Officer Maltba would not meet Defendant until presenting her with the probation violations reports in December 2019.

¶ 24 The State argues Defendant was informed during the intake processes for both the Lincoln and Catawba County Cases she was being supervised on probation in Watauga County—and, thus, was required to report to Officer Maltba upon her release from custody in Catawba County. However, Officer Maltba's testimony actually only reflects

that the narrative summary from Lincoln County stated the Lincoln County JSC told Defendant she was still on probation in the Watauga County Case.[3] Similarly, the narrative summary from the Catawba County Probation Officer reflects Defendant was simply told her request to transfer probation in the Watauga County Case to Catawba County had been denied and she should contact Officer Maltba once she was released from custody in Catawba County. Again, however, and unlike *Regan*, Defendant was never alleged to be in violation of her probation in the Watauga County Case by failing to report to Officer Maltba.

¶ 25 As with the Lincoln County Case, the State has failed to provide any basis for asserting Defendant's probation in the Catawba County Case was properly supervised in Watauga County. This is particularly so where the State's own evidence revealed Department of Public Safety Policy required the probationer to be supervised in the county of her residence, there was no evidence Defendant resided in Watauga County, and every indication in the Record is that Defendant resided in Catawba County. Thus, the State failed to meet its burden to show Defendant was properly being supervised on probation in Watauga County resulting from the Catawba County Case such that any absconding from probation occurred in Watauga County. Therefore, the trial court lacked jurisdiction to revoke Defendant's probation in Watauga County. Consequently, we vacate the trial court's Judgment revoking Defendant's probation in the Catawba County Case (Watauga County file number 19 CRS 634).

Conclusion

¶ 26 Accordingly, for the foregoing reasons, we vacate the trial court's Judgments revoking Defendant's probation in both Watauga County file numbers 19 CRS 633 and 19 CRS 634.

VACATED.

Judges ARROWOOD and CARPENTER concur.

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3. Officer Maltba speculated in his testimony that the Lincoln County JSC's instruction to Defendant to contact her within a day of Defendant's release was for the purpose of providing Defendant with Officer Maltba's contact information. This does not appear on the face of Officer Maltba's recitation of the narrative report and would be in conflict with the express terms of Defendant's plea agreement.

WARREN COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF ERICKA GLENN, PLAINTIFF

v.

ANTHONY J. GARRELTS, DEFENDANT

No. COA20-868

Filed 15 June 2021

Paternity—child support claim—sperm donor—definition of "parent"—choice of law—lex loci test

In a case of first impression involving a child support claim brought against a sperm donor (defendant), where the issue was whether defendant qualified as the "parent" of a child conceived via artificial insemination, the Court of Appeals applied the lex loci test when deciding that the paternity laws of the state where the artificial insemination, conception, pregnancy, and birth occurred (Virginia) governed the action rather than the laws of the state where the action was filed (North Carolina). Therefore, the trial court's order requiring defendant to pay child support pursuant to North Carolina law—which provides that sperm donors legally qualify as parents—was reversed and remanded for a new proceeding applying Virginia law, which does not include sperm donors in the legal definition of a "parent."

Appeal by Defendant from an order entered on 10 July 2020 by Judge Adam S. Keith in Warren County District Court. Heard in the Court of Appeals 28 April 2021.

Banzet, Thompson, Styers, & May, PLLC, by Mitchell G. Styers and Jill A. Neville, for Defendant-Appellant.

No brief for Plaintiff-Appellee.

JACKSON, Judge.

¶ 1 This case presents a novel choice-of-law issue as between the artificial insemination laws of North Carolina and those of Virginia. In order to determine whether a sperm donor qualifies as the "parent" of a minor child conceived via artificial insemination, we must decide whether to apply the paternity laws of the state where the insemination and birth occurred (here, Virginia), or alternatively the laws of the state where the paternity action was initiated (here, North Carolina). Because our traditional choice of law principles direct us to apply the law of the situs

of the claim, we conclude that this action should be governed by the substantive laws of Virginia. We accordingly reverse and remand for further proceedings consistent with this opinion.

I. Factual and Procedural Background

¶ 2 Plaintiff Ericka Glenn met and befriended Defendant Anthony Garrelts in 2010 in Virginia. Ms. Glenn and her partner wanted to conceive a child together, and they asked Defendant to serve as a sperm donor in order to artificially inseminate Ms. Glenn. Defendant agreed, and the parties entered into a "verbal contract" to solidify their understanding. The artificial insemination and conception[1] occurred in Virginia, and Ms. Glenn continued to live in Virginia throughout her pregnancy. The child was born in December 2011, and Ms. Glenn was the only parent who was listed on the birth certificate.

¶ 3 In late 2012, Defendant, Ms. Glenn, and Ms. Glenn's partner appeared in court in James City County, Virginia, in order for Defendant to voluntarily "sign over his parental rights" so that Ms. Glenn's partner could formally adopt the child. The exact outcome of this court proceeding is unknown, as the appellate record in this case does not contain a copy of the Virginia court order. In 2014, Ms. Glenn moved with the child to California, and soon thereafter begin receiving public assistance from the state. Defendant was residing in Norlina, North Carolina at the time.

¶ 4 In March 2019, the Warren County Department of Social Services in North Carolina ("DSS") filed an action in Warren County District Court alleging that Defendant was the father of the minor child and that he was obligated to pay child support. Defendant filed an Answer, contending that he was under no obligation to pay child support. A hearing was held on the matter on 10 July 2020 in Warren County District Court. During the hearing, Defendant's counsel argued that this matter should be governed by the law of Virginia, where the child had been conceived and born. Defendant's counsel explained that under a Virginia statute,[2]

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1. The record does not specify whether the artificial insemination occurred with the help of a physician or medical facility, or whether instead the parties conducted the insemination privately with no physician assistance. On remand, this matter should be investigated by the trial court, as it may be dispositive in determining whether Defendant qualifies as a legal parent under Virginia law. *See, e.g.*, *Bruce v. Boardwine*, 64 Va. App. 623, 628-31, 770 S.E.2d 774, 776-77 (2015) (holding that the Virginia Assisted Conception Statute was inapplicable where the child was conceived through an at-home "turkey baster insemination" with no physician or medical facility involved).

2. Va. Code Ann. § 20-158 provides that "[a] donor is not the parent of a child conceived through assisted conception, unless the donor is the spouse of the gestational mother." Va. Code Ann. § 20-158(A)(3) (2019).

a sperm donor does not legally qualify as a parent, and thus Defendant did not owe any child support under Virginia law. Counsel for DSS disagreed, arguing that under the full faith and credit doctrine, the trial court was under no obligation to apply Virginia law, and that the law of North Carolina should apply as a matter of public policy.

¶ 5 The trial court issued an order on 24 August 2020 adjudicating Defendant to be the biological father of the child and ordering him to (1) pay $13,642.75 in past due child support; (2) obtain medical insurance for the child; and (3) pay $50.00 in monthly child support thereafter. Regarding the choice of law issue, the trial court concluded as follows:

> (4) The Court finds from the testimony and argument that, while the child was born in the Commonwealth of Virginia, and that there is a Virginia statute defining paternity, the Virginia paternity statute is not controlling in this action, which was brought pursuant to North Carolina statutes regarding the establishment of paternity and payment of child support.
>
> (5) The Court finds from the testimony and arguments that there is no known provision in current North Carolina statutory or case law which provides an exception or alternative to establishing paternity in this case and entering an order that the father of the child pay child support as calculated by the North Carolina Child Support Guidelines.

Defendant submitted a timely notice of appeal on 10 September 2020.

II. Analysis

¶ 6 On appeal, Defendant argues that the trial court erred in adjudicating him to be the father of the child and in ordering him to pay child support. Defendant contends that the trial court should have applied the law of Virginia, rather than the law of North Carolina, in making its paternity determination. We agree with Defendant that the trial court erred in applying North Carolina law, and remand for a new proceeding.

A. Choice of Law vs. Full Faith and Credit

¶ 7 We first address the applicable principles of law. Defendant, DSS, and the trial court all apparently agreed that the full faith and credit doctrine was dispositive in determining whether Virginia law should be applied. The parties are mistaken on this point.

¶ 8 The full faith and credit clause of the United States Constitution provides that "Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. This provision has been interpreted to mean that "the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." *Freeman v. Pac. Life Ins. Co.*, 156 N.C. App. 583, 586, 577 S.E.2d 184, 186 (2003) (internal marks and citation omitted). In other words, the doctrine requires that a "foreign judgment be given the same force and effect it enjoys in the state where it was rendered." *Id.* For example, North Carolina will provide full faith and credit to "[a] paternity determination made by another state" when such a determination is made "(1) [i]n accordance with the laws of that state, and (2) [b]y any means that is recognized in that state as establishing paternity[.]" N.C. Gen. Stat. § 110-132.1 (2019).

¶ 9 However, the full faith and credit doctrine is inapplicable here because this case does not involve an existing judgment or order from another state. Based on the record, it does not appear that the minor child here has ever been the subject of any previous paternity or child support order, and thus there is no foreign order for us to credit. Rather, this case involves determining the paternity of a child who was conceived (via artificial insemination) and born in Virginia, but who is the subject of a child support action in North Carolina. The issue before us thus becomes whether we should apply the substantive law of Virginia or North Carolina in adjudicating this paternity claim.

¶ 10 When a court is faced with a situation such as this—litigation that features significant ties to multiple states, each of which has conflicting substantive laws—the court must engage in a choice of law analysis to determine which state's laws should be applied to the claims raised in the suit. *See Boudreau v. Baughman*, 322 N.C. 331, 333, 368 S.E.2d 849, 852 (1988). Because the application of "conflict of law rules is a legal conclusion," we conduct a *de novo* review of the trial court's decision to apply North Carolina law. *Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 694, 698 S.E.2d 719, 724 (2010).

B. Selecting the Proper Choice of Law Test

¶ 11 In determining which state's laws apply to a given matter, there are two primary choice of law doctrines that a court may choose from. The most "traditional" conflict of law doctrine in North Carolina is *lex loci*, which provides that "matters affecting the substantial rights of the parties are determined by *lex loci*, the law of the situs of the claim."

Boudreau, 322 N.C. at 335, 368 S.E.2d at 853-54. In contrast, the *lex fori* test provides that "remedial or procedural rights are determined by *lex fori*, the law of the forum," i.e., North Carolina. *Id*. In other words, "[u]nder North Carolina choice of law rules, we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina." *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 83, 772 S.E.2d 143, 145 (2015) (internal marks and citation omitted). For example, *lex fori* will govern the technical and procedural matters involved in any lawsuit, such as "determining the [applicable] statute of limitations," *Stetser v. TAP Pharm. Prod., Inc.*, 165 N.C. App. 1, 16, 598 S.E.2d 570, 581 (2004), or determining "the applicable burden of proof," *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 249 (2005).

¶ 12 On the other hand, *lex loci* will be applied when determining substantive matters, such as what causes of action are available to a plaintiff or what damages a plaintiff may recover. *Stetser*, 165 N.C. App. at 16, 598 S.E.2d at 581. *Lex loci* has traditionally been applied in cases "involving tort or tort-like claims." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 420, 838 S.E.2d 334, 343 (2020). *See also Gbye v. Gbye*, 130 N.C. App. 585, 587, 503 S.E.2d 434, 436 (1998) (recognizing that our state courts maintain a "strong adherence to the traditional application of the *lex loci deliciti* doctrine when choice of law issues arise"). *Lex loci* has previously been used to adjudicate wrongful death claims, trade secret claims, alienation of affection claims, and breach of contract claims. *See Gbye*, 130 N.C. App. at 585, 503 S.E.2d at 434 (wrongful death); *SciGrip*, 373 N.C. at 421, 838 S.E.2d at 344 (trade secrets); *Jones v. Skelley*, 195 N.C. App. 500, 505, 673 S.E.2d 385, 389 (2009) (alienation of affection); *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 440, 196 S.E.2d 711, 722 (1973) (breach of contract).

¶ 13 Here, the question becomes whether the present action is governed by the *lex loci* test or the *lex fori* test—in other words, does a paternity statute qualify as a procedural or substantive law? We conclude that a paternity law is substantive in nature and thus that the *lex loci* test should be applied. A "substantial right" has been defined by this Court as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 677-78, 657 S.E.2d 55, 61 (2008) (internal marks and citation omitted). A law that formally adjudicates a person's status as a parent (or non-parent) of a child meets this definition, as parenthood is one of the most fundamental protected

rights in our entire legal system. We accordingly conclude that the *lex loci* test should be applied to determine which state's paternity law governs this dispute.

C. Applying *Lex Loci*

¶ 14 The *lex loci* test states that the rights of the parties are governed by "the law of the situs of the claim." *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854. This Court has not previously had occasion to address what qualifies as "the situs of the claim" when the claim in question is a paternity claim or child support claim. In a tort-based action, *lex loci* instructs that we should apply "the substantive law of the state where the injury or harm was sustained or suffered, which is, ordinarily, the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place." *SciGrip*, 373 N.C. at 420, 838 S.E.2d at 343 (internal marks and citation omitted). In a contract-based action, *lex loci* states that "the law of the place where the contract is executed governs the validity of the contract." *Morton v. Morton*, 76 N.C. App. 295, 298, 332 S.E.2d 736, 738 (1985).

¶ 15 Under the unique circumstances of the present case, we conclude that the proper "situs of the claim" of the parties' paternity dispute is Virginia. Here, Virginia is the state where Defendant and Ms. Glenn entered into a "verbal contract" regarding the artificial insemination; Virginia is where the artificial insemination occurred; Virginia is where Ms. Glenn lived during the entirety of her pregnancy; Virginia is where the child was born; and Virginia is where the mother and child lived together for the first several years of the child's life. Under the *lex loci* tort theory, Virginia thus qualifies as the state where "the last event necessary to make the actor liable" occurred, in that it was the state where Ms. Glenn was impregnated and gave birth. Under the *lex loci* contractual theory, Virginia also qualifies as the state where the contract was executed, in that it was the state where Ms. Glenn and Defendant entered into a "verbal contract" regarding the artificial insemination.

¶ 16 Moreover, this result is supported by persuasive caselaw from other jurisdictions. For example, in *In re Marriage of Adams*, 133 Ill. 2d 437, 447, 551 N.E.2d 635, 639 (1990), the Illinois Supreme Court concluded that Florida law (rather than Illinois law) should apply to a paternity and child support action for a child conceived via artificial insemination. There, a married woman living in Florida underwent artificial insemination at a medical clinic, in which she was "artificially inseminated with semen of a man other than her husband." *Id.* at 440, 551 N.E.2d at

636. The husband and wife continued to live together throughout her pregnancy, and the child was born in Florida. *Id.* The couple separated when the child was several months old, and the wife and child moved to Illinois, where she subsequently filed a petition for child support. *Id.* In his answer to the petition, the husband acknowledged that the child was born during the marriage but asserted that he was not the father because the child was conceived as a result of artificial insemination to which he did not consent. *Id.* at 441, 551 N.E.2d at 636. The trial court adjudicated the husband the legal father of the child under Illinois law. *Id.* at 442-43, 551 N.E.2d at 637.

¶ 17 On appeal, the Illinois Supreme Court recognized that the case presented a choice of law issue, because Illinois law provided that children conceived via artificial insemination to a married couple were presumed legitimate, whereas Florida law provided that such children were only legitimate if both the husband and wife had consented in writing to the artificial insemination. *Id.* at 443-44, 551 N.E.2d at 637-38. Applying Illinois choice of law rules, the Court held that the law of Florida should govern the paternity action because Florida had "the more significant relationship to the dispute." *Id.* at 447, 551 N.E.2d at 639. The Court found it relevant that "[the wife] was . . . inseminated in Florida, the Adamses were residents of Florida at that time and continued to live there during the course of the pregnancy, and the child was born in Florida." *Id.*

¶ 18 The Illinois Supreme Court concluded that "whether a parent-child relationship exists . . . as a result of [] artificial insemination should not depend on the laws of every State in which the family members may find themselves in the future." *Id.* The Court noted that this rule would best "fulfill the participants' expectations and [] help ensure predictability and uniformity of result," because the parties participating in an artificial insemination procedure will naturally "expect that their own local law will govern the relationships created by it." *Id. See also In re K.M.H.*, 285 Kan. 53, 56-62, 169 P.3d 1025, 1030-32 (2007) (holding that a paternity action for twins conceived via artificial insemination should be governed by the law of Kansas because the "original oral agreement with [the sperm donor] took place in Kansas; the parties reside in Kansas; the sperm resulting in the pregnancy was given to [the mother] by [the donor] in Kansas . . . [and] the twins were born in Kansas and reside in Kansas").

¶ 19 We agree with this approach. Under the *lex loci* doctrine, following the paternity laws of the state where the child is conceived not only fulfills the parties' natural expectations, but helps ensure predictable and equitable results. If we were to accept DSS's arguments—and hold that

a paternity action is simply governed by the laws of whichever state the plaintiff chooses to sue in—this would encourage forum-shopping, as a parent seeking a paternity determination could simply travel to whichever state has the most favorable laws. *See Hamdan v. Freitekh*, 271 N.C. App. 383, 386, 844 S.E.2d 338, 341 (2020) (noting that an important goal of child support and custody laws is "to prevent parents from forum shopping their child custody disputes and assure that these disputes are litigated in the state with which the child and the child's family have the closest connection") (internal marks and citation omitted). We cannot condone such a result, and instead conclude that, under our state's choice of law principles, we must follow the paternity law of the state where the insemination and conception occurred.[3] Because that state here is Virginia, the trial court erred in applying North Carolina law to this matter.

III. Conclusion

¶ 20 Because this matter was decided in the trial court under the inappropriate law, and because the parties have not had an opportunity to brief and argue the relevant issues under Virginia law,[4] we reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges DIETZ and COLLINS concur.

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3. However, we emphasize that no single factor is dispositive in determining which state qualifies as the "situs of the claim" for a paternity action under the *lex loci* theory. This analysis is highly fact-based and individualized and must be carefully considered under the unique circumstances of each case.

4. We make no comment on the ultimate outcome of this matter under Virginia law—it is the role of the trial court to determine on remand whether Defendant qualifies as the child's legal parent under the applicable Virginia law.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JUNE 2021)

AZEVEDO v. ONSLOW CNTY. DEP'T OF SOC. SERVS. 2021-NCCOA-276 No. 20-526	Onslow (19JRI2)	Remanded
BELCHER v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-277 No. 20-562	Office of Admin. Hearings (19OSP05603)	Reversed and Remanded
BRANCH BANKING & TR. CO. v. SUNTRUST BANK 2021-NCCOA-278 No. 20-707	Mecklenburg (16CVS15658)	Affirmed
HEWETT v. CAROLINA TRACTOR & EQUIP. CO. 2021-NCCOA-279 No. 20-659	N.C. Industrial Commission (18-728785)	Dismissed
IN RE J.F. 2021-NCCOA-281 No. 20-231	Gaston (17JA342) (17JA343)	Affirmed in Part, Reversed in Part and Remanded
IN RE L.M. 2021-NCCOA-282 No. 20-516	Gaston (19JA138) (19JA139)	Affirmed
LAWING v. MILLER 2021-NCCOA-283 No. 20-492	Guilford (18CVS1024)	Affirmed in part, Vacated in part and Remanded
SCHAEFFER v. SINGLECARE HOLDINGS, LLC 2021-NCCOA-284 No. 20-427	Orange (19CVS810)	Reversed
STATE v. BYRD 2021-NCCOA-285 No. 20-361	Harnett (02CRS52697)	Affirmed
STATE v. CATHCART 2021-NCCOA-286 No. 20-872	Mecklenburg (14CRS237227)	Affirmed.
STATE v. DOUGLAS 2021-NCCOA-287 No. 20-214	Cumberland (99CRS1543)	Vacated and remanded for resentencing.

STATE v. LITTLE 2021-NCCOA-288 No. 20-690	Guilford (18CRS81022-23)	New Trial
STATE v. SOUTHERN 2021-NCCOA-289 No. 20-433	Surry (18CRS531-532)	No error in part; dismissed in part.
STATE v. TILLMAN 2021-NCCOA-290 No. 20-734	Lee (19CRS134)	Dismissed
STATE v. TIRADO 2021-NCCOA-291 No. 20-213	Cumberland (98CRS34831)	Affirmed
STATE v. WILLIAMS 2021-NCCOA-292 No. 20-432	Iredell (15CRS56346-49) (18CRS55457)	No Error
WILSON v. SWEELY 2021-NCCOA-293 No. 20-682	Stanly (19CVD244)	Vacated and Remanded

ANTON v. ANTON

[278 N.C. App. 150, 2021-NCCOA-294]

WILLIAM D. ANTON, PLAINTIFF
v.
THOMAS C. ANTON, JR., INDIVIDUALLY, IN HIS CAPACITY AS CURRENT TRUSTEE OF THE ROSEMARY ANTON REVOCABLE LIVING TRUST, AND IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSEMARY ANTON, YVONNE A. NIEMANN, AND THE ROSEMARY ANTON REVOCABLE LIVING TRUST, DEFENDANTS

No. COA20-655

Filed 6 July 2021

1. Appeal and Error—abandonment of issues—multiple claims in estate dispute—failure to brief

In a dispute over the validity of a will and trust, the issue of whether the trial court improperly granted partial summary judgment to defendants on plaintiff's claims for constructive fraud, tortious interference with inheritance, and punitive damages was deemed abandoned, pursuant to Appellate Rule 28(b)(6), where plaintiff failed to advance any arguments on this issue in his appellate brief.

2. Wills—caveat proceeding—undue influence—probative factors—forecast of evidence

In an estate dispute, sufficient evidence was presented regarding decedent's mental acuity and independence in directing her estate affairs at the time she revised her will and trust (to exclude plaintiff, one of her sons, as a beneficiary of her estate) to undermine plaintiff's claim of undue influence. Defendants (plaintiff's two siblings) presented sufficient evidence to rebut a presumption of undue influence, which arose because one defendant was in a fiduciary relationship with his mother at the time she changed her estate documents, and plaintiff's evidence failed to show any genuine issue of material fact to support his claim.

Appeal by Plaintiff from order entered 10 January 2019 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 28 April 2021.

Hopler, Wilms, & Hanna, PLLC, by Adam J. Hopler, and Fiduciary Litigation Group, by Thomas R. Sparks, for Plaintiff-Appellant.

Manning Fulton & Skinner P.A., by Robert S. Shields, Jr., for Defendants-Appellees.

COLLINS, Judge.

¶ 1 Plaintiff appeals the trial court's grant of partial summary judgment in favor of Defendants on Plaintiff's claims of constructive fraud, tortious interference with inheritance, punitive damages, and undue influence. Because Plaintiff has failed to adequately brief his claims of constructive fraud, tortious interference with inheritance, and punitive damages before this Court, those issues are deemed abandoned. Because the record demonstrates a lack of a genuine issue of material fact concerning two essential elements of an undue influence claim, the trial court did not err in granting Defendants' motion for partial summary judgment on the undue influence claim.

I. Procedural History

¶ 2 On 27 September 2017, Plaintiff filed a caveat to the purported 6 November 2014 Will of Rosemary Anton ("Revised Will"). An assistant clerk of superior court ordered the matter transferred to superior court on 10 October 2017. The propounders of the Revised Will, Thomas C. Anton, Jr. and Yvonne A. Niemann (together, "Defendants") initially answered on 24 October 2017. Plaintiff subsequently filed a petition for declaratory judgment on 15 December 2017 seeking a judgment that the 6 November 2014 restatement of the Rosemary Anton Revocable Trust ("Restated Trust") was invalid, and that the original trust was still operative. Plaintiff alleged that decedent, Rosemary Anton, lacked the requisite capacity and intent to amend the trust, and the revision was executed under duress and undue influence by Defendants. The trial court ordered the consolidation of the caveat and declaratory judgment actions in July 2018.

¶ 3 Plaintiff thereafter filed an "Amended Complaint and Petition and Request for Declaratory Judgment" alleging that the Restated Trust was invalid and asserting against Defendants claims for constructive fraud, tortious interference with expectation of inheritance, and punitive damages. Plaintiff alleged that the Restated Trust was improperly executed and was the result of duress or undue influence by Defendants; the Revised Will and Restated Trust were procured by Defendants' use of their position of trust and confidence with Rosemary; and Defendants intentionally manipulated Rosemary to deprive him of his inheritance under the Restated Trust and Revised Will. Defendants answered and asserted counterclaims against Plaintiff for constructive fraud and breach of fiduciary duty, alleging that Plaintiff had misappropriated funds from Rosemary and made self-serving gifts from Rosemary's assets.

¶ 4 Defendants moved for partial summary judgment as to all Plaintiff's claims and Plaintiff filed a memorandum in opposition. Following a hearing, the trial court granted Defendants' motion for partial summary judgment. By written order, the trial court dismissed all of Plaintiffs' claims, leaving only Defendants' counterclaims pending. Plaintiff sought to immediately appeal the trial court's order to this Court. Because the trial court's order was interlocutory and Plaintiff failed to demonstrate a right to immediate review, this Court dismissed Plaintiff's appeal in January 2020. *See Anton v. Anton*, No. COA19-549, 2020 WL 292175, 2020 N.C. App. LEXIS 81 (N.C. Ct. App. 2020) (unpublished). This Court's judgment was filed with the trial court on 28 February 2020.

¶ 5 On 21 May 2020, Defendants dismissed their counterclaims without prejudice. Because no further claims between the parties remained pending in the trial court, the trial court's order granting partial summary judgment became a final judgment as to Plaintiff's claims. *Cf. Parmley v. Barrow*, 253 N.C. App. 741, 745, 801 S.E.2d 386, 389 (2017) ("When a trial court grants partial summary judgment in favor of a defendant, and the plaintiff thereafter voluntarily dismisses its remaining claims, the trial court's order serves as a final judgment."). Following the voluntary dismissal, Plaintiff timely appealed the order granting partial summary judgment to this Court.

II. Factual Background

¶ 6 Rosemary Anton was married to Thomas C. Anton, Sr., and had three children, William, Thomas, and Yvonne. After Thomas C. Anton, Sr., passed away, Rosemary executed a will ("1993 Will") and a revocable living trust ("1993 Trust").

¶ 7 The 1993 Will provided that Rosemary's personal belongings would be divided evenly between her three children and the remaining property would be distributed to the 1993 Trust. Under the 1993 Trust, the property was to be divided evenly between the children, except that the amount distributed to Plaintiff was to be reduced by a $63,000 debt he owed Rosemary.

¶ 8 In June 2002, Plaintiff moved to Alton, Illinois, to live with Rosemary. In February 2003, Plaintiff purchased and moved into the house next door to Rosemary's. Plaintiff helped Rosemary by doing yardwork and chores around her house, making necessary repairs to her home, and working in her garden. Rosemary was independent and managed her monthly income and finances with no help from Plaintiff. Defendants helped Rosemary manage her brokerage accounts.

¶ 9 After Rosemary stopped driving in 2009, Plaintiff drove her to medical appointments and social engagements. Rosemary's eyesight was limited. In early 2010, because of Rosemary's aging and decreased mobility, Rosemary, Plaintiff, and Defendants discussed modifying her home to make it more suitable. Rosemary desired to stay in her own home, where she had lived for approximately 40 years. Plaintiff made modifications to his home to provide greater accessibility and safety for Rosemary if she were to live there in the future.

¶ 10 In fall of 2012, Rosemary broke her hip, which required surgery. While she was in the hospital after the surgery, Rosemary executed powers of attorney on 9 October 2012 enabling Plaintiff to make medical and financial decisions on her behalf. After Rosemary signed these powers of attorney, Plaintiff and Defendants decided in a telephone conversation that Defendants would continue to manage Rosemary's brokerage accounts.

¶ 11 After the surgery, Rosemary moved into Plaintiff's modified home next to her house, and Plaintiff stayed in Rosemary's house. Plaintiff brought her meals daily. Rosemary told a longtime friend who visited her during the summer and fall of 2012 that Plaintiff did not allow Rosemary to make decisions, locked her in the house at night, and left her alone. Rosemary's friend believed that Plaintiff was psychologically hurting Rosemary and that Rosemary was "distraught that her son, William, could treat her the way he did."

¶ 12 In April 2013, Rosemary resigned as trustee of the 1993 Trust and appointed Thomas as the successor trustee. Thomas accepted the appointment in writing.

¶ 13 In summer and fall of 2013, Rosemary complained to Defendants that Plaintiff was limiting her access to clothing and other belongings, giving her no choice as to what she was eating, isolating her, restricting her movement, and locking the doors of the home from 5:00pm until the next morning. When Rosemary shared similar feelings with her friend again in September 2013, the friend contacted Yvonne to let her know. Yvonne believed that Plaintiff was abusing Rosemary. Around October 2013, Yvonne and Thomas decided that they needed to remove Rosemary from Alton.

¶ 14 At Rosemary's request, Yvonne arranged for Rosemary to meet with two Illinois attorneys. Defendants travelled to Illinois, planning to take Rosemary to Wake Forest, North Carolina, where Thomas lived. Thomas told Plaintiff that he was taking Rosemary to lunch and then to visit the grave of her late husband, which he did, but afterward he took

Rosemary to meet with the attorneys. During her meeting with the attorneys, Rosemary revoked the previously executed powers of attorney and executed new financial and healthcare powers of attorney in favor of Thomas. Neither Thomas nor Yvonne participated in this meeting. The attorneys documented that they had "discussed in detail [Rosemary's] option" of executing new powers of attorney, and that Rosemary's execution of the new powers of attorney was a "free and voluntary act." After the meeting, Thomas returned to North Carolina with Rosemary.

¶ 15 Once in North Carolina, Rosemary experienced continued hip pain. On 29 October 2013, Rosemary established a relationship with a primary care doctor in North Carolina. The doctor noted no evidence of cognitive impairment at the time. As of 7 January 2014, Rosemary's medical records reflected diagnoses including hypertension, osteoporosis, allergies, hip pain, macular degeneration, depression, anxiety, and arthritis.

¶ 16 In January 2014, Rosemary fell and hit her hip. On 27 January 2014, she underwent a hip replacement surgery. Rosemary was transferred to inpatient rehabilitation on 30 January 2014. Medical notes reflect that on 30 and 31 January 2014, Rosemary was "cooperative but confused," was "impaired by pain, balance, endurance, strength, cognitive and ROM [sic] deficits," but was "able to follow one step instructions." Medical notes from February indicated instances of confusion and decreased cognition. Rosemary was discharged home from rehabilitation on 28 February 2014. Rosemary's occupational therapist noted that, at Rosemary's discontinuation of occupational therapy in March 2014, she was alert and not confused, though forgetful.

¶ 17 In the spring and summer of 2014, Rosemary met with an attorney in North Carolina to discuss revising the 1993 Will and 1993 Trust. Thomas called the attorney at Rosemary's request. Though the meetings took place at Thomas' home, the attorney met with Rosemary outside of Thomas' presence. Rosemary explained to the attorney that she did not wish to include Plaintiff in her revised estate planning documents and that she did not feel obligated to include Plaintiff because Plaintiff had not been a dutiful son. The attorney described Rosemary as "completely clear about her financial affairs," "mentally alert, extremely sharp in her expressions and conversation," knowing "exactly what she wanted," and "prepared to discuss these matters in detail." The attorney prepared revised estate planning documents but Rosemary did not execute the documents at that time.

¶ 18 Rosemary went to Kentucky to stay with Yvonne in June 2014. Once there, Rosemary met with a Kentucky attorney to discuss executing

the revised estate planning documents that had been prepared in North Carolina. In a private meeting at the attorney's office, Rosemary provided the attorney with a "detailed history . . . regarding her relationships with each of her children." Rosemary explained "in great detail that she was not providing for [Plaintiff] in her will . . . because he had not been a dutiful son." The attorney described Rosemary as "a well-educated person" who was "extremely lucid and articulate." On 6 November 2014, Rosemary executed the Revised Will and Restated Trust, along with a new health care power of attorney.

¶ 19 In the Revised Will, Rosemary stated, "I have already provided for my son William D. Anton and intentionally make no provisions for him in this Will." Under the Revised Will, all of Rosemary's property would be left to her Restated Trust. Upon Rosemary's death, only Thomas and Yvonne or their issue were to be the beneficiaries of the Restated Trust. The Restated Trust, like the Will, stated that Rosemary "has already provided for William D. Anton and does not include him as a beneficiary hereunder."

¶ 20 Several people observed Rosemary's condition around the time she executed her revised estate planning documents in November 2014. Susan O'Daniel, a retired school employee, testified that she "visited Rosemary Anton with regularity" between 24 June 2014 and 5 January 2015 while Rosemary was living with Yvonne. Susan testified that the two engaged in a variety of activities and that

> [d]espite her age . . . [Rosemary] always seemed to be mentally alert and clearly aware of all aspects of her life. I never observed or experienced any issues of memory problems, confusion, or lack of concentration . . . . Despite experiencing anticipated health issues she was feisty and forever optimistic, thinking she could do anything she wished. She was physically limited and chronologically aged but incredibly witty and mentally sharp. . . . Rosemary Anton was articulate, well-spoken, and a delightful, well-informed woman. She was a proud woman, with good reason, and very conversive."

¶ 21 Mari Wertz attended the same church as Yvonne and testified that, from September to November 2014, she interacted with Rosemary on approximately 15 occasions. Rosemary discussed a variety of topics with Wertz. Wertz described Rosemary as "a very strong-willed and independent lady" and testified that "she always seemed to be mentally alert

and extremely sharp" without "issues of memory problems, confusion or lack of concentration . . . ."

¶ 22 Anne Villanova also attended the same church as Yvonne and testified that she interacted with Rosemary on numerous occasions at mass and other church functions beginning in September 2014. Villanova likewise described Rosemary as "articulate, well-spoken," and "mentally alert and extremely sharp."

¶ 23 After executing the Revised Will and Restated Trust, Rosemary alternated between staying with Yvonne in Kentucky and Thomas in North Carolina. During this period, Rosemary experienced ongoing health problems. On 14 January 2015, Rosemary went to her primary care doctor in North Carolina to be examined for cough, nasal and head congestion, and hematuria. At that visit, her doctor noted evidence of cognitive impairment. On 17 April 2015, Rosemary was weak and could not follow commands well. Rosemary went to the emergency room after fainting, and was treated for an infection and anemia. Rosemary returned home on 19 April 2015.

¶ 24 Rosemary died in March 2017 at 101 years old.

III. Discussion

A. Standard of Review

¶ 25 Plaintiff argues that the trial court erred by granting Defendants' motion for partial summary judgment. We review a trial court's order granting or denying summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and quotation marks omitted).

¶ 26 "Summary judgment involves a two-step process: first, the party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact . . . ." *New Hanover Cnty. Bd. of Educ. v. Stein*, 374 N.C. 102, 115, 840 S.E.2d 194, 204 (2020) (brackets, quotation marks, and citations omitted). This "may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative

defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). If the movant meets this burden, then "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial." *New Hanover Cnty. Bd. of Educ.*, 374 N.C. at 115, 840 S.E.2d at 204 (brackets, quotation marks, and citations omitted).

B. Constructive Fraud, Tortious Interference with Inheritance, and Punitive Damages

¶ 27 **[1]** Plaintiff asserts that the trial court erred by granting partial summary judgment in Defendants' favor on Plaintiff's claims for constructive fraud, tortious interference with inheritance, and punitive damages.

¶ 28 Plaintiff contends that Defendants abandoned their motion for partial summary judgment in the trial court as to these claims because they "neither presented evidence nor argued these issues." Contrary to Plaintiff's assertion, Defendants supported their motion for partial summary judgment with multiple affidavits, deposition excerpts, and other documents. The trial court was permitted to enter summary judgment based upon these materials and the other materials in the record, regardless of whether Defendants made specific legal arguments concerning these claims in memoranda or at the summary judgment hearing. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (summary judgment may be entered upon "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . ."). In its order granting Defendants' motion for partial summary judgment, the trial court stated, "having reviewed the pleadings, affidavits, memorandums of law and other matters of record . . . there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law on their Motion for Partial Summary Judgment[.]"

¶ 29 As the party appealing the entry of summary judgment, Plaintiff was obligated to brief the issue of whether the trial court erroneously granted Defendants summary judgment on the claims of constructive fraud, tortious interference with inheritance, and punitive damages before this Court. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Plaintiff has failed to cite any legal authority or advance any legal arguments as to this issue, and may not rest on the fact that the amended complaint raised the claims. *See Forbis v. Neal*, 361 N.C. 519, 526, 649 S.E.2d 382, 387 (2007) ("Although the

original complaint alleged various causes of action including fraud, undue influence, and breach of fiduciary duty, plaintiffs did not brief the undue influence and breach of fiduciary duty claims before this Court and thereby abandoned them."). Accordingly, the issue of whether the trial court erroneously granted summary judgment on Plaintiff's claims of constructive fraud, tortious interference with inheritance, and punitive damages is deemed abandoned.

C. Undue Influence

¶ 30 **[2]** Plaintiff also argues that the trial court erred by granting partial summary judgment in Defendants' favor on his claim of undue influence.

¶ 31 "There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *In re Will of McNeil*, 230 N.C. App. 241, 245, 749 S.E.2d 499, 503 (2013) (quoting *In re Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000)). Undue influence requires more than mere influence or persuasion. *In re Will of Jones*, 362 N.C. at 574, 669 S.E.2d at 577. Our Supreme Court

> has previously defined "undue influence" as something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. "It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."
>
> In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

Id. (quoting *In re Will of Turnage*, 208 N.C. 130, 131-32, 179 S.E. 332, 333 (1935)).

¶ 32 While "[t]he very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty[,]" *In re Will of Andrews*, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980) (citation omitted), the North Carolina Supreme Court has identified seven factors probative of the issue of undue influence:

> 1. Old age and physical and mental weakness.
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
> 3. That others have little or no opportunity to see him.
> 4. That the will is different from and revokes a prior will.
> 5. That it is made in favor of one with whom there are no ties of blood.
> 6. That it disinherits the natural objects of his bounty.
> 7. That the beneficiary has procured its execution.

Id. at 55, 261 S.E.2d at 200 (quoting *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915)). A caveator need not prove each of these factors to prevail. *In re Will of Jones*, 362 N.C. at 576, 669 S.E.2d at 578. But "no matter how difficult the task may be, the burden of proving undue influence is on the caveator and he must present sufficient evidence to make out a [p]rima facie case in order to take the case to the jury." *In re Will of Andrews*, 299 N.C. at 55, 261 S.E.2d at 200.

¶ 33 "When a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises and the propounder must rebut that presumption." *Seagraves v. Seagraves*, 206 N.C. App. 333, 342, 698 S.E.2d 155, 163 (2010) (quoting *In re Est. of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 799 (1999)). At the time Rosemary executed the Revised Will and Restated Trust, Thomas was both the trustee of the 1993 Trust and Rosemary's agent under Rosemary's 2013 financial and healthcare powers of attorney. Accordingly, Thomas and Rosemary had a fiduciary relationship. *See King v. Bryant*, 369 N.C. 451, 464, 795 S.E.2d 340, 349 (2017) ("A number of relationships have been held to be inherently fiduciary, including the relationships between . . . trustee and beneficiary . . . ."); *Albert v. Cowart*, 219 N.C. App. 546, 554, 727 S.E.2d 564, 570 (2012) ("The relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature . . . .").

¶ 34 We conclude, however, that Defendants' forecast of evidence in support of their motion for partial summary judgment was sufficient to both rebut the presumption of undue influence and meet their "burden of establishing that there is no triable issue of material fact" concerning the claim for undue influence. *See New Hanover Cnty. Bd. of Educ.*, 374 N.C. at 115, 840 S.E.2d at 204 (citation and quotation marks omitted). Specifically, Defendants have demonstrated that there is no genuine issue of material fact regarding whether Rosemary was "subject to influence" or that the Restated Trust amounted to "a result indicating undue influence." *See In re Will of McNeil*, 230 N.C. App. at 245, 749 S.E.2d at 503 (reciting the essential elements of an undue influence claim).

¶ 35 Defendants presented multiple affidavits indicating that, at the time Rosemary prepared and executed the Revised Will and Restated Trust, she had opportunities to see and associate with others beyond Defendants. *See In re Will of Andrews*, 299 N.C. at 55, 261 S.E.2d at 200 (whether "others have little or no opportunity to see" the testator is probative of undue influence). Defendants' forecast of evidence shows that Rosemary interacted with others regularly, attended church, and participated in church events. *See In re Will of Jones*, 362 N.C. at 579-80, 669 S.E.2d at 579-80 (finding a triable issue of undue influence where, *inter alia*, beneficiary rarely left the cancer-stricken testator alone at home; beneficiary had an "intercom" or "baby monitor" in testator's room while he had visitors; and beneficiary hid, and ultimately removed, the telephone from testator's room).

¶ 36 Defendants also submitted multiple uncontradicted accounts demonstrating Rosemary's mental acuity at the time she executed the Revised Will and Restated Trust. *See In re Will of Andrews*, 299 N.C. at 55, 261 S.E.2d at 200 ("physical and mental weakness" are probative of undue influence). Those who interacted with Rosemary consistently described her as conversive, articulate, sharp, alert, and free of confusion and memory problems, despite her physical ailments and age. The North Carolina attorney who prepared Rosemary's revised estate planning documents described Rosemary as "completely clear about her financial affairs," "mentally alert, extremely sharp in her expressions and conversation," knowing "exactly what she wanted," and "prepared to discuss these matters in detail." Similarly, the Kentucky attorney who assisted Rosemary in executing the documents described Rosemary as "a well-educated person" who was "extremely lucid and articulate" and capable of providing a detailed history of her relationship with her children and a clear explanation of her choice to disinherit Plaintiff. These accounts of Rosemary's condition are particularly relevant as "[o]ur case

law has noted that the mental condition of a testator at the time he or she makes a will or codicil is perhaps, the strongest factor leading to the answer to the fraud and undue influence issue." *In re Will of Campbell*, 155 N.C. App. 441, 457, 573 S.E.2d 550, 562 (2002) (citation, quotation marks, and brackets omitted).

¶ 37 While Defendants facilitated the drafting and execution of the revised estate planning documents by arranging Rosemary's meetings with attorneys and transporting Rosemary, their uncontradicted testimony shows that Defendants undertook these actions at Rosemary's behest. Additionally, Defendants were not themselves present when Rosemary met with her attorneys and executed the documents. *See In re Est. of Forrest*, 66 N.C. App. 222, 229-30, 311 S.E.2d 341, 345 (concluding that the arrangement of the testator's appointments with the drafting attorney did "not rise to the level of 'procurement' of the execution of the will by the beneficiary"), *aff'd per curiam*, 311 N.C. 298, 316 S.E.2d 55 (1984).

¶ 38 Because Defendants met their initial "burden of establishing that there is no triable issue of material fact," the burden shifted to Plaintiff "to produce a forecast of evidence demonstrating that [Plaintiff] will be able to make out at least a prima facie case at trial." *See New Hanover Cnty. Bd. of Educ.*, 374 N.C. at 115, 840 S.E.2d at 204 (citations, quotation marks, and brackets omitted). This he has failed to do. The fundamental thrust of Plaintiff's affidavit and deposition testimony is that the reasons Rosemary provided for disinheriting him were not "factually accurate," leading Plaintiff "to believe that those erroneous rationales were fed to" Rosemary by Defendants. Plaintiff asserts that he was a dutiful son and had a "loving" and "fantastic" relationship with his mother.

¶ 39 "[S]uch conclusory statements of opinion are not evidence properly considered on a motion for summary judgment." *In re Est. of Whitaker*, 144 N.C. App. 295, 302, 547 S.E.2d 853, 858 (2001). Affidavits supporting and opposing summary judgment "shall be made on personal knowledge . . . ." N.C. Gen. Stat. § 1A-1, Rule 56(e). "Our courts have held affirmations based on personal awareness, information and belief, and what the affiant thinks, do not comply with the 'personal knowledge' requirement of Rule 56(e)." *Hylton v. Koontz*, 138 N.C. App. 629, 634, 532 S.E.2d 252, 256 (2000) (citations, quotation marks, and brackets omitted). Plaintiff's bare assertion of a belief that Defendants misled Rosemary is not based on any specific facts within Plaintiff's personal knowledge, and is insufficient to overcome the specific factual evidence forecast by Defendants.

¶ 40 Plaintiff also contends that summary judgment was improper in part because Rosemary was in Defendants' homes, subject to their

constant association and supervision, and had little or no opportunity to see others. In support of this contention, Plaintiff averred in his affidavit that Defendants "had made it clear to [Plaintiff] that [he] was not welcome" in their homes. But Plaintiff indicated that he was only made to feel unwelcome by "[t]he accusation that [he] would steal from [Rosemary]." Plaintiff did not aver that he ever sought to visit Rosemary in person and was never prohibited from doing so by Defendants. Moreover, Plaintiff did not contradict the evidence presented by Defendants that Rosemary freely saw other people while living with Defendants.

¶ 41 Plaintiff also argues that summary judgment was inappropriate because the Revised Will and Restated Trust were different from the 1993 Will and Trust, and because they disinherited a natural object of Rosemary's bounty. But Rosemary had an absolute right to disinherit anyone of her choosing, including her son, *see In re Will of Campbell*, 155 N.C. App. at 460, 573 S.E.2d at 563, and Defendants provided multiple affidavits explaining Rosemary's consistently-held rationale for doing so. The revised estate planning documents do not otherwise significantly differ from Rosemary's longtime estate plans—they add no new beneficiaries and maintain Defendants as beneficiaries. *See In re Will of Jones*, 362 N.C. at 580, 669 S.E.2d at 580 (finding a triable issue of undue influence where, *inter alia*, the caveator "offered considerable evidence that the [new will] differed significantly from [the testator's] longtime estate plans"). Additionally, the documents were not "made in favor of one with whom there are no ties of blood." *See In re Will of Andrews*, 299 N.C. at 55, 261 S.E.2d at 200.

¶ 42 Plaintiff further contends that evidence of Rosemary's physical and mental weakness precludes summary judgment in Defendants' favor. Plaintiff failed, however, to contradict the evidence that Defendants introduced concerning Rosemary's condition at the time she executed the revised estate planning documents. Plaintiff instead underscores medical records reflecting that Rosemary experienced confusion and cognitive deficits at times before and after Rosemary executed the documents. The records Plaintiff cites from early 2014 were made while Rosemary was rehabilitating from hip replacement surgery. Records from March 2014, when Rosemary discontinued in-home occupational therapy, do not indicate that Rosemary was confused. The medical records provided by Plaintiff do not note any further cognitive concerns until January and March 2015, when Rosemary presented with other acute physical ailments.

¶ 43 Plaintiff argues that portions of Defendants' deposition testimony show that Rosemary was subject to influence. Thomas's testimony

reflected his belief that before she left Alton, Rosemary could be coerced, was "under the duress of a very domineering person," and that Plaintiff exercised influence over Rosemary. Yvonne's testimony reflected her belief that Rosemary could be "dependent on a man being in charge" while living with her late husband, and then with Plaintiff. This testimony fails, however, to contradict the accounts submitted by Defendants that Rosemary had "progress[ed] from weak and timid at the time she arrived from Illinois in 2013" and was independent at the time she executed the revised estate planning documents.

¶ 44 In these circumstances, Plaintiff has failed to raise a genuine issue of whether Rosemary was subject to influence at the time she executed the Restated Trust, and whether it was a result indicating undue influence. *See In re Will of McNeil*, 230 N.C. App. at 245, 749 S.E.2d at 503. Accordingly, Plaintiff has failed to forecast sufficient facts from which a jury could reasonably infer that the Revised Trust was the product of an influence of "sufficient controlling effect to destroy free agency and to render the [Revised Trust], brought in question, not properly an expression of the wishes of [Rosemary], but rather the expression of the will of [Defendants]." *See In re Will of Jones*, 362 N.C. at 574, 669 S.E.2d at 577. The trial court did not err in granting Defendants' motion for partial summary judgment as to Plaintiffs' undue influence claim.

IV. Conclusion

¶ 45 Plaintiff's challenge to the trial court's grant of partial summary judgment as to his claims of constructive fraud, tortious interference with inheritance, and punitive damages is deemed abandoned. Because Plaintiff did not establish a triable issue on two essential elements of an undue influence claim—whether Rosemary was subject to influence, and whether the Revised Trust was a result indicative of undue influence—the trial court did not err in granting Defendants partial summary judgment on the undue influence claim.

AFFIRMED.

Judges DIETZ and JACKSON concur.

BARROW v. SARGENT

[278 N.C. App. 164, 2021-NCCOA-295]

CHRISTOPHER BARROW, PLAINTIFF
v.
DAVID SARGENT, DEFENDANT

No. COA20-497

Filed 6 July 2021

1. Motor Vehicles—negligence—car hitting a bicyclist—jury instructions—motorist's duty to "lawful crosswalk user"—definition of "highway"

In a negligence lawsuit arising from a car accident, where defendant drove up to a crosswalk and his car hit plaintiff as plaintiff was riding a bicycle onto the crosswalk, the trial court properly declined plaintiff's request for a jury instruction asserting that motorists must yield to "a lawful crosswalk user," where the governing statutes (N.C.G.S. §§ 20-155 and 20-173) only require motorists to yield to "pedestrians," who travel by foot. The court also properly rejected plaintiff's alternative instruction stating that a sidewalk is part of a "highway" where, although some sidewalks could plausibly qualify as part of a "highway" under N.C.G.S. § 20-4.01(13), plaintiff failed to present evidence that the particular sidewalk upon which he was riding his bicycle was part of the highway where the collision occurred.

2. Civil Procedure—rule of completeness—portions of defendant's deposition regarding car accident—negligence case

In a negligence lawsuit arising from a car accident, where defendant drove up to a crosswalk and his car hit plaintiff as plaintiff was riding a bicycle onto the crosswalk, the trial court did not abuse its discretion by requiring plaintiff to read additional portions of defendant's deposition at trial for completeness under Civil Procedure Rule 32(a)(5), which were relevant to the portions already introduced because they further explained defendant's familiarity with the neighborhood and what defendant saw and did at the time of the collision.

Appeal by Plaintiff from judgment entered 2 March 2020 by Judge Martin B. McGee in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 April 2021.

Johnson & Groninger, PLLC, by Ann Groninger and Helen S. Baddour, for Plaintiff-Appellant.

Robinson Elliot & Smith, by William C. Robinson and Dorothy M. Gooding, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff Christopher Barrow appeals from a judgment entered upon a jury's verdict finding that Plaintiff was not injured by the negligence of Defendant. Plaintiff argues that the trial court erred by declining to give either of two alternative proposed jury instructions and by requiring Plaintiff to introduce additional portions of Defendant's deposition at trial for completeness under N.C. Gen. Stat. § 1A-1, Rule 32(a)(5). The trial court did not err in declining Plaintiff's first proposed special instruction because it was not a correct statement of law, and did not err in declining his alternative proposed instruction because it was not supported by the evidence. The trial court did not abuse its discretion in requiring the reading of the portions of Defendant's deposition requested by Defendant.

I. Procedural History and Factual Background

¶ 2 This case arises from a collision between a car driven by Defendant and a bicycle ridden by Plaintiff in the crosswalk across Meta Road adjacent to the intersection of Meta Road and Jetton Road in Cornelius. The particular facts relevant to the issues on appeal are as follows: A sidewalk runs alongside Jetton Road and crosses Meta Road in a marked crosswalk (the "crosswalk"). Drivers traveling toward Jetton Road on Meta Road approaching the intersection are presented with a stop sign before the crosswalk.

¶ 3 On 22 December 2016, Plaintiff was bicycling with a friend on the sidewalk along Jetton Road. At around 4 p.m., Defendant was driving on Meta Road towards the intersection, planning to make a right turn onto Jetton Road. In his deposition, Defendant testified that as he "approached the intersection, [he] saw that there was no one, no pedestrians that [he] could see in [his] clear view" and he shifted his attention left to look for oncoming traffic. Similarly, Defendant told a responding officer that while he was pulling up to the stop sign, he looked in both directions "while he was also braking into it and didn't see anything" and "then at some point, he was looking left with the traffic." Defendant testified that he came to a complete stop at the stop sign. Plaintiff testified that it "looked like [Defendant] was coming to a stop" but could not "say if he did a rolling stop or a full stop."

¶ 4 Plaintiff approached the crosswalk on the sidewalk from Defendant's right. Plaintiff entered the crosswalk, and the front bumper

of Defendant's car collided with Plaintiff and his bicycle in the crosswalk. Plaintiff went to urgent care and was treated for injuries.

¶ 5 Plaintiff filed this negligence action against Defendant and Janet Sargent on 19 February 2019. Before trial, Plaintiff voluntarily dismissed certain claims and dismissed Janet Sargent as a party. At trial, Plaintiff read various portions of Defendant's deposition to the jury. Over Plaintiff's objection, the trial court required Plaintiff to read additional portions of the deposition to the jury for completeness under N.C. Gen. Stat. § 1A-1, Rule 32(a)(5).

¶ 6 At the charge conference, Plaintiff requested the trial court give either a special instruction explaining a "[m]otorists['] duty toward a lawful crosswalk user" or an instruction stating the definition of a highway and that "a sidewalk is a part of the highway." The trial court declined to give either instruction. Following the jury instructions given, Plaintiff renewed his request for an instruction on the definition of a highway, which the trial court again rejected.

¶ 7 After deliberations, the jury returned a verdict that Plaintiff was not injured by the negligence of Defendant. The trial court entered judgment upon the jury's verdict, and Plaintiff gave timely notice of appeal.

II. Discussion

A. Plaintiff's Proposed Jury Instructions

¶ 8 **[1]** Plaintiff argues that the trial court erred by declining to give either of his proposed jury instructions.

> To prevail on this issue, [P]laintiff must demonstrate that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.

Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002). To be supported by the evidence, a proposed instruction "must be based on evidence, which when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted." *Anderson v. Austin*, 115 N.C. App. 134, 136, 443 S.E.2d 737, 739 (1994).

¶ 9 Plaintiff first argues that the trial court erred by failing to instruct the jury according to his first proposed special instruction that "[w]hen a lawful crosswalk user is crossing a roadway within a marked crosswalk,

the operator of any vehicle must yield the right of way to the lawful crosswalk user." Plaintiff contends that, under North Carolina law, "a motorist has a duty to yield to a person in [the] crosswalk, regardless of whether the person is on foot, riding a bicycle, scooter or skate board, or is in a wheelchair, as long as the person is lawfully (ie. not prohibited from) using the crosswalk."

¶ 10 Whether Plaintiff's first proposed special instruction accurately states the law is a question of statutory interpretation reviewed de novo on appeal. *See Swauger v. Univ. of N.C. at Charlotte*, 259 N.C. App. 727, 728, 817 S.E.2d 434, 435 (2018) ("Issues of statutory interpretation are also subject to de novo review."). "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citation omitted). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Id.* (citation omitted).

¶ 11 The language of the statutory provisions governing this question is not ambiguous, and the plain meaning of those provisions does not support Plaintiff's first proposed special instruction. N.C. Gen. Stat. § 20-155 provides, in pertinent part:

> The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a *pedestrian* crossing such highway within any clearly marked crosswalk . . . except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices.

N.C. Gen. Stat. § 20-155(c) (2016) (emphasis added). N.C. Gen. Stat. § 20-173 provides, in pertinent part:

> Where traffic-control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a *pedestrian* crossing the roadway within any marked crosswalk or within any unmarked crosswalk at or near an intersection, except as otherwise provided . . . .

N.C. Gen. Stat. § 20-173(a) (2016) (emphasis added).

¶ 12 These provisions, which Plaintiff cites in support of his first proposed special instruction, are by their terms limited to "pedestrians."

The term pedestrian is not specifically defined in the relevant statutes. Absent a specific "contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) (quoting *Perkins v. Ark. Trucking Servs.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000)). The ordinary meaning of pedestrian has long been understood to be a person traveling on foot, not a person bicycling. *See Pedestrian*, Webster's Third New International Dictionary (1971) (defining a pedestrian as "a person who travels on foot," or "one walking as distinguished from one traveling by car or cycle"). Indeed, our courts have consistently employed this definition of the term pedestrian. *See, e.g.*, *Barnes v. Horney*, 247 N.C. 495, 498, 101 S.E.2d 315, 317 (1958) ("[A] pedestrian is a foot traveler . . . ."); *Lewis v. Watson*, 229 N.C. 20, 26, 47 S.E.2d 484, 488 (1948) ("[A] person walking along a public highway pushing a handcart is a pedestrian . . . ."); *Holmes v. Blue Bird Cab, Inc.*, 227 N.C. 581, 584, 43 S.E.2d 71, 73 (1947) (holding that a person pushing a bicycle on foot was a pedestrian).

¶ 13 Other related provisions distinguish between pedestrians and bicyclists, confirming that the legislature intended to employ the ordinary meaning of the term pedestrian and did not intend to include bicyclists within the definition of pedestrian in sections 20-155(c) and 20-173(a). *See* N.C. Gen. Stat. §§ 20-171.8(2) (2016) (defining an "operator" of a bicycle as "a person who travels on a bicycle"); 20-171.8(6) (defining a "public bicycle path" as certain rights-of-way "for use primarily by bicycles and pedestrians"); 20-173(c) (requiring the driver of a vehicle to yield the right-of-way to "any pedestrian, or person riding a bicycle," in certain circumstances); 20-175.6(c) (2016) (requiring a "person operating an electric personal assistive mobility device on a sidewalk, roadway, or bicycle path" to "yield the right-of-way to pedestrians and other human-powered devices"). Likewise, provisions governing pedestrians recognize that pedestrians "walk." *See* N.C. Gen. Stat. §§ 20-172(b) (2016) (Pedestrian-control signals shall indicate either "WALK" or "DON'T WALK"); 20-174(d) (2016) ("Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the extreme left of the roadway or its shoulder facing traffic which may approach from the opposite direction.").

¶ 14 Additionally, bicycles are explicitly classified as "vehicles," not "pedestrians." N.C. Gen. Stat. § 20-4.01 defines a "vehicle" as follows:

> Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that *for the purposes of this Chapter bicycles and electric assisted bicycles shall be deemed vehicles* and every rider of a bicycle or an electric assisted bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application.

N.C. Gen. Stat. § 20-4.01(49) (2016) (emphasis added).

¶ 15 Because Plaintiff's first proposed special instruction was not a correct statement of law, the trial court did not err in declining to give the instruction to the jury. *See Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274.

¶ 16 This is not to say that bicyclists are wholly unprotected in crosswalks. "The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm and a violation of that duty is negligence." *Toone v. Adams*, 262 N.C. 403, 409, 137 S.E.2d 132, 136 (1964). Additionally, the law imposes a number of specific duties on drivers. Drivers must stop at stop signs. *See* N.C. Gen. Stat. § 20-158(b)(1) (2021) ("When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto . . . ."). Drivers must also "keep a reasonable and proper lookout in the operation of [their] motor vehicle[s;]" have "a duty not only to look, but to see what is there to be seen[;]" and "must keep such an outlook in the direction of travel as a reasonably prudent person would keep under the same or similar circumstances." *Sink v. Sumrell*, 41 N.C. App. 242, 246, 254 S.E.2d 665, 668-69 (1979); *see also* N.C.P.I.—MV 201.20 (2020) (same). Additionally, a driver "upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety . . . ." N.C. Gen. Stat. § 20-154(a) (2021). In this case, the trial court instructed the jury on each of these duties.

¶ 17 Plaintiff presents several policy arguments that the specific protections our statutes afford to pedestrians using crosswalks should extend to bicyclists. "It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law."

State v. Scoggin, 236 N.C. 19, 23, 72 S.E.2d 54, 57 (1952). Accordingly, we do not address the merits of Plaintiff's policy arguments, which are more appropriately directed to our legislature.

¶ 18 Plaintiff next argues that the trial court erred by declining his alternative proposed instruction that the definition of "highway" is "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic" and that "[a] sidewalk is a part of the highway."

¶ 19 A "highway" is defined as

> [t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

N.C. Gen. Stat. § 20-4.01(13) (2016). A sidewalk is not categorically part of the highway; but a sidewalk that falls within the boundaries of the property or right-of-way lines described in section 20-4.01(13) would be a part of the highway. Our Supreme Court has held that the portion of sidewalk which drivers cross to access a parking lot open to public vehicular traffic is considered a part of the "highway" under the definition now codified in section 20-4.01(13). *See State v. Perry*, 230 N.C. 361, 363, 53 S.E.2d 288, 289 (1949).

¶ 20 In the present case, Plaintiff has failed to present "evidence, which when viewed in the light most favorable to [Plaintiff], will support a reasonable inference" that the particular sidewalk along Jetton Road upon which he was riding his bicycle was a part of the highway. *See Anderson*, 115 N.C. App. at 136, 443 S.E.2d at 739. There is no evidence in the record that the sidewalk at issue was "between property or right-of-way lines of" the property upon which Jetton Road was located. *See* N.C. Gen. Stat. § 20-4.01(13). Nor was there evidence that the sidewalk at issue was crossed by drivers to access a parking lot open to the public for vehicular traffic. *See Perry*, 230 N.C. at 363, 53 S.E.2d at 289. While the evidence shows that the crosswalk is within the "roadway" of Meta Road and is therefore a part of the "highway," *see* N.C. Gen. Stat. § 20-4.01(38) (defining "roadway" as the "portion of a highway improved, designed, or ordinarily used for vehicular travel . . . ."), Plaintiff requested that the jury be instructed more broadly that "a sidewalk is a part of the highway." Plaintiff has therefore failed to demonstrate that his alternative

proposed instruction "was supported by the evidence," *see Liborio*, 150 N.C. App. 534, 564 S.E.2d 274, and the trial court did not err by declining to give the instruction.

B. Admission of Supplemental Deposition Excerpts

¶ 21 **[2]** Plaintiff next argues that the trial court erred by requiring the reading of additional portions of Defendant's deposition at trial to supplement the portions of the deposition introduced by Plaintiff.

¶ 22 At trial, "any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition . . . ." N.C. Gen. Stat. § 1A-1, Rule 32(a) (2016). "North Carolina law provides that a trial court may require a party to read a complete statement or other relevant portions of evidence in order to provide context for the jury; however, this decision is within the trial court's discretion at trial." *Gray v. Allen*, 197 N.C. App. 349, 358, 677 S.E.2d 862, 868 (2009) (citing N.C. Gen. Stat. § 1A-1, Rule 32(a)(5)). "[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

¶ 23 Plaintiff read the following portions of Defendant's deposition at trial, and the trial court required the italicized portions to be read for completeness.

> Q. Now, as of December . . . 2016, how long had you lived in that neighborhood?
>
> A. I had lived there my whole life, so since 1994.
>
> Q. Okay. Would you say that you came in and out of the neighborhood at least once a day, sometimes more than once a day while you were living there?
>
> A. Yes. I wasn't driving until I was 16, obviously.
>
> Q. Okay.
>
> A. But yes, at least once a day. If I left the house, more than likely I was going to . . . [g]o through that intersection.

Q. Okay. How would you describe your neighborhood? Is it a family neighborhood? Do you see a lot of kids and activity in the neighborhood?

A. Yes. It's a pretty active neighborhood.

Q. Okay. All residential area?

A. Yes. Yeah. There's no, like, shopping centers or retail or anything . . . like that. Just residential and a golf club?

Q. Okay. Did you get your driver's license when you were 16?

A. I did.

Q. How old were you at the time that this happened?

. . . .

A. 22.

. . . .

Q. You said it's a pretty active neighborhood. What was your experience of seeing people on the sidewalks walking, riding bikes, jogging, what have you?

A. Generally, I remember people doing all of those things, nothing specifically.

Q. Right. Just a general memory of seeing a lot of activity?

A. Yes.

. . . .

Q. Let's turn to the December 22 collision. All right. In your own words tell me what happened?

A. As we said, I was driving my car to play golf. I left my house and . . . went up Meta Road, and approached the intersection of Meta Road and Jetton to make a right to go towards the golf course. As I approached the intersection, I saw that there was no one, no pedestrians that I could see in my clear view. I shifted my attention left to look for oncoming

traffic, and I - - I don't remember specifically how many cars, but I - - I do seem to remember waiting for traffic to go by. And then, as I saw that the traffic from the left was clear, I turned my attention to look where I was going, let off the brakes to start moving, and right as I shifted my attention to the right, I saw [Plaintiff] in front of me on the bicycle. I saw him before I made contact, but given the, the shock and reaction time of it, I did bump into him. We - - there was a period of time before I was able to, like, fully stop the car that he was kind of pinned up against the front of my car. And then, once I was able to stop, he fell away from the car. Once I - - once that happened, I got up the car, got out and checked out [Plaintiff] and how he was doing and made sure we got him out of the road.

. . . .

Q. You weren't rushing your speed or anything?

. . . .

A. No.

Q. And did you come to a complete stop at the stop sign? It sounds like you did.

A. I did, because I do distinctly remember stopping and looking because I had to definitely make sure the traffic wasn't coming left. And there was - - I don't remember exactly how many cars, but there - - I do distinctly remember having to wait for traffic coming from this part of Jetton Road.

Q. From your left as you are facing . . . Jetton Road from Meta?

A. Correct.

Q. Okay. And I know you said you don't remember how many cars, but it didn't seem like it was, you know, more than one, maybe a couple of cars or - -

A. I - - I can't remember exactly. It was - - it was at least one. . . . I don't remember how many it was.

Q. But that there was traffic.

. . . .

A. But that there was traffic.

Q. Okay. And in general, what was the traffic like that day? And were cars coming from the other direction?

A. There - - there were some cars coming from the other direction. It definitely wasn't empty streets. I would say pretty steady, normal traffic for this residential area.

. . . .

Q. As you are driving along Meta and you are approaching the stop sign at Jetton, are there any obstructions and signs in the way of you being able to see the sidewalk on either side of the road?

A. There are. So . . . as I was [] approaching that intersection on the near right corner, there is kind of an elevated - - not a hill, but . . . an elevated grounds area where they have just plants and shrubbery on it, so it's a - - can be a bit tough to see a pedestrian[] coming from that way. There is a . . . kind of a middle median just at the intersection of Meta here, kind of a little spot in the middle between the incoming people of Meta and outcoming people of Meta that you kind of have to pull out in front of a bit to be able to see cars coming from the left. . . . And just generally, it's a downhill area of the road coming from this side . . . this side over here kind of comes over a rise and then starts to go downhill pretty much everywhere, I would say. . . . Generally, around this intersection, it's downhill going this way on Jetton.

Q. . . . [T]ell me if I'm understanding it correctly. As you're approaching the stop sign on Meta and you're looking to the right, you have a little bit of a limited sight distance because Jetton Road itself is a downhill road, so you can only see for some distance to the right; is that correct?

A. Correct.

Q. And is it the same as true for the left, or was there more visibility there?

A. The left is a little bit, definitely more visibility, I would say, because also the road kind of starts to go move the right here. If you were going out towards Cornelius or Jetton, the road kind of starts moving to the right, so you actually can then maybe see a little bit more than you can normally.

Q. Okay. How far back . . . can you start seeing out onto the road? . . . As you are approaching the stop sign, you're probably already kind of looking at traffic on Jetton; is that right?

A. Once I get to the stop, to the intersection, yes.

. . . .

Q. Okay. . . .

A. Because you can't see it initially very much because of that kind of middle tree, shrubbery area.

Q. I see. Okay. So you actually have to be at the stop sign to really get - -

A. You do.

Q. - - the view that you need in order to safely pull out.

A. You do for both directions.

Q. Okay. So do you know how long in seconds or minutes . . . you were at the stop sign before you started to pull out?

A. I don't remember the exact amount of time it was. I had stopped and was looking at traffic to the left. It was - - it was multiple seconds, I would say. I don't remember exactly details beyond that, but it was, you know, certainly more than a second that I was stopped there.

Q. Okay. All right. And as you are approaching the stop sign, before you got to the stop sign, is it true that you did not see [Plaintiff] or anyone on a bicycle?

A. I did not see anyone, at least at the corner, and really, the corner is kind of the only place that I can really see as I was approaching. . . . [t]he intersection, because of that kind of raised hill, plants that are on this near corner of Meta and Jetton.

Q. Okay. If I understand what you told me earlier correctly you actually did not see him until you started to go out from the stop sign that way?

A. Yeah. I - - I would say I saw that the coast was going to be clear on the left. I started to look to the right. As I lift my foot off the brake, so my car started moving slowly, and then as I then panned right, that's when I saw [Plaintiff].

Q. Okay. Before you pulled out from the stop sign, before you took your foot off the gas and started to move forward, did you look right at any time?

A. I don't think I did. I would say it happened as I was just letting my foot off the brake to start moving. As I - - as when I started to look to the right.

Q. Okay. And how fast did you have to pull out? I mean, was there other traffic coming from the left? I mean, can you describe how fast you pulled out?

A. I definitely wasn't trying to hit a gap. It wasn't like I needed to pull out quickly. I - - from what I remember, it was totally clear from the left, so I had as much time as I wanted to, to turn right, in terms of the traffic coming from the left. And so it was, you know, letting my foot off the brake. And I would say, yeah, it was just kind of that idling speed that I was starting to move at.

Q. Okay. And what part of your car was impacted in the collision?

A. Just the front. . . . It is just basically right on the front of my car, the front bumper, the front area of my car.

[Defendant marks the front bumper of the car on the exhibit]

Q. Okay. So there are some marks - -

A. Some lower, lower front, lower front part of my car.

Q. Okay. And there - - so there's some scratches that were left on the car, and those are from that impact?

A. Yes.

. . . .

Q. Do you know how much time went by from the time you pulled out from the stop sign until the impact?

A. I don't. . . . And I don't have an exact, exact amount of time. It was - - it was a relatively short time because it was basically I took my foot off the brake as I was looking to the right, and then he was there. And that's basically when the impact happened.

¶ 24 The trial court reasoned that Defendants' requested portions were relevant to those introduced by Plaintiff because they further explained (1) Defendant's familiarity with the neighborhood, (2) what Defendant did at the time of the collision, and (3) what Defendant saw and what conditions were like at the time of the collision. We cannot say that the trial court's decision on these grounds was "so arbitrary that it could not have been the result of a reasoned decision." *See White*, 312 N.C. at 777, 324 S.E.2d at 833. Accordingly, the trial court did not abuse its discretion by requiring the reading of the portions of Defendants' deposition requested by Defendant.

III. Conclusion

¶ 25 The trial court did not err in refusing Plaintiff's first proposed special jury instruction concerning "lawful crosswalk users" because it was not a correct statement of law. The trial court did not err in refusing Plaintiff's alternative proposed instruction on the definition of the highway and of a sidewalk being a part of the highway because it was unsupported by the evidence. The trial court did not abuse its discretion in requiring Plaintiff to supplement the portions of Defendants' deposition read at trial with additional portions requested by Defendant.

AFFIRMED.

Judges DIETZ and JACKSON concur.

BRETT HENDERSON, PLAINTIFF
v.
MEGAN LYNN WITTIG, DEFENDANT

No. COA20-924

Filed 6 July 2021

Child Custody and Support—custody modification—substantial change in circumstances—baseline findings—effect of changes on child

The trial court's order modifying the custodial arrangement between two parents included sufficient findings of fact to establish a baseline of circumstances existing at the time the initial custody order was entered (since that order did not contain any findings). However, the modification order was vacated where the findings regarding changed circumstances, which mostly centered on the parties' significant disagreements over matters such as communication and scheduling, did not address how those changes affected the welfare of the child, which was not self-evident. The matter was remanded for further findings of fact.

Appeal by Defendant from an order to modify child custody entered on 30 July 2020 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals on 11 May 2021.

McIlveen Family Law Firm, by Sean F. McIlveen and Chelsea M. Chapman, for Defendant-Appellant.

Arnold & Smith, PLLC, by Ronnie D. Crisco, Jr., for Plaintiff-Appellee.

GORE, Judge.

¶ 1 Megan Lynn Wittig ("Defendant-Appellant") appeals from the trial court's order modifying child custody. For the following reasons we vacate the trial court's order and remand for further findings of fact.

I. Background

¶ 2 Defendant-Appellant and Brett Henderson ("Plaintiff-Appellee") were never married but were the natural parents of one child born on 19 December 2013. On 4 August 2015, Plaintiff-Appellee filed a verified complaint for emergency custody, temporary parenting arrangement,

permanent custody, and temporary and permanent child support against Defendant-Appellant. On 11 June 2016, the trial court entered a consent order approving the parties' parenting agreement. The parenting agreement provided the parties would share legal custody and all major decisions would be decided jointly. The parties would equally share physical custody on a two-week rotating schedule, with exchanges occurring four times in each two-week period.

¶ 3 Soon after the consent order was entered in 2016 the parties began having difficulties abiding by the provisions of the parenting agreement. On 3 April 2017, Plaintiff-Appellee filed a motion for contempt alleging Defendant-Appellant failed to consult with him on major decisions and failed to share information on health matters. On 5 October 2017, the trial court entered an order appointing Dr. Geyer as a parenting coordinator. While Dr. Geyer was appointed in October 2017, she did not meet with the parties until February 2018. In the two years the parties worked with Dr. Geyer they only had a handful of face-to-face meetings with her, due partially to Plaintiff-Appellee's then work travel obligations and partially to Defendant-Appellant's procrastination of scheduling appointments.

¶ 4 While Dr. Geyer was able to assist the parties in setting guidelines for exchanges, the parties continued to have communication issues and disagreements arose pertaining to vacation time, school related matters, and healthcare decisions. On 16 December 2019, Defendant-Appellant filed a motion to modify child custody. On 21 April 2020, the trial court entered its child custody order modifying the original 2016 parenting agreement. The April 2020 order grants the parties joint physical custody of the minor child on a week-to-week rotating basis, sets out a holiday visitation schedule, and provides that whichever party is in physical custody of the minor child has day-to-day decision-making authority, but the parties should have meaningful discussions as to all medical and educational decisions and the Plaintiff-Appellee has final decision-making ability. Defendant-Appellant filed written notice of appeal on 30 July 2020.

II. Discussion

¶ 5 "It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (cleaned up). It is not necessary to show a change had an adverse effect on a child to warrant a modification. "A showing of a

change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Pulliam v. Smith*, 348 N.C. 616, 619–20, 501 S.E.2d 898, 899–900 (1998).

¶ 6 Our Supreme Court summarized the analysis a trial court must conduct when considering a modification of an existing child custody order in *Shipman*:

> The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child the court must then examine whether change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Shipman, 357 N.C. at 474, 586 S.E.2d at 253.

¶ 7 On appellate review, this Court must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). If we find there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if the record also includes evidence that support findings to the contrary. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253–54. Additionally, this Court must determine if the trial court's factual findings support its conclusions of law. *Pulliam*, 348 N.C. at 628, 501 S.E.2d at 904. If the trial court's findings of fact show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, "then we will defer to the trial court's judgment and not disturb its decision to modify an existing agreement." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254.

¶ 8 In the case *sub judice*, the trial court made no findings of fact when adopting the parties' parenting agreement in the 2016 consent order. *See*

Buckingham v. Buckingham, 134 N.C. App. 82, 90, 516 S.E.2d 869, 875 (1999) ("When parties enter into an agreement and ask the court to approve the agreement as a consent judgment, . . . the court has no duty to make findings of fact or conclusions of law as to the child's best interest when it approved the parties' agreement.") Therefore, when ruling on the Defendant-Appellant's 2019 motion to modify child custody the trial court was required to "make appropriate findings in order to provide a base line before it could determine if there had been a substantial and material change in circumstances that would warrant a modification in child custody as [Defendant-Appellant] had requested." *Balawajder v. Balawajder*, 216 N.C. App. 301, 309, 721 S.E.2d 679, 684 (2011) (cleaned up). There is no set minimum threshold for the number, content, or specificity to guide the trial court in making these findings. *See id.* There only needs to be sufficient findings to establish a base line of events at the time the initial custody order was entered. Defendant-Appellant argues that the trial court failed to make findings of fact as to the circumstances existing at the time of the 2016 consent order, therefore, it was impossible for the court to determine whether a substantial change in circumstances had occurred.

¶ 9 In the April 2020 order modifying child custody, the trial court made findings of fact which found that since the 2016 consent order the parties needed a court-appointed parent coordinator to help resolve disagreements, the 2016 consent order's vacation system has led to several disagreements, disagreements surrounding school issues arose after the minor child started kindergarten, and the Plaintiff-Appellee has remarried and moved to a new home since the 2016 consent order was entered. Further, finding of fact 22 specifically states, "That since the entry of the 2016 Order, there have been several substantial changes in circumstances. In October 2016, the minor child was not quite three years of age and attending daycare . . . . In October 2016, both the parties were single, and the [Plaintiff-Appellee] was traveling for work frequently." We find these findings are sufficient to create a baseline of the circumstances at the time of the 2016 consent order.

¶ 10 Defendant-Appellant also argues that the trial court failed to make sufficient findings of fact to support modification of custody because the findings do not establish that the substantial change in circumstances had an effect on the welfare of the child, making modification of custody in the best interest of the child. In its findings of fact, the trial court is not required to use the specific language "affecting the welfare of the child," and direct evidence linking the substantial change in circumstances to the welfare of the child is not required when the effect on the child is

self-evident. *Karger v. Wood*, 174 N.C. App. 703, 709, 622 S.E.2d 197, 202 (2005); *Lang v. Lang*, 197 N.C. App. 746, 750–51, 678 S.E.2d 395, 398–99 (2009).

¶ 11 However, if the effect of the substantial change of circumstances on the child is not self-evident, a showing of evidence directly linking the change to the welfare of the child is necessary. *Id.* "Evidence linking these and other circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent. *Id.*

¶ 12 In *Carlton v. Carlton*, there were sufficient findings to support the conclusion of law that the minor child's welfare was affected by the substantial changes in circumstances because the trial court incorporated into its findings of fact the psychiatric assessment report prepared for the case, the trial court's finding of fact pertaining to the minor child's missed school days discussed the impact those missed days had on the child's school work and what was required for her to catch up, and the trial court's findings of fact discussed the effect moving out of state would have on the minor child. 145 N.C. App. 252, 261, 549 S.E.2d 916, 923 (2001) (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L. Ed. 2d 811 (2002).

¶ 13 In the case *sub judice*, the substantial change in circumstances centers around the extensive disagreements by the minor child's parents. This is not a case where the facts supporting a finding that a substantial change of circumstances had occurred show there was an obvious effect on the minor child. Therefore, the trial court's findings of fact must directly link the substantial change of circumstances and their effect on the minor child. The trial court's findings did not accomplish that.

¶ 14 The substantial change in circumstances in the present case include extensive disagreements between the parents regarding the minor child's schooling and healthcare, an overall lack of communication, difficulties in exchanges of the minor child, disagreements over vacation time, and changes in the parents' living arrangements. The trial court's findings focus on the parents' role in these changes. In contrast to the findings in *Carlton*, the trial court's findings do not address the effect the parents' communication difficulties had on the minor child's welfare and does not discuss the effect the disagreements pertaining to the minor child's medical treatment had on her welfare. Further, the finding of fact pertaining the minor child's missed school days makes

no mention of any impact on her schoolwork or development. Finally, while the trial court makes findings as to both parents' home-life there is no discussion of how either home-life may impact the minor child. Given the severity of the change in custody granted by the trial court, awarding Plaintiff-Appellee final decision-making authority, we cannot say the trial court made sufficient findings of fact directly linking the change of circumstances and the minor child's welfare to support a conclusion of law that modification of custody would be in the child's best interest.

III. Conclusion

¶ 15 For the foregoing reasons we find the trial court made sufficient findings of fact relating to the circumstances existing at the time of the initial custody order. However, we find the trial court's findings of fact do not support the conclusion of law that modification of the custody order is in the minor child's best interest, because the findings of fact do not directly link the change in circumstances and their effect on the minor child. As a result, we remand to the trial court for further findings pertaining to the effect of the change in circumstances to the minor child's welfare.

REMANDED.

Judges ARROWOOD and COLLINS concur.

IN THE MATTER OF B.H.

No. COA21-27

Filed 6 July 2021

Child Abuse, Dependency, and Neglect—permanency planning hearing—appointment of guardians—understanding of legal significance—sufficiency of evidence

In a permanency planning matter in which the trial court granted guardianship of a child to her aunt and aunt's partner, with whom the child had previously been placed, sufficient evidence was presented—testimony from one of the guardians and the social worker, as well as a home study report—from which the trial court could verify, as required by N.C.G.S. §§ 7B-600(c) and 7B-906.1(j), that both of the proposed guardians understood the legal significance of the guardianship.

IN RE B.H.

[278 N.C. App. 183, 2021-NCCOA-297]

Appeal by respondent from order entered 21 September 2020 by Judge Regina R. Parker in Beaufort County District Court. Heard in the Court of Appeals 8 June 2021.

Miller & Audino, LLP, by Jay Anthony Audino, for Petitioner-Appellee Beaufort County Department of Social Services.

Elon University School of Law Guardian ad Litem Appellate Advocacy Clinic, by Senior Associate Dean Alan D. Woodlief, Jr., for guardian ad litem.

Lisa Anne Wagner for Respondent-Appellant Mother.

CARPENTER, Judge.

¶ 1 Respondent-Mother appeals from a permanency planning order (the "Order") entered 21 September 2020 granting permanent guardianship of B.H. to her paternal aunt, E.H., and E.H.'s long-term partner, L.G., and ordering supervised visitation to Respondent-Mother and B.H.'s biological father. On appeal, Respondent-Mother contends the trial court failed to follow the statutory mandate prescribed in N.C. Gen. Stat. § 7B-600(c) (2019) and N.C. Gen. Stat. § 7B-906.1(j) (2019). Specifically, she argues the trial court erred in granting guardianship to E.H. and L.G. without first verifying that both guardians understood the legal significance of the appointment of guardianship, as statutorily required. After careful review, we affirm the Order because there is competent evidence in the record to support the trial court's verification.

I. Factual & Procedural Background

¶ 2 B.H. is the oldest of Respondent-Mother's four children and has a different father from her siblings.[1] The North Carolina Department of Social Services' engagement with Respondent-Mother's children dates back to 2015. On 4 February 2015, Respondent-Mother was arrested on drug-related charges in Carteret County while her two children were present in the car with her as she "conduct[ed] drug deals." Following Respondent-Mother's arrest, Carteret County Department of Social Services obtained legal custody of B.H. and her younger half-sister. E.H. and L.G. served as a relative placement for the two children from March 2015 to June 2016.

1. None of B.H.'s three half-siblings is, nor is either of the children's fathers, a subject of this appeal.

¶ 3 Nearly four years later, on 14 January 2019, the Beaufort County Department of Social Services ("DSS" or "Petitioner-DSS") received a report from the Craven County Department of Social Services alleging: (1) the children were dirty and unkept; (2) the children spoke about living in a camper with no water or power; (3) the family slept closely together in a van to keep warm; and (4) there was a warrant for Respondent-Mother's arrest for violating school attendance laws. After receiving the report, DSS provided in-home services to assist the family with enrolling the children in school and obtaining stable housing.

¶ 4 On 31 January 2019, DSS received information from the Carteret County Department of Social Services reporting that it had become involved with Respondent-Mother's family due to concerns she slept half the day, kept her two oldest girls in her bedroom, and did not properly care for her children. The family could not be located; therefore, DSS could not continue to provide its in-home services to the family.

¶ 5 On 15 October 2019, DSS received a report alleging improper care of juveniles due to Respondent-Mother's children not attending school. The report further alleged Respondent-Mother had just given birth to her fourth child, and the family had no stable housing. Concerns of past substance abuse by Respondent-Mother as well as by Z.H., the husband of Respondent-Mother and the father of B.H.'s three half-siblings, were also raised in the report. A social worker contacted Z.H. on 18 October 2019. Z.H. informed the social worker that the family was staying in a hotel and stated he would provide the hotel information later that evening; however, neither Z.H. nor Respondent-Mother provided the location of the family or otherwise made themselves or the children available to the social worker. The social worker was unable to locate the family despite making diligent efforts. Because DSS could not locate the family during the assessment period, the 15 October 2019 report was closed on 27 November 2019.

¶ 6 On 5 December 2019, an additional report was made to DSS. DSS sent this report to the Onslow County Department of Social Services as the family was suspected of living in Onslow County with a family member. The report alleged the family was living with a registered sex offender, B.H. was not enrolled in school, and B.H. was in need of a physical examination. Again, the family could not be located; however, Onslow County Department of Social Services was able to make contact with Respondent-Mother by telephone, and she acknowledged the report.

¶ 7 On 10 December 2019, DSS received a similar report, which was based on B.H.'s lack of enrollment in school, her parents' failure to

make her physical examination appointment so B.H. could enroll in school, and the family's homelessness and "couch surfing." The report also expressed concerns of the children's safety due to potential substance abuse by Respondent-Mother, Z.H., and Z.H.'s sister with whom the family was staying, as well as the possible presence of a registered sex offender in the sister's home. Due to DSS's allegations and concerns, including the possibility of the family fleeing out-of-state with the minor children, DSS sought emergency custody of the four minor children. DSS learned Respondent-Mother was scheduled for treatment services at the Agape Center on 10 December 2019, and found the family at the location on that day. DSS obtained custody of the children at the facility with the assistance of the Washington Police Department. The Washington Police Department arrested Respondent-Mother based on three active arrest warrants related to violating school attendance laws and absconding from probation, which had been imposed in part because of a previous school truancy conviction. Respondent-Mother was placed in jail for a thirty-day sentence.

¶ 8 Following the events on 10 December 2019, DSS filed the same day a juvenile petition alleging neglect and dependency of B.H. by Respondent-Mother and B.H.'s biological father. Also on 10 December 2019, the trial court issued an order for nonsecure custody, which was filed 11 December 2019. The nonsecure custody order awarded placement authority to DSS, and a hearing was scheduled for 18 December 2019 to determine the need for continued nonsecure custody.

¶ 9 Upon the filing of the petition, all four children were placed in licensed foster homes. After B.H. and her older half-sister were placed in a home together, B.H.'s biological father requested during a team meeting with the social worker that a home study be completed on his sister, E.H. Consequently, Respondent-Mother asked that B.H.'s half-sister also be placed with E.H. since the siblings had already been placed in a foster home together. E.H. and L.G. agreed to be considered as a placement for B.H. only. The Carteret County Department of Social Services completed a home study on their residence at the request of DSS on 4 February 2020, and the residence was recommended for placement of B.H. on 19 February 2020. The trial court ordered B.H. to be placed with E.H. and L.G. on 19 February 2020; B.H was placed in their home on 21 February 2020.

¶ 10 On 18 December 2019, the matter came on for hearing on the need for continued nonsecure custody before the Honorable Keith Mason. Judge Mason entered the Order on Need for Continued Nonsecure Custody the same day. The order concluded the best interests of B.H. would be served by continuing DSS's custody of the juvenile pend-

ing a further hearing and by allowing appropriate visitation. The trial court ordered the juvenile remain in the nonsecure custody of DSS pending further hearings and granted weekly supervised visitation to Respondent-Mother and B.H.'s father.

¶ 11 On 16 June 2020, the trial court held pre-adjudication, adjudication, and disposition hearings before Judge Mason on DSS's petitions alleging B.H. and her three half-siblings were neglected and dependent. Respondent-Mother was not present for the hearings. The trial court adjudicated the four children neglected and dependent. The trial court entered its disposition order the same day and found, *inter alia*, that "[t]he present risk of harm to the children if placed into [Respondent-Mother] and [Z.H.'s] home is high" based on the current report of neglect, Respondent-Mother's substance abuse issues, and the family's lack of stable housing. The trial court made the following pertinent conclusions of law:

> 1. the juveniles cannot return home to any parent immediately, but it is possible that the children could return to a parent's home in the next six (6) months;
> 2. the appropriate plan for the juveniles is reunification with a concurrent plan of adoption;
> 3. the juveniles have received adequate care and supervision in their present placements;
> 4. [DSS] has made reasonable efforts aimed at reunification and in eliminating the need to remove the juveniles from the parents' custody; and
> 5. it is in the best interest of the juveniles that [DSS] continue to be responsible for their well-being.

¶ 12 The trial court ordered in the disposition order, *inter alia*, that physical and legal custody of the children remain vested in DSS with the children remaining in their current placements or as DSS deems appropriate; that Respondent-Mother and Z.H. receive psychological evaluations and comply with all recommendations, obtain and maintain stable housing and employment, complete parenting classes, and attend individual therapy; and that the permanent plan shall be reunification with a concurrent plan of adoption.

¶ 13 Respondent-Mother received her court-ordered psychological evaluation in August 2020. The evaluator recommended that Respondent-Mother receive "individual therapy sessions to address her discomfort with stability and her avoidance of situations she needs to address." The

evaluator also noted "Respondent-Mother continues to be a risk for uprooting her family when adversity arises." The report concluded that it was "improbable that [Respondent-Mother] is capable of sole caregiving to her children" until she addressed her issues, including her unstable childhood and adulthood, in therapy.

¶ 14 On 2 September 2020, the trial court held a permanency planning hearing before the Honorable Regina Parker. Respondent-Mother testified that at the time of the hearing, she was not enrolled in any type of therapy, she had begun new employment the week prior, she had completed the first month of a one-year lease of a house, and the social worker had cited no problems with her home. The social worker testified that Respondent-Mother had not attended therapy since April 2020 although she had reached out to her therapist; thus, she had not attended individual therapy as recommended in her August 2020 court-ordered psychological evaluation. The social worker further testified that although Respondent-Mother completed parenting classes online, the social worker still recommended a face-to-face parenting course. The trial court considered concerns raised in Respondent-Mother's forensic psychological evaluation, her progress with her case plan, and the fact that B.H. had previously been placed in foster care. On the date of the hearing, Judge Parker entered the permanency planning order, which concluded, *inter alia*: (1) reunification efforts with the child's parents are futile in that such efforts are inconsistent with the child's health and welfare; (2) the child cannot return home in the next six months; (3) it is not in the child's best interests to return home immediately; and (4) the child's parental aunt E.H. and her partner L.G. are fit and proper persons to serve as B.H.'s guardians. Accordingly, the trial court granted permanent guardianship of B.H. to E.H. and L.G. and continued supervised visitation with B.H.'s father and Respondent-Mother. Respondent-Mother timely filed written notice of appeal from the Order.

II. Jurisdiction

¶ 15 This Court has jurisdiction to address Respondent-Mother's appeal from the Permanency Planning Order pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2019) and N.C. Gen. Stat. § 7A-27(b)(2) (2019).

III. Issue

¶ 16 The sole issue on appeal is whether the trial court properly verified that B.H.'s paternal aunt and her partner understood the legal significance of their appointment as guardians of B.H., as required by N.C. Gen. Stat. §§ 7B-600(c) and 7B-906.1(j).

IV. Standard of Review

¶ 17 This Court's "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). "If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citation omitted).

¶ 18 "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re P.A.*, 241 N.C. App. 53, 58, 772 S.E.2d 240, 245 (2015) (citation omitted). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (citation omitted) (emphasis added).

V. Verification of Guardianship

¶ 19 Respondent-Mother argues the trial court reversibly erred when it granted guardianship to B.H.'s paternal aunt and her partner because the court failed to satisfy the statutory requirement that the trial court verify both guardians understand the legal significance of being appointed as guardians. Specifically, she contends the testimony from L.G. and the social worker concerning the guardianship was inadequate evidence of either L.G.'s or E.G.'s understanding of the legal significance of their appointment as guardians of B.H. Furthermore, she asserts "the record contains no evidence of court or home study reports" or other evidence which would support the trial court's findings that the guardians understood the legal significance of their appointment.

¶ 20 Petitioner-DSS argues "[t]he trial court sufficiently verified the guardians' understanding of the legal significance of being appointed as [B.H.'s] guardians . . . ." Similarly, the guardian *ad litem* maintains "[t]here was ample evidence before the trial court from which it could verify that B.H.'s guardians understood the legal significance of guardianship."

¶ 21 After careful review, we hold the record contains sufficient evidence for the trial court to have properly verified that both E.H. and L.G. understood the legal significance of their appointments as B.H.'s guardians.

¶ 22 The Juvenile Code, Chapter 7B of the North Carolina General Statutes, governs the appointment of a guardian for a juvenile. "In any case . . . 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). When a court determines that the appointment of a guardian shall be the permanent plan for a juvenile, "the court shall verify that the person receiving custody or being appointed as guardian of the juvenile *understands the legal significance of the placement or appointment* and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-906.1(j) (emphasis added); N.C. Gen. Stat. § 906.2(a)(3) (2019) (providing guardianship as one of the permanent plans that a court shall adopt at a permanency planning hearing); *see also* N.C. Gen. Stat. § 7B-600(c) (mirroring the guardian verification requirements provided in N.C. Gen. Stat. § 7B-906.1(j)).

¶ 23 Here, Respondent-Mother does not dispute the court verified B.H.'s appointed guardians to ensure they "have adequate resources to care appropriately for the juvenile." *See* N.C. Gen. Stat. § 7B-906.1(j); N.C. Gen. Stat. § 7B-600(c). Therefore, our analysis of this case is limited to the issue of whether the court properly verified that the appointed guardians "understand the legal significance of the placement or appointment." *See* N.C. Gen. Stat. § 7B-906.1(j); N.C. Gen. Stat. § 7B-600(c).

¶ 24 This Court has held that the trial court is not required to "make any specific findings in order to make the verification[s]" mandated under N.C. Gen. Stat. § 7B-906.1(j) and N.C. Gen. Stat. § 7B-600(c). *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73, *disc. rev. denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). However, "the record must contain competent evidence demonstrating the guardian's awareness of [his or] her legal obligations . . . ." *In re K.B.*, 249 N.C. App. 263, 266, 803 S.E.2d 628, 630 (2016). The proposed guardians need not "demonstrate to the trial court a practical application of this understanding prior to or during the [permanency planning] hearing." *In re S.B.*, 268 N.C. App. 78, 88, 834 S.E.2d 683, 691 (2019). "It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship." *In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) (citation omitted). Furthermore, when two persons are appointed together as guardians for a juvenile, there must be sufficient evidence before the trial court that both persons understand the legal significance of the appointment. *Id.* at 349, 767 S.E.2d at 433 (vacating in part an order for guardianship where "there was no evidence that the foster mother accepted responsibility" for the juvenile and affirming the order in part because the record tended to show the foster father's desire to take guardianship of the minor child).

¶ 25 At a permanency planning hearing, any evidence may be considered, "including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, or testimony or evidence from any person that is not a party,

that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c). Our Court has concluded:

> [e]vidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship.

In re E.M., 249 N.C. App. 44, 54, 790 S.E.2d 863, 872 (2016); *see In re S.B.*, 268 N.C. App. at 88, 834 S.E.2d at 691 (holding "[t]he testimony of the social worker and a court summary were relevant and reliable evidence" to support the trial court's finding that the guardian understood the legal significance of her appointment); *In re J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73 (concluding the trial court adequately verified that a minor child's grandparents understood the legal significance of their appointment as guardians based solely on a home study report).

¶ 26 In this case, the trial court made the following pertinent findings of fact in its Order:

> 73. [E.H.] and [L.G.] are willing to serve as this child's guardians.
>
> 74. Prior to this hearing, [E.H.] and [L.G.] have discussed between themselves the idea of serving as this child's permanent guardian. And, they have discussed their desire to serve as guardians with Social Worker Vinson.
>
> . . . .
>
> 80. [E.H.] and [L.G.] are fit and proper persons to serve as this child's guardians.
>
> . . . .
>
> b. They understand the legal obligations to which they are assuming; and, they have articulated a willingness to become this juvenile's guardians.

¶ 27 Respondent-Mother does not argue that the aforementioned findings of fact do not support the conclusion of law that "[E.H. and L.G.] . . . understand the legal significance of being appointed the children's guardians . . . ." Rather, Respondent-Mother challenges finding of fact 80(b) on the grounds that it is "not supported by competent evidence in part, as there is insufficient evidence that the proposed guardians understood the legal obligation of assuming guardianship of B.H." We disagree.

¶ 28 Although E.H. was not present at the permanency planning hearing, L.G. was present and testified as follows:

> Petitioner-DSS's counsel: And have you and [E.H.] discussed taking custody or guardianship of the child?
>
> [L.G.]: We have.
>
> Petitioner-DSS's counsel: How frequently have y'all discussed that?
>
> [L.G.]: We have discussed it at length basically since she came back into our home just because none of us ever really want the situation to happen and when it happened for a second time you kind of get a pattern so we—we talked about it in case things weren't where we thought that they needed to be what we could do and that's—that's our stance.
>
> Petitioner-DSS's counsel: And have y'all also had those discussions with the social worker in the case?
>
> [L.G.]: We have.
>
> DSS-Petitioner's counsel: And what is it that you understand that you're proposing to do?
>
> [L.G.]: To take guardianship over [B.H.] and at that point we would facilitate the visits with the parents. That would not be under—I guess, right now DSS facilitates those visits and I believe that we would at that point then facilitate those visits.
>
> Petitioner-DSS's counsel: And in regards to the guardian, what does the guardian do for a child?
>
> [L.G.] Meet the child's needs. I know that that once came up but that's not what a child needs. A child needs to have a stable environment. They need an education. They need love and care constant and they

> need to be taught how to be successful human beings when they're able to leave home and that's what we want to teach is—for her never to repeat a cycle and to be in a similar position as we're all in today.

¶ 29 Respondent-Mother relies on *In re E.M.* in support of her argument that L.G.'s testimony was inadequate evidence of the proposed guardians' awareness of the guardianship's legal significance. 249 N.C. App. 44, 790 S.E.2d 863 (2016). In *In re E.M.*, we held that there was "no evidence in the record [to] support[ ] the court's finding that either of the custodians underst[ood] the legal significance of the placement." *Id.* at 54, 790 S.E.2d at 872. Although only the wife in the custodial couple testified, she did not testify "regarding her understanding of the legal relationship" nor did the court examine her to confirm she understood the legal significance of the placement. *Id.* at 55, 790 S.E.2d at 872. Moreover, the record did not include any competent evidence to support the trial court's verification. *Id.* at 55, 790 S.E.2d at 872. Accordingly, the Court vacated the order of guardianship and remanded the matter for further proceedings. *Id.* at 55, 790 S.E.2d at 872.

¶ 30 We find the case of *In re E.M.* readily distinguishable from the case *sub judice*. Here, L.G. acknowledged that B.H. was returning to their home, which demonstrates E.H.'s and her awareness of their legal responsibilities as guardians from B.H.'s previous placement of over one year with them. Furthermore, unlike *In re E.M.*, there is evidence in addition to L.G.'s testimony. The social worker's testimony and the home study report substantiated L.G.'s contention that both she and E.H. understood the legal obligations of guardianship appointment.

¶ 31 In *In re J.E.*, our Court concluded that a home study report, which referred to both "maternal grandparents," was sufficient proof of both grandparents' understanding of the legal obligations that accompany guardianship appointment. *In re J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73. The report explained the grandparents' desire to have structure and consistency in the child's life and noted that both grandparents "have a clear understanding of the enormity of the responsibility of caring for [the minor child]." *Id.* at 617, 643 S.E.2d at 73. The home study report also stated that "[the grandparents] are committed to raising [the child] and providing for his needs regardless of what may be required." *Id.* at 617, 643 S.E.2d at 73. We affirmed the trial court's order granting custody to the juvenile's grandparents. *Id.* at 619, 643 S.E.2d at 74.

¶ 32 In the instant case, the trial court "receive[d] and consider[ed]" competent evidence that both L.G. and E.H. were aware of the legal

significance of being appointed as guardians. *See In re L.M.*, 238 N.C. App. at 347, 767 S.E.2d at 432. L.G. testified that she not only understood the role of a guardian, but she and E.H. had discussed the appointment at length with one another as well as with the social worker before deciding to take guardianship. Like the home study report in *In re J.E.*, which referred to the child's grandparents collectively, L.G. used the pronoun "we" in replying to DSS's counsel's questions; thus, her responses provided evidence of her and E.H.'s collective understanding of the appointment. *See In re J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73. L.G. stated that "she and [E.H.] want to teach" [B.H.] "how to be a successful human being[ ]" through love, care, education, and a stable environment. She made clear that it was both her and E.H.'s intention to break the cycle of B.H.'s unstable living situations that had initially brought B.H. into their home in 2015. L.G.'s testimony demonstrates both she and E.H. are committed to raising B.H. and their understanding of the legal significance of being appointed as B.H.'s guardian.

¶ 33 L.G.'s testimony was corroborated by the social worker's testimony at the permanency planning hearing in which the social worker testified that she had conversations with both E.H. and L.G. regarding the role, and they understood the legal significance of guardianship:

> Petitioner-DSS's counsel: Ms. Vinson, have you had discussions with both [E.H.] and [L.G.] about assuming guardianship or custody of the child?
>
> Social Worker: Yes.
>
> Petitioner-DSS's counsel: And from your discussions with—with them, do they understand that the legal significance of that is?
>
> Social Worker: Yes.

¶ 34 At the hearing, there was no objection to the social worker's testimony; therefore, it is competent evidence. *See In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753–54 (2009). Nevertheless, Respondent-Mother argues that the social worker's "conclusory testimony is inadequate [evidence] to support the trial court's finding . . . ." This argument is without merit as our Court has held that an affirmative response of "yes" to the question of whether a guardian understands the legal significance of guardianship is sufficient to satisfy the statutory requirement. *See In re P.A.*, 241 N.C. App. 53, 60, 772 S.E.2d 240, 245–46 (2015) (concluding a guardian's affirmative one-word response to the trial court's question of whether she understood the nature and legal significance of having the

label of permanent guardian was sufficient evidence to support the trial court's finding regarding her understanding).

¶ 35 The trial court's verification is further supported by the 19 February 2020 home study report. In the home study report, the social worker stated that E.H. and L.G. have served as relative placements for B.H. in the past, and both "are aware of the time and involvement that is needed to care for [B.H.] . . . ." The home study report also noted E.H. and L.G. have "a personal commitment to each other that they hold in the same high regard as a legal marriage," and they "thoroughly discuss all issues and matters and make decisions together." Finally, the social worker stated E.H. and L.G. are willing to care for B.H. "for as long as needed."

V. Conclusion

¶ 36 The testimony of L.G., the testimony from the social worker, and the home study report each provided competent evidence from which the trial court could verify that both B.H.'s guardians understood the legal significance of the guardianship appointment. We hold the trial court properly performed its statutory duty to verify the guardians pursuant to N.C. Gen. Stat. § 7B-906.1(j) and N.C. Gen. Stat. § 7B-600(c).

AFFIRMED.

Judges DIETZ and MURPHY concur.

IN THE MATTER OF H.P., I.S., J.S.

No. COA20-876

Filed 6 July 2021

1. Child Abuse, Dependency, and Neglect—adjudication—findings of fact—mere recitation of allegations

The trial court's order adjudicating three children neglected and dependent, based in part on lack of appropriate housing and access to food, was reversed where many of the court's findings did not reflect the court's independent evaluation of the evidence, but merely incorporated allegations contained in the petitions that were filed by the department of social services (DSS) or were recitations of witness statements made to DSS that had not been corroborated. Further, the trial court contradicted itself by incorporating

allegations in some of its findings, while explicitly stating in other findings that those allegations were not supported by the evidence.

2. Child Abuse, Dependency, and Neglect—neglect—dependency —conclusions of law—sufficiency of evidence

The trial court's adjudication of three children as neglected and dependent was reversed where its findings (regarding neglect, dependency, and the reasonableness of efforts by the department of social services (DSS)), which were more properly reviewed as conclusions of law, were not supported by evidence. Although DSS opened several investigations into the family's access to housing and food, many of the allegations against the parents were not substantiated, resulting in each investigation against them being closed without services being provided, and no evidence was presented that the children were harmed.

Judge INMAN concurring in part and dissenting in part.

Appeal by Respondent-Mother from order entered 19 August 2020 by Judge Thomas Foster in Macon County District Court. Heard in the Court of Appeals 13 April 2021.

Narain Legal PLLC, by Lucky Narain, for Guardian ad Litem.

Wagner Family Law, by Lisa Anne Wagner, for Appellant-Respondent-Mother.

WOOD, Judge.

¶ 1 Respondent-Mother appeals an order adjudicating her minor children as neglected and dependent juveniles. Because the trial court's order includes contradictory findings and no record evidence resolves those factual issues, we reverse and remand.

I. Factual and Procedural Background

¶ 2 Respondent-Mother has three minor children. Howard[1] was born on June 7, 2011; Ivy was born on February 8, 2013; and Jordan was born on May 4, 2015. The Macon County Department of Social Services ("DSS") first had contact with Respondent-Mother on June 30, 2015, after receiv-

1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

ing a report alleging improper discipline, injurious environment, and domestic violence. The report noted Respondent-Mother suffered from post-partum depression. Respondent-Mother participated in mental health services, and DSS closed the case on July 10, 2015.

¶ 3 Nearly two years later, on March 27, 2017, DSS received two additional reports regarding the family. The reports alleged "improper supervision, injurious environment, substance abuse, and domestic violence." DSS recommended, but did not provide, Respondent-Mother complete mental health and substance abuse assessments. The case was closed on May 8, 2017.

¶ 4 On September 11, 2017, DSS received an additional report, alleging "injurious environment and domestic violence." According to the report, Respondent-Mother had obtained a domestic violence protective order ("DVPO") against Respondent-Father. The case was closed on October 13, 2017 as "Services Not Recommended [because] the Respondent[-]Mother had obtained a DVPO against the Respondent[-]Father."

¶ 5 Nearly a year later, on August 30, 2018, DSS accepted a report alleging Respondent-Parents continued to have contact with each other, and Respondent-Mother was abusing recreational drugs. The case was closed as there was not enough evidence to support the allegations. Another report was received on October 31, 2018, alleging domestic violence between Respondent-Parents, that Respondent-Parents suffered from substance abuse, and that Howard expressed suicidal ideations. DSS recommended, but did not provide, mental health and substance abuse assessments. However, as there was insufficient evidence to support the allegations in the report, DSS closed the case.

¶ 6 Another report was received on March 18, 2019, alleging Respondent-Mother and at least one of the juveniles were residing in a storage unit. The case was closed when the social worker determined the family was living in a motel. DSS accepted another report on May 2, 2019, alleging Jordan was found "running around naked in the road . . . and was in the parking lot . . . ." When Jordan was returned home, Respondent-Mother was unresponsive. Respondent-Mother reported "she had 'passed out from a sunburn,' " and "was determined to be dehydrated" with an elevated heart rate. It was further reported that the family was residing in a storage unit, and this allegation appeared to be supported by the social worker's investigation. However, the report also alleged the family had obtained a camper in which to reside, and they would no longer be residing in a storage unit. Because there was insufficient evidence to support the allegations in the report, the case was closed on June 11, 2019.

¶ 7 On January 22, 2020, DSS accepted another report. The report alleged "Respondent[-]Father was [] mean," and deprived Respondent-Mother of food and drinks. It was further alleged that Respondent-Father made Respondent-Mother hurt her hand, Respondent-Father "almost made [] Respondent[-]Mother kill herself," and Respondent-Mother did not feel safe near Respondent-Father. The children reported they had not had dinner the night before, and Respondent-Mother was starved.

¶ 8 On January 24, 2020, the social worker met with Howard and Ivy. The juveniles reported they did not have food at home and that Respondent-Father took their food. The juveniles informed the social worker that Respondent-Father would not allow them to eat, and that Respondent-Father "gets really mad and is really mean to the Respondent[-]Mother." They told the social worker that Respondent-Mother fed them when she had food in the home.

¶ 9 On the same day, the social worker attempted multiple home visits with the family, but Respondent-Mother would not answer the door. At approximately 8:00 p.m. on January 24, 2020, the social worker was able to complete a home visit. During the visit, Respondent-Mother informed the social worker that Respondent-Father "ate all of the food in front of her and the juveniles and would not let them have any of the food." Respondent-Mother further stated Respondent-Father had moved out of her camper and resided in another camper approximately thirty yards away from Respondent-Mother. Respondent-Mother reassured the social worker "[t]hat she always makes sure the juveniles eat and said she did not eat for four days so the juveniles could have food to eat." Respondent-Mother also stated she no longer received food stamps "because they were cancelled and she [had] to pay back money before she [could] reapply." Respondent-Mother could not get services from CareNet,[2] because she did not have a copy of the juveniles' social security cards or birth certificates. Respondent-Mother relied on Respondent-Father for transportation. Respondent-Mother requested help from the social worker in "getting the juveniles seen by a pediatrician and getting [Jordan] tested for Autism." Respondent-Mother also expressed her desire for mental health and counseling services for Howard and Ivy. The social worker later attempted a home visit with Respondent-Father and Jordan, but no one answered the door.

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2. The record does not provide a description for the services it provides. CareNet's website, however, provides that it is a food assistance program in Macon County, North Carolina. http://maconcarenet.org/.

¶ 10 In February 2020, the social worker visited the home of Respondent-Mother. When the social worker arrived, he observed Jordan running naked and barefoot in the snow from Respondent-Mother's camper to Respondent-Father's camper. The social worker discussed the importance of warm clothing with Respondent-Father before going to Respondent-Mother's camper. Respondent-Mother was asleep at the time.

¶ 11 DSS accepted another report on February 10, 2020, alleging Jordan was walking down the street alone in the rain. Respondent-Parents were outside looking for him. A social worker met with the family shortly thereafter, and the family agreed to a safety plan that required the juveniles to be supervised at all times.

¶ 12 On February 15, 2020, DSS accepted a report regarding the family, which stated the juveniles were "very hungry," and had gone to a neighbor's home. The juveniles told their neighbor they did not have any power, water, or food. Howard stated Respondent-Father had disconnected the power cord from his camper to Respondent-Mother's camper. Another report was accepted on February 17, 2020, in which Howard disclosed "he was starving," and there was no food in the home. Ivy stated they did not have food in the home, and they had gone hungry over the weekend. Ivy also disclosed that Respondent-Mother and the juveniles "will have to move to the side of the road soon because the Respondent[-]Father did not pay the rent."

¶ 13 On February 17, 2020, the social worker met with Respondent-Mother and Jordan. During the visit, Respondent-Mother disclosed that there was food in the home, but the refrigerator was broken. Respondent-Mother's camper had power and water. Respondent-Mother and the juveniles expressed fear of Respondent-Father, but Respondent-Mother had no friends or family with whom they could stay. Respondent-Mother expressed an interest in taking the juveniles to stay at the REACH Shelter[3] if there was an opening. The social worker contacted the REACH Shelter but was informed that Respondent-Mother must contact the shelter herself.

¶ 14 On February 18, 2020, two social workers met with Respondent-Parents. The REACH Shelter had availability for Respondent-Mother and the juveniles if she completed the admission process. Respondent-Father "was hostile and verbally aggressive toward the

3. The Macon County REACH Shelter is a shelter for domestic violence, sexual assault, and human trafficking victims. https://www.reachofmaconcounty.org/.

social workers," and during this interaction, in the Respondent-Father's presence, Respondent-Mother refused to go to the REACH Shelter with the juveniles.

¶ 15 DSS filed petitions alleging Howard, Ivy, and Jordan were neglected and dependent juveniles on February 19, 2020. DSS was granted nonsecure custody. Respondent-Mother was served on February 21, 2020.

¶ 16 On August 19, 2020, the adjudication and disposition hearings were held. Neither Respondent-Parent was present when the matters were called for hearing on adjudication. The trial court proceeded in their absences. One social worker testified, and Respondent-Father arrived during her testimony. The social worker provided, as "Exhibit A," the attachment to the juvenile petition. Exhibit A was a summary of DSS's history with the family, inclusive of all reports DSS received. Exhibit A consists of thirty-seven allegations, four of which state there was insufficient evidence to support other allegations in the exhibit. At the hearing, the trial court orally adjudicated the juveniles neglected and dependent and adopted the contents of Exhibit A as findings of fact in its adjudication order. The trial court's findings of fact include the allegations dismissed by DSS because there "was not evidence to support" such allegations. Several other findings of fact are verbatim recitations of the allegations contained within Exhibit A.

¶ 17 Thereafter, the court continued to disposition. Respondent-Mother arrived just prior to the close of DSS's evidence on disposition; however, she did not testify at the hearing. DSS's evidence consisted of a foster care worker's testimony, DSS's court report prepared for the dispositional hearing, and Exhibit A. Although the record on appeal contains a court report prepared by the Guardian *ad Litem*, the transcript does not reflect that this report was introduced at the disposition hearing. At the conclusion of the hearing, the trial court entered a written adjudication and disposition order, containing forty-seven findings of fact. This order was pre-prepared in advance of the hearing by DSS. The order provided the court with the opportunity to circle whether Respondent-Parents were present at the adjudication and disposition hearing. Many of the order's findings of fact are verbatim recitations of allegations from DSS's Exhibit A. Several of the factual findings are more appropriately designated conclusions of law. The trial court ordered reunification as the primary permanent plan for the juveniles with a concurrent plan of guardianship. Respondent-Mother timely appealed.[4]

4. Respondent-Father did not appeal.

II. Standard of Review

¶ 18 "In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code." *In re A.K.*, 360 N.C. 449, 454, 628 S.E.2d 753, 756 (2006). "Such cases are typically initiated when the local department of social services (DSS) receives a report indicating a child may be in need of protective services." *Id.* at 454, 628 S.E.2d at 756-57. "DSS conducts an investigation, and if the allegations in the report are substantiated, it files a petition in district court alleging abuse, dependency, or neglect." *Id.* at 454, 628 S.E.2d at 757.

¶ 19 "The first stage in such proceedings is the adjudicatory hearing." *Id.* "If DSS presents clear and convincing evidence of the allegations in the petition, the trial court will adjudicate the child as an abused, neglected, or dependent juvenile." *Id.* at 454–55, 628 S.E.2d at 757; *see also* N.C. Gen. Stat. § 7B-807 (2020). "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802 (2020).

¶ 20 We review adjudication orders 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 C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016) (citation omitted); *see also* N.C. Gen. Stat. § 7B-805 (2020). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The trial court's conclusions of law are reviewed *de novo*. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation and internal quotation marks omitted). A disposition order is reviewed to determine whether the trial court abused its discretion in deciding what action is in the juvenile's best interest. *In re C.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007).

III. Discussion

¶ 21 Respondent-Mother raises several issues on appeal. Each will be addressed in turn.

A. The Trial Court's Findings of Fact

¶ 22 **[1]** Respondent-Mother first argues the trial court erred when it incorporated the allegations in the juveniles' petitions as findings of fact in

the adjudicatory order, as the allegations are not supported by competent evidence. We agree.

¶ 23 The Juvenile Code provides that adjudication orders "shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b). Rule 52 of our rules of civil procedure mandates the trial court make findings of "facts specially and state separately its conclusions of law thereon. . . ." N.C. Gen. Stat. § 1A-1, Rule 52. "[T]he trial court's factual findings must be more than a recitation of allegations. They must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citing *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)). It is "not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. . . . this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. 44, 48-49, 772 S.E.2d 249, 253, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602; *see also In re H.J.A.*, 223 N.C. App. 413, 418, 735 S.E.2d 359, 363 (2012).

¶ 24 Here, the trial court made forty-seven findings of fact in the adjudication order. However, many of the findings of fact in the adjudication order are mere recitations of the allegations in Exhibit A that was attached to the juvenile petition, and the trial court failed to properly make findings of ultimate facts necessary to dispose of the case. Several of the trial court's findings are verbatim recitations of the allegations in the juvenile petition. Four of the trial court's findings expressly state that "there was not evidence" to support other allegations the trial court found as fact in the adjudication order. For example, finding of fact 16 states

> 16. That on October 31, 2018 the Department accepted a report regarding the family, which alleged that there was a domestic violence situation between the Respondent[-]Mother and Respondent[-] Father [] the previous week wherein Respondent[-] Father [] threw an ashtray at the Respondent[-]Mother and the juveniles, which missed them but shattered against a wall; that the Respondent[-]Mother did not

> have any way to leave Respondent[-]Father [] and needed help; that the juvenile, [Howard], stated to the Respondent[-]Mother that he just wanted to kill himself; that Respondent[-]Father [] was verbally abusive toward the juvenile, [Howard], and told the juvenile to "get the [expletive omitted] out"; that the Respondent[-]Mother was being harassed constantly by Respondent[-]Father []; and that the Respondent[-]Parents were using substances and that Respondent[-]Father [] admitted to being addicted to heroin and methamphetamines.

Finding of fact 17 states

> 17. That Former Social Worker Timan investigated the allegations and worked with the family. There *was not evidence found throughout the investigation to substantiate the reported allegations*. However, there continued to be many concerns regarding this family. The case was closed on December 11, 2018 as Services Recommended because it was recommended that the Respondent[-]Parents complete mental health and substance abuse assessments and comply with recommendations resulting from those assessments. (emphasis added).

Although not explicitly stated, three other findings of fact by the trial court recognize that there was insufficient evidence to support the allegations accepted as fact in other findings. Specifically, the trial court's finding of fact 15 states there was insufficient evidence to support finding of fact 14; finding of fact 17 states there was insufficient evidence to support finding of fact 16; finding of fact 21 states there was insufficient evidence to support finding of fact 20, although it is unclear which concerns were unsupported. Finding of fact 18 states DSS received a report that the family was residing in a storage unit; however, finding of fact 19 states DSS investigated the allegation and the family resided in a motel. The contents of Exhibit A are contradictory on its face and, therefore, not competent evidence.

¶ 25 At the adjudication and disposition hearing, the trial court heard testimony from a DSS social worker, who summarized Exhibit A's contents. The social worker testified about alleged substance abuse issues that could not be substantiated by DSS. No evidence, other than Exhibit A, was presented at the adjudication and disposition hearing. By DSS's own

evidence, several of the allegations contained within Exhibit A were dismissed by DSS as there was not enough evidence to support them.

¶ 26 The trial court's findings may not be mere recitations of the allegations of neglect or dependency. *See In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 ("[T]he trial court's . . . findings must be more than a recitation of allegations"); *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004). As no evidence to support the allegations in Exhibit A was presented at the adjudication and disposition hearing, and several of the allegations in Exhibit A could not be substantiated, we hold the trial court did not, "through [the] process[] of logical reasoning," find ultimate facts necessary to dispose of the case. *See In re J.W.*, 214 N.C. App. at 48, 772 S.E.2d at 253.

¶ 27 Additionally, several of the trial court's findings reflect statements made to DSS during its investigation. Two of the trial court's findings summarize what the children reported to social workers. Three of the findings describe statements made by Respondent-Mother to a social worker while seeking assistance. An additional finding mirrors an allegation in Exhibit A, and reflects statements made by a DSS social worker. Lastly, one of the trial court's findings reflects statements by Respondent-Parents' neighbors. Most of these findings state that DSS received or accepted reports wherein it was alleged by various people that certain things had occurred. The findings do not reflect that DSS found the statements to be true, and the trial court did not make a determination as to the veracity of the allegations or statements made. None of these individuals testified at the hearing.

¶ 28 Respondent-Mother argues these findings are "reiterations of statements made to DSS during its investigation[.]" These statements were not corroborated by any of the testimony given at the adjudication hearing. We agree with Respondent-Mother's contention that the trial court's findings may not be "mere[] recitations of statements made to DSS." The trial court must, through the process of logical reasoning, make findings with respect to "the ultimate facts necessary to dispose of the case." *See In re J.W.*, 241 N.C. App. at 48, 772 S.E.2d at 253; *In re Anderson*, 151 N.C. App. at 96-97, 564 S.E.2d at 601-02.

¶ 29 The Guardian *ad Litem* argues this Court should affirm the adjudication order as Respondent-Mother "placed the children in an environment that was injurious to their health." The Guardian *ad Litem* asserts that Respondent-Mother and the juveniles were residing in a storage unit for an unspecified period of time. DSS investigated this allegation, and found the family was not residing in a storage unit, but in a motel.

Although DSS accepted a second report that the family was residing in a storage unit, the trial court, while still reciting Exhibit A, subsequently found that "the Respondent[-]Parents obtained a camper to reside in and would no longer be residing in the storage unit." Furthermore, without evidence of the conditions of the storage unit or other access to necessities, we hold that taking temporary shelter in a storage unit is not *per se* neglect.

¶ 30 The Guardian *ad Litem* asserts Respondent-Mother's broken refrigerator "created an inability to reliably provide the children with proper nutrition." However, the trial court did not make such a finding. The trial court found, in relevant part, "Respondent-Mother reported . . . that the refrigerator was broken, and they couldn't store anything in the refrigerator," although Respondent-Mother's camper had both power and water. The gap between the trial court's finding about the refrigerator, with no mention of nutrition, and the Guardian *ad Litem*'s assertion regarding lack of nutrition exemplifies the difference between a finding that recites the evidence and a finding that resolves a material issue of ultimate fact. The Guardian *ad Litem*'s arguments are without merit.

B. The Trial Court's Conclusions of Law

¶ 31 **[2]** Next, Respondent-Mother contends that several of the trial court's findings of fact are more properly considered conclusions of law. We agree.

¶ 32 "Facts are things . . . that can be objectively ascertained. . . . Facts, in turn provide the bases for conclusions." *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 892-93 (2004) (internal citations omitted). Determinations which require an exercise of judgment are more properly designated conclusions of law. *In re J.V.*, 198 N.C. App. 108, 117, 679 S.E.2d 843, 848 (2009); *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 869-70 (1985). The trial court's findings that are more appropriately designated conclusions of law are reviewed as such. *See In re N.G.*, 186 N.C. App. 1, 12-13, 650 S.E.2d 45, 52-53 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). We review the trial court's conclusions of law to determine if they are supported by its findings of fact. *See In re C.B.*, 245 N.C. App. at 199, 783 S.E.2d at 208.

¶ 33 Here, Respondent-Mother contends the following determinations, labeled findings of fact by the trial court, are more appropriately considered conclusions of law:

> 41. That the juveniles are neglected juveniles pursuant to N.C. Gen. Stat. §7B-101(15) and dependent juveniles pursuant to N.C. Gen. Stat. §7B-101(9).

> 42. That the Macon County Department of Social Services has made reasonable efforts to prevent or eliminate the need for placement of the juveniles . . . .
>
> 43. That by their actions and inactions, the Respondent[-]Parents have forfeited their constitutionally protected status as parents and their entitlement to the legal presumption that they, as the natural biological parents, are the most fit and proper persons to have custody, care, and control of the juveniles.
>
> 44. That the juveniles continue to require more adequate care than the Respondent[-]Parents can provide.
>
> 45. That the return of the juveniles to the home of the Respondent[-]Parents is contrary to the health, safety, and welfare of the juveniles at this time.
>
> 46. That it is in the best interests of the juveniles for the Department to maintain and have the authority to consent to all medical, surgical, dental, orthodontic, psychological, psychiatric, mental health, and education needs of the juveniles, as well as the statutory authority granted by N.C. Gen. Stat. §7B-904.

Respondent-Mother contends that "[e]ach of these enumerated findings of fact is more properly considered and reviewed as a conclusion of law." As such, Respondent-Mother asks, "this Court [to] apply the *de novo* standard of review to these mischaracterized findings to determine whether they are supported by adequate findings of fact." We agree that these findings are more properly designated conclusions of law and review them as such. *See In re D.H.*, 177 N.C. App. at 703, 629 S.E.2d at 922 (the trial court's conclusions of law are reviewed *de novo*).

¶ 34 The determinations of neglect, dependence, reasonable efforts, and best interests require the application of legal principles and the exercise of judgment. *See In re Helms*, 127 N.C. App. at 510-11, 491 S.E.2d at 675-76 (citing *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). Therefore, these findings are more properly designated conclusions of law. We review the trial court's conclusions of law to determine if they are supported by the trial court's findings of fact, which must be founded upon competent evidence. *See In re C.B.*, 245 N.C. App. at 199, 783 S.E.2d at 208.

1. The trial court's conclusion that the juveniles are neglected and dependent

¶ 35 Finding of fact 41 concludes that the juveniles are neglected and dependent juveniles.

¶ 36 Section 7B-101(15) of our general statutes defines a "neglected juvenile" as "any juvenile . . . whose parent . . . does not provide proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2020). To adjudicate a juvenile neglected, "some physical, mental, or emotional impairment of that juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline," is required. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993); *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007). A "dependent juvenile" is one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). An adjudication of dependency requires the trial court to "address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re L.C.*, 253 N.C. App. 67, 80, 800 S.E.2d 82, 91-92 (2017); *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

¶ 37 Although the family had a history with DSS, many of the allegations investigated by DSS were not supported by sufficient evidence, and the cases were closed. DSS failed to present any evidence that Howard, Ivy, and Jordan suffered any physical, mental, or emotional harm. No evidence suggested, and the trial court did not find, the children were underweight or malnourished, although DSS expressed concern about their access to food. Similarly, there was no evidence or finding that Respondent-Mother could not provide water or heat in her home. Concerns of such issues do not translate into facts without clear and convincing evidence to support the concerns.

¶ 38 DSS did not present evidence, and the trial court did not make any ultimate factual findings, regarding Respondent-Mother's ability to provide for the minor children's care or supervision. Nor did the trial court find that the children lacked an appropriate alternative child care

arrangement. The trial court's conclusion that the minor children are neglected and dependent juveniles is not supported by its findings.

¶ 39 There are two substantive findings by the trial court that remain uncontested. First, Jordan was observed running between his parents' homes naked. Secondly, Jordan was walking alone prior to the parents' entry into a safety plan. These facts, by themselves, do not constitute negligence on behalf of Respondent-Parents. Further, had these acts arisen from Respondent-Parents' negligence, "not every act of negligence on the part of parents or other care givers constitutes 'neglect' under the law and results in a 'neglected juvenile.' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). These two incidents by themselves do not constitute neglect or dependency. Although Respondent-Mother has a history of involvement with DSS, the majority of the allegations remain unsubstantiated. The trial court did not find the minor children had experienced or were at risk of experiencing any physical, mental, or emotional harm. Thus, the trial court's conclusions that the minor children are neglected and dependent are not supported by its findings of fact.

2. The trial court's conclusion that DSS made reasonable efforts

¶ 40 Finding of fact 42 concludes DSS "made reasonable efforts to prevent or eliminate the need for placement of the juveniles. . . ."

¶ 41 "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).

¶ 42 A thorough review of the record and transcript shows Respondent-Mother's history with DSS, consisting of DSS accepting reports, investigating the allegations, and ultimately closing the case files due to its determination that insufficient evidence existed to substantiate the allegations. In more than one instance, DSS recommended, but did not provide, services to Respondent-Mother. DSS attempted to connect Respondent-Mother to the REACH Shelter but sought removal of the minor children when Respondent-Mother, in the presence of her alleged abuser, refused to take them to the REACH Shelter. Further, the record is devoid of DSS's effort to connect the family with alternative

food sources once their supplemental nutrition assistance program ("SNAP") benefits were suspended. The evidence presented at the adjudication and disposition hearing was insufficient to support the finding that DSS made reasonable efforts to prevent the juveniles' removal from the familial home.

IV. Conclusion

¶ 43 We reverse the adjudication order and remand for dismissal of the juvenile petition. As we reverse the adjudication order, we need not reach the merits of Respondent-Mother's appeal of the trial court's disposition order.

REVERSED AND REMANDED.

Judge MURPHY concurs.

Judge INMAN concurs in part and dissents in part in a separate opinion.

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

¶ 44 I concur with the majority's conclusion that the trial court failed to resolve the conflicts in the evidence and make the ultimate findings of fact necessary to support DSS's neglect or dependency petitions. However, because in my view the appropriate mandate is to reverse and remand the order for further proceedings, I respectfully dissent.

I. Ultimate Findings

¶ 45 The majority correctly holds that, in simply reciting the allegations of the petitions, the trial court failed to make findings of ultimate fact "reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97 564 S.E.2d 599, 602 (2002) (quotation marks and citation omitted). This mere repetition of DSS's allegations is inadequate absent other findings stating which circumstances, as found by the trial court, sufficed to demonstrate neglect or dependency. *See, e.g.*, *In re S.C.R.*, 217 N.C. App. 166, 169-70, 718 S.E.2d 709, 712 (2011) (reversing and remanding an adjudicatory petition that simply recited the allegations of the petition because "[t]he trial court made no findings . . . linking any of respondent's actions to dependency or neglect"). When the trial court errs in this manner, the appropriate disposition is to reverse the adjudication and disposition orders and remand for further findings of fact. *Id.* at 170, 718 S.E.2d at 712; *see also Anderson*, 151 N.C. App. at 100, 564 S.E.2d at 603 (reversing and remanding for further findings of ultimate fact).

II. Neglect, Dependency, and Reasonable Efforts

¶ 46 The majority goes further than remanding this matter for proper determination by the trial court as the finder of fact, and holds that no evidence introduced below could possibly support findings demonstrating (1) neglect or dependency, or (2) reasonable efforts by DSS to prevent or eliminate the need for placement of the children with DSS. I disagree with this further analysis.[1]

1. Neglect or Dependency

¶ 47 The majority holds that the record evidence could not support findings sufficient to demonstrate neglect or dependency. For example, it asserts that because "no evidence suggested . . . the children were underweight or malnourished" and no evidence substantiated DSS's concerns about food access, even if the trial court had made necessary ultimate findings of fact, it would be error to adjudicate the children neglected. However, Exhibit A attached to the petitions—received by the trial court as substantive evidence without objection—included repeated mention of food insecurity issues in statements by the juveniles, which were recounted in the adjudication order's findings of fact. Both Exhibit A and the adjudication order disclose numerous statements by Howard and Ivy that show all three children went hungry for days at a time and lacked ready access to food. While some of those statements indicate that Respondent-Mother made efforts in the face of a domineering and abusive father, they also demonstrate that the children faced continuing food insecurity issues despite those efforts.[2] Exhibit A further states

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1. It should be noted that Respondent-Mother, who was represented by counsel at all times during the adjudication hearing, at no point contested the petition filed by DSS. Counsel presented no evidence, conducted no cross-examination, made no objections, and offered no argument to the trial court in opposition to an adjudication of neglect or dependency. To the contrary, her lone response to DSS's argument was to correct an inadvertent misstatement by DSS's counsel that the petition also asserted abuse.

2. Howard stated on one occasion that "I was so hungry I was shaking. I was starving Saturday. There is no food. I tried to look for food and couldn't find any. Mom told me sorry and she was trying her best." He also reported that "Dad makes me, mom, and my brother starve." Ivy likewise stated that "every day he [The Respondent Father] lets us go hungry and we starve," and on one occasion she went 48 hours with only a single sandwich to eat. Howard and Ivy both told DSS directly:

> That [School Resource Officer] Tom Pruett had given the family some canned food yesterday because they did not have food at home. . . . Respondent Father does not get them food, and the Respondent Mother cannot get them food because she doesn't have a car. . . . Respondent Father makes them starve, and . . . they were shaking really badly because they were so hungry. . . . The juvenile, [Jordan], doesn't get to eat either and he also has to starve.

that Respondent-Mother had lost access to SNAP benefits, and that DSS had "previously provided . . . Food and Nutrition Services, but no longer does so because of a substantiated fraud investigation."

¶ 48 Hillary Shockley, the social worker who helped draft Exhibit A, also testified at trial that much of the information in the several reports to DSS came directly from the children, who raised the issue of lack of food with her personally. When asked if the children's statements were inconsistent with one another or ever changed in such a way as to "cause . . . concern with their truthfulness," she testified that the children's statements were consistent and never changed.

¶ 49 Notwithstanding the above, the majority holds that the record evidence cannot support the grounds alleged in the petition. It offers three reasons to disregard Exhibit A: (1) "the contents of Exhibit A are contradictory on its face and, therefore, not competent evidence[;]" (2) the trial court did not expressly find the statements therein credible; and (3) none of the witnesses who gave the statements testified at the hearing. None of these reasons supports the result reached by the majority.

¶ 50 The majority asserts that contradictions in Exhibit A render it incompetent as a matter of law. To the extent that Exhibit A—which largely recites the history of reports received by DSS and the results of DSS's investigations into those reports—contains contradictions, they are not for us to reconcile. Having received Exhibit A into evidence without objection from Respondent-Mother, the trial court is the sole tribunal with authority to resolve conflicts in the evidence. *See*, *e.g.*, *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189, (1980) ("The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." (citations omitted)); *Carolina Mulching Co. v. Raleigh-Wilmington Investors II, LLC*, 272 N.C. App. 240, 246, 846 S.E.2d 540, 545 (2020) ("This Court does not resolve issues of credibility or conflicting evidence." (citation and quotation marks omitted)).

¶ 51 We may not usurp the trial court's role as the finder of fact. To the extent that the adjudication order fails to include ultimate findings based

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It appears Mother tried to feed her children in the face of Respondent-Father's domination. But the statutory mandate to protect children from neglect and dependency does not require finding fault with a parent. *See*, *e.g.*, *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.").

on evaluation of the probative value and credibility of the evidence presented below, the trial court should be given the opportunity to resolve that deficiency by entering proper ultimate findings on remand. This Court ordered exactly that in *In re Gleisner*, 141 N.C. App. 475, 539 S.E.2d 362 (2000), because the trial court's adjudication order—as here—consisted of "findings [that] are simply a recitation of the evidence presented at trial, rather than ultimate findings of fact." 141 N.C. App. at 480, 539 S.E.2d at 365. We did not hold, as the majority does here, that the entire petition must be dismissed without an opportunity for the trial court to correct its error. Instead, recognizing that "it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony," *id.*, we remanded the matter "with instructions to make ultimate findings of fact based on the evidence." *Id.* at 481, 539 S.E.2d at 366.

¶ 52 Respondent-Mother's failure to object to hearsay statements by the children received into evidence waived any challenge to that evidence on appeal. *See*, *e.g.*, *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) ("Respondent also contends that the court erred in basing these findings on evidence that was not 'substantive' or was hearsay. Respondent failed to raise these objections at trial, however, and must be considered to have waived them.").

¶ 53 Our Supreme Court recently has made clear that hearsay statements to DSS shall be considered competent evidence on appellate review when no objection to their admission was lodged at trial. *See In re J.C.L.*, 374 N.C. 772, 775, 845 S.E.2d 44, 49 (2020) (holding a finding of fact based solely on a hearsay statement to DSS was supported by competent evidence because "[r]espondent did not raise any objection, either on a hearsay ground or upon any other basis, to the social worker's testimony at trial").

¶ 54 Because Exhibit A was introduced into evidence without objection and it discloses the potential existence—if so found by proper ultimate findings made by the trial court—of at least one of the grounds alleged in the petition, I cannot join the majority in requiring the petition be dismissed.[3]

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3. The evidence of food insecurity, unavailability of SNAP benefits, Respondent-Father's hoarding of what food is available in the home, and lack of DSS food services due to a substantiated fraud investigation, discussed above in the context of neglect, is also relevant to a determination of dependency. *See* N.C. Gen. Stat. § 7B-101(9) (2019) (defining "Dependent juvenile" as "[a] juvenile in need of assistance or placement because . . . the juvenile's parent . . . is unable to provide for the juvenile's care . . . and lacks an appropriate alternative child care arrangement").

2. Reasonable Efforts

¶ 55 I also dissent from the majority's determination that the trial court erred in concluding DSS failed to make "reasonable efforts to prevent or eliminate the need for placement of the juveniles" with DSS. Notably, Respondent-Mother has not challenged that determination in her briefs to this Court. She only argues that any conclusion *as to neglect or dependency* is unsupported by adequate findings and competent evidence. Our Supreme Court has cautioned us that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant[,]" *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), and "[i]t is not our role . . . to supplement and expand upon . . . arguments of a party filing a brief. . . . We address only those issues which are clearly and understandably presented to us." *Hill v. Hill*, 229 N.C. App. 511, 514-15, 748 S.E.2d 352, 356 (2013). Absent any assertion of error by Respondent-Mother on the issue of reasonable efforts by DSS, I cannot join the majority's decision to *sua sponte* review the question.

¶ 56 I also disagree with the majority's analysis on the merits regarding this issue. The majority holds DSS failed to exercise reasonable efforts to address the children's food insecurity because "the record is devoid of DSS's effort to connect the family with alternative food sources once their [SNAP] benefits were suspended." Both Exhibit A and the trial court's order disclose why, as DSS had previously "[p]rovided Medicaid and Food and Nutrition services, *but no longer does so due to a substantiated fraud investigation*." I would not hold that, in order to show reasonable efforts, DSS was required to continue to provide food services in the face of substantiated fraud, particularly when other evidence showed that the children went hungry even when there was food in the home because Respondent-Father deprived the children of whatever food was available.

¶ 57 The record evidence tends to show that Respondent-Mother may have been victimized by Respondent-Father. But consistent with the purpose of child protective statutes, her relative role with respect to deprivation of their children is not a basis to deny a petition to adjudicate them neglected or dependent. *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

III. Conclusion

¶ 58 For the foregoing reasons, I concur in the majority's holding that the trial court erred in failing to make the ultimate findings of fact in its adjudication order. However, because I disagree with the majority's remaining holdings that (1) nothing in the record could support any ground

stated in the petitions, and (2) DSS failed to make reasonable efforts to prevent or eliminate the need for placement of the children, I would remand the matter to the trial court to make any necessary ultimate findings to support whatever determination it reaches from the record evidence. I respectfully dissent as to those holdings.

JACOB SAMUEL McELHANEY AND JULIA ELIZABETH McELHANEY, AS BENEFICIARIES OF THE JANE RICHARDSON McELHANEY REVOCABLE TRUST AND THE SAMUEL CLINTON McELHANEY REVOCABLE TRUST, PLAINTIFFS

v.

ORSBON & FENNINGER, LLP, AND R. ANTHONY ORSBON, DEFENDANTS

No. COA20-561

Filed 6 July 2021

1. Appeal and Error—interlocutory orders—summary judgment—collateral estoppel—election of remedies

An interlocutory order denying defendants' motion for summary judgment on the defense of collateral estoppel was immediately appealable because it affected defendants' substantial right to avoid litigating issues that had already been determined in a final judgment. However, defendants' writ of certiorari requesting review of the interlocutory order denying their motion for summary judgment on the defense of election of remedies was denied.

2. Collateral Estoppel and Res Judicata—identical issue—actually and necessarily determined in prior determination—trusts—grantor's intent

In an action against attorney defendants for negligence, legal malpractice, and breach of contract arising from estate planning work, plaintiffs' claims were not barred by collateral estoppel where, although the issue of the grantor's intent had been raised in prior actions (a declaratory action by the trustee bank and a claim for reformation of the trust by the grantor's grandchildren), defendants failed to show with clarity and certainty that the issue of the grantor's intent was actually and necessarily determined in the prior actions.

Appeal by Defendants from order entered 3 March 2020 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2021.

Shumaker Loop & Kendrick, L.L.P., by Stephanie C. Daniel and Lucas D. Garber, for Plaintiffs-Appellees.

Brooks Pierce McClendon Humphrey & Leonard, L.L.P., by Gary S. Parsons and Kimberly M. Marston, for Defendants-Appellants.

COLLINS, Judge.

¶ 1 Anthony Orsbon and his law firm, Orsbon & Fenninger, LLP, (collectively, "Defendants") appeal from an order denying their motion for summary judgment on certain defenses and granting Plaintiffs' motion for partial summary judgment. Defendants argue that the trial court erred by denying their motion for summary judgment as to the defenses of collateral estoppel and election of remedies and granting Plaintiffs summary judgment on those defenses. Because Defendants have not shown sufficient grounds for immediate appellate review of the trial court's interlocutory order as to the election of remedies defense, we deny Defendants' petition for writ of certiorari and dismiss Defendants' arguments concerning that defense. Because Defendants cannot show that each element of collateral estoppel is satisfied, we affirm the trial court's order as to that defense.

I. Procedural History

¶ 2 The present action follows a declaratory judgment action ("Declaratory Action") brought by Wells Fargo Bank, N.A., as trustee of the Jane Richardson McElhaney Revocable Trust ("Wells Fargo as Jane's Trustee"), and a claim for reformation of that trust ("Reformation Claim") brought by Jacob and Julia McElhaney. On 7 December 2018, the Mecklenburg County Superior Court announced its ruling from the bench on a motion for summary judgment and judgment on the pleadings in those actions.

¶ 3 The same day, Jacob and Julia McElhaney (together, "Plaintiffs") brought this action against Defendants alleging negligence, legal malpractice, and breach of contract. Simultaneously, Wells Fargo as Jane's Trustee, along with Wells Fargo Bank, N.A., as trustee of the Samuel Clinton McElhaney Revocable Trust, and Wells Fargo Bank, N.A., as executor of the Jane Richardson McElhaney Estate (together, "Wells Fargo") brought an action against Defendants alleging negligence and legal malpractice arising from the same set of facts. Upon consent motions in both cases, the trial court consolidated the actions for the purposes of discovery. With leave of the trial court, Defendants filed amended answers in each action. Defendants asserted as defenses that each of the

plaintiffs lacked standing and that collateral estoppel and election of remedies barred each of the plaintiffs' claims.

¶ 4 Defendants moved for summary judgment in both actions on their defenses of collateral estoppel and election of remedies, as well as an alleged lack of damages from some or all of Defendants' alleged negligent acts. Defendants also moved for summary judgment against Wells Fargo on the defense of lack of standing. Plaintiffs moved for partial summary judgment on standing, collateral estoppel, and election of remedies.

¶ 5 In a consolidated order ("Order on Appeal"), the trial court granted the motions for partial summary judgment by Plaintiffs and Wells Fargo and denied Defendants' motions. Defendants timely appealed.

II. Factual Background

A. The Estate Planning Documents

¶ 6 In May 1996, both Samuel and Jane McElhaney established revocable trusts, Samuel's Trust and Jane's Trust, respectively. In the fall of 2010, attorney Anthony Orsbon ("Orsbon") assisted Samuel and Jane in amending these trusts and preparing other estate planning documents. On 12 October 2010, Samuel and Jane executed separate trust agreements amending and restating their trusts. As amended, both provided that the trust of the first spouse to die would be divided into a marital share and a family share, each share to be administered as a trust. During the surviving spouse's lifetime, he or she would be entitled to certain distributions from both the marital trust and the family trust.

¶ 7 Upon the surviving spouse's death, the surviving spouse's entire trust would be allocated to the family share which, along with any remains of the marital share, would be distributed to an identified set of beneficiaries ("Specific Beneficiaries"). Following amendments in 2011, Samuel's and Jane's Trusts each provided for identical bequests to identical lists of Specific Beneficiaries, comprised of relatives and private organizations.

¶ 8 Each Specific Beneficiary would receive both the bequest provided in Samuel's Trust and the bequest provided in Jane's Trust. The surviving spouse held a limited power of appointment "at any time and from time to time by and through [his or her] Last Will and Testament to reduce or decrease any or all bequest amounts bequeathed to" the Specific Beneficiaries.

¶ 9 After disbursement to the Specific Beneficiaries, any remainder would be held by the trustee "for the benefit of [Samuel and Jane's]

grandchildren who are living at the Division Date." Plaintiffs are the children of Samuel and Jane's one son, Scott McElhaney. Following Scott McElhaney's death in 2010, Plaintiffs were the sole living descendants of Samuel and Jane. After Samuel died in August 2015, Jane consulted Orsbon concerning her estate planning documents. In October 2015, Orsbon provided drafts of updated estate documents to Jane's Wells Fargo financial advisor, Linda Montgomery. In November, Montgomery had discussions with Orsbon concerning changes Jane desired to make to the draft documents.

¶ 10 On 8 December 2015, Jane executed a new Last Will and Testament ("Jane's Will") and an Amended and Restated Trust Agreement modifying her Trust. Jane's Will disposed of certain personal property and otherwise left the remainder of her estate to her Trust via a pour-over clause. Jane's Trust, as amended in 2015, stated that "[t]he Family Share shall be administered as a Family Trust" with a changed list of specific bequests. The amendment eliminated certain Specific Beneficiaries, reduced bequests to others, and added one new Specific Beneficiary. The remainder of Jane's Trust after payment to the Specific Beneficiaries was to be divided in equal shares and held in trust for Jane's grandchildren or, if applicable, the issue of her deceased grandchildren. Jane died on 21 April 2017.

B. The Declaratory Action and Reformation Claim

¶ 11 On 3 October 2017, Wells Fargo as Jane's Trustee instituted the Declaratory Action in Mecklenburg County Superior Court. Its petition for declaratory judgment included the following allegations:

> 22. Specifically, as [Jane's] Trust does not provide for the creation and disposition of a Family Share or Family Trust, the reference to the Family Trust contained in [Jane's] Trust creates a latent ambiguity as to whether by making such reference Jane intended to exercise her testamentary limited power of appointment over the Family Trust created under Samuel's Revocable Trust.
>
> 23. [Jane's] Trust does not reference the testamentary limited power of appointment granted to Jane. Even if it did, the power of appointment granted to Jane was limited to the power to "reduce or decrease" the bequest of the specific beneficiaries named in Samuel's Trust, and the provision in [Jane's] Trust adds a beneficiary, Ellen McElhaney, which is

> not authorized by the testamentary limited power of appointment granted to Jane . . . .
>
> 24. [Jane's] Will does not reference the testamentary limited power of appointment granted to Jane in the Family Trust or any attempt to exercise such power of appointment.
>
> . . . .
>
> 35. The Trustee is not aware of any evidence that would be admissible to clarify Jane's intent in using the term "Family Share" and/or "Family Trust" in [Jane's] Trust.

¶ 12 Wells Fargo as Jane's Trustee requested the trial court to:

> 1. Declare that [Jane's] Will did not exercise Jane's testamentary limited power of appointment over the Family Trust.
>
> 2. Absent the admissibility of evidence to clarify the latent ambiguity in [Jane's] Trust sufficient to find that Jane exercised her testamentary limited power of appointment over the Family Trust, declare that [Jane's] Trust does not exercise Jane's testamentary limited power of appointment over the Family Trust[.]
>
> 3. Absent the admissibility of evidence to clarify the latent ambiguity in [Jane's] Trust sufficient to find that Jane exercised her testamentary limited power of appointment over the Family Trust, declare that the Trustee shall distribute the property of the Family Trust as set forth in . . . Samuel's Revocable Trust.
>
> 4. Absent the admissibility of evidence to clarify the latent ambiguity in [Jane's] Trust sufficient to find that Jane exercised her testamentary limited power of appointment over the Family Trust, declare that the references to Family Share and Family Trust in [Jane's] Trust refer to all of the property of [Jane's] Trust and that the Trustee shall distribute the property of [Jane's] Trust pursuant to the provisions of . . . the Trust.

¶ 13 On 19 March 2018, Plaintiffs filed a response to the petition for declaratory judgment and asserted their Reformation Claim against

Wells Fargo as Jane's Trustee and the Specific Beneficiaries. Plaintiffs alleged that

> [Jane's] Trust's express references to "The Family Share" and "Family Trust" created under Samuel's Revocable Trust, the substantial identity in beneficiaries between [Jane's] Trust and Samuel's Revocable trust, and [Jane's] Trust's reduction of the specific bequests set forth in Samuel's Revocable Trust each are indicative of Jane's desire and intent to exercise the testamentary limited power of appointment granted to her under Samuel's Revocable Trust.

Plaintiffs contended that additional extrinsic evidence "further reveals that Jane intended, through execution of her Will and the Trust, to exercise the testamentary limited power of appointment granted to her under Samuel's Revocable Trust."

¶ 14 Plaintiffs sought reformation of Jane's Trust under N.C. Gen. Stat. § 36C-4-415 on the ground that it "fail[ed] to include language clearly expressing Jane's intent to exercise the testamentary limited power of appointment granted to her under Samuel's Revocable Trust." They prayed the court to eliminate the bequests to Specific Beneficiaries in Jane's Trust as contrary to Jane's intent.

¶ 15 Several of the Specific Beneficiaries moved for summary judgment and, in the alternative, judgment on the pleadings, arguing that reformation was not available as a matter of law. Plaintiffs filed a brief and multiple affidavits in opposition. On 7 December 2018, the trial court orally announced its ruling:

> I did read everything because I wanted to make sure that in addition to the arguments that I went back and reviewed everything in context of your arguments. . . . I read the depositions, read the affidavits, read the arguments and reformation and extrinsic evidence.
>
> . . . .
>
> [I]n reviewing everything that was provided to me regarding Jane's [T]rust and the issue of power of appointment and whether it was exercised. . . . I have to find that I don't see any issues of material fact in this case as relates to what her intentions were at the time of the execution.

> So as to the petition for declaratory judgment, I'm finding that Jane did not exercise her testamentary limited . . . power of appointment in either her will or her trust and that the claim for reformation will not be available based on the evidence of her intent at the time of execution. So again, as to the motion for summary judgment, I cannot find there are any genuine issues of material fact . . . .
>
> I will also grant the motion for judgment on the pleadings after reviewing the pleadings in the file in this case, and that will be my order.

¶ 16 The trial court entered a written order ("Underlying Order") on 20 December 2018 stating as follows:

> After review of the matters of record including, without limitation, the pleadings, including the Petition, the Counterclaim, the Crossclaim, the Answers, and the exhibits referenced therein, the parties' submissions to the Court and materials filed in support of and in opposition to [the Specific Beneficiary] Movants' Motions, including sworn deposition testimony, and having the benefit of legal briefs and oral argument by counsel for the parties, the Court finds and determines that there exists no genuine issue as to any material fact and that Movants are entitled to Judgment as a matter of law on all claims and causes of action asserted in this action, except the Movants' Motion for attorneys' fees and costs . . . .
>
> The trial court granted the Specific Beneficiary Movants' motion for summary judgment and, in the alternative, granted their motion for judgment on the pleadings. As to the petition for declaratory judgment, the trial court declared that Wells Fargo Bank, N.A., shall distribute the property in Samuel's Trust and Jane's Trust as written in the trust instruments. Finally, the trial court dismissed the Reformation Claim with prejudice. Plaintiffs timely appealed to this Court, but withdrew their appeal after the parties entered into a confidential settlement agreement.

C. The Negligence and Malpractice Actions

¶ 17 On 7 December 2018, shortly after the trial court orally announced its decision in the Declaratory Action and Reformation Claim, Plaintiffs and Wells Fargo filed their respective actions for negligence and legal malpractice. The trial court granted summary judgment in favor of Plaintiffs and Wells Fargo on the defenses of lack of standing, collateral estoppel, equitable estoppel, laches, and election of remedies, and against Defendants with respect to their defenses of collateral estoppel, election of remedies, standing, and the alleged lack of damages due to some or all of Defendants' alleged negligent acts. Defendants appealed.

III. Appellate Jurisdiction

¶ 18 **[1]** We first address whether Defendants' appeal is properly before this Court. The Order on Appeal is interlocutory because it does not "dispose[] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). There is generally no right to immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). The purpose of this rule is to "prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985) (citation omitted). A party may immediately appeal an interlocutory order, however, if the order "affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat § 1-277(a) (2021).

¶ 19 Defendants contend that the Order on Appeal is immediately appealable to the extent that its denial of their motion for summary judgment on the defense of collateral estoppel affects a substantial right. "The doctrine [of collateral estoppel] is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Thus, "[i]t is well established that the denial of a motion for summary judgment 'affects a substantial right when the motion . . . makes a colorable assertion that [a] claim is barred under the doctrine of collateral estoppel.' " *Gray v. Fannie Mae*, 264 N.C. App. 642, 645, 830 S.E.2d 652, 655-56 (2019) (quoting *Turner*, 363 N.C. at 558, 681 S.E.2d at 773); *see also Fox v. Johnson*, 243 N.C. App. 274, 281, 777 S.E.2d 314, 321 (2015) (holding that appellants made a colorable assertion of collateral estoppel by including the defense in their answer and as a basis for their

motion for judgment on the pleadings); *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 35, 738 S.E.2d 819, 823 (2013) (concluding that appellant made a colorable assertion of collateral estoppel because the prior and instant lawsuits both arose from the same building demolition).

¶ 20 In this case, before the trial court, Defendants moved for summary judgment based on collateral estoppel. Defendants thoroughly briefed and argued each element of collateral estoppel and referenced numerous citations to caselaw and the evidentiary record. We conclude that Defendants have made a colorable assertion of collateral estoppel and the Order on Appeal may affect their "substantial right to avoid litigating issues that have already been determined by a final judgment." *See Turner*, 363 N.C. at 558, 681 S.E.2d at 773. Accordingly, we will review the Order on Appeal's denial of the defense of collateral estoppel.

¶ 21 Defendants aptly concede that no precedent holds that the denial of summary judgment on the defense of election of remedies affects a substantial right. Indeed, "[t]he avoidance of one trial is not ordinarily a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). As such, Defendants have petitioned for a writ of certiorari requesting this Court to review the Order on Appeal as to their defense of election of remedies.

¶ 22 This Court may issue the writ of certiorari "in appropriate circumstances . . . to permit review of . . . orders of trial tribunals when . . . no right of appeal from an interlocutory order exists . . . ." N.C. R. App. P. 21(a). We assess petitions seeking review of interlocutory orders in light of our "general policy against the piecemeal review of" such orders. *See Harbor Point Homeowners' Ass'n ex rel. Bd. of Directors v. DJF Enterprises, Inc.*, 206 N.C. App. 152, 165, 697 S.E.2d 439, 448 (2010). We have emphasized that "the routine allowance of interlocutory appeals would have a tendency to delay, rather than advance, the ultimate resolution of matters in litigation." *Newcomb v. Cnty. of Carteret*, 207 N.C. App. 527, 554, 701 S.E.2d 325, 344 (2010).

¶ 23 Defendants argue that this Court should grant certiorari because (1) the issue of election of remedies "arises from substantially the same facts as the collateral estoppel issue; (2) the issue could be equally dispositive; (3) the issue is ripe; and (4) it would promote judicial economy by eliminating the need for a later appeal on this issue." These arguments are unavailing because "similar considerations would support the issuance of a writ of certiorari in virtually any case in which a trial court refuses to grant summary judgment" on one out of several affirma-

tive defenses. *See id.* at 553, 701 S.E.2d at 344. Additionally, as Plaintiffs argue, a decision by this Court on the merits of the issue would not necessarily dispose of all claims as to all parties. Accordingly, in our discretion, we deny Defendants' petition for a writ of certiorari and decline to review the merits of their arguments concerning the defense of election of remedies.

IV. Discussion

¶ 24 **[2]** Defendants argue that the trial court erred by denying their motion for summary judgment on the defense of collateral estoppel and granting Plaintiffs' motion as to that defense. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2020). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

¶ 25 "Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (alteration, citation, and quotation marks omitted). "The issues resolved in the prior action may be either factual issues or legal issues." *Doyle v. Doyle*, 176 N.C. App. 547, 549, 626 S.E.2d 845, 848 (2006). The party alleging collateral estoppel must demonstrate

> that the earlier suit resulted in a final judgment on the merits, that the *issue in question was identical to an issue actually litigated and necessary to the judgment*, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

State ex rel. Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (emphasis added) (brackets, quotation marks, and citation omitted). For issues to be considered "identical" to ones "actually litigated and necessary" to a previous judgment:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to

> the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation omitted). "The burden is on the party asserting [collateral estoppel] to show with clarity and certainty what was determined by the prior judgment." *Miller Bldg. Corp. v. NBBJ N.C., Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (internal quotation marks and citation omitted); *accord Powers v. Tatum*, 196 N.C. App. 639, 642, 676 S.E.2d 89, 92 (2009).

¶ 26 Defendants argue that the instant malpractice and negligence suits present the identical issue as the Declaratory Action and Reformation Claim: whether Jane intended to exercise her limited power of appointment. Defendants contend that this issue was actually litigated and that in the course of deciding the motions for summary judgment and judgment on the pleadings in the Declaratory Action and Reformation Claim, the trial court actually and necessarily determined that Jane did not intend to exercise her limited power of appointment. Plaintiffs respond that (1) the previous and instant actions present different issues, (2) the trial court did not actually decide the issue of Jane's intent in the previous actions, (3) any determination of Jane's intent was not necessary to the Order on Appeal, and (4) the previous and instant actions involve different facts.

¶ 27 Plaintiffs did raise the issue of Jane's intent in the Declaratory Action. Specifically, they argued that a material issue of Jane's intent precluded entry of summary judgment as to the petition for declaratory judgment. They contended that the issue was material to whether Jane had successfully exercised her power of appointment by substantially complying with the terms set out in Samuel's Trust, as required by N.C. Gen. Stat. § 31D-3-304.

¶ 28 Plaintiffs also raised the issue of Jane's intent while pursuing their Reformation Claim, which sought "to correct a mistake that occurred as the result of a scrivener's error which caused [Jane's Trust] to fail to conform the terms of trust to [Jane's] intent." Plaintiffs and the Specific Beneficiaries extensively litigated the issue of Jane's intent prior to entry of the Underlying Order. Nonetheless, Defendants cannot meet their burden of showing "with clarity and certainty" that the issue of Jane's intent was actually and necessarily determined by the Underlying Order. *See Miller Bldg. Corp.*, 129 N.C. App. at 100, 497 S.E.2d at 435.

¶ 29 When the trial court orally announced its ruling, it stated in pertinent part that

> in reviewing everything that was provided to me regarding Jane's [T]rust and the issue of power of appointment and whether it was exercised . . . . *I have to find that I don't see any issues of material fact in this case as relates to what her intentions were at the time of the execution.*
>
> So as to the petition for declaratory judgment, I'm finding that Jane did not exercise her testamentary limited . . . power of appointment in either her will or her trust and that *the claim for reformation will not be available based on the evidence of her intent at the time of execution. So again, as to the motion for summary judgment, I cannot find there are any genuine issues of material fact* . . . . (emphasis added).

The written Underlying Order stated in pertinent part that

> there exists no genuine issue as to any material fact and that [the Specific Beneficiary] Movants are entitled to judgment as a matter of law on all claims and causes of action asserted in this action, except the Movants' Motion for attorneys' fees and costs . . . .

¶ 30 The Underlying Order granted the moving Specific Beneficiaries' motion for summary judgment and, in the alternative, the motion for judgment on the pleadings.[1] While the "slightest doubt" as to a material fact entitles a party opposing summary judgment to trial, *Adventure Travel World, Ltd. v. Gen. Motors Corp.*, 107 N.C. App. 573, 577, 421 S.E.2d 173, 176 (1992) (citation omitted), a dispute as to an immaterial fact will not preclude summary judgment, *Capps v. City of Raleigh*, 35 N.C. App. 290, 293, 241 S.E.2d 527, 529 (1978). Likewise, "[j]udgment

1. We note that where "matters outside the pleadings are presented to and not excluded by the court," a motion seeking judgment on the pleadings must be treated as a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 12(c) (2018). Because the trial court explicitly stated that it considered matters outside the pleadings, it was improper to grant judgment on the pleadings in the alternative. *See Battle v. Clanton*, 27 N.C. App. 616, 618, 220 S.E.2d 97, 98 (1975) (holding that judgment on the pleadings was inappropriate where "matters outside the pleadings were presented to and considered by the court"). Even so, the Underlying Order's grant of judgment on the pleadings in the alternative illuminates the possible bases of the trial court's dismissal of the Reformation Claim.

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.' " *Shearin v. Brown*, 2021-NCCOA-4, ¶ 11 (quoting *Samost v. Duke Univ.*, 226 N.C. App. 514, 518, 742 S.E.2d 257, 260 (2013)). The petition for declaratory judgment and the counterclaim and crossclaim for reformation took inconsistent positions on the issue of Jane's intent. Prior to entry of the Underlying Order, the parties submitted plainly conflicting evidence on this issue to the trial court.[2]

¶ 31 The trial court may have determined the issue of Jane's intent by concluding that it was required to disregard some of the conflicting evidence of Jane's intent as a matter of law. But it is also possible that the trial court merely determined that the conflicting evidence of Jane's intent was immaterial as a matter of law. Specifically, the trial court could have resolved the Declaratory Action by determining that Jane had not substantially complied with the requirements on her limited power of appointment, regardless of her intent. *See* N.C. Gen. Stat. § 31D-3-304 (2015). Section 31D-3-304 provides that

> [a] power holder's substantial compliance with a formal requirement of appointment imposed by the donor . . . is sufficient if both of the following apply:
>
> (1) The power holder knows of and intends to exercise the power.
>
> (2) The power holder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

Id. The Underlying Order could be based on a determination under section 31D-3-304 that Jane's "manner of attempted exercise . . . impair[ed] a material purpose" of the restrictions in Samuel's Trust, and Defendants cannot show that Jane's intent was material to, and therefore actually and necessarily determined in, the Declaratory Action.

¶ 32 Nor can Defendants show that the issue of Jane's intent was material to the Reformation Claim, and therefore actually and necessarily determined. The trial court's oral announcement could be understood as

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2. This evidence included, *inter alia*, Orsbon's deposition testimony denying that Jane intended to exercise the limited power of appointment or directed him to draft her estate documents to do so, Linda Montgomery's deposition testimony that Jane did intend to exercise the limited power of appointment, and affidavits from various witnesses attesting that Orsbon had acknowledged Jane's intent to exercise the limited power of appointment during a "family meeting" concerning trust administration.

stating that reformation was unavailable because there was no genuine issue that Jane did not intend to exercise the power of appointment. But a closer examination of the Record and Underlying Order demonstrates that, as Plaintiffs argue, the trial court likely determined that Jane's intent was immaterial to the Reformation Claim. Plaintiffs did not cite any precedent supporting the proposition that a court may reform a trust under § 36C-4-415 based on the settlor's intent to exercise a power of appointment that by its terms could only be exercised in the power holder's will. The moving Specific Beneficiaries underscored this issue and argued that "the relief [Plaintiffs] seek far exceeds the scope of permissible reformations under North Carolina Law." On these facts, Defendants cannot show with clarity and certainty that the issue of Jane's intent was actually and necessarily determined in the Declaratory Action or Reformation Claim.[3] Accordingly, collateral estoppel does not bar Plaintiffs' claims. *See Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128-29. The trial court did not err in denying Defendants' motion for summary judgment and granting Plaintiffs' motion for partial summary judgment on the defense of collateral estoppel.

V. Conclusion

¶ 33 We deny Defendants' petition for a writ of certiorari to review the Order on Appeal as to the defense of election of remedies. Because Defendants cannot show that each element of the affirmative defense of collateral estoppel is satisfied, the trial court did not err in denying their motion for summary judgment and granting Plaintiffs' motion for partial summary judgment as to that defense.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

3. We therefore need not reach Plaintiffs' additional arguments that collateral estoppel cannot apply here.

MOBILE IMAGING PARTNERS OF NORTH CAROLINA, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION, RESPONDENT
AND
INSIGHT HEALTH CORP., RESPONDENT-INTERVENOR

No. COA20-605

Filed 6 July 2021

Hospitals and Other Medical Facilities—certificate of need—application—statutory criteria—compliance

An administrative law judge (ALJ) properly concluded that a certificate of need (CON) application to provide a mobile PET scanner complied with the statutory criteria (N.C.G.S. § 131E-183(a)) regarding the need determination in the State Medical Facilities Plan (Criterion 1), the population to be served and its projected need for PET scans (Criterion 3), and financial and operational projections (Criterion 5). There was substantial evidence of the applicant's compliance with each of the review criteria; the ALJ properly deferred to the agency's discretionary determination that "statewide," which was not defined by statute, meant anywhere in the state; a health facility's letter of support for the application, which the facility rescinded, was properly disregarded because the competing applicant trying to introduce it was not seeking to amend its own application; and there was evidence that the rescinded letter, rather than indicating a lack of support for the application, was due to the competing applicant's anti-competitive behavior.

Appeal by petitioner from final decision entered 20 February 2020 by Administrative Law Judge William T. Culpepper, III in the Office of Administrative Hearings. Heard in the Court of Appeals 9 June 2021.

Wyrick Robbins Yates & Ponton LLP, by Lee M. Whitman and J. Blakely Kiefer, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for respondent-appellee.

Fox Rothschild LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondent-intervenor.

TYSON, Judge.

¶ 1 Mobile Imaging Partners of North Carolina ("Petitioner") appeals from a Final Decision by an Administrative Law Judge ("ALJ") affirming the decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section's ("DHHS") decision to approve InSight Health Corps' ("InSight") (together, "Respondents") application for a certificate of need ("CON") for a mobile PET/CT ("PET") scanner. This machine combines a positron emission tomography scan and a computerized tomography scan.

¶ 2 Petitioner appealed DHHS' decision to the Office of Administrative Hearings. In February 2020, the ALJ affirmed and entered a Final Decision for Respondents. Petitioner appeals. We affirm.

I. Background

¶ 3 Petitioner is a joint venture between Alliance HealthCare Services Inc. ("Alliance") and University of North Carolina Rockingham Health Care, Inc. ("UNC-Rockingham"), a UNC-owned affiliate of the UNC Health Care System. Alliance operates two mobile PET scanners in North Carolina. InSight is a national provider of imaging services and offers mobile PET services in other states. Providers who desire to offer PET services within North Carolina must obtain a CON from DHHS. *See* N.C. Gen. Stat. §§ 131E-175 and -176(16)(f1)(8)(2019).

¶ 4 The 2018 State Medical Facilities Plan ("SMFP") identified a statewide need for one additional mobile PET scanner to operate within North Carolina. InSight, Petitioner, and two other organizations each submitted CON applications to be issued the certificate for the additional mobile PET scanner pursuant to the SMFP.

¶ 5 Petitioner proposed to serve nine host sites across five of the six health service areas ("HSAs") established across North Carolina. InSight proposed to initially serve two host sites located in only one of the six HSAs. The last date to submit applications to DHHS was 1 December 2018. DHHS reviewed timely submitted applications.

¶ 6 Both Petitioner's and InSight's applications included a letter of support from the Caldwell Memorial Hospital ("Caldwell") signed by President/CEO Laura Easton. After applicants timely submitting their applications, Petitioner submitted written comments to DHHS within the form of another letter signed by Easton on 28 December 2018. This subsequent letter purportedly rescinded Caldwell's previous letter

of support for InSight and advised DHHS that Caldwell was now fully supporting Petitioner's application. Without Easton's letter of support for Caldwell to host, InSight had only one remaining host site, Harris Regional Hospital, in Jackson County.

¶ 7 DHHS issued its decision approving InSight's application and disapproving the remaining applications in April 2019. DHHS found and concluded InSight, Petitioner and Novant each conformed with all applicable statutory review criteria and performance standards, but it awarded the CON to InSight based upon the comparative review.

II. Jurisdiction

¶ 8 Petitioner's appeal is proper pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-29(a) (2019).

III. Issues

¶ 9 Petitioner challenges whether InSight's application conformed with statutory criteria for the issuance of a CON. Petitioner argues InSight failed to meet Criterion 1 and did not satisfy the statewide need determination. Petitioner also argues the ALJ erred in concluding InSight's application conformed with Criterion 3 and 5 and concluding Petitioner's rights were not substantially prejudiced.

IV. Standard of Review

¶ 10 This Court reviews a decision by the ALJ, and may reverse or modify the decision if:

> [T]he substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2019).

¶ 11 Alleged errors in the ALJ's decision in categories one through four are reviewed by this Court *de novo*. N.C. Gen. Stat. §150B-51(c) (2019). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't Health & Hum. Servs.*, 237 N.C. App. 113, 117, 764 S.E.2d 491, 494 (2014) (citations and internal quotations omitted). Categories five and six of N.C. Gen. Stat. § 150B-51(b) are reviewed under the "whole record" test. N.C. Gen. Stat. § 150B-51(c). Petitioner argues the issues before this Court are errors of law and subject to *de novo* review.

V. Conforming with Criterion 1 and Statewide Need Determination

A. Criterion 1

¶ 12 DHHS' review criteria are statutory and the first is referred to as "Criterion 1" throughout the record. Criterion 1 requires:

> The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.

N.C. Gen. Stat. § 131E-183(a)(1) (2019).

¶ 13 "The Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." N.C. Gen. Stat. § 131E-183(a).

¶ 14 The 2018 SMFP included a need determination for one additional mobile PET scanner statewide. We combine the analysis of Petitioner's first two issues in this section, because the answer to one will also necessarily answer the other.

¶ 15 Criterion 1 requires an applicant to demonstrate its application is "consistent with applicable policies and need determinations in the [SMFP]." N.C. Gen. Stat. §131E-183(a)(1). "Mobile PET Scanner" is defined as "a PET scanner and transporting equipment that is moved, at least weekly, *to provide services at two or more host facilities*." 10A N.C. Admin. Code 14C.3701.(5) (2019) (emphasis supplied).

¶ 16 All CON applications, including InSight's application, must demonstrate conformity with all statutory and regulatory review criteria. *See Presbyterian-Orthopaedic Hosp. v. N.C. Dep't Hum. Res.*, 122 N.C. App. 529, 534, 470 S.E.2d 831,834 (1996) (holding "an application must comply with *all* review criteria" and the failure to comply with one review criterion supports entry of summary judgment against the applicant) (emphasis in original).

¶ 17 "It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, 240 N.C. App. 92, 102, 771 S.E.2d 537, 543 (2015) (citation omitted). "It is proper to presume that an administrative agency has properly performed its official duties." *In re Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980).

¶ 18 "[The ALJ] is properly limited to consideration of evidence which was before the CON Section when making its initial decision." *Robinson v. N.C. Dep't of Health & Human Servs.*, 215 N.C. App. 372, 376, 715 S.E.2d 569, 571 (2011).

¶ 19 InSight pointed to Petitioner's effective monopoly on mobile PET services outside of Novant's services and facilities. InSight also described Petitioner's history of opposing opportunities to allow additional providers to introduce services to North Carolina's health care market. InSight predicted new providers would find it difficult to obtain public support for their applications, based upon feedback it had received from potential host sites, who were wary of taking action to put their current service with Petitioner at risk.

¶ 20 InSight proposed a statewide mobile PET route with the scanner moving weekly between six potential host sites in eastern, central, and western North Carolina. At least three potential host sites told InSight they would not provide documentation to support its CON application due to their concerns about Petitioner's reaction.

¶ 21 Petitioner undertook efforts to encourage InSight's two host sites to rescind their support for InSight's CON application. Petitioner prepared draft rescission letters for both of InSight's host sites: Caldwell and Harris Regional. Caldwell's president signed the letter. Harris' did not.

¶ 22 Respondents set forth ample evidence before the DHHS and the ALJ showing any recission of support was the result of Petitioner's anti-competitive behavior to ensure it was awarded the CON.

¶ 23 Additional evidence led both DHHS and the ALJ to conclude that InSight's application met the two-host-site requirements notwithstanding Caldwell's recission letter. DHHS evaluated the recission letter, wrote two pages in its findings addressing the recission drafted by the Petitioner and explained why it did not affect InSight's conformity with Criterion 1. DHHS recognized Caldwell's recission letter did not indicate that Caldwell was no longer interested in a contract with InSight to the extent InSight was awarded the CON. The letter merely expressed a preference that Petitioner be awarded the CON. The ALJ was limited to the record evidence before the agency's hearing. *Robinson*, 215 N.C. App. at 375-76, 715 S.E.2d at 571 (citation omitted). Caldwell's president testified that if InSight had contacted her, she would have confirmed she would still consider contracting with InSight if it received the CON.

¶ 24 It cannot be said the ALJ's review and interpretation of DHHS' findings and conclusion that InSight met Criterion 1 is either unsupported or unreasonable. Substantial evidence supports the conclusion that InSight's application complied with the host site requirement. Petitioner's argument is overruled.

B. Statewide

¶ 25 Petitioner contends the term "statewide" in the SMFP means "throughout the State," while Respondents argue the term "statewide" means "anywhere in the State."

1. Standard of Review

¶ 26 Petitioner asserts the determination of whether an agency erred in its interpretation of a *statutory* term is entitled to *de novo* review. *Cashwell v. Dep't State Treasurer*, 196 N.C. App. 81, 89, 675 S.E.2d 73, 78 (2009); N.C. Gen. Stat. § 150B-51(b)(3). "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995) (citation omitted). The SMFP created by DHHS uses the word "statewide" in the need determination, but the word "statewide" is not included in the statute, Respondent's administrative rules, or statutorily defined. N.C. Gen. Stat. § 150B-2(8a)(k) (2019).

2. Interpretation

¶ 27 Petitioner argues the ALJ failed to conduct any analysis of the evidence demonstrating Respondent's interpretation of "statewide" was contrary to: (1) the plain language of the need determination; (2) the

rationale for the North Carolina State Health Coordinating Council's inclusion of the need determination in the SMFP; (3) the CON statute; and (4) the policies in the CON Act.

¶ 28 The 2018 SMFP expressly concludes there is a "need for one additional mobile dedicated PET scanner statewide" and "the service areas listed in the table below need additional mobile dedicated PET scanners."

¶ 29 DHHS prepared the need determination pursuant to its discretionary authority granted by the General Assembly as part of the CON Act. *See* N.C. Gen. Stat. § 131E-177(4) (2019). Petitioner's argument, asserting the ALJ and DHHS misinterpreted its own meaning of "statewide," would require us to conclude DHHS abused its own discretion by determining InSight's application met DHHS' own meaning of "statewide." We conclude the ALJ properly upheld and concluded DHHS' interpretation of the term "statewide" was supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b).

C. Letter as Amendment

¶ 30 DHHS asserts Caldwell's purported rescission letter was properly disregarded because it was an improper attempt by Petitioner to amend InSight's submitted application. "An applicant may not amend an application." 10A N.C. Admin. Code 14C.0204 (2019). Caldwell was not an applicant in this CON review. Rule .0204 does not apply as a matter of law because, here, a CON applicant was not seeking to amend its own application. *See In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 790–91 (1987) ("The rules adopted by the Department of Human Resources to govern contested certificates of need hearings prevent a party from amending his application once it is deemed completed"). It stands to reason that if pursuant to Rule .0204 an applicant cannot "amend an application," then another applicant cannot amend a competitor's application. 10A N.C. Admin. Code 14C.0204; *see In re Application of Wake Kidney Clinic*, 85 N.C. at 643, 355 S.E.2d at 791. Petitioner's argument is without merit.

VI. Criterion 3 and 5

A. Criterion 3

¶ 31 Petitioner argues InSight's utilization and revenue projections were not reasonable nor adequately supported. "[F]indings of fact made by the agency are conclusive on appeal if they are supported by substantial evidence in the record reviewed as a whole." *Id.* at 644, 355 S.E.2d at 791. The ALJ reviewed DHHS' decision to determine if, based upon the

information available to it, it was supported by evidence in the record and was reasonable. *Britthaven*, 118 N.C. App. at 382, 455 S.E. 2d at 459.

> The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C. Gen. Stat. § 131E-183(a)(3).

¶ 32 The president of Strategic Healthcare Consultants, who was charged with "prepar[ing] certificate of need applications, provid[ing] healthcare consulting, and strategic planning services," testified the projections made in the application must be "reasonable and adequately supported" to conform with Criterion 3. To receive the CON in question, this Criterion required InSight to meet the performance standard, pursuant to 10A N.C. Admin. Code 14C.3703(a)(3), "of projecting of at least 2,080 PET" scans in the third operating "year following completion of the project."

¶ 33 "To fulfill its obligation of determining whether applications are consistent with statutory review criteria, [DHHS] must perform a meaningful analysis." *AH N.C. Owner*, 240 N.C. App. at 108, 771 S.E.2d at 547. DHHS performs a meaningful analysis by determining "whether an applicant conforms to [the criterion], [DHHS] must analyze and give due regard to the information available to it that is reasonably related to an applicant's history of providing quality care." *Id.* at 109, 771 S.E.2d at 547.

¶ 34 The ALJ made twenty-one findings of fact regarding Criterion 3 in the Final Decision. These findings of fact include:

> 56. . . . [P]hysicians are using PET for an increasing number of indications, [InSight] assumed that the demand for PET services will continue to increase in the future.
>
> . . . .
>
> 62. [InSight] projected that annual utilization of the proposed mobile PET scanner would exceed 2,080 procedures within the first three years of operation based on assumptions described in its application.

> 63. [InSight's] projections relied on a "need-based" or "use rate" methodology to project demand based on application of the use rate to the population to be served. A need-based methodology is just one of many accepted methodologies used by healthcare planners. [DHHS] deemed [InSight's] use of a use rate/need-based methodology to be reasonable.
>
> 64. . . . [InSight] began by using data from the North Carolina Office of State Budget and Management to project the population in the counties to be served . . .
>
> 65. . . . [InSight's] calculation was based on historical use of both mobile and fixed PET scanners . . .
>
> . . . .
>
> 67. . . . [InSight] projected its anticipated market shares in the various counties that it proposed to serve. . . .

InSight incorporated these presumptions into its methodology to project the number of scans it would provide in the first three operating years, by applying the projected market share to the projected demand in each county. Petitioner's arguments were raised, responded to by InSight, and considered by DHHS. DHHS addressed these presumptions and found them to be reasonable and adequately supported.

¶ 35 DHHS and the ALJ's Final Decision addressed the bases for InSight's projections in detail and both determined that its demonstration of need and projected utilization were reasonable and adequately supported. Substantial evidence supports the reasonableness and adequacy of InSight's projections. Petitioner's argument is overruled.

B. Criterion 5

¶ 36 Petitioner argues the ALJ's findings on Criterion 5 are unreasonable and not adequately supported.

> Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5).

¶ 37 During the hearing, Martha Frisone, chief of the Health Care Planning and CON Section of DHHS, offered testimony. Her duties include directing and managing a team of twenty individuals in the implementation of North Carolina CON law. When asked about the requirements for Criterion 5, Frisone responded:

> There are several components. First, the financial and operational projections have to demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal based upon reasonable projections of the cost of and charges for providing health services by the person proposing the service.

¶ 38 When asked why InSight's application was found to conform with Criterion 5, Frisone replied, "they provided what the capital cost was. We were satisfied that it was based on reasonable assumptions which were provided." The exchange between Frisone and counsel continued:

> [Frisone]: We were satisfied that they had adequately documented the availability of those funds, and we were satisfied that the projected utilization and projected cost and charges were reasonable and adequately supported.
>
> [Counsel]: Okay. And as you sit here today, do you have any reason to disagree with the [DHHS'] determination that InSight was conforming with Criterion (5)?
>
> [Frisone]: I do not.

¶ 39 Petitioner further argues Caldwell's President Easton, demonstrated InSight's projections were unreasonable. Petitioner relies upon Easton's testimony she "[did not] think" Caldwell needed twelve times its current service, she had "no reason to believe" that Caldwell could support 1,046 scans on a mobile PET per year, and Caldwell had not achieved a 95 percent market share in another service.

¶ 40 Easton did not share any concerns about InSight's projections with DHHS in the rescission letter or otherwise during testimony. Easton acknowledged Caldwell was losing volume to other health care providers because its access to mobile PET scanners is limited. She also conceded it was reasonable to expect Caldwell's volume to increase if it provided more services. Easton was unaware that InSight proposed to charge Caldwell a fee per scan and Caldwell would only have to pay

the amounts InSight projected if it achieved the projected volumes to support it.

¶ 41 Evidence proffered at the ALJ hearing showed InSight anticipated helping Caldwell increase its market share. Through increased access and resources, InSight would help Caldwell leverage existing and new referral relationships.

¶ 42 The ALJ stated DHHS' analysis relied upon four factors. "Of those four factors, Petitioner was found most effective on one factor and least effective on two factors. Novant was found most effective on one factor and least effective on one factor." Petitioner was found lacking in two areas, and InSight was found lacking only in one.

¶ 43 Substantial evidence supports the ALJ's conclusion DHHS acted reasonably and did not commit reversible error regarding review of InSight's projections. The ALJ's findings and conclusion that DHHS correctly determined InSight met the requirements of Criterion 5 is affirmed.

VII. Petitioner's Substantial Rights

¶ 44 "[A] petitioner in a CON case must show (1) either that the agency (a) has deprived the petitioner of property, (b) ordered the petitioner to pay a fine or civil penalty, or (c) substantially prejudiced the petitioner's rights, *and* (2) that the agency erred." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 235 N.C. App. 620, 624, 762 S.E.2d 468, 471 (2014) (emphasis in original).

¶ 45 Petitioner contends both DHHS and the ALJ erred by concluding Petitioner's rights were not substantially prejudiced. Without error in the underlying decisions, we need not reach this analysis. For the reasons described previously herein, we affirm the ALJ's Final Decision and decline to address Petitioner's argument on prejudice.

VIII. Conclusion

¶ 46 The ALJ reviewed DHHS' evidence and findings and heard arguments from DHHS and Petitioner. Substantial evidence supported DHHS' finding InSight complied with Criterion 1 and met the meaning of statewide in the ALJ's Final Decision to grant them the CON for the additional mobile PET scanner.

¶ 47 The ALJ also affirmed DHHS' finding InSight had complied with both Criterion 3 and 5 based upon DHHS' analysis of the evidence and requirements in InSight's application.

¶ 48 The ALJ Final Decision to affirm DHHS' CON designation as properly complying with the statutory CON requirements is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and ARROWOOD concur.

ROBERT M. PEDLOW, PLAINTIFF
v.
TIMOTHY KORNEGAY, DEFENDANT

No. COA20-747

Filed 6 July 2021

1. Statutes of Limitation and Repose—breach of promissory note—executed under seal—sealed instrument—ten-year statute of limitations

An action to collect on a promissory note was not barred by the statute of limitations because, although promissory notes are negotiable instruments subject to the provisions of the Uniform Commercial Code, where the note was executed "under seal," it was a sealed instrument subject to the ten-year statute of limitations in N.C.G.S. § 1-47(2), as provided by N.C.G.S. § 25-3-118(h).

2. Statutes of Limitation and Repose—breach of promissory note—ten-year statute of limitations—accrual of claim—upon execution of note

In an action to collect on a promissory note, which was signed under seal and therefore subject to the ten-year statute of limitations in N.C.G.S. § 1-47(2), as provided by N.C.G.S. § 25-3-118(h), the cause of action accrued on the date the note was signed, since that was when the note became enforceable, and not on the earlier date appearing on the face of the note.

Judge DILLON concurring in result by separate opinion.

Appeal by plaintiff from an order entered 24 July 2020 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 May 2021.

Raynor Law Firm, PLLC, by Kenneth R. Raynor for Plaintiff-Appellant.

Law Offices of Michael Messinger, PLLC, by Michael J. Messinger for Defendant-Appellee.

GORE, Judge.

¶ 1 Plaintiff Robert M. Pedlow ("Mr. Pedlow") appeals from the trial court's entry of summary judgment in favor of defendant Timothy Kornegay ("Mr. Kornegay"). Following careful review, we reverse the trial court's entry of summary judgment and hold Mr. Pedlow's action is not barred by the applicable statute of limitations.

I. Background

¶ 2 The facts in this case are undisputed. Between 1 August 2006 and 1 October 2007 Mr. Pedlow made several loans to Mr. Kornegay. In 2008, the parties sought to memorialize the loans in a promissory note. Between 6 February 2008 and 29 July 2008, the parties engaged in discussions as to the total amount loaned to Mr. Kornegay by Mr. Pedlow, ultimately agreeing the amount owed was $84,000.00. On the evening of 29 July 2008, Mr. Pedlow's attorney emailed a promissory note to Mr. Kornegay and requested that Mr. Kornegay come to his office the next day to sign the promissory note. The promissory note attached in the 29 July 2008 email was dated 30 July 2008. Mr. Kornegay did not sign the promissory note in July of 2008. In November of 2008, another disagreement as to the amount loaned arose. Between 13 November 2008 and 18 May 2009, the parties were engaged in discussions as to the total amount loaned, again settling on the $84,000.00 amount. Between 18 May 2009 and 2 July 2009, Mr. Pedlow's attorney sent Mr. Kornegay several emails containing the promissory note for signature, with no response from Mr. Kornegay. On 2 July 2009, Mr. Kornegay signed the promissory note and a corresponding security agreement. At no time did Mr. Kornegay make any payments against the principle or interest on the loan.

¶ 3 On 30 May 2019, Mr. Pedlow filed a complaint against Mr. Kornegay demanding payment of the entire balance of the promissory note and alleging Mr. Kornegay was in breach of the promissory note. On 19 June 2019, Mr. Pedlow amended his complaint to include an alternative request for reformation. Mr. Pedlow filed a motion for summary judgment on 15 May 2020. Mr. Kornegay filed a motion for summary judgment, asserting a statute of limitations defense, on 21 May 2020. On 24 July 2020,

the trial court granted Mr. Kornegay's motion for summary judgment. Mr. Pedlow filed written notice of appeal on 26 August 2020.

II. Standard of Review

¶ 4 "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) (internal quotations and citations omitted).

III. Discussion

¶ 5 **[1]** Promissory notes are negotiable instruments which are governed by Article 3 of the Uniform Commercial Code ("UCC"). North Carolina has adopted a version of the UCC in Chapter 25 of the North Carolina General Statutes. However, Chapter 25 is not an exhaustive list of applicable commercial laws in North Carolina. "Unless displaced by the particular provisions of [Chapter 25], the principles of law and equity . . . supplement its provisions." N.C. Gen. Stat. § 25-1-103(b) (2020).

¶ 6 The statute of limitations for promissory notes payable on demand generally is six years from the date a demand for payment was made or, if no demand was made, and neither principal nor interest on the note has been paid for a continuous period of ten years, then an action to enforce the note is barred. N.C. Gen. Stat. § 25-3-118(b). However, North Carolina adopted an additional statute of limitations provision when enacting Article 3 of the UCC. Subsection (h) of § 25-3-118 states, "A sealed instrument otherwise subject to this Article is governed by the time limits of [N.C. Gen. Stat. §] 1-47(2)." N.C. Gen. Stat. § 25-3-118(h). Here, the last line of the promissory note reads,

> IN WITNESS WHEREOF, Maker has executed this Note under seal as of the day and year first above written.

Further, the word "seal" appears in parentheses next to Mr. Kornegay's signature on the promissory note, this is sufficient to support a finding that the document was executed under seal. *See Biggers v. Evangelist*, 71 N.C. App. 35, 39, 321 S.E.2d 524, 527 (1984). Therefore, we apply the time limits of § 1-47(2).

¶ 7 Mr. Kornegay argues that because § 25-3-118(b) specifically applies to negotiable instruments payable on demand, and the promissory note at issue here is payable on demand, § 25-3-118(b) trumps any other statute of limitations and provides the exclusive statute of limitations for demand notes. However, the language "[a] sealed instrument otherwise subject to this Article . . ." demonstrates that when an instrument is

executed under seal § 25-3-118(h) displaces any other statute of limitations found in the UCC. Further, § 25-3-118(a) provides a statute of limitations for negotiable instruments payable on a specific date. Following the logic of Mr. Kornegay's argument, § 25-3-118(a) would create an exclusive statute of limitations for notes payable on a specific date. As negotiable instruments can only be payable on a specific date or payable on demand, if we adopted Mr. Kornegay's argument and applied the statute of limitations in § 25-3-118(b) simply because the note at issue here is payable on demand, we would effectively be rendering § 25-3-118(h) inapplicable under any circumstances. Therefore, we find § 25-3-118(h) clearly dictates the statute of limitations when an instrument is executed under seal.

¶ 8 **[2]** Section 1-47(2) provides a ten-year statute of limitations. N.C. Gen. Stat. § 1-47(2). Therefore, whether the present action is barred by the applicable statute of limitations hinges on what date the statute of limitations accrued and began to run. Mr. Pedlow argues the statute of limitations accrued 2 July 2009, the day the promissory note was signed, while Mr. Kornegay argues the statute of limitations accrued on 30 July 2008, the date appearing on the face of the executed document.

¶ 9 Article 3 of North Carolina's UCC does not provide specific guidance on when the statute of limitations on a negotiable instrument accrues, therefore, under § 25-1-103(b) we must look to principles of law and equity to inform this analysis. "The statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note." *Wells v. Barefoot*, 55 N.C. App. 562, 566, 286 S.E.2d 625, 627 (1982) (citing *Caldwell v. Rodman*, 50 N.C. 139, 140–41 (1857)); *see also Causey v. Snow*, 122 N.C. 326, 329, 29 S.E. 359, 360 (1898); *Shields v. Prendergast*, 36 N.C. App. 633, 634, 244 S.E.2d 475, 476 (1978); *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) ("A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises."). Our Supreme Court in *Caldwell* remarked that the principle behind the common law rule is, "that the execution of the note, or the borrowing of money, where no time for the payment is specified, creates a present debt, upon which an action can be brought immediately." 50 N.C. 139, 141 (1857). The issue of whether a note is executed on the date signed or the date appearing on the face of the document appears to be an issue of first impression in North Carolina. We find the statute of limitations began to run on 2 July 2009.

¶ 10 Here, Mr. Kornegay admitted, in an affidavit submitted to the trial court and during deposition, that a further dispute as to the amount owed arose between Mr. Kornegay and Mr. Pedlow in November 2008, after the 30 July 2008 date listed on the promissory note, and negotiations as to the amount owed continued after November 2008. This is evidence that, had Mr. Pedlow wanted to, he would not have been able to sue to enforce the promissory note as of 30 July 2008, and that the promissory note was not finalized, and an action could not have been brought on the note until the document was signed on 2 July 2009. Further, Mr. Kornegay does not dispute, or provide evidence to the contrary, that he signed the promissory note on 2 July 2009. Therefore, because the debt was not finalized and secured until Mr. Kornegay signed and Mr. Pedlow would not have been able to sue under the promissory note until the document was signed, we find that the note was executed, and the statute of limitations began to run on the date the document was signed.

¶ 11 Mr. Kornegay argues we should find the statute of limitations began to run on the date appearing on the face of the promissory note, 30 July 2008, because § 25-3-113(a) allows for an instrument to be postdated. *See* N.C. Gen. Stat. § 25-3-113(a). Mr. Kornegay relies on this provision to claim that the date appearing on the face of the document is the only date from which the statute of limitations could begin to run. However, we do not find this argument persuasive, because looking at § 25-3-113 as a whole, the statute specifically uses the date stated to determine timing of payment and makes no mention of any effect on the statute of limitations. Using the logic employed by Mr. Kornegay in making this argument, § 25-3-105 would be just as applicable in determining when the statute of limitations began to run. Section 25-3-105(a) provides that " 'Issue' means the first delivery of an instrument by the maker or drawer . . . for the purpose of giving rights on the instrument to any person." N.C. Gen. Stat. § 25-3-105(a). If this section had any bearing on the statute of limitations, the limitations period would begin to run when someone gains rights under the instrument, in this case when Mr. Pedlow gained the right to enforce the instrument. Therefore, the statute of limitations would begin to run on the date of signature, which is in direct opposition of the beginning of the limitations period when the same reasoning is applied to § 25-3-113. Because neither §§ 25-3-105 or 25-3-113 explicitly state they dictate when the limitations period begins to run, we find that neither are applicable, and the principles of law and equity addressed above control the running of the statute of limitations.

IV. Conclusion

¶ 12 For the foregoing reasons we find that the statute of limitations began to run on the date the promissory note was executed, 2 July 2009.

As a result, Mr. Pedlow's action filed on 30 May 2019 was not barred by the ten-year statute of limitations in § 1-47(2). We reverse the trial court's entry of summary judgment in favor of Mr. Kornegay and remand this matter for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge CARPENTER concurs.

Judge DILLON concurs in result by separate opinion.

DILLON, Judge, concurring, writing separately.

¶ 13 I concur in the majority opinion. Plaintiff's action on the promissory note is not barred by the statute of limitations. I write separately to clarify one point. I conclude that Plaintiff did have a cause of action based on the original debt which accrued prior to the execution of the promissory note at issue, notwithstanding that the amount owed was in dispute at that time. However, the execution of the promissory note created a new cause of action, which is the subject of Plaintiff's complaint, which did not accrue until the note was executed, as the majority holds.

¶ 14 This is an action to enforce a promissory note. Defendant made several loans to Plaintiff between 2006 and 2007. However, there was a disagreement regarding *the amount* owed by Defendant, a dispute which lasted until Defendant executed the promissory note on 2 July 2009.

¶ 15 I am writing to clarify that I conclude that though prior to 2 July 2009 the amount of the debt was in dispute, Plaintiff did have a cause of action against Defendant which had accrued based on the debt owed. That cause of action was presumably subject to a 3-year statute of limitations pursuant to Section 1-52 of our General Statutes. The time to bring a cause of action on a debt is not tolled merely because the parties disagree about the amount owed or whether money is owed at all.

¶ 16 However, the execution of the promissory note by Defendant gave rise to a new obligation, an obligation based on the note itself. *See Franklin Credit v. Huber*, 127 N.C. App. 187, 487 S.E.2d 825 (1997).

¶ 17 Regarding the cause of action based on the note, it is undisputed that Defendant executed the note on 2 July 2009, as this fact is admitted by Defendant in his affidavit that was before the trial court at the summary judgment hearing.

¶ 18 It is clear from the language of the note that the note is a *demand* note. Thus, Plaintiff's cause of action on the note accrued upon its execution by Defendant.

¶ 19 Further, the note expressly states that Defendant was executing the note "under seal", and the word "SEAL" appears next to Defendant's signature. Accordingly, based on our holding in *Central Systems v. General Heating*, the note at issue here is a sealed instrument, subject to the 10-year statute of limitations found in Section 1-47, *as a matter of law*. 48 N.C. App. 198, 202, 268 S.E.2d 822, 824 (1980).

¶ 20 Since Plaintiff brought this action to enforce the note within 10 years of 2 July 2009, Plaintiff's action on the note is not barred by the statute of limitations as a matter of law.

STATE OF NORTH CAROLINA
v.
JAMES DWAYNE BARNES

No. COA20-597

Filed 6 July 2021

1. Appeal and Error—satellite-based monitoring—insufficient notice of appeal—constitutional issues not raised—review granted

Where the trial court did not conduct a *Grady* hearing before imposing lifetime satellite-based monitoring (SBM) on defendant, the Court of Appeals exercised its discretion, both to grant defendant's petition for writ of certiorari to review the SBM order where defendant gave only oral notice of appeal and thus did not properly invoke appellate jurisdiction, and to utilize Appellate Rule 2 in order to review defendant's unpreserved constitutional challenge regarding the lack of a reasonableness determination.

2. Satellite-Based Monitoring—lifetime—reasonableness—no Grady hearing

The trial court's order imposing lifetime satellite-based monitoring (SBM) on defendant—upon the completion of his sentence for rape, kidnapping, and sexual offense—was reversed without prejudice to the State's right to file a new SBM application, where the trial court did not first hold a *Grady* hearing to determine the reasonableness of lifetime SBM.

Judge TYSON dissenting.

Appeal by defendant from order entered 25 October 2019 by Judge D. Thomas Lambeth, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Mark Montgomery for the defendant.

ARROWOOD, Judge.

¶ 1 James Dwayne Barnes ("defendant") appeals by *writ of certiorari* from the trial court's order imposing lifetime satellite-based monitoring ("SBM"). Defendant contends the order should be vacated because "[t]here was no hearing of any kind, no argument by the State, nothing to support the trial court's order." For the following reasons, we vacate the order without prejudice to the State's ability to file a subsequent SBM application.

I. Background

¶ 2 On 2 July 2018, defendant was indicted for assault by strangulation, first-degree rape, first-degree kidnapping, two counts of first-degree sexual offense, and attaining habitual offender status. The matter came on for trial at the 21 October 2019 criminal session of Alamance County Superior Court, the Honorable D. Thomas Lambeth, Jr., presiding. The State's evidence tended to show as follows.

¶ 3 In May 2018, defendant, who is white, was dating "Cindy,"[1] also white. Cindy was engaging in prostitution to earn "[m]oney for cocaine[,]" as well as to provide defendant to "do whatever we had to live. Live by it and buy cigarettes and dope." On or around 7 May 2018, Cindy prostituted herself to an African American man, "Brian." When defendant discovered Cindy in bed with Brian, defendant became angry and started beating Cindy, eventually choking Cindy until she lost consciousness. After Cindy regained consciousness, defendant anally raped Cindy and continued to beat her. Cindy later fell asleep, but defendant periodically woke her and beat her, and also forced her to perform oral sex.

1. The parties agreed to use this pseudonym in their briefs.

¶ 4 The following morning, defendant and Cindy went to a Wal-Mart to panhandle. Officer Justin Jolly ("Officer Jolly") of the Burlington Police Department received a call about Cindy's apparent injuries and went to the Wal-Mart to investigate. After interviewing defendant and Cindy separately, Officer Jolly arrested defendant.

¶ 5 On 8 May 2018, Cindy was interviewed by Sharon Staley ("Ms. Staley"), a forensic nurse, and Lindsey Strickland ("Ms. Strickland"), a forensic nurse examiner. Both Ms. Staley and Ms. Strickland testified that Cindy's physical injuries were consistent with her account. Cindy was also interviewed by Detective Kevin King ("Detective King") with the Burlington Police Department, and Justin Parks ("Mr. Parks"), a special victims investigator with the Iredell County Sheriff's Office. Recordings of Cindy's interviews with Detective King and Mr. Parks were played for the jury.

¶ 6 On 25 October 2019, a jury found defendant guilty of assault by strangulation, first-degree rape, first-degree kidnapping, one count of first-degree sexual offense, and of being a habitual offender. The trial court consolidated the convictions and imposed a sentence of 420 to 564 months imprisonment. The trial court determined that defendant had committed a sexually violent offense and an aggravated offense, and accordingly ordered defendant to enroll in SBM for life.

¶ 7 Defendant gave oral notice of appeal in open court on 25 October 2019. Defendant filed petition for *writ of certiorari* on 9 November 2020.

II. Discussion

¶ 8 Defendant contends the trial court erred in ordering lifetime SBM where the trial court did not conduct a hearing on whether lifetime SBM was reasonable and the State did not offer any evidence that lifetime SBM was reasonable. Because the oral notice of appeal was insufficient to confer jurisdiction on this Court, defendant petitions for *writ of certiorari* to review the merits of his appeal.

A. Appellate Jurisdiction

¶ 9 **[1]** Because of the civil nature of SBM hearings, a defendant must file a written notice of appeal from an SBM order pursuant to Appellate Rule 3. N.C. R. App. P. 3(a); *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding that oral notice of appeal from an SBM order does not confer jurisdiction on this Court). This Court, however, is authorized to issue *writs of certiorari* "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1).

In the present case, because defendant's oral notice of appeal was insufficient to confer jurisdiction on this Court under Rule 3, defendant filed a petition for a *writ of certiorari* on 9 November 2020 seeking review of the order imposing lifetime enrollment in SBM. In our discretion, we allow defendant's petition for *writ of certiorari*.

¶ 10 Defendant asserts that the trial court erred in ordering that defendant enroll in lifetime SBM upon his release from prison because the State failed to meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment. *See Grady v. North Carolina* ("*Grady I*"), 575 U.S. 306, 310, 135 191 L. Ed. 2d 459, 462 (2015). However, defendant did not raise any constitutional challenge or otherwise preserve this constitutional claim at any point during his sentencing hearing. Pursuant to Rule 10 of the North Carolina Appellate Rules of Procedure, "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). Accordingly, because defendant did not object to the imposition of lifetime SBM on constitutional grounds, he has waived the ability to argue it on appeal. *State v. Bursell* ("*Bursell II*"), 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019).

¶ 11 Defendant requests that this Court exercise its discretion to invoke Rule 2 of the Rules of Appellate Procedure to reach the merits. Under Rule 2, "[t]o prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]" N.C. R. App. P. 2. An appellate court's decision to invoke Rule 2 and suspend the appellate rules is always an exercise of discretion. *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted). The determination of whether a particular case is an "instance" appropriate for Rule 2 review "must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether 'substantial rights of an appellant are affected.' " *Id.* (emphasis in original) (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)).

¶ 12 In *Bursell II*, our Supreme Court affirmed this Court's decision to invoke Rule 2 and review the unpreserved constitutional issue. *Bursell II*,

372 N.C. at 197, 827 S.E.2d at 303 (affirming *State v. Bursell* ("*Bursell I*") 258 N.C. App. 527, 813 S.E.2d 463 (2018)). First noting that the Fourth Amendment right implicated in such cases is a substantial right, the *Bursell II* Court affirmed this Court's suspension of the appellate rules after examining "the specific circumstances of [the] individual case[ ] and parties," including "defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error." *Id.* at 201, 827 S.E.2d at 306.

¶ 13 In *State v. Ricks*, 271 N.C. App. 348, 843 S.E.2d 652, *writ allowed*, 375 N.C. 281, 842 S.E.2d 88 (2020),[2] this Court examined the State's and trial court's failure to follow well-established precedent in applying for and imposing SBM. The Court first discussed *Bursell I*, in which "the trial court and the State had the benefit of our Court's precedent in *State v. Blue*, 246 N.C. App. 259, 783 S.E.2d 524 (2016), and *State v. Morris*, 246 N.C. App. 349, 783 S.E.2d 528 (2016), which 'made clear that a case for SBM is the State's to make[.]' " *Ricks*, 271 N.C. App. at 360, 843 S.E.2d at 663 (citing *Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467) (internal quotation marks omitted). In *Ricks*, "the State and the trial court . . . had the benefit of even more guidance regarding the State's burden than in *Bursell*[,]" which "make clear that the trial court must conduct a hearing to determine the constitutionality of ordering a defendant to enroll in the SBM program, and that the State bears the burden of proving the reasonableness of the search. *Id.* at 360-61, 843 S.E.2d at 663 (citing *State v. Greene*, 255 N.C. App. 780, 806 S.E.2d 343 (2017), *State v. Grady* ("*Grady II*"), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), and *State v. Gordon* ("*Gordon I*"), 261 N.C. App. 247, 820 S.E.2d 339 (2018)).

¶ 14 Here, as in *Ricks*, the State and trial court had the benefit of even more guidance than in *Bursell I*. The multiple cases referenced above clearly state a *Grady* hearing must be conducted and the State must present any evidence regarding the reasonableness of the search. Although the trial court in this case had the benefit of the precedent referenced above, it did not conduct a *Grady* hearing and the State failed to offer any evidence regarding the reasonableness of the search. For these

2. We note that *Ricks* has been stayed by our Supreme Court and is of questionable precedential value as a result. However, because the invocation of Rule 2 is a discretionary decision, we nonetheless find its reasoning persuasive.

reasons, we exercise our discretion and invoke Rule 2 to reach the merits of defendant's appeal.

B. Lifetime SBM

¶ 15 **[2]** Defendant contends the trial court erred in imposing lifetime SBM without first conducting a hearing to "consider whether the warrantless, suspicionless search here is reasonable when its intrusion on the individual's Fourth Amendment interests is balanced against its promotion of legitimate governmental interests." *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (citation omitted). We agree.

¶ 16 As previously discussed, before imposing lifetime SBM, the trial court must conduct a *Grady* hearing and the State must present evidence regarding the reasonableness of the search. Determining the constitutionality of an SBM order "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462. In doing so, the trial court must balance the State's interests in solving crimes, preventing the commission of sex crimes, and protecting the public, against SBM's deep intrusion upon an individual's protected Fourth Amendment interests. *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568. The State bears the burden of showing that the SBM program would further the State's interests. *Id.* Additionally, when the State seeks to impose future SBM following a defendant's release from prison, the State also must "demonstrat[e] what [a d]efendant's threat of reoffending will be after having been incarcerated for" the duration of his sentence with some "individualized measure of [the d]efendant's threat of reoffending." *State v. Gordon* ("*Gordon II*"), 270 N.C. App. 468, 477-78, 840 S.E.2d 907, 913-14 (2020) (concluding that the State did not meet its burden of proving the reasonableness of "a search of this magnitude approximately fifteen to twenty years in the future"), *disc. review allowed*, *writ allowed*, 376 N.C. 671, 853 S.E.2d 148 (2021). When the State has the opportunity to present "evidence that could possibly support a finding necessary to impose SBM," and fails to do so, "the appropriate disposition is to reverse the trial court's order rather than to vacate and remand the matter for re-hearing." *Griffin*, 260 N.C. App. at 636, 818 S.E.2d at 342 (citing *Grady II*, 259 N.C. App. at 676, 817 S.E.2d at 28).

¶ 17 In the present case, defendant's substantial rights under the Fourth Amendment are affected, and both the State and trial court failed to follow well-established precedent in failing to apply for and impose SBM by conducting a *Grady* hearing. In failing to conduct a *Grady* hearing, the trial court did not engage in the balancing test required by *Grady III*

nor demonstrate the threat of reoffending as discussed in *Gordon II*. Although the State argues defendant failed to preserve his constitutional challenge to the lifetime SBM order, the State concedes that should we exercise our discretion to review defendant's appeal, the proper result is to vacate the SBM order without prejudice to the State's ability to file a subsequent SBM application. We note that this case is distinguishable from the holdings in *Griffin* and *Grady II* because the trial court did not conduct a *Grady* hearing, and accordingly the State has not lost the "one opportunity to prove that SBM is a reasonable search of the defendant." *Grady II*, 259 N.C. App. at 676, 817 S.E.2d at 28. Because we exercise our discretion to review the imposition of lifetime SBM where no reasonableness hearing was conducted, we vacate the trial court's order imposing lifetime SBM without prejudice to the State's ability to file a subsequent SBM application.

III. Conclusion

¶ 18 For the forgoing reasons, we vacate the trial court's order imposing lifetime SBM and remand without prejudice to the State's ability to file a subsequent SBM application.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 19 Defendant's constitutional challenge was not presented, preserved, nor ruled upon by the trial court. As such, his petition for writ of certiorari to obtain appellate jurisdiction and to seek review of the imposition of SBM in violation of the appellate rules is properly dismissed. I respectfully dissent from the majority opinion to allow defendant's petition to review the SBM order.

I. No Jurisdiction

¶ 20 An appellant is required to file a written notice of appeal to invoke appellate jurisdiction on an appeal from the imposition of SBM, pursuant to North Carolina Rule of Appellate Procedure 3. *See* N.C. R. App. P. 3; *State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010).

¶ 21 Defendant, recognizing his failure to appeal, filed a petition for a writ of certiorari to invoke this Court's jurisdiction and to seek review

of the imposition of lifetime SBM. This Court, in its discretion, should grant such writs only if the petition "show[s] merit or that [prejudicial] error was probably committed." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted).

II. Constitutional Error Not Preserved

¶ 22 Defendant never raised any constitutional challenge before the trial court nor otherwise preserved his constitutional claim. When asked by the trial court if he wished to enter a notice of appeal, defendant's counsel simply and orally noted that "[h]e does" with no specific objection to the SBM order.

¶ 23 "[T]o 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).

¶ 24 It is long and well established that constitutional arguments not raised at trial are not preserved and are barred from review direct appeal. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("The failure to raise a constitutional issue before the trial court bars appellate review."); *see also State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (holding constitutional arguments are barred on direct appeal when not properly preserved).

III. Rule 2

¶ 25 In addition to his Rule 3 jurisdictional defect, defendant also requests this Court to further suspend the appellate rules and to invoke Rule 2 of the Rules of Appellate Procedure to reach the unpreserved merits of his claim. *See* N.C. R. App. P. 2. Invoking Rule 2 is wholly a discretionary act and it is to be used only in "exceptional circumstances." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting *State v. Hart*, 361 N.C. 309, 315-17, 644 S.E.2d 201, 205-06 (2007)).

¶ 26 "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis original) (citation omitted).

¶ 27 "[P]recedent cannot create an automatic right to review via Rule 2." *Id.* at 603, 799 S.E.2d at 603. Similarities between previous instances in

which this Court has discretionally invoked Rule 2 are not independently sufficient to justify doing so here. Defendant must present specific evidence demonstrating obvious injustice in his case.

¶ 28 When a defendant seeking discretionary review is "no different from other defendants who failed to preserve their constitutional arguments in the trial court, and . . . has not argued any specific facts that demonstrate manifest injustice" this Court should decline to invoke Rule 2. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370.

¶ 29 Our Supreme Court has stated "if the Rules [of Appellate Procedure] are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly." *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

¶ 30 The majority's opinion relies upon *State v. Ricks*, 271 N.C. App. 348, 843 S.E.2d 652, *writ allowed*, 375 N.C. 281, 842 S.E.2d 602 (2020) to buttress its assertion that this Court should invoke Rule 2. The majority's opinion correctly notes this Court's divided opinion in *State v. Ricks* has been appealed to the Supreme Court of North Carolina. The opinion and the mandate in *Ricks* have been stayed. *State v. Ricks*, 374 N.C. 749, 842 S.E.2d 88 (2020). As acknowledged in the majority's opinion, *Ricks* is neither precedential nor binding on the case before us.

¶ 31 Defendant has not presented any evidence demonstrating "exceptional circumstances." *See Campbell*, 369 N.C. at 603, 799 S.E.2d at 602. Defendant has not demonstrated he is any "different from other defendants who failed to preserve their constitutional arguments in the trial court" nor has he "argued any specific facts that demonstrate manifest injustice." *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. This Court should dismiss defendant's petition and decline to invoke Rule 2. *Id.*

IV. No Showing of Merit

¶ 32 It is uncontested the trial court properly found the multiple offenses the jury convicted defendant of committing were sexually violent and aggravated offenses pursuant to N.C. Gen. Stat. § 14-208.6 (2019). In open court and in presence of defendant and his counsel, the trial court found:

> I do find that this was a sexually violent offense. That the defendant has not been classified as a sexually violent predator. That the defendant is not a recidivist. And that the offense of conviction is an aggravating offense. Based on the above findings, the Court

> does order registration as a sex offender for the defendant's natural life.

¶ 33 Defendant failed to object during his sentencing hearing, even after being explicitly asked by the trial court if he wished to object to the order. Defendant's counsel explicitly noted "[defendant is] going to be subject to lifetime registration and satellite based monitoring," while asking the trial court for leniency in sentencing.

¶ 34 Defendant's appellate counsel now attempts to raise a purported and barred constitutional violation on appeal. In the absence of a demand, preservation, or objection from defendant, his petition for writ of certiorari to invoke jurisdiction to fix his admitted failure to comply with Appellate Rule 3, and, if granted, to invoke Rule 2 is properly dismissed and denied.

¶ 35 Defendant's counsel's frivolous appellate argument hinges on the notion and assertion that the trial court or this Court should sit as a "second chair" to his defense counsel.

> [A judge's] job [is] to call balls and strikes, and not to pitch or bat . . . [t]he role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . we are a Government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans.

¶ 36 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109 Cong. 56 (Statement of John G. Roberts, Jr.).

¶ 37 "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Defendant cannot raise a constitutional argument for the first time on appeal. The petition for writ of certiorari by defendant is properly dismissed.

V. Conclusion

¶ 38 Defendant failed to argue, raise, or preserve his constitutional challenge to his SBM order. Defendant may not raise this issue for the first time on appeal. Dismissal of his petition is the only proper ruling. I respectfully dissent.

STATE v. BECK

[278 N.C. App. 255, 2021-NCCOA-305]

STATE OF NORTH CAROLINA
v.
ISAIAH SCOTT BECK

No. COA20-499

Filed 6 July 2021

1. Conspiracy—robbery with a dangerous weapon—breaking and entering—multiple acts in single conspiracy

In a prosecution for conspiracy to commit robbery with a dangerous weapon and conspiracy to commit felonious breaking and entering, the trial court erred by denying defendant's motion to dismiss one of the two conspiracy charges where the State's evidence only established a single agreement among the co-conspirators to enter a drug dealer's apartment and commit a robbery. The co-conspirators' decision to break and enter into the apartment did not convert their original conspiracy to rob the drug dealer into two separate conspiracies.

2. Jury—request for transcript of witness testimony—trial court's discretion

At a trial for robbery with a dangerous weapon, breaking and entering, and related conspiracy charges, the trial court did not abuse its discretion by declining the jury's request for a transcript of witness testimony, explaining that the transcript was unavailable, "we do not operate in realtime," and that it was the jury's duty to remember the evidence presented at trial. The court did not improperly deny the jurors' request based solely on the transcript's unavailability, but rather the court properly exercised its discretion by considering the request and ultimately rejecting it, as allowed by N.C.G.S. § 15A-1233(a).

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 31 October 2019 by Judge Susan E. Bray in Watauga County Superior Court. Heard in the Court of Appeals 9 June 2021.

Joshua H. Stein, Attorney General, by Assistant Attorney General Wes Saunders, for the State.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for defendant.

ARROWOOD, Judge.

¶ 1 Isaiah Scott Beck ("defendant") appeals from judgments entered 31 October 2019 for convictions of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, felonious breaking and entering, and conspiracy to commit felonious breaking and entering. For the following reasons, we vacate the conspiracy conviction in Case No. 17 CRS 50616. Apart from this disposition, we conclude that defendant received a fair trial free of prejudicial error.

I. Background

¶ 2 At all relative times, Mackenzie Beshears ("Beshears") lived with her boyfriend, Devon Trivette ("Trivette"), and a roommate Daniel Blackburn ("Blackburn") in Boone, North Carolina. Beshears, who at the time was a student at Appalachian State University, sold narcotics on the side, particularly Xanax and marijuana.

¶ 3 On 27 April 2017, Beshears was contacted by a former high school associate Cameron Baker ("Baker") who inquired whether Beshears had any drugs for sale. Given their prior affiliation, Beshears agreed to the sale and arranged to consummate the transaction at Beshears' apartment.

¶ 4 After working out logistics, Baker advised Beshears that his friend Danny Silva ("Silva") would arrive by himself and complete the purchase. Silva pulled into the subject apartment complex but was spooked after noticing that Beshears and Trivette were watching him from an apartment window. Beshears then called Baker who told her that Silva was returning to the apartment complex. Silva arrived at Beshears' apartment and was greeted and admitted by Beshears and Trivette. Beshears noticed that Silva was "really sweaty and acting bizarre."

¶ 5 Trivette then left the room to take a shower while Silva and Beshears finalized the transaction. At this moment, two men suddenly burst into the apartment wearing all black and bandannas covering the lower portions of their faces. Notwithstanding their disguises, Beshears immediately recognized the two men as defendant and Javier Holloway ("Holloway"). Beshears had previously met defendant and had viewed photos of Holloway on Baker's social-media platform.

¶ 6 Upon entry, defendant raised an AR-15 assault rifle to Beshears' head and instructed Holloway to grab everything he could. When Holloway attempted to steal Beshears' bookbag, Beshears began screaming for Trivette and a physical altercation ensued. Trivette proceeded to physically engage defendant and pushed him toward the door of the apart-

ment. Holloway then charged at Trivette; at this point, Blackburn emerged from his room and came to the aid of Beshears and Trivette. As the three occupants attempted to force defendant and Holloway out of the apartment door, defendant wedged the barrel of his gun between the door to prevent it from closing. Ultimately, Blackburn, Trivette, and Beshears were able to oust defendant and Holloway and latch the door. While outside, defendant began shouting and threatened to shoot into the apartment. Silva was still inside the apartment, standing alone in the corner. Silva denied any involvement in the robbery or knowing the intruders, and claimed that he was there only to buy drugs.

¶ 7 Over Trivette's objections, Blackburn called the police. As police sirens were approaching, Trivette let Silva leave the apartment, though Silva was swiftly apprehended as he fled the scene by Lieutenant Daniel Duckworth ("Lt. Duckworth") and Officer Kaleb Forrest ("Officer Forrest"). Detective Kat Eller ("Detective Eller") then arrived at the scene and interviewed Beshears, Trivette, and Blackburn. The occupants identified defendant and Holloway as the assailants, prompting the Boone Police Department to issue a "be on the lookout" alert to local enforcement agencies.

¶ 8 During Detective Eller's initial interview with Beshears, Beshears falsely claimed that she had arranged to *purchase*, not sell, controlled substances from Silva and his associates. Shortly thereafter, Detective Eller was informed that Silva had been apprehended and that text messages from his phone indicated that Beshears was the seller, not the purchaser, of the drugs. In order to develop trust and ensure that she had received accurate information, Detective Eller allowed Beshears to destroy evidence of other narcotics in the apartment by flushing marijuana, pills, and crushed Xanax down the toilet. Beshears then turned over her cellular phone to Detective Eller and consented to the search of its contents. Detective Eller then spoke to Trivette, who admitted that Beshears was selling drugs and that the buyers "were coming here to get [drugs] and I guess it just went bad." Neither Beshears nor Trivette were charged in connection with respect to the incidents noted above.

¶ 9 After taking Silva into custody, Lt. Duckworth proceeded to the scene of the crimes. Lt. Duckworth, in addition to his duties with the Boone Police Department, had been previously assigned to a special task force through the Department of Homeland Security focusing on drug smuggling. Two months earlier, Lt. Duckworth received a tip from a confidential informant that a group of individuals from out of town were planning to rob Boone-area drug dealers. Lt. Duckworth and Detective James Lyall ("Detective Lyall") set up surveillance around the area in

which they believed the conspirators were located. Detective Lyall had photographs of the suspects from their respective Facebook accounts. After driving past the subject location, Lt. Duckworth observed two suspects matching the photo descriptions. Lt. Duckworth immediately set up a perimeter, per protocol, when an unidentified person approached Lt. Duckworth's vehicle and reported seeing two males run through his yard in the direction of downtown Boone (both of whom matched the descriptions of the suspects identified by Detective Lyall).

¶ 10 Around the same time, a student at Appalachian State University, Ashley Hickman ("Hickman"), was riding a bus from campus when two men abruptly boarded the bus at an intersection. She testified that the two men appeared sweaty, unsettled, and agitated. While on the bus, Hickman received an alert on her cell phone informing her of the criminal activity discussed above and describing the suspects. Shortly after, the two suspects exited the bus and fled across Highway 105. Hickman called the police and reported these events and exited the bus at the same location as the suspects and proceeded to her apartment complex which was located behind the "Water Wheel Café."

¶ 11 Meanwhile, Baker was at his apartment, located just a few hundred yards from the Water Wheel Café. He received a phone call from defendant advising him that the drug deal had gone wrong and asking him for transportation. Later, defendant and Holloway arrived at Baker's apartment and obtained new clothing. Hickman, shortly thereafter, walked outside of her apartment and observed the same two men from the bus in her apartment complex parking lot, though they were wearing different clothes. She watched the two men proceed to a structural water wheel in front of the Water Wheel Café and hide from view. Hickman immediately contacted law enforcement and updated them on the location of the two suspects.

¶ 12 Lt. Duckworth proceeded to the Water Wheel Café to set up surveillance. From this vantage point, Lt. Duckworth observed defendant and Holloway near the Water Wheel Café but noted that they had changed their clothing. After observing the suspects for a few minutes, a marked police cruiser passed the location of the suspects and they fled on foot into the woods, prompting other officers to respond. Detective Lyall, who was then riding with another officer, pursued the suspects and apprehended defendant after a short chase. Holloway was taken into custody shortly thereafter by Lt. Duckworth.

¶ 13 Once in custody, a warrant was issued to search the contents of Silva's seized cell phone. Law enforcement extracted a series of text

messages between Silva and Holloway. These messages revealed that on 18 April 2017, Silva sent Holloway a text asking for "a pic with [Silva] and the gun lol so I can show my amigo." Holloway sent a video file back to Silva with a picture of Silva and a gun. On the same day, Holloway sent Silva another message stating, "[Hit me up] . . . asap got a lick."[1] Another message dated 24 April 2017 revealed a text from Holloway to Silva stating, "Aye bro I need that [rifle] asap." Then, on the evening of 26 April 2017, Holloway again messaged Silva and asked whether he was "try[ing] [to get in] on this lick in the am." Silva replied, "Where[?]" Holloway responded, "Boone, certified we gone [sic] come up bro we just need a ride." Silva then said, "Ight [sic] you me and [defendant]?" Holloway confirmed by saying, "Yeah." On 27 April 2017, defendant messaged Baker asking if he knew "where he could buy some drugs and stuff, and [Baker] told him [that he] knew someone that [he] could put [defendant] in contact with." Baker was then informed by defendant, Silva, and Holloway that they were currently driving to Boone in Silva's car. Baker reached out to Beshears to make the introduction and set the trap for the robbery. Defendant sent another message to Baker while en route to Boone stating that "Ima [sic] take all the money [Beshears] got too I might can have her take me to [Trivette's] money." According to Baker, he interpreted this message to mean that defendant intended to "take [Beshears'] belongings and try to get her to take him to the stuff that [Trivette] had as well." The messages exchanged above clearly demonstrate that Silva, Holloway, and defendant intended to rob Beshears and Trivette on 27 April 2017—though defendant was not included in the messages between Silva and Holloway in the preceding days. As mentioned above, the criminal plan was executed on 27 April 2017.

¶ 14 On 5 September 2017, defendant was indicted for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, felonious breaking and entering, and conspiracy to commit felonious breaking and entering. Following a four-day trial, the jury returned verdicts finding defendant guilty of all charges. The trial judge consolidated the robbery and conspiracy to commit robbery charges into one judgment, and sentenced defendant to a minimum of 73 months' and a maximum of 100 months' imprisonment (within the presumptive range for a prior record level two offender). The trial court also consolidated the breaking and entering and conspiracy to commit breaking and entering charges into one judgment, and imposed an active sentence of 8 to 19 months' incarceration to run consecutive to the first sentence (within

1. Detective Jason Reid testified that, based on his training and experience, a "lick" refers to a "robbery."

the presumptive range for a prior record level two offender). Judgments were entered on 31 October 2019.

¶ 15 Defendant filed a timely notice of appeal on 1 November 2019. Defendant's appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444.

II. Discussion

¶ 16 Defendant argues that the trial court erred by denying his motion to dismiss one of the two conspiracy charges and by entering two judgments for the same. Defendant also claims that the trial court committed prejudicial error by failing to provide the jury with a transcript of Blackburn's trial testimony following the jury's request for this record. We address each issue in turn.

A. Conspiracy

¶ 17 **[1]** Defendant argues that the trial court erred by denying his motion to dismiss one of the two conspiracy charges and entering two separate judgments for the convictions. We agree.

¶ 18 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citations omitted). Substantial evidence has been defined by our North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 19 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

¶ 20 This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide

whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

¶ 21 "A criminal conspiracy is an agreement by two or more persons to perform an unlawful act or to perform a lawful act in an unlawful manner." *State v. Rozier*, 69 N.C. App. 38, 49, 316 S.E.2d 893, 900 (1984) (citation omitted). The crime of criminal conspiracy is complete once an agreement is reached; the conspirators need not take any overt act to establish criminal liability. *Id.* "It is also clear that where a series of agreements or acts constitutes a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy." *Id.* at 52, 316 S.E.2d at 902 (emphasis in original) (citation omitted). "[W]hen the State elects to charge separate conspiracies, it must prove not only the existence of at least two agreements but also that they were separate." *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993) (citation omitted). Our Supreme Court has enumerated a number of factors to consider in deciding whether multiple agreements constitute a single conspiracy or multiple conspiracies, which include, but are not limited to, the "nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered." *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004) (citation omitted).

¶ 22 Here, we conclude that the trial court erred by denying defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. The State's evidence established *one* single conspiracy that continued from on or around 18 April 2017 through the date of the breaking and entering and armed robbery on 27 April 2017. The decision to break and enter into Beshears' apartment did not convert the original conspiracy to rob a drug dealer in Boone into two separate conspiracies. *See Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902 (citation omitted) ("[U]nder North Carolina law[,] multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies."). The evidence at trial established the existence of one agreement and only one conspiracy, insofar as defendant is concerned: to break and enter into Beshears' apartment and rob Beshears and Trivette of their drugs,

money, and other belongings. The agreement between defendant, Silva, and Holloway was entered on or around 26-27 April 2017 with one objective in mind. Although the robbery conspiracy evolved into a breaking and entering plot and the details regarding the target and location of the robbery were not finalized until hours before the crime, the criminal purpose remained the same. Since the State elected to charge defendant with separate conspiracies, it had to "prove not only the existence of at least two agreements but also that they were separate." *Id.* at 53, 316 S.E.2d at 902 (citation omitted). The State failed to connect defendant with Silva and Holloway's initial text conversation regarding robbing a drug dealer in Boone. Moreover, we disagree with the State's contention that when Silva declined Beshears' offer to conduct a drug sale in the parking lot, defendant and Silva hatched a new, separate agreement to break and enter into Beshears' apartment. "A single conspiracy is not transformed into multiple conspiracies simply because its members vary occasionally and the same acts in furtherance of it occur over a period of time." *Griffin*, 112 N.C. App. at 841, 437 S.E.2d at 392 (citation omitted). In our view, the events in this case were so overlapped as to comprise one continuing conspiracy.

¶ 23 We cannot allow two conspiracy convictions to stand when the State produced evidence of only one agreement between defendant and his co-conspirators. *See State v. Hicks*, 86 N.C. App. 36, 42, 356 S.E.2d 595, 598 (1987); *see also State v. Fink*, 92 N.C. App. 523, 533, 375 S.E.2d 303, 309 (1989).

¶ 24 When the Court vacates one of multiple conspiracy convictions, we must identify the first substantive crime committed in determining which conspiracy charge to vacate. *See Fink*, 92 N.C. App. at 533, 375 S.E.2d at 309 (citations omitted); *cf. State v. Tabron*, 147 N.C. App. 303, 307-308, 556 S.E.2d 584, 587 (2001) (holding that only the "earliest conspiracy conviction should stand."). Here, the felony breaking and entering was the first substantive crime as it occurred before (albeit immediately before) the armed robbery. As the felony breaking and entering was the first substantive crime committed by defendant (*i.e.*, the "operative" crime), because the conspiracy to commit felony breaking and entering was the "earlier of the conspiracy convictions" insofar as defendant is concerned, and because the State failed to prove that defendant conspired with Holloway and Silva in the weeks leading up to the crimes, we vacate defendant's conviction for conspiracy to commit armed robbery in Case No. 17 CRS 50616. *See Hicks*, 86 N.C. App. at 42, 356 S.E.2d at 598; *see also Fink*, 92 N.C. App. at 533, 375 S.E.2d at 309.

¶ 25 Because the trial judge consolidated the conspiracy to commit armed robbery conviction with the substantive robbery conviction and sentenced defendant within the presumptive range for the latter offense, defendant has not shown a reasonable probability that the trial court would have imposed a different and perhaps lesser sentence for the substantive offense of robbery with a dangerous weapon had the robbery conspiracy charge been dismissed. *See Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903.

B. Trial Transcript

¶ 26 **[2]** Defendant contends that the trial court abused its discretion by failing to provide the jury with a copy of Blackburn's trial testimony after the jury requested this record from the court. We disagree.

¶ 27 During deliberations, the jury submitted a note to the trial judge asking whether it could review a record or copy of Blackburn's testimony. The trial judge, outside the presence of the jury, stated to counsel the following: "I believe the answer to that is no. We don't operate in realtime. We do not have that available. I propose telling them no, and reminding them it's their duty to remember the evidence, recalling and remembering the evidence." Neither the State nor counsel for defendant objected to the trial judge's opinion on the matter. After bringing in the jury, the trial judge answered the jury's question this way: "The answer is no, we do not operate in realtime and don't have that available for you. It is your collective duty to recall and remember the evidence." Neither party objected to the aforesaid statement to the jury.

¶ 28 "If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence." N.C. Gen. Stat. § 15A-1233(a) (2019). It is well settled that "where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted); *State v. Perez*, 135 N.C. App. 543, 554, 522 S.E.2d 102, 110 (1999) (citations omitted) ("A trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof.").

¶ 29 In the context of jury requests, the trial court errs when it refuses to exercise its discretion in the erroneous belief that it has no discretion

to grant the jurors' request. *See Perez*, 135 N.C. App. at 554, 522 S.E.2d at 110; *see also State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). "Thus, in summary, we must consider if the trial court failed to exercise its discretion. If the trial court did indeed fail to exercise its discretion, this would constitute error, and we must then consider whether this error was prejudicial." *State v. Long*, 196 N.C. App. 22, 28, 674 S.E.2d 696, 700 (2009) (citations omitted). Such error is only prejudicial if defendant can show that (1) the requested testimony involved issues of some confusion and contradiction, and (2) it is likely that a jury would want to review such testimony. *State v. Johnson*, 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004) (citation and quotation marks omitted).

¶ 30 Here, the trial judge did not impermissibly deny the jurors' request based solely on the unavailability of the transcript. The trial judge's statement to the jury reflects that the trial court considered, but in its discretion, denied the jury's request in compliance with N.C. Gen. Stat. § 15A-1233(a). *See State v. Guevara*, 349 N.C. 243, 253, 506 S.E.2d 711, 718 (1998) (holding that because the "trial court did not say or indicate that it could not make the transcript or review of the testimony available to the jury[,]" defendant failed to show that the trial court failed to exercise its discretion). In short, the trial court exercised its discretion in denying the jury's request for a copy of Blackburn's trial testimony. *See State v. Lawrence*, 352 N.C. 1, 28, 530 S.E.2d 807, 824 (2000). Defendant acquiesced to the court's instruction and cannot now complain that he was prejudiced by the trial judge's decision on the matter.

III. Conclusion

¶ 31 For the foregoing reasons, we vacate the conspiracy conviction in Case No. 17 CRS 50616. In addition, we hold that the trial court did not err, much less commit prejudicial error, by denying the jury's request to review a copy of Daniel Blackburn's trial testimony.

VACATED IN PART; NO ERROR IN PART.

Judge INMAN concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

¶ 32 Defendant has failed to carry his burden on appeal to prove any error occurred or, even if so, has failed to show he suffered any preju-

dice. I concur with the majority opinion's conclusion that no prejudicial or plain error occurred in defendant's convictions for robbery with a dangerous weapon, felonious breaking and entering, and conspiracy to commit felonious breaking and entering, and defendant is not entitled to a new sentencing hearing. I also concur with the majority's opinion concluding the trial court did not err by denying the jury's request to review a transcript copy of Daniel Blackburn's trial testimony.

¶ 33 There is sufficient evidence to deny defendant's motion to dismiss and to submit the charge of conspiracy to commit robbery with a dangerous weapon to the jury. There is no error or prejudice in defendant's conviction for conspiracy to commit robbery with a dangerous weapon. I concur in part and respectfully dissent in part.

I. Standard of Review

¶ 34 "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 [d]efendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [d]efendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[T]he evidence need only give rise to a reasonable inference of guilt" to survive defendant's motion to dismiss and for the charge to be properly submitted to the jury for determination. *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (internal quotations omitted) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

II. Analysis

¶ 35 "A criminal conspiracy is an agreement between two or more persons to do an unlawful act . . . ." *State v. Massey*, 76 N.C. App. 660, 661, 334 S.E.2d 71, 72 (1985). "A conspiracy may be shown by express agreement or an implied understanding." *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000).

¶ 36 Our Supreme Court stated nearly ninety years ago: "Direct proof of the charge is not essential, for such is rarely obtainable. 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).

¶ 37 Defendant argues the court should have instructed the jury on just one conspiracy, robbery. Defendant argues, and the majority's opinion erroneously agrees, he and his co-conspirators only discussed the robbery, and the breaking and entering was a consequence of the intended robbery. Defendant argues because the conspiracy to break and enter was antecedent to the robbery, the conspiracy to break and enter should be vacated, and the case should be remanded for re-sentencing.

¶ 38 The State argues sufficient evidence tends to show two separate conspiracies. The agreement to break and enter was not part of defendant's original plan and agreement to commit robbery. Defendant had to change how, when, and where the robbery would be committed once Beshears refused to meet Baker or Silva in the parking lot. Defendant then conspired with Holloway to break and enter Beshears' apartment. While enroute to Boone, defendant sent a text message to his co-conspirator Baker, stating that "Ima [sic] take all the money [Beshears] got too I might can have her take me to [Trivette's] money." Baker initially had set up the drug transaction between Beshears and Silva to occur in the parking lot.

¶ 39 The separate conspiracy indictment and conviction is appropriate since it was agreed to at a separate time and by separate co-conspirators. The State also argues the conspiracy charge was consolidated into the underlying felony, and, if this Court were to vacate the conspiracy charge, remanding for resentencing is unnecessary. We all agree the sentence imposed upon remand would not change.

¶ 40 The State's evidence tended to show, and the jury could reasonably conclude, there was enough circumstantial evidence to show separate conspiracies to commit armed robbery and to break and enter. After Silva went inside of Beshears' apartment, it is logical defendant and Holloway reached an agreement to break into the apartment to get the money and drugs. Based upon the evidence and the actions of the parties, a separate conspiratorial agreement between defendant and Holloway was reached in order to break and enter into the apartment.

¶ 41 The State's evidence meets all of our Supreme Court's enumerated factors to consider in deciding whether multiple agreements constitute a single conspiracy or multiple conspiracies. These factors include, "[t]he nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered." *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004) (citation omitted). Defendant's argument is without merit.

III. Conclusion

¶ 42 The State presented sufficient circumstantial evidence to allow the jury to conclude there were two separate conspiracies to break and enter and to commit armed robbery. Defendant and the other co-defendant, Holloway, did not initially have to break and enter the apartment to rob Beshears or Trivette.

¶ 43 Viewed in the light most favorable to the State, the evidence and the actions of the parties clearly show separate and distinct agreements at different times between defendant, Baker, Silva, and Holloway to commit armed robbery. Also viewed in the light most favorable to the State, defendant later agreed to a separate conspiracy with Holloway to break and enter Beshears' apartment.

¶ 44 There are no errors in any of defendant's convictions, including his conspiracy to commit armed robbery in Case No. 17 CRS 50616. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
O.C. BILLINGS

No. COA20-550

Filed 6 July 2021

1. Satellite-Based Monitoring—Grady—application—recidivist's mandatory lifetime enrollment—subsequent review hearing

Defendant—as someone who was enrolled in lifetime satellite-based monitoring (SBM) based solely on his status as a recidivist and who was not under any post-release supervision—was entitled to relief under *State v. Grady*, 372 N.C. 509 (2019), which enjoined all applications of mandatory lifetime SBM in cases such as defendant's. Therefore, where the State scheduled a review hearing in defendant's case following the *Grady* decision, the trial court's subsequent order continuing defendant's lifetime SBM enrollment was vacated because the State could not bypass *Grady* by simply asking the court to make an independent inquiry to determine whether to reenroll defendant in lifetime SBM.

2. Satellite-Based Monitoring—jurisdiction—review hearing—mandatory lifetime enrollment

Where the Supreme Court's decision in *State v. Grady*, 372 N.C. 509 (2019), rendered defendant's enrollment in lifetime satellite-based monitoring (SBM) unconstitutional, the trial court's subsequent order continuing defendant's enrollment was vacated because the court lacked jurisdiction to conduct the review hearing—held two and a half years after defendant's conviction—which resulted in the order. The statutory provisions that would have conferred such jurisdiction did not apply to defendant's case, where N.C.G.S. § 14-208.40A required the court to conduct an SBM hearing "during the sentencing phase," and where the court lacked authority under section 14-208.40B to conduct a second SBM hearing because its first hearing was based upon the same reportable convictions. Moreover, the State failed to invoke the court's jurisdiction by failing to file a written pleading requesting the review hearing.

Judge TYSON concurring in the result by separate opinion.

Appeal by defendant from order entered 2 March 2020 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 27 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant O.C. Billings appeals from the trial court's order continuing his enrollment in satellite-based monitoring following our Supreme Court's opinion in *State v. Grady* ("*Grady III*"), 372 N.C. 509, 831 S.E.2d 542 (2019). After careful review, we vacate the trial court's order.

Background

¶ 2 On 28 September 2006, Defendant pleaded guilty to 14 counts of taking indecent liberties with a child, and was sentenced to 31 to 38 months of imprisonment.

¶ 3 Thereafter, the General Assembly established the state's satellite-based monitoring program for sex offenders. *See generally* N.C. Gen. Stat. § 14-208.40 *et seq*. (2019); *see also* 2007 N.C. Sess. Laws 340, 340–48, ch. 213. The program classifies sex offenders into several different categories, among them the category of "recidivist" as defined by § 14-208.6(2b). N.C. Gen. Stat. § 14-208.40(a)(1). If a trial court finds that an offender is a recidivist, "the court shall order the offender to enroll in satellite-based monitoring for life." *Id.* §§ 14-208.40A(c), -208.40B(c). On 29 April 2009, following a bring-back hearing pursuant to N.C. Gen. Stat. § 14-208.40B, the trial court classified Defendant as a recidivist and ordered him to enroll in satellite-based monitoring for the remainder of his natural life.

¶ 4 By opinion issued on 16 August 2019, our Supreme Court in *Grady III* considered both facial and as-applied challenges to the constitutionality of the state's satellite-based program with respect to "individuals who are subject to mandatory lifetime [satellite-based monitoring] based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision." 372 N.C. at 522, 831 S.E.2d at 553 (footnote omitted). The Court concluded that satellite-based monitoring is "unconstitutional as applied to all" such individuals. *Id.* at 511, 831 S.E.2d at 547.

¶ 5 Our Supreme Court recognized that "unsupervised individuals . . . , unlike probationers and parolees, are not on the continuum of possible criminal punishments and have no ongoing relationship with the State." *Id.* at 531, 831 S.E.2d at 559–60 (citation and internal quotation marks omitted). As a result, for this class of unsupervised individuals, "constitutional privacy rights, including [their] Fourth Amendment expectations of privacy, have been restored." *Id.* at 534, 831 S.E.2d at 561. Among its reasons for concluding that the satellite-based program is unconstitutional as applied to this class of individuals, the Court observed that "the provisions governing recidivists present no opportunity for determinations by the court regarding what particular risk, if any, is posed by the individual and whether a particular duration of [satellite-based monitoring] will, in any meaningful way, serve the State's interest in combating that risk." *Id.* at 546, 831 S.E.2d at 569. The Court thus concluded that "the Fourth Amendment, which secures the privacies of life against arbitrary power and places obstacles in the way of a too permeating police surveillance, prohibits the mandatory imposition of lifetime [satellite-based monitoring] on this class of individuals." *Id.* (citation and internal quotation marks omitted).

¶ 6 Accordingly, our Supreme Court fashioned a remedy for Mr. Grady and all similarly situated individuals that was "neither squarely facial nor as-applied." *Id.* The Court explained the facial aspects of its holding:

> [O]ur holding is facial in that it is not limited to [Mr. Grady]'s particular case but enjoins application of mandatory lifetime [satellite-based monitoring] to other unsupervised individuals when the [satellite-based monitoring] is authorized based solely on a "recidivist" finding that does not involve a sexually violent predator classification, an aggravated offense, or statutory rape or statutory sex offense with a victim under the age of thirteen by an adult.

Id. at 547, 831 S.E.2d at 570.

¶ 7 The Department of Public Safety developed two lists of individuals whose enrollments in satellite-based monitoring were potentially affected by our Supreme Court's opinion in *Grady III*.[1] Defendant was named in one of those lists. On 26 November 2019, the North Carolina Conference of District Attorneys circulated a "Best Practices" memo to all of the elected district attorneys in the state, providing guidance on how to conduct "Satellite[-]Based Monitoring Review Hearings" for the named individuals in light of *Grady III*. In accordance with this memo, the State scheduled a satellite-based monitoring review hearing in Defendant's case. The parties stipulate that the State served Defendant with notice of the hearing, but did not file any written motion, application, or other pleading.

¶ 8 On 2 March 2020, Defendant's satellite-based monitoring review came on for hearing before the Honorable Joseph N. Crosswhite in Iredell County Superior Court. The State presented the trial court with a newly completed Static-99R risk assessment, which indicated that Defendant had a "Well Above Average Risk" of recidivism. The State also provided an overview of Defendant's criminal record: the prosecutor described the 2006 incident that gave rise to the 14 charges to which Defendant pleaded guilty, the events surrounding Defendant's separate 2004 conviction for taking indecent liberties with children, and Defendant's several other prior convictions for non-sexual offenses.

¶ 9 Following its presentation of evidence, the State requested that the trial court impose lifetime satellite-based monitoring on Defendant,

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1. The criteria followed by the Department of Public Safety in the creation of these lists is not clear from the record.

asserting that the Supreme Court's opinion in *Grady III* did not bar such in Defendant's case:

> [THE STATE]: I would ask the Court to consider ordering him to comply with lifetime satellite-based monitoring based on the Static 99 evaluation, the risk of recidivism, and the threat that he's demonstrated in these different communities in the past.
>
> THE COURT: Yes, ma'am, and let me ask you this. I just want to make sure we're clear. If the Court does order lifetime satellite-based monitoring, is that consistent with that recent decision?
>
> [THE STATE]: Your Honor, the recent decision in Grady applies only to lifetime satellite-based monitoring that's ordered based on solely recidivism. That applies only when there's been an order based on the statute that says if a person is a recidivist, he may automatically receive lifetime satellite-based monitoring. And I think that holding does not bar the Court from making an independent inquiry through the Static 99 and determining that the defendant is high risk based on that evaluation and ordering lifetime satellite-based monitoring, or ordering satellite-based monitoring for a period of years. I think the Court is free to do either of those things.
>
> THE COURT: Okay, thank you very much.

¶ 10 After considering the arguments of Defendant, who appeared *pro se*, the trial court ordered Defendant to "continue to maintain the satellite-based monitoring" based on Defendant's Static-99R score and "the totality of these circumstances[.]" Defendant then attempted to give oral notice of appeal in open court, arguing that as a result of the *Grady III* decision, the trial court lacked authority to order him to submit to lifetime satellite-based monitoring.

¶ 11 The trial court entered a written order that states: "DEFENDANT SHALL REMAIN ON [SATELLITE-BASED MONITORING] DUE TO THE STATIC 99 SCORE OF 8 AND [HIS] CRIMINAL HISTORY." On 12 June 2020, pursuant to the 30 May 2020 order of the Chief Justice of the Supreme Court of North Carolina extending filing deadlines due to the COVID-19 pandemic, Defendant timely filed his notice of appeal from the 2 March 2020 order.

Discussion

¶ 12 Defendant raises four issues on appeal. First, Defendant argues that the trial court lacked jurisdiction to conduct a satellite-based monitoring hearing and to impose satellite-based monitoring on him on grounds other than recidivism. Then, assuming *arguendo* that the trial court did possess jurisdiction to impose satellite-based monitoring on other grounds, Defendant argues that the trial court erred by (1) ordering satellite-based monitoring when the State failed to meet its burden of showing reasonableness under the Fourth Amendment; (2) ordering Defendant to remain subject to satellite-based monitoring for the remainder of his natural life, as opposed to a term of years, in the absence of any statutory authority permitting such an order; and (3) conducting a satellite-based monitoring hearing without appointing counsel to represent Defendant, as required by N.C. Gen. Stat. §§ 7A-451(a)(18) and 14-208.40B(b).

¶ 13 After careful review, we conclude that the trial court lacked jurisdiction to conduct the 2 March 2020 hearing. Accordingly, we vacate the trial court's order without prejudice to the State's ability to file an application for satellite-based monitoring.

I. Standard of Review

¶ 14 "Whether a trial court has subject matter jurisdiction is a question of law," which this Court reviews de novo. *State v. Clayton*, 206 N.C. App. 300, 303, 697 S.E.2d 428, 431 (2010) (citation omitted). When an appellate court conducts de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

II. Grady III *Relief*

¶ 15 **[1]** As an initial matter, the State argues that Defendant is not entitled to relief under *Grady III*. In so arguing, the State misconstrues the basis for our Supreme Court's ruling in that case.

¶ 16 As stated above, in *Grady III*, our Supreme Court concluded that satellite-based monitoring was not only unconstitutional as applied to that particular defendant, but also as applied to other similarly situated individuals. 372 N.C. at 546, 831 S.E.2d at 569. Accordingly, the Court enjoined *all*

> applications of mandatory lifetime [satellite-based monitoring] of unsupervised individuals authorized

> solely on a finding that the individual is a recidivist and without any findings that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator.

Id. at 547, 831 S.E.2d at 570.

¶ 17 At a bring-back hearing in 2009, Defendant was enrolled in mandatory lifetime satellite-based monitoring based solely on a finding that he was a recidivist, and without any findings that he was convicted of an aggravated offense, or was an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or was classified as a sexually violent predator. Defendant is not currently under any form of post-release supervision, and the record on appeal does not contain any indication that he was at the time of the 2 March 2020 hearing. He is thus entitled to relief under *Grady III*.

¶ 18 Nonetheless, the State asserts that the 2 March 2020 hearing remedied any deficiencies in the original imposition of satellite-based monitoring on Defendant, and removed him from the *Grady III* class. The State maintains that Defendant "1) was provided reasonable opportunity for termination, via the March 2020 hearing, wherein 2) the Superior Court considered both his individualized assessment and the characteristics of his crimes in rendering a decision as to whether to maintain or modify his prior [satellite-based monitoring] order." Thus, the State claims, Defendant is no longer entitled to relief under *Grady III*.

¶ 19 The State's argument is inapposite. Under *Grady III*, the State was enjoined from the continued application of unconstitutional satellite-based monitoring of Defendant. That the State subsequently chose to conduct a "review hearing" is immaterial. The State did not invoke the jurisdiction of the trial court for the 2 March 2020 hearing during which Defendant was ostensibly provided with the *post hoc* process that the State claims disqualifies him from relief under *Grady III*. The State cannot avoid *Grady III*, which enjoined the unconstitutional application of satellite-based monitoring in cases such as Defendant's, by devising a procedure that itself violates Defendant's rights.

¶ 20 Pursuant to the plain text of our Supreme Court's opinion, Defendant falls within the class of individuals eligible for relief under *Grady III*. Hence, the State was enjoined from subjecting Defendant to the continued application of satellite-based monitoring for the remainder of his life. If the State wished to reenroll Defendant in satellite-based monitor-

ing, it had to proceed in a manner consistent with its statutory authority and procedural obligations. For the following reasons, we conclude that it did not.

III. Statutory Jurisdiction

¶ 21 **[2]** Defendant argues that the trial court lacked jurisdiction to conduct the 2 March 2020 hearing because (1) neither *Grady III* nor any statute permits the State to seek a rehearing of its application for satellite-based monitoring of a defendant eligible for relief under *Grady III*; and (2) "[t]he State filed no motion, application, or other pleading invoking the trial court's jurisdiction under a rule of criminal or civil procedure."

¶ 22 "Jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it. . . . A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *State v. Wooten*, 194 N.C. App. 524, 527, 669 S.E.2d 749, 750 (2008) (citations and internal quotation marks omitted), *disc. review denied and cert. dismissed*, 363 N.C. 138, 676 S.E.2d 308 (2009).

¶ 23 Two statutes confer jurisdiction upon a trial court to enroll a qualifying individual in satellite-based monitoring. Section 14-208.40A requires the trial court to conduct a satellite-based monitoring hearing "during the sentencing phase" of a criminal proceeding following a conviction. N.C. Gen. Stat. § 14-208.40A(a). This section is plainly inapplicable to Defendant's case, because Defendant was initially enrolled in the satellite-based monitoring program approximately two and a half years after he was convicted and sentenced.

¶ 24 Section 14-208.40B similarly fails to provide a statutory basis for the State's "satellite-based monitoring review hearing" that could apply in Defendant's case. This section confers jurisdiction upon a trial court to conduct a satellite-based monitoring hearing "[w]hen an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), *and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring*[.]" *Id.* § 14-208.40B(a) (emphasis added). The plain language of this statute indicates that it does not apply where there *has already* been a "determination by a court on whether the offender shall be required to enroll in satellite-based monitoring," *id.*, as happened in this case in 2009 when Defendant was initially enrolled in satellite-based monitoring following his "bring-back" hearing pursuant to § 14-208.40B(a).

¶ 25 Moreover, our precedent makes clear that the State cannot move for reconsideration of satellite-based monitoring under § 14-208.40B. In

Clayton, the defendant pleaded guilty in April 2008 to two counts of taking indecent liberties with a child and received a sentence that was suspended upon a term of probation. 206 N.C. App. at 301, 697 S.E.2d at 430. On 19 May 2008, pursuant to § 14-208.40B, the defendant was brought back before the trial court for a satellite-based monitoring hearing, at which the trial court determined that the defendant was not subject to satellite-based monitoring. *Id.* The defendant was subsequently charged with violating his probation in July 2008. *Id.* At the probation violation hearing on 5 March 2009, the defendant's satellite-based monitoring status was reevaluated, and at that time, the trial court ordered him to enroll in satellite-based monitoring for a period of ten years. *Id.* at 301–02, 697 S.E.2d at 430.

¶ 26 On appeal, this Court observed that there was "no indication that between 19 May 2008 and 5 March 2009 [the] defendant was convicted of another 'reportable conviction' which could trigger another [satellite-based monitoring] hearing based upon the new conviction." *Id.* at 305, 697 S.E.2d at 432. We thus vacated the 2009 satellite-based monitoring order, in that "[t]he trial court did not have any basis to conduct another [satellite-based monitoring] hearing, where it had already held [a satellite-based monitoring] hearing based upon the same reportable convictions in 2008." *Id.*

¶ 27 As in *Clayton*, the record in the instant case reflects no new "reportable conviction"[2] between the 29 April 2009 order enrolling Defendant in mandatory lifetime satellite-based monitoring and the 2 March 2020 "review" hearing upon which the trial court could base jurisdiction under § 14-208.40B(a). *See* N.C. Gen. Stat. § 14-208.6(4) (defining a "[r]eportable conviction" for the purposes of the sex offender and public protection registration programs). Thus, the trial court "did not have any basis to conduct another [satellite-based monitoring] hearing, where it had already held [a satellite-based monitoring] hearing based upon the same reportable convictions" in 2009. *Id.*

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2. At the 2 March 2020 hearing, the State indicated that Defendant had been "charged with first degree rape and first degree forcible sex offenses and possession of a firearm by a felon" and "prosecuted contemporaneously for that in Federal court." According to the State, Defendant "was convicted of possessing a firearm by a felon in Federal court and the state charges were dismissed, so he was not convicted of the rape or any sex offense at that time." There is no documentation of this proceeding in the record on appeal. But in any event there is also no indication that Defendant was *convicted* of any new offense that would trigger another satellite-based monitoring hearing under § 14-208.40B(a). As the plain text of § 14-208.40B(a) refers only to a "reportable conviction[,]" rather than to an arrest or an indictment, we may reach no other conclusion. N.C. Gen. Stat. § 14-208.40B(a).

¶ 28 Additionally, the State did not validly invoke the court's jurisdiction to conduct the 2 March 2020 hearing. The satellite-based monitoring program is "a civil regulatory scheme," of which satellite-based monitoring hearings and proceedings are part. *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (citation and internal quotation marks omitted). Under the North Carolina Rules of Civil Procedure, "jurisdiction is dependent upon the existence of a valid motion, complaint, petition, or other valid pleading[.]" *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003).

> *A court* cannot undertake to adjudicate a controversy on its own motion; rather, it *can adjudicate a controversy* only when a party presents the controversy to it, and then, *only if it is presented in the form of a proper pleading.* Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.

Id. at 444, 581 S.E.2d at 795 (citation omitted); *accord State v. Turner*, 262 N.C. App. 155, 819 S.E.2d 415, 2018 WL 4997420, at *2 (2018) (unpublished).

¶ 29 In *Turner*, the State argued before the trial court that the defendant's conviction for statutory rape constituted an aggravated offense, mandating lifetime satellite-based monitoring of the defendant. 2018 WL 4997420, at *1. However, a subsequent risk assessment placed the defendant in the "Moderate-Low" risk category, and the trial court entered an order stating that the defendant was not required to enroll in satellite-based monitoring. *Id.* Months later, another satellite-based monitoring hearing was held, although the record on appeal contained no information indicating how that second hearing was initiated. *Id.* At the second hearing, the State argued that the trial court had previously misinterpreted case law regarding statutory rape, and the trial court set aside the earlier order and entered a new order imposing lifetime satellite-based monitoring upon the defendant. *Id.*

¶ 30 On appeal, this Court vacated the second satellite-based monitoring order for lack of subject-matter jurisdiction. *Id.* at *3. Although we agreed that the trial court's initial analysis of statutory rape was erroneous, pursuant to *Clayton*, "once the trial court entered the erroneous order, it did not have the authority to *sua sponte* modify the prior order." *Id.* at *2. The State argued in *Turner*—as it argues in present case—that it could have properly invoked the jurisdiction of the trial court by filing pleadings such as a Rule 60 motion, but we rejected the State's argument

because "[t]he record on appeal d[id] not contain any motion filed by the State[.]" *Id.* Although *Turner* is an unpublished opinion and therefore not binding legal authority, *see* N.C. R. App. P. 30(e)(3), we nevertheless find its reasoning persuasive and applicable to the issue before us, and we hereby adopt and employ that reasoning here.

¶ 31 In the instant case, the State has stipulated in the record on appeal that it "did not file a written motion, application, or other pleading." At oral argument, Defendant's counsel conceded that a hypothetical motion, such as a Rule 60 motion or a motion in the cause, may properly invoke the jurisdiction of the trial court "in some case" under similar post-*Grady III* circumstances. However, defense counsel further asserted that in the absence of any such motion, the State does not actually invoke the trial court's jurisdiction. We agree.

¶ 32 "We need not speculate about whether any hypothetical motions could have granted the trial court subject-matter jurisdiction to enter the [2 March 2020] order. In the absence of any motion, the trial court lacked subject-matter jurisdiction to conduct the [2 March 2020] hearing and the [2 March 2020] order is void." *Turner*, 2018 WL 4997420, at *3. Accordingly, we "vacate the trial court's [satellite-based monitoring] order without prejudice to the State's ability to file [an] application" for satellite-based monitoring, consistent with this opinion. *State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019).

Conclusion

¶ 33 For the foregoing reasons, the trial court did not have jurisdiction to conduct the 2 March 2020 hearing. Accordingly, we vacate the trial court's order without prejudice to the State's ability to file an application for satellite-based monitoring.

VACATED.

Chief Judge STROUD concurs.

Judge TYSON concurs in the result by separate opinion.

TYSON, Judge, concurring in the result only.

¶ 34 Defendant argues and this Court agrees the trial court lacked subject matter jurisdiction to conduct a rehearing on Defendant's satellite-based monitoring. The parties stipulated the State served Defendant with a

letter providing purported notice of the hearing, but "did not file a written motion, application, or other pleading" with the court.

¶ 35 As noted in the majority's opinion, Defendant's counsel conceded at oral argument a "motion, such as a Rule 60 motion or a motion in the cause, may properly invoke the jurisdiction of the trial court 'in some case' under similar post-*Grady III* circumstances." *See* N.C. Gen. Stat. § 1A-1, Rule 60 (2019); *see generally J&M Aircraft Mobile T-Hangar, Inc. v. Johnston Cty. Airport Auth.*, 166 N.C. App. 534, 539, 603 S.E.2d 348, 351 (2004) (a motion in the cause is the proper action to set aside a judgment pursuant to N.C. Gen. Stat. § 1A–1, Rule 60). In the absence of any such motion, the State did not invoke the trial court's subject matter jurisdiction.

¶ 36 We unanimously agree the trial court lacked subject matter jurisdiction to conduct the 2 March 2020 hearing as the *ratio decidendi* of this appeal. The order therefrom must be vacated without prejudice to the State's ability to invoke the trial court's jurisdiction and file an application for satellite-based monitoring. *State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (vacating "the trial court's [satellite-based monitoring] order without prejudice to the State's ability to file [an] application" for satellite-based monitoring).

¶ 37 Further analysis or discussion beyond the dispositive determination to vacate without prejudice is *obiter dicta*. *See Catawba Memorial Hospital v. N.C. Dept. Human Resources*, 112 N.C. App. 557, 561, 436 S.E.2d 390, 392 (1993) (finding the addressed issue "to be dispositive and, in view of our decisions with respect thereto, conclud[ing] that it is unnecessary to address the remainder"). I concur in the result to vacate the order without prejudice.

STATE v. BRANTLEY-PHILLIPS

[278 N.C. App. 279, 2021-NCCOA-307]

STATE OF NORTH CAROLINA
v.
KIMBERLY BRANTLEY-PHILLIPS

No. COA20-608

Filed 6 July 2021

1. False Pretense—obtaining property by false pretenses—online payments to Dep't of Revenue—credit to taxpayer account—sufficiency of evidence

The State presented substantial evidence that defendant committed multiple counts of obtaining property by false pretenses where she made numerous online payments (totaling $559,549.71) to the Department of Revenue (DOR) on her taxpayer account from invalid bank accounts. Although all the payments were ultimately rejected, the amounts that were initially positively credited to defendant's taxpayer account, which resulted in her liabilities being extinguished and refund checks being issued to her after the DOR system registered the amounts as overpayments, constituted "property or a thing of value" pursuant to N.C.G.S. § 14-100(a), and DOR was in fact deceived by the invalid payments.

2. Appeal and Error—preservation of issues—fatal variance between indictment and jury instructions—general motion to dismiss

In a prosecution for obtaining property by false pretenses, where defendant moved to dismiss all the charges but did not make a specific objection to the court's jury instructions, the appellate court nevertheless applied de novo review, rather than plain error review, to the issue of whether the trial court's jury instruction fatally varied from the indictment.

3. False Pretense—jury instructions—identification of "thing of value"—fatal variance with indictment

In its instructions to the jury on ten counts of obtaining property by false pretenses, the trial court did not err by using the term "thing of value" without identifying the "thing" as amounts credited to defendant's taxpayer account after she made numerous invalid payments to the Department of Revenue, all of which were rejected after defendant received the benefit of those credits (by having her liabilities extinguished and refund checks issued to her). There was no fatal variance between the indictment and the instructions where the State's evidence corresponded to the indictment's allegations

and there was consistency between the indictment, evidence, and jury instructions.

4. Sentencing—restitution—condition of probation—lack of supporting evidence

Defendant's judgments for obtaining property by false pretenses were vacated and the matter remanded for resentencing where the court's order requiring defendant to pay restitution as a condition of probation was not supported by evidence that the losses to be repaid were the result of the criminal offenses.

Appeal by Defendant from Judgments entered 9 September 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 12 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Benjamin J. Kull for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Kimberly Brantley-Phillips (Defendant) appeals from Judgments entered 26 September 2019 after a jury found her guilty of ten counts of Obtaining Property by False Pretense. The Record tends to reflect the following:

¶ 2 Between 20 November 2014 and 25 January 2018, Defendant made forty-eight online payments to the North Carolina Department of Revenue (NCDOR), which were "applied to Transaction Lists, or NCDOR ledgers, for tax years 2011 and 2014." These payments—which were made on Defendant's NCDOR taxpayer account, under Defendant's name, and in association with Defendant's Social Security Number—came from a total of ten banks. The routing numbers associated with each online payment all corresponded to valid bank routing numbers. Ultimately, each payment was rejected: one for insufficient funds, and the remaining forty-seven by reason of "Invalid Account[s][.]" These payments would have amounted to a total of $559,549.71.

¶ 3 NCDOR's internal online filing and payment system registered each payment, along with the pertinent personal information. After each payment was registered, Defendant's taxpayer account would be positively

credited "virtually immediately[.]" Then, before it had time to realize these payments were invalid,[1] NCDOR would "either sen[d] money to other tax years to pay liabilities owed[,]" or "sen[d] [money] to external agencies to pay liabilities owed to them[.]" On a few occasions following these payments, NCDOR also stopped garnishments of Defendant's wages, previously put in place to recoup existing debts on Defendant's taxpayer account. Moreover, because Defendant's alleged payments resulted in overpayment on Defendant's tax account for the 2014 account period, Defendant received four refund checks, the first three of which she was able to cash before NCDOR realized Defendant's payments were invalid and issued a stop payment order.

¶ 4 In July 2017, Karli Hahn (Agent Hahn), a special agent in the criminal investigation section of NCDOR, was assigned to investigate Defendant's online payment activity. In February 2018, Agent Hahn spoke with Defendant directly. Agent Hahn testified, over the course of her interview with Defendant, Defendant admitted: she knew the payments in question and associated bank accounts were false; she had cashed the refund checks despite knowing she was not entitled to the money; and had made the invalid payments to "stop the wage garnishments from occurring[.]" "[E]ventually she realized that she was getting refund checks, so then she decided she wanted to continue the cycle."

¶ 5 On 14 August 2018, three warrants were issued for Defendant's arrest charging Defendant with a total of ten counts of Obtaining Property by False Pretense. The State subsequently gave notice it intended to use the remainder of the forty-eight payments as evidence of "an ongoing and substantially interconnected criminal enterprise." The warrants alleged: Defendant had submitted online filings to NCDOR in 2014, 2015, and 2016, respectively; had made these payments from invalid bank accounts under false pretenses; and had obtained or attempted to obtain a total of $1,092.48, $4,456.23, and $20,248.16, respectively.

¶ 6 On 9 October 2018, a grand jury in Wake County indicted Defendant on ten counts of Obtaining Property by False Pretense, alleging she had obtained or attempted to obtain "United States Currency[.]" On 30 July 2019, Defendant was indicted on the same charges via superseding indictments, this time alleging Defendant had obtained or attempted to obtain "a credit on her North Carolina Department of Revenue account in the approximate amount[s]" of $2,256.16, $35,500, and $40,000, respectively.

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1. The amount of time needed for NCDOR to receive notice from alleged payment source bank that the account in question is either invalid or has insufficient funds is "three to seven . . . business days depending on holidays and weekends . . . ."

¶ 7 The matter came on for trial before a jury in Wake County Superior Court on 23 September 2019. At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence. The trial court denied the Motion, finding "there [wa]s substantial evidence as to each element of each charge charged in this case[.]" Defendant renewed her Motion to Dismiss at the close of all evidence. The trial court again denied the Motion. The trial court subsequently instructed the jury for each of the ten counts:

> If you find from the evidence beyond a reasonable doubt . . . the Defendant made a representation and that this representation was false, that this representation was calculated and intended to deceive, that the alleged victim was in fact deceived by it, and that the Defendant thereby obtained property or a thing of value from the alleged victim, it would be your duty to return a verdict of guilty.

¶ 8 On 26 September 2019, the jury found Defendant guilty on all ten counts of Obtaining Property by False Pretense. The trial court entered Judgments in each of the three cases. The first Judgment (file number 18 CRS 215090) consolidated four of the convictions and sentenced Defendant in the presumptive range of six-to-seventeen months. The second Judgment (file number 18 CRS 215091) consolidated three of the convictions, sentencing Defendant to a consecutive, active term of six-to-seventeen months, suspended for a period of thirty-six months. The third Judgment (file number 18 CRS 215092) consolidated the remaining three convictions sentencing Defendant to a further consecutive term of six-to-seventeen months, also suspended. As a monetary condition of probation in 18 CRS 215091, Defendant was ordered to pay restitution in the amount of $14,506.56. A separate notation in the Judgment entered in 18 CRS 215092 reflects it applies the same conditions of probation as in 18 CRS 215091. Defendant gave timely, oral Notice of Appeal in open court, consistent with N.C. R. App. P. 4.

Issues

¶ 9 The dispositive issues on appeal are whether: (I) the trial court erred in denying Defendant's Motion to Dismiss the charges of Obtaining Property by False Pretense for insufficient evidence; (II) the jury instructions varied fatally from the indictments by failing to specify the credits to Defendant's NCDOR account as the "thing of value" obtained; and (III) the trial court committed error in ordering Defendant to pay restitution in the amount of $14,506.56.

Analysis

I. Motion to Dismiss

A. Standard of Review

¶ 10 "Upon [a] 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. Fields*, 265 N.C. App. 69, 71, 827 S.E.2d 120, 122 (2019), *review allowed*, *writ allowed*, 830 S.E.2d 816 (N.C. 2019), *and aff'd as modified*, 374 N.C. 629, 843 S.E.2d 186 (2020) (citation and quotation marks omitted). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *State v. Golder*, 374 N.C. 238, 249-50, 839 S.E.2d 782, 790 (2020) (alterations in original; quotations marks omitted) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered 'in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.' " *Id.* at 249-50, 839 S.E.2d at 790 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Id.* at 250, 839 S.E.2d at 790 (quotation marks omitted) (quoting *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018)).

B. Obtaining Property by False Pretense

¶ 11 **[1]** Our General Statutes set out the felony of Obtaining Property by False Pretense as follows:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any *money*, *goods*, *property*, *services*, *chose in action*, *or other thing of value* with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony[.]

N.C. Gen. Stat. § 14-100(a) (2019).

> Our Supreme Court has defined the elements of the crime of obtaining property by false pretenses in N.C. Gen. Stat. § 14-100 as follows: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) *which does in fact deceive*, and (4) by which one person *obtains or attempts to obtain value from another*."

State v. Bradsher, 275 N.C. App. 715, 733, 852 S.E.2d 716, 729 (2020) (emphasis added) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)).

¶ 12 Here, Defendant argues the trial court erred in denying her Motion to Dismiss on the basis the State failed to present substantial evidence that Defendant's positive credits to her NCDOR taxpayer account constituted "property or a thing of value," or that NCDOR was deceived by Defendant's invalid payments.

1. *Evidence Defendant Obtained Property or a Thing of Value*

¶ 13 Defendant first argues the State presented insufficient evidence to establish Defendant obtained "property or a thing of value." Specifically, Defendant argues the credit to Defendant's taxpayer account resulting from her invalid payments does not constitute "property or a thing of value." In fact, Defendant contends "there [i]s no evidence that [Defendant] received any actual, real-world value from any of the ten indicted transactions."

¶ 14 As to all which the term "thing of value" may encompass, for the purpose of proving the offense of Obtaining Property by False Pretense, "all that our law requires is that the defendant obtain[] or attempt[] to obtain anything of value." *State v. Golder*, 257 N.C. App. 803, 813, 809 S.E.2d 502, 509 (2018), *aff'd as modified*, 374 N.C. 238, 839 S.E.2d 782 (2020) (alterations in original) (citation and quotation marks omitted); *see also Golder*, 374 N.C. at 252-53, 839 S.E.2d at 792 ("The fact that the statute imparts criminal liability when a defendant even *attempts* to obtain *any* 'other thing of value' guides this Court in deciding to apply a broader definition of 'thing of value' than suggested by defendant.") " 'Anything' is the most broad term one can use to define the class of valuable items that could satisfy this element, and that factual determination [i]s for the jury." *Golder*, 257 N.C. App. at 813, 809 S.E.2d at 509.

¶ 15 In *Golder*, "[t]he indictment arose from allegations that [the] defendant and Kevin Ballentine, a public employee with the Wake County

Clerk's Office, devised a scheme in which [the] defendant would pay Ballentine to alter or falsify court documents to secure remission of bail bond forfeitures." *Golder*, 374 N.C. at 240, 839 S.E.2d at 784. The defendant argued the State had not shown he had obtained "a thing of value" "because the fraudulent representations merely resulted in the 'elimination of a potential future liability.' " *Id.* at 252, 839 S.E.2d at 792. Our Supreme Court reasoned:

> Assuming *arguendo* that the elimination of a potential future liability does not constitute "property" under N.C.G.S. § 14-100, that result is not dispositive . . . . At a minimum, this was an attempt to reduce the amount that defendant's bail bond company was required to pay as surety for forfeited bonds and, therefore, constitutes a "thing of value" under N.C.G.S. § 14-100.

Id. at 252-53, 839 S.E.2d at 792. Accordingly, the Supreme Court concluded the State had provided sufficient evidence to support the defendant's conviction of Obtaining Property by False Pretense. *Id.* at 253, 839 S.E.2d at 792.

¶ 16 Though the context of our case differs somewhat from *Golder*, the respective outcomes are not significantly distinguishable. Here, the State provided testimony from Agent Hahn and Defendant's NCDOR transactions list for the 2011 and 2014 tax years. The evidence, viewed in the light most favorable to the State, provides a clear picture: Defendant's fraudulent payments positively credited her taxpayer account "virtually immediately[.]" These credits, in turn, led NCDOR to provide credit toward Defendant's liabilities and to credit Defendant's liabilities to other agencies, to put a hold on its garnishments of Defendant's wages, and to submit four refund checks to Defendant, three of which she successfully cashed. Thus, the benefit Defendant incurred from her purported "payments" was the elimination or diminution of liabilities owed to NCDOR and other agencies, in addition to the tangible benefit of cash by way of the refund checks. Moreover, Defendant herself admitted she committed these offenses to "stop the wage garnishments from occurring," and deliberately "continue[d] the cycle" to redeem additional refund checks. "At a minimum," then, Defendant's efforts were "an attempt to reduce the amount that [D]efendant[] . . . was required to pay" NCDOR. *See id.* at 253, 839 S.E.2d at 792. Thus, the State brought forth sufficient evidence to "persuade a rational juror to accept [the] conclusion" Defendant, by obtaining credits to her taxpayer account by way of her invalid payments, had indeed obtained "property or a thing of value." *See id.* at 249, 839 S.E.2d at 790 (citation omitted).

2. *Evidence NCDOR Was Deceived by Defendant's Invalid Payments*

¶ 17 Defendant next argues the State failed to present substantial evidence showing NCDOR was, in fact, deceived by Defendant's invalid payments to her taxpayer account.

¶ 18 Here, the evidence at trial showed, following Defendant's invalid payments, because "there were a bunch of online payments made on the Defendant's account that [NCDOR] thought [it] received the funding for[,]" NCDOR "either sent money to other tax years to pay liabilities owed or . . . sent it to external agencies to pay liabilities owed to them, as well, when in actuality [NCDOR] never received the funding from [Defendant] or these bank accounts because they were fake." NCDOR stopped garnishments on Defendant's wages on multiple instances following Defendant's false payments. Moreover, some of Defendant's invalid payments led NCDOR to believe, erroneously, Defendant had overpaid, thus resulting in the issuing of the four refund checks to her.

¶ 19 Thus, again, the State brought forth sufficient evidence to "persuade a rational juror to accept [the] conclusion" NCDOR was deceived by Defendant's false payments. *See id.* at 249, 839 S.E.2d at 790 (citation omitted). The trial court did not err in denying Defendant's Motion to Dismiss for lack of sufficient evidence.

II. Jury Instructions

¶ 20 Defendant further argues the trial court's instructions to the jury—using the term "thing of value" without identifying the thing of value as the credits to Defendant's taxpayer account, as specifically described in the superseding indictments—varied fatally from the indictments and were thus erroneous.

A. Standard of Review

¶ 21 **[2]** As a preliminary matter, the parties dispute whether we should apply plain error or de novo review. Defendant failed to preserve a specific objection on the issue of jury instructions, a fact which she concedes. Defendant contends, however, the Supreme Court in *Golder* "assumed without deciding" that "issues concerning fatal variance are preserved by a general motion to dismiss." Thus, because Defendant did make a Motion to Dismiss, which was renewed at the close of all evidence, Defendant claims the issue is preserved and subject to de novo review. Conceding, however, the Supreme Court "did not firmly settle that question," in the alternative, Defendant seeks plain error review. The State, for its part, argues Defendant's claim regarding jury instructions "is not

related to the sufficiency of evidence presented at trial," and thus, as unpreserved, her claim must be reviewed for plain error.

¶ 22 Although *Golder* did not address this specific question, our Court has noted, in light of *Golder*: "any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020) (citation omitted). We further reasoned: "[o]ur Supreme Court made clear in *Golder* that 'moving to dismiss at the proper time . . . preserves *all* issues related to the sufficiency of the evidence for appellate review.' " *Id.* (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). Specifically, in *Gettleman* we determined the defendant failed to preserve an argument that the jury instructions and indictment in that case created a fatal variance precisely because the Defendant failed to move to dismiss the charge in question. *Id.* Here, unlike in *Gettleman*, Defendant did timely move to dismiss all charges, and thus, under the rationale of *Gettleman*, it would appear Defendant did preserve this argument.[2] *See id.* Without so deciding, and for purposes of review of this case, we employ de novo review. *See id.*

B. Whether the Jury Instructions Varied Fatally from the Indictments

¶ 23 **[3]** Defendant argues: "[t]o the extent th[e] [jury] instructions allowed the jury to conclude that the $1,889.80 in offsets, as described during Agent Hahn's testimony, constituted the requisite 'thing of value' for any of the ten charges, the instructions varied fatally from the indictments." In other words, Defendant argues, to the extent the jury may have been misled by the instructions to confuse "offsets" with "credits" as the "thing of value" allegedly obtained by Defendant, the jury instructions varied fatally from the superseding indictments and were thus erroneous.

¶ 24 "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018) (quotation marks omitted) (quoting *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885,

2. The State's point is well taken. It is not clear our Supreme Court necessarily intended a Motion to Dismiss based on insufficient evidence to preserve an argument that the jury instructions varied from the indictment. *See generally State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996) (reviewing for plain error); *State v. McNair*, 253 N.C. App. 178, 799 S.E.2d 631 (2017) (reviewing for plain error); *State v. Locklear*, 259 N.C. App. 374, 816 S.E.2d 197 (2018) (reviewing for plain error); *State v. Lu*, 268 N.C. App. 431, 836 S.E.2d 664 (2019) (reviewing for plain error).

888 (2016)). "Thus, '[i]f the indictment's allegations do not conform to the "equivalent material aspects of the jury charge," this discrepancy is considered a fatal variance.' " *Id.* (alteration in original) (quoting *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *rehr'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983)). "It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment." *Id.* at 383, 816 S.E.2d at 204 (alteration in original; quotation marks omitted) (quoting *Taylor*, 304 N.C. at 274, 283 S.E.2d at 777). "Nevertheless, this Court has stated that '[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds "no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury." ' " *Id.* (alteration in original) (quoting *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005)). For example, "[i]n [*State v.*] *Clemmons*, this Court held the trial court did not err in failing to mention the exact misrepresentation alleged in the indictment in the jury instruction because the State's evidence corresponded to the allegation in the indictment." *Id.* (citing *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993)).

¶ 25 *State v. Locklear* provides another pertinent example; there, at issue was whether there was a fatal variance between the indictment for Obtaining Property by False Pretense and the jury instructions. *Id.* at 380, 816 S.E.2d at 202. There, the indictment specified the false pretense of "filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence," whereas the jury instructions did not make such specifications, but instead provided "that the jury must find 'that the [d]efendant made a representation to another[,]' 'that the representation was false[,]' and 'the representation was calculated and intended to deceive.' " *Id.* at 380-81, 816 S.E.2d at 203 (second and third brackets in original). In fact,

> [d]uring the charge conference, the parties agreed that the court would instruct the jury on obtaining property of value of $100,000 or greater by false pretense and the lesser offense of obtaining property by false pretense where value is not at issue. The trial court was informed that both offenses were included in the same pattern jury instruction. The trial court then instructed the jury pursuant to pattern instruction N.C.P.I.—Crim. 219.10A without specifying the false pretense alleged in the indictment.

Id. "The jury ultimately convicted [the] defendant of the lesser obtaining property by false pretense offense." *Id.* at 381, 816 S.E.2d at 203. Our Court analyzed:

> evidence was introduced at defendant's trial of various misrepresentations in defendant's insurance claim besides her denial that she had anything to do with setting the fire. Precisely, in addition to evidence of the misrepresentation alleged in the indictment—"filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence"—evidence was introduced that defendant signed her ex-husband's name on a deed, overstated the personal items allegedly destroyed in the fire, and sought money for rent that was not used for rent. Both defendant and the State have acknowledged evidence of these misrepresentations.

Id. at 383-84, 816 S.E.2d at 205. Our Court further reasoned:

> [w]here there is evidence of various misrepresentations which the jury could have considered in reaching a verdict for obtaining property by false pretense, we hold the trial court erred by not mentioning the misrepresentation specified in the indictment in the jury instructions for the offense.

Id. at 384, 816 S.E.2d at 205. Then, our Court concluded:

> Upon review, we agree with defendant that absent the trial court's error, it is likely the jury would have reached a different verdict for the obtaining property by false pretense charge. If the trial court's instructions had limited the jury's consideration to "filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence," it is unlikely the jury would have found defendant guilty because the jury found defendant not guilty of occupant or owner setting fire to a dwelling house. The instructions given by the trial court allowed the jury to consider any misrepresentation by defendant as a basis for a guilty verdict for obtaining property by

> false pretense . . . . Because the trial court's erroneous instructions allowed the jury to convict defendant on a theory not alleged in the indictment and it is unlikely the jury would have convicted defendant on the theory alleged in the indictment, we hold the error had a probable impact on the jury's finding defendant guilty of obtaining property by false pretense. The trial court plainly erred.

Id. at 384-85, 816 S.E.2d at 205.

¶ 26 Here, the alleged variance between the superseding indictments and the jury instructions arises from what constituted the "thing of value" requisite in charging Defendant for Obtaining Property by False Pretense. As Defendant concedes, the superseding indictments were very clear in alleging the "thing of value" obtained by Defendant in each of the ten charges was in the form of "credit[,]" enumerating each of the ten transactions at issue along with its respective date, time, and monetary amount credited to Defendant's NCDOR account.[3] Conversely, the trial court's instructions did not make reference to any "credits," but instead allowed the jury to convict if it found beyond a reasonable doubt Defendant had "obtained property or a thing of value from the alleged victim" for each of the ten counts. To the extent the jury instructions do not match the exact language used within the superseding indictments, Defendant's argument is not entirely without merit. *See id.* at 380, 816 S.E.2d at 202. Defendant, however, contends these instructions allowed the jury to understand the "offsets," as described by Agent Hahn, to constitute the "thing of value" obtained by Defendant, when "none of the offsets matches the amount of any of the 'credits' described in the superseding indictments." This portion of Defendant's argument is inapposite.

¶ 27 In the instances in which Agent Hahn makes references to "offsets"—particularly those passages upon which Defendant's argument relies—she appears to use the term informatively to explain dollar amounts in the State's exhibits, as exemplified in the following transcript excerpt:

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3. Despite this concession, in support of her argument, Defendant cites *State v. Jones*, 367 N.C. 299, 758 S.E.2d 345 (2014) (in which our Supreme Court concluded that an indictment for Obtaining Property by False Pretense alleging the defendant obtained "services" was insufficient) and *State v. Everette*, 256 N.C. App. 244, 807 S.E.2d 168 (2017) (in which the indictments charging the defendant with obtaining credit of an unspecified amount were insufficient). These cases are inapposite to the issue presented here.

> Q. Okay. And I'm going to show you the third page of Exhibit 2. Could you please walk the jury through the pertinent entries on that.
>
> A. Yep. Again you can see on line one where a payment was made for just over $2,200. And then you can see shortly after we received -- we backed out that payment because again, the funds were never received. And then we sent -- these are actually offsets that were received from other payments [Defendant] made and other tax years. So we had a negative balance there and so we took other payments that [Defendant] made another tax year and applied it to this in order to, you know, alleviate [Defendant's] tax due to [NCDOR].
>
> Q. Okay. Can you just remind the jury what an offset is.
>
> A. Yep. Again, the offset, it can occur in two separate ways. Like I was just explaining, let's say in 2011 [Defendant] owes an amount of money and she made a payment to apply to another tax year. If that payment that [Defendant] submitted for the other tax year is an excess amount of what she owed for that tax year, [Defendant] owes another tax year money. So in this instance, 2011, we'll apply that over -- overage of money to 2011 to alleviate the tax liability. And then again, it can also be to an external agency, IRS, government, university.
>
> Q. So in this circumstance [Defendant] allegedly made a payment for another tax year and had a positive balance.
>
> A. Right. Yes.

Moreover, Agent Hahn's testimony makes it clear that Defendant did not obtain offsets as a "thing of value":

> Q. Okay. And are you asserting that the Defendant received anything more than a credit on her tax account? Well, initially the refund checks and the offsets that she gets credit for, that all stems from a positive credit on her account in this window, right?

A. Yes, sir.

¶ 28 The State's evidence—Agent Hahn's testimony—is indicative that the alleged "thing of value" of the felony charged is the temporary credit to Defendant's NCDOR account, not the offsets nor the refund checks resulting therefrom.

¶ 29 Furthermore, the State's case was consistent with the superseding indictments, in that it alleged the "thing of value" obtained by Defendant was in fact "credit," as illustrated in the State's closing argument:

> We know that the Department of Revenue got those payments and [NCDOR] perceived them to be legitimate and gave the Defendant's account credit for those payments. And the Defendant thereby obtained property or a thing of value.
>
> Now, I want to talk about that, because the evidence in this case is a little bit confusing . . . . So the thing of value in this case is that credit in her account. So on a particular day if she puts in a payment for $2,256, it's the credit of $2,256 that we're talking about . . . .
>
> . . . .
>
> But the reason that I'm clarifying this is because you will be asked to consider . . . 10 specific actions at specific times. And I don't want to confuse you with the difference between the credit for the payments on one side, which is what the State is alleging here is the thing of value, and the paying off the debts and the checks that were cashed later, because those are effects or a natural outcome to the thing of value. So what we are charging on that particular date is related to the actual payment and the credit associated with that. So hopefully that's clear.

¶ 30 Moreover, although the jury instructions did not specify, by way of using the word "credit," that the "thing of value" allegedly obtained in each of the ten counts were credits to Defendant's NCDOR account, the trial court was otherwise very specific in enumerating each count individually, distinguishing each of the ten transactions by date and time, and instructing the jury for each of those counts that, if it found from the evidence beyond a reasonable doubt that Defendant "made a representation and that this representation

was calculated and intended to deceive, that the alleged victim was in fact deceived by it, and that the Defendant thereby obtained property or a thing of value from the alleged victim," it should convict.

¶ 31 In fact, unlike in *Locklear*, where "[t]he instructions given by the trial court allowed the jury to consider any misrepresentation by [the] defendant as a basis for a guilty verdict for obtaining property by false pretense[,]" here, the trial court's instructions did not allow the jury such broad bandwidth, but were instead careful instructions as to each of the ten transactions at issue. *Locklear*, 259 N.C. App. at 384, 816 S.E.2d at 205. Further, the trial court provided clear limiting instructions regarding the extent to which evidence of the thirty-eight remaining payments, the three bad checks, and Defendant's cashing or attempt to cash the checks may have been considered.[4] Lastly, in her argument, Defendant relies upon case law in which it was the indictment, rather than the jury instructions, that was insufficiently specific and thus variant from the jury instructions; here, as analyzed, that is simply not the case.

¶ 32 Thus, because "the State's evidence corresponded to the allegation[s] in the indictment[s]" and there is consistency between "the indictment[s], the proof presented at trial, and the instructions to the jury[,]" there was no fatal variance between the superseding indictments and the jury instructions. *See id.* at 383, 816 S.E.2d at 204 (citations and quotation marks omitted). Therefore, the trial court's jury instructions were not erroneous. *See id.*

III. Restitution

¶ 33 **[4]** In her final argument, Defendant argues the trial court erred in ordering Defendant to pay restitution of $14,506.56 for the State's losses as

4. In these instructions, the trial court advised the remaining thirty-eight invalid payments were received solely for the purpose of showing, if the jury found that the transactions did indeed occur, the identity of the person who made the payments, and to show "Defendant had a motive for the commission of the crime charged in this case, that the Defendant had the knowledge, intent, or preparation to commit the crime charged, that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case, or the absence of mistake or accident." Evidence of the three bad checks was received for the limited purpose "of showing that the Defendant had the intent or knowledge to commit the crime charged in this case, that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case, that the Defendant had the opportunity to commit the crime, preparation, or the absence of mistake." Evidence of Defendant's cashing or attempting to cash the refund checks was received for the limited purpose "of showing that the Defendant had a motive for the commission of the crime charged in this case, that the Defendant had the intent or knowledge to commit the crime charged in this case, that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case, that the Defendant had the opportunity to commit the crime, preparation, or the absence of mistake."

a condition of probation in 18 CRS 215091 and 18 CRS 215092 because there was no evidence those losses resulted from the offenses for which Defendant was convicted.

¶ 34 "On appeal, we review de novo whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation and quotation marks omitted; emphasis omitted). With respect to this claim, the State concedes the trial court erred in ordering Defendant to pay $14,506.56 in restitution. We agree, and consequently we vacate the Judgments in 18 CRS 215091 and 215092 and remand solely for resentencing on this issue. *See, e.g.*, *State v. Santillan*, 259 N.C. App. 394, 396, 815 S.E.2d 690, 692 (2018) (vacating the defendant's two sentences and remanding for a new sentence hearing upon the State's concession "the trial court failed to make sufficient findings to support the two sentences").

Conclusion

¶ 35 Accordingly, for the foregoing reasons, we conclude there was no error at the trial of Defendant. However, we vacate the Judgments in 18 CRS 215091 and 18 CRS 215092 and remand those matters for resentencing on the issue of restitution, if any, to be paid by Defendant as a monetary condition of probation.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and WOOD concur.

STATE v. GIBSON

[278 N.C. App. 295, 2021-NCCOA-308]

STATE OF NORTH CAROLINA
v.
JOSHUA ARRON GIBSON, DEFENDANT

No. COA20-644

Filed 6 July 2021

1. Forgery—uttering a forged instrument—presentation of stolen check at bank drive-through—defendant as perpetrator—sufficiency of evidence

In a trial for uttering a forged instrument, the State presented sufficient evidence that defendant committed the crime where a bank employee testified that the person who presented the forged check in a drive-through lane, and who was about ten to twelve feet away, also submitted defendant's driver's license and social security card and matched the photo on the license.

2. Attorney Fees—criminal case—ordered as condition of probation—automatically included per statute

In a trial for uttering a forged instrument, the trial court did not abuse its discretion by ordering defendant to pay attorney fees without conducting a colloquy on defendant's right to be heard where the fees were automatically included as a condition of defendant's probation pursuant to N.C.G.S. § 15A-1343(b)(10) and where the trial court correctly calculated the amount based on established rates for indigent defense in criminal cases.

Appeal by Defendant from judgment entered on 18 February 2020 by Judge Steven Warren in Burke County Superior Court. Heard in the Court of Appeals 28 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth B. Jenkins, for the State.

Gilda C. Rodriguez for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Joshua Gibson ("Defendant") argues that the trial court erred when it (1) denied Defendant's motion to dismiss and (2) ordered payment of attorney's fees without affording Defendant an opportunity to be heard. We disagree and find no error in the proceedings below.

I. Facts and Procedural Background

¶ 2 On 3 May 2017, Kress Berry ("Mr. Berry"), a financial services representative, operated the drive through lanes of a State Employees' Credit Union branch ("SECU"). During Mr. Berry's shift, a car pulled into the drive-through lane closest to him—placing the car and Mr. Berry approximately within 10 to 12 feet of each other. The individual sitting on the rear passenger side rolled his window down and submitted a check, driver's license, and social security card through the SECU tube system.

¶ 3 Upon receiving the check and identification documents, Mr. Berry confirmed that the driver's license, belonging to Defendant, matched the individual who was in the car. Mr. Berry, however, became suspicious of the check which he believed "didn't feel quite right." Mr. Berry also noticed that the writing on different parts of the check did not match, prompting Mr. Berry to contact Patricia Austin ("Mrs. Austin"), the person who had allegedly written the check. Mrs. Austin informed Mr. Berry that she did not write a check to Defendant and did not, in fact, know Defendant. Mrs. Austin did, however, write the check to the utility company for the Town of Long View and deposited it in her mailbox. Before the mailman could retrieve the utility payment, a vehicle drove up to Mrs. Austin's mailbox and removed the check.

¶ 4 After speaking with Mrs. Austin, Mr. Berry raised his concerns to his supervisor. At that time, the car Defendant was in drove away. Following the incident, SECU employees contacted the sheriff's department and provided officers with the original check, Defendant's driver's license, and his social security card that had been deposited through the SECU tube system.

¶ 5 On 16 April 2018, a grand jury indicted Defendant for uttering a forged instrument. The case was later tried on 18 February 2020, before the Honorable Judge Steven Warren in Burke County Superior Court. During the trial, Detective Burton Wilbur ("Detective Wilbur") of the Burke County Sheriff's Office testified regarding the chain of custody of Defendant's driver's license and social security card, and the check presented to Mr. Berry. Mrs. Austin's husband also testified, confirming that he did not write a check to Defendant.

¶ 6 At the close of the State's evidence, Defendant moved to dismiss the charge of uttering a forged instrument for the State's failure to present sufficient evidence that Defendant was the perpetrator of the alleged offense. The court denied Defendant's motion. At the close of all the evidence, Defendant renewed his motion; the court denied that motion as well.

¶ 7 The jury returned a guilty verdict, and on 18 February 2020 Judge Warren entered a judgment sentencing Defendant to a term of five to 15 months, suspending the sentence, and placing Defendant on supervised probation for 18 months.

¶ 8 On 20 February 2020, Defendant filed a written notice of appeal.

II. Analysis

¶ 9 Defendant contends that the trial court erred in (1) denying Defendant's motion to dismiss for failure to present sufficient evidence that Defendant was the perpetrator and (2) ordering attorney's fees without affording Defendant the opportunity to be heard. We address each issue in turn.

A. Motion to Dismiss

¶ 10 **[1]** A defendant's motion to dismiss should be denied if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant[ ] being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). We review a trial court's denial of a motion to dismiss de novo. *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010).

¶ 11 "The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another." *State v. Hill*, 31 N.C. App. 248, 249, 229 S.E.2d 810 (1976). Here, Defendant does not challenge whether the offense was committed. Instead, Defendant challenges the identity requirement necessary to overcome a motion to dismiss—arguing that the trial court erred in denying Defendant's motion to dismiss because the State failed to present sufficient evidence that Defendant was the perpetrator.

¶ 12 "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869 (citation omitted). "Moreover, circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (internal marks and citations omitted). Indeed, "[t]he trial court[,] in considering

such motions[,] is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). To that end, "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.*

¶ 13 Defendant was charged with uttering a forged instrument. During trial, the State offered the following as evidence that Defendant committed the offense: (1) Defendant's driver's license and social security card, which was furnished to Mr. Berry at the SECU drive-through; (2) testimony from Detective Wilbur, confirming the chain of custody to verify that the jury was presented with the same items that were furnished to Mr. Berry on 3 May 2017; and (3) testimony from Mr. Berry that he confirmed that the person in the drive-through lane matched Defendant's driver's license.

¶ 14 Taken in the light most favorable to the State and drawing all reasonable inferences in favor of the State, the evidence showed that Defendant's driver's license and social security card were given to Mr. Berry along with a forged instrument, in the form of a check. Upon receiving the identifying documents, Mr. Berry utilized the driver's license, which indisputably belongs to Defendant, to confirm that the person in the SECU drive-through matched the person who provided him with the license. During trial, Mr. Berry also confirmed that the individual in the rear seat of the car was clearly visible and within 10 to 12 feet of him when he compared the photograph on the license to the individual in the car—matching Defendant to his driver's license. After confirming Defendant was in fact the individual he was dealing with, Mr. Berry took notice of the check's texture, which he described as "real stiff," as if "it had been damp or wet at some point." Mr. Berry also noticed that the writing on the check did not match the signature.

¶ 15 These suspicions prompted Mr. Berry to contact the member who had "allegedly" written the check to Defendant. The member, Mrs. Austin, reviewed her checkbook and confirmed that the check had been written to a utility company. At trial, she testified that the check was taken from her mailbox the day preceding the offense. After contacting his supervisor, Mr. Berry testified that the car drove away. Thereafter, the sheriff's office was contacted and provided with the original check and Defendant's driver's license and social security card. Detective Wilbur confirmed the chain of custody of Defendant's driver's license and social security card to ensure that the jury received the same documents that Mr. Berry received on 3 May 2017.

¶ 16 Defendant contends that these facts are similar to *State v. Bass*, 303 N.C. 267, 272, 278 S.E.2d 209, 212 (1981), in which our Supreme Court

held that fingerprint evidence is insufficient when the State has failed to present substantial evidence of circumstances from which the jury could find that the fingerprints could only have been impressed at the time the crime was committed. This case, however, is distinguishable from *Bass* for several reasons. In fingerprint cases, the State has an added burden because a person's fingerprints can remain on a surface for long periods of time. *See*, *e.g.*, *id.* at 270, 278 S.E.2d at 212 ("An expert in the field of fingerprint analysis found eleven points of similarity between the latent print on the screen and the known inked impressions of defendant's prints. The State's witnesses testified that fingerprints can last for months or even years"). Thus, the State must be able to link the fingerprint evidence to the crime. Here, Defendant's driver's license was provided to Mr. Berry, who confirmed that the license matched the person who provided it to him, while committing the underlying offense. Thus, Defendant's identification documents were not simply left in a place for any reason other than Defendant's commission of the crime. Moreover, there is no indication that Defendant left his driver's license or social security card on any other day or time than when the underlying offense was committed as confirmed by Detective Wilbur's testimony.

¶ 17 Thus, considering all evidence in the light most favorable to the State, we conclude that a reasonable jury could have found as fact that Defendant was the perpetrator. Perhaps the strongest evidence introduced against Defendant was Defendant's driver's license and social security cards—documents that are generally (1) kept on one's person and (2) used as key identification documents—which were presented to Mr. Berry, who confirmed that the driver's license, containing a picture of Defendant, matched that of the individual in the car that sat approximately 10 to 12 feet from Mr. Berry. Moreover, the court was without evidence refuting Defendant's presence at SECU, including any evidence supporting Defendant's claim that his license and social security card were stolen.

¶ 18 Accordingly, we conclude that there was sufficient evidence to raise a jury question regarding Defendant being the perpetrator of the offense.

B. Attorney's Fees

¶ 19 **[2]** Defendant also argues that the trial court erred in ordering payment of attorney's fees without affording Defendant the opportunity to be heard. We disagree.

¶ 20 Generally, "[a] challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard of review." *State v. Allah*, 231 N.C. App. 88, 98, 750 S.E.2d 903,

911 (2013). However, "[a] number of conditions of probation are automatically included in each probationary judgment unless the trial court specifically elects to exempt the defendant from the necessity for compliance with one or more of those conditions." *Id.* at 97, 750 S.E.2d at 911. For example, N.C. Gen. Stat. § 15A-1343 provides that "as [a] regular condition[ ] of probation, a defendant *must* . . . [p]ay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation." N.C. Gen. Stat. § 15A-1343(b)(10) (2019) (emphasis added). Thus, § 15A-1343(b)(10) mandates that a defendant released on probation pay for the costs of appointed counsel.

¶ 21 There is, however, an exception to the mandate. Specifically, N.C. Gen. Stat. § 15A-1343(e) provides that any person placed on probation is required to pay all costs for court appointed counsel, "[u]nless the court finds there are extenuating circumstances[.]" N.C. Gen. Stat. § 15A-1343(e) (2019). When attorney's fees are required, the amount "shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs and fees to be repaid and the method of payment." *Id.*

¶ 22 Here, as a condition of probation, Defendant was ordered to pay $1,680 for the cost of attorney's fees. This number was based on testimony from Defendant's appointed counsel that he had spent 28 hours on the case. At the time of judgment, the rate paid to counsel assigned to represent an indigent defendant charged with a Class I felony in Superior Court was $60 an hour.[1] Thus, Defendant's attorney's fee costs, calculated in compliance with N.C. Gen. Stat. § 15A-1343(e), totaled $1,680.

¶ 23 Defendant contends that the court should have afforded him an opportunity to be heard before ordering the payment of attorney's fees. This argument, however, is misplaced. Indeed, this Court has only required notice and an opportunity to be heard when the court has imposed a civil judgment against an indigent defendant for attorney's fees, pursuant to N.C. Gen. Stat. § 7A-455(b). *See*, *e.g.*, *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005) (recognizing that "N.C. Gen. Stat. § 7A-455 (2003) provides that the 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. Friend*, 257 N.C. App. 516, 523 809 S.E.2d 902, 907 (2018) (finding that the trial

1. The hourly assigned counsel rate for Class E-I felony cases in the superior court, with a final disposition of or after 1 December 2018, is $60. *Counsel Rates*, Office of Indigent Defense Services, https://www.ncids.org/counsel-rates/.

court erred by entering a civil judgment against the defendant, because he was not informed of his right to be heard before the court entered the judgment).

¶ 24 Here, the trial court did not enter a civil judgment to recoup attorney's fees pursuant to N.C. Gen. Stat. § 7A-455(b), but instead, imposed a condition that is automatically included in each probationary judgment. *See* N.C. Gen. Stat. § 15A-1343(b)(10) (2019) ("As a regular condition of probation, a defendant must . . . [p]ay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the cases for which he was placed on probation."). Therefore, the court was not required to engage in the colloquy under *Jacobs* and *Friend*, and the trial court's decision must stand unless this Court finds that the trial court abused its discretion. *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

¶ 25 Accordingly, we find that the trial court did not abuse its discretion in ordering that Defendant pay the costs of attorney's fees. Not only was the requirement a regular condition of probation, authorized by N.C. Gen. Stat. § 15A-1343(b)(10), but the court correctly calculated the fee based on rates provided by the Office of Indigent Defense Services, as mandated by N.C. Gen. Stat. § 15A-1343(e).

III. Conclusion

¶ 26 For the reasons stated above, we hold that there was substantial evidence that Defendant was the perpetrator of the alleged offense. Thus, the trial court properly denied Defendant's motion to dismiss the charge of uttering a forged instrument. We further hold that the trial court did not abuse its discretion in ordering the payment of attorney's fees. Accordingly, Defendant has failed to demonstrate any error occurred during his trial.

NO ERROR.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
MARIBEL GONZALEZ, DEFENDANT

No. COA20-390

Filed 6 July 2021

1. Contempt—criminal contempt—failure to appear—subpoena

Although a one-page subpoena personally served on defendant did not meet the requirements of Civil Procedure Rule 45(a)(1) because it failed to state information required by that rule, the trial court nonetheless had jurisdiction to hold defendant in criminal contempt for violating a subpoena where defendant was also served with a subpoena via telephone for the same matter, and the telephone service was proper and in compliance with Rule 45(a)(1).

2. Contempt—criminal contempt—failure to appear—findings beyond a reasonable doubt

Although the trial court failed to check the box indicating that its findings were beyond a reasonable doubt in its written order holding defendant in criminal contempt, the trial court did indicate that it used the reasonable doubt standard when it presented its findings in open court, thus satisfying the requirement in N.C.G.S. § 5A-15(f).

Appeal by Defendant from the Order entered 20 November 2019 by Judge Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison Angell, for the State.

Mary McCullers Reece, for Defendant.

GORE, Judge.

¶ 1 The trial court held Maribel Gonzalez ("Defendant") in criminal contempt for failure to appear and testify in accordance with subpoenas served on Defendant. Defendant argues the trial court erred by holding her in contempt based on an insufficient subpoena and by failing to make findings based on the statutorily required standard. We disagree.

I. Background

¶ 2 On 18 May 2018, a deputy with the Watauga County Sheriff's Office served three subpoenas on Defendant, for herself and her two minor daughters, to be on telephone standby to testify in *State v. Merlos* during the Watauga County Superior Court session of 21 May through 25 May 2018. Prior to the personally served subpoenas, Defendant was served with subpoenas to appear for the same session of court on 9 May 2018 via the telephone. When a subpoena is served via the telephone, a member of the Sheriff's Office informs the individual they have been subpoenaed to appear and testify in court, the court date and time, and any additional information in the subpoena. The physical copy of the subpoena is then filed with the clerk of court.

¶ 3 Defendant did not appear or bring her daughters to testify in accordance with the subpoenas. In a conversation with Detective Jason Reid, of the Boone Police Department, in the week after she failed to appear to testify, Defendant admitted that she knew she had been required to appear and testify under the subpoena and intentionally did not appear. Defendant met with the Assistant District Attorney the day before the trial at which she was subpoenaed to testify and admitted she was aware she had to appear the following day under the subpoena. Further, Defendant told Detective Reid that she purposefully left her residence and turned off her cell phone so that neither she nor her children could be located during the time of the trial. An order to show cause was issued directing Defendant to appear and show cause "why she should not be held in criminal contempt for failing to appear as directed by a subpoena that was personally served on her."

¶ 4 Defendant filed an objection to jurisdiction and motion to dismiss. Defendant argued that the subpoenas served on her included only the front page of AOC Form G-100 and therefore, without the back page, were insufficient to require her to appear.

¶ 5 Following a show cause hearing, the trial court found that Defendant acted in bad faith and took steps to willfully avoid being present or have her children present at the proceeding for which they were subpoenaed. The trial court held Defendant in criminal contempt and ordered that she be imprisoned for thirty days. Defendant appealed.

II. Discussion

¶ 6 Defendant presents two issues on appeal. First, Defendant argues the trial court erred by holding her in criminal contempt based on a subpoena that lacked elements required by N.C. Gen. Stat. § 1A-1, Rule 45

and therefore was not "lawful process" subject to enforcement by the trial court. Second, Defendant contends the trial court erred by holding her in criminal contempt without making findings beyond a reasonable doubt, as required by N.C. Gen. Stat. § 5A-15(f). We disagree.

A. Standard of Review

¶ 7 In reviewing contempt cases, findings of fact are binding on appeal if there is competent evidence to support them. *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019). The trial court's conclusions of law are reviewable *de novo*. *Id.* Whether a subpoena is valid is a question of law and is reviewable *de novo*. *State v. Black*, 232 N.C. 154, 157, 59 S.E.2d 621, 623 (1950).

B. Subpoena

¶ 8 **[1]** In North Carolina service of a subpoena may be done by:

> [T]he sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person . . . . Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

N.C. Gen. Stat. § 1A-1, Rule 45(b)(1). In the present case, Defendant was initially properly served with a subpoena via the telephone by a member of the Watauga County Sheriff's Department. After being served with the initial telephone subpoena, Defendant was then personally served with a subpoena. This personally delivered subpoena only contained the contents found of the first page of AOC Form G-100.

¶ 9 Defendant argues that because the subpoena personally served on her contained only the first page, and the protections required by N.C. Gen. Stat. § 1A-1, Rule 45 were on the missing second page, the personally served subpoena was insufficient for the trial court to have jurisdiction to hold her in contempt for her failure to appear. However, Defendant fails to consider the subpoena properly served via the telephone; because Defendant was properly served with a subpoena the trial court had jurisdiction to hold her in contempt.

¶ 10 The North Carolina Rules of Civil Procedure provide that "[e]very subpoena *shall* state" the requirements in subsections (a)–(d). N.C. Gen.

Stat. § 1A-1, Rule 45(a)(1) (emphasis added). This Court has held that use of the language "shall" is a mandate to trial judges. *Orange Cnty. Dep't of Soc. Serv. v. Alexander*, 158 N.C. App. 522, 525, 581 S.E.2d 466, 468 (2003). As a result, all provisions of Rule 45(a)(1) need to be present for a personally served subpoena to be valid. Rule 45(a)(1) provides every subpoena shall state:

> (a) The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.
>
> (b) A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, electronically stored information, or tangible things in the possession, custody, or control of that person therein specified.
>
> (c) The protections of persons subject to subpoenas under subsection (c) of this rule.
>
> (d) The requirements for responses to subpoenas under subsection (d) of this rule.

N.C. Gen. Stat. § 1A-1, Rule 45(a)(1). Rule 45(c) contains protections of the subpoenaed individual and Rule 45(d) contains the requirements for a response to a subpoena. Here, the trial judge found that only page one of AOC Form G-100 was personally delivered to the Defendant. Page one of AOC Form G-100 contains the material required by Rule 45(a)(1)(a)&(b) while the material required by Rule 45(a)(1)(c)&(d) is contained on page two of the Form. Therefore, the one-page subpoena personally delivered to Defendant did not meet the statutory requirements.

¶ 11 However, Defendant was also served, a subpoena, via telephone for the same court date, before being personally served. Service of a subpoena, to secure the attendance of a witness, via telephone is proper under Rule 45(b)(1). N.C. Gen. Stat. § 1A-1, Rule 45(b)(1). As a result, because Defendant was served with a valid subpoena via telephone, the trial court had proper jurisdiction to hold her in contempt, so long as the trial court followed the lawful process required to order contempt.

¶ 12 Defendant also argues that because the subpoena personally served upon her did not meet the statutory requirements, set out in N.C. Gen. Stat. § 1A-1, Rule 45(a)(1), the trial court exceeded the statutory mandate and therefore did not have jurisdiction to enforce the subpoena.

This is a mischaracterization of the law. As discussed above, the trial court had proper jurisdiction to hold Defendant in contempt for violating the subpoena properly served via the telephone.

¶ 13 Rule 45 is not the only avenue available for the trial court to issue a contempt order–a trial court may also base its contempt order on N.C. Gen. Stat. § 5A-11. *See First Mt. Vernon Indus. Loan Ass'n v. ProDev XXII, LLC*, 209 N.C. App. 126, 131, 703 S.E.2d 836, 839 (2011). Section 5A-11 provides that any "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution" is criminal contempt. N.C. Gen. Stat. § 5A-11(a)(3). Section 5A-13 goes on to distinguish between direct and indirect criminal contempt. A contemptuous act that is committed within the sight or hearing of the court, committed in the immediate proximity of the court, or is likely to interrupt matters of the court is considered direct criminal contempt. N.C. Gen. Stat. § 5A-13(a). Any other act that is considered criminal contempt is indirect criminal contempt. N.C. Gen. Stat. § 5A-13(b). Indirect criminal contempt must be enforced through plenary proceedings. *Id.* Plenary proceedings for contempt require the trial court to first issue a show cause order and subsequently hold a show cause hearing. N.C. Gen. Stat. § 5A-15(a).

¶ 14 Principles of due process only require reasonable notice of a charge and an opportunity to be heard in defense before punishment for criminal contempt is imposed. *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985). An order that states the alleged contemptuous conduct and orders the defendant to show cause why they should not be held in contempt provides sufficient notice to satisfy due process for indirect criminal contempt proceedings. *Id.* at 437, 329 S.E.2d at 374. This Court has consistently held that "a show cause order is sufficient to confer jurisdiction on a trial court for finding a defendant in indirect criminal contempt where it incorporates by reference a prior court order that a defendant has failed to comply with." *State v. Revels*, 250 N.C. App. 754, 762, 796 S.E.2d 744, 750 (2016); *see also State v. Pierce*, 134 N.C. App. 148, 151, 516 S.E.2d 916, 919 (1999). "[T]here is no requirement that the judge make a finding of improper conduct upon the issuance of a *criminal* contempt citation." *Pierce*, 250 N.C. App. at 762, 796 S.E.2d at 750 (emphasis in original). Therefore, because the trial court was not required to make any findings of improper conduct before issuing a show cause order, the trial court would not be divested of jurisdiction to hold a show cause hearing to determine whether criminal contempt occurred especially for a subpoena validly served via telephone.

¶ 15 In the case *sub judice*, after Defendant failed to appear in accordance with the subpoena served upon her via the telephone, the trial court issued an order to show cause and subsequently held a show cause hearing, affording Defendant the opportunity to provide any defenses as to why she should not be found in contempt of court. These are clearly indirect criminal contempt proceedings in accordance with N.C. Gen. Stat. §§ 5A-11, 5A-13, and 5A-15. The show cause order stated, "Defendant is ordered to appear in front of this court . . . to show cause to this court as to why she should not be held in criminal contempt for failing to appear as directed by [] subpoena . . . ." This order satisfies the due process notice requirements set out in *O'Briant*, 313 N.C. at 437, 329 S.E.2d at 374. Further, the trial court held a show cause hearing where Defendant was afforded an attorney and provided the opportunity to present a defense before the trial court found her in contempt of court.

¶ 16 Consequently, because the trial court entered a show cause order requiring defendant to appear in court and explain why she failed to appear in accordance with the subpoena served upon her, it was fully authorized to find her in criminal contempt of court. Defendant's argument that the trial court never gained jurisdiction over the criminal contempt proceedings should, as a result, be overruled.

C. Criminal Contempt

¶ 17 **[2]** Defendant also argues that the trial court erred by holding her in criminal contempt without making findings beyond a reasonable doubt. North Carolina General Statutes § 5A-15(f) provides, "If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt." A failure by the trial court to indicate that they applied the "beyond a reasonable doubt" standard in making its findings of fact "renders the contempt order fatally deficient." *State v. Phillips*, 230 N.C. App. 382, 386, 750 S.E.2d 43, 46 (2013). While a trial court in a plenary contempt proceeding is required to make findings beyond a reasonable doubt, it is sufficient for the trial court to "indicate" that it made such findings. *See State v. Ford*, 164 N.C. App. 566, 571, 596 S.E.2d 846, 850 (2004).

¶ 18 Here, Defendant argues the trial court did not make factual findings beyond a reasonable doubt because the trial court failed to check the box indicating the findings were beyond a reasonable doubt on the show cause order. However, the trial court did use the reasonable doubt standard when presenting its findings in open court. This is sufficient to "indicate" that the trial court applied the beyond a reasonable doubt standard. Further, Defendant makes no argument that she did not act

willfully or that the trial court erred in its decision to hold her in contempt. Thus, we find that the trial court made no error.

III. Conclusion

¶ 19 For the foregoing reasons, we affirm the trial court's order of contempt.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
CHERELLE RENEE HILLS, DEFENDANT

No. COA20-9

Filed 6 July 2021

1. Judges—impermissible expression of opinion—in presence of jury—multiple drug charges—others charged

The trial court did not impermissibly express an opinion in defendant's trial for multiple drug charges where, after instructing the jury on each charge, it told the jury not to be distracted or influenced by the fact that another person may have been charged in connection with the same drugs found in the van that defendant was driving. Contrary to defendant's arguments on appeal, the trial court's statement was not an opinion that the charged crimes actually occurred, it did not touch on the credibility of any evidence, and it did not imply that defendant's defense was a distraction that should be ignored—rather, the trial court's statement reminded the jury that the State had the burden to prove defendant's guilt beyond a reasonable doubt.

2. Indictment and Information—fatally defective—controlled substances—not named in Controlled Substances Act

An indictment charging defendant with possession with the intent to manufacture, sell, and deliver "a controlled substance, namely Methyl(2S)-2-{{1-(5-fluoropentyl)-1H-indazol-3-yl] formamido}-3,3-dimethylbutanoate (5F-ADB), which is included in Schedule I of the North Carolina Controlled Substances Act" was facially invalid because it failed to identify a substance actually

listed in the Controlled Substances Act. The Court of Appeals rejected the State's argument that, because a simple online search shows that the named substance is a synthetic cannabinoid, the indictment was valid; the court further noted that the online encyclopedia Wikipedia cannot be used as an authoritative source for any factual or legal argument.

Appeal by Defendant from judgments entered 19 February 2019 by Judge Ronald L. Stephens in Superior Court, Brunswick County. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

W. Michael Spivey, for Defendant-Appellant.

STROUD, Chief Judge.

¶ 1 Cherelle Renee Hills ("Defendant") appeals from a judgment entered upon jury verdicts finding her guilty of possession with intent to manufacture, sell, and deliver a Schedule I controlled substance, synthetic cannabinoid; possession with intent to sell and deliver a Schedule III controlled substance, Buprenorphine; possession with intent to sell and deliver heroin; three counts of trafficking heroin of 14 grams or more but less than 28 grams (by possession, by transportation, and by manufacturing); and possession with intent to manufacture, sell, and deliver cocaine. Defendant argues that the trial court expressed an impermissible opinion; the indictment in 18 CRS 2453 was facially invalid; and the trial court erred by denying her motion to dismiss. We hold that the trial court did not express an impermissible opinion that would warrant a new trial. However, because the indictment 18 CRS 2453 did not set forth the essential elements of the crime charged, we vacate Defendant's conviction for possession with intent to manufacture, sell, and deliver a Schedule I controlled substance, synthetic cannabinoid.

I. Background

¶ 2 The State's evidence tended to show that in February of 2018, after being arrested and charged with numerous drug offenses, Desaraa Giano ("Ms. Giano") agreed to work as an informant for narcotics agents within the Brunswick County Sheriff's Office. Ms. Giano informed officers that Defendant, from whom she had purchased heroin in New

Jersey three times, planned to bring forty "clips"[1] of heroin to North Carolina to sell. Ms. Giano testified that she had worked with Defendant in a group home in New Jersey, and Defendant was listed in her phone as "Relly Hills."

¶ 3 On 8 March 2018, Ms. Giano was instructed to call the number listed in her phone for "Relly;" however, due to "technical difficulties" from Ms. Giano's handling of the recording device, the recording of the person Ms. Giano spoke to was not clear. Agent Samuel Britt of the Brunswick County Sheriff's Department, who was present when Ms. Giano made the call, testified that he could hear a woman's voice on the other end of the line, that Ms. Giano referred to that person as "Cherelle," Cherelle "stated that she was bringing her bros and the kids with her on the trip to North Carolina[,]" and Cherelle planned to bring 40 "bricks" of heroin to North Carolina. After the FBI confirmed that the phone number Ms. Giano used belonged to Cherrelle Hills, Agent Britt received a "tracking order" for Defendant's phone.

¶ 4 On 9 March 2018, officers tracked the location of Defendant's phone as it moved from New Jersey to North Carolina. Throughout 9 March into the early hours of 10 March, Ms. Giano communicated with Defendant via text message about the transportation of the drugs, and Ms. Giano forwarded the text messages to Agent Britt. Officers ultimately tracked the location of the phone to a burgundy Dodge van in the parking lot of a store in Wayne County and then followed the van.

¶ 5 At approximately 2:00 A.M. on 10 March 2018, officers initiated a traffic stop and pulled the van over for speeding. The van had three rows of seats: Defendant was in the driver's seat; Jerry Colvin was in the passenger's seat; Kenneth Norman was in the second row behind Defendant; and two children were in the third row. After K-9 officers alerted to the presence of narcotics, a search of a compartment under the floor board of the second row of seats revealed Tasty Cake boxes, Swiss Cake Rolls boxes, and a cell phone box—all containing controlled substances. The three adults were arrested, and the children were placed in the custody of the Department of Social Services. Chemical analysis identified the controlled substances found in the van as 24.3 grams of heroin, less than .1 gram of cocaine, fourteen strips of Buprenorphine, and .33 grams of synthetic cannabinoid.[2] The State's expert witness, a forensic scientist

1. In her testimony, Ms. Giano explained that a "brick" or a "clip" is made up of 50 "bindles" or "bags" of heroin. Each "bindle" or "bag" usually consists of one dose of heroin.

2. The State's expert witness explained that a cannabinoid "is what gives the plant material its – the effect of being high," so a synthetic cannabinoid "is one that is man-made, not natural, and it's usually sprayed on non-controlled plant material."

in the Drug Chemistry Section at the North Carolina State Crime Lab, testified that the green leafy material discovered in the van was "a synthetic cannabinoid called 540 ADD."

¶ 6 Defendant testified that her nickname was Relly and that she rented the van to drive to "South of the Border" in South Carolina to purchase cigarettes and fireworks to resell in New Jersey. Defendant denied texting with Ms. Giano during the drive; she testified that Jerry Colvin was sending text messages from her phone. Defendant denied making any arrangements with Ms. Giano to sell her drugs.

¶ 7 The case came on for trial on 21 January 2019 and 19 February 2019 in Superior Court, Brunswick County. The jury returned verdicts finding Defendant guilty of possession with intent to manufacture, sell, and deliver a Schedule I controlled substance synthetic cannabinoid; possession with intent to sell and deliver a Schedule III controlled substance, Buprenorphine; possession with intent to sell and deliver heroin; 3 counts of trafficking heroin of 14 grams or more but less than 28 grams (by possession, by transportation, and by manufacturing); and possession with intent to manufacture, sell, and deliver cocaine. The trial court consolidated the convictions for judgment into Counts II and III of 18 CRS 51074 and imposed fines of $100,000 in each case. The trial court also imposed consecutive sentences of imprisonment for a minimum of 90 months and a maximum of 117 months.[3]

II. Petition for Writ of Certiorari

¶ 8 Defendant filed a petition for writ of certiorari on 3 February 2020 acknowledging that "[t]he record is clear that [Defendant] wanted to give notice of appeal but her trial counsel failed to do so." Under Rule 21, a "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). In our discretion, we allow Defendant's petition.

III. Impermissible Opinion

¶ 9 **[1]** Defendant argues that "the trial court expressed an impermissible opinion when it instructed the jury to disregard evidence related to involvement of others in the offenses with which [Defendant] was charged." (Original in all caps.) The State contends that Defendant's fail-

3. The trial court subsequently entered amended judgments to correct a clerical error; however, the minimum and maximum terms of confinement remained the same.

ure to object to the trial court's statement limits this Court's review to plain error. *See* N.C. R. App. P. 10(b)(2). However, it is well established that a "defendant's failure to object to alleged expressions of opinion by the trial court in violation of [N.C. Gen. Stat. § 15A-1222 and N.C. Gen. Stat. § 15A-1232] does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (citations omitted); *see also State v. Austin*, 273 N.C. App. 565, 568, 849 S.E.2d 307, 310 (2020). Therefore, Defendant's argument is preserved as a matter of law.

¶ 10 The prohibition on a trial court's expression of opinion is codified in North Carolina General Statutes § 15A-1222 and § 15A-1232. North Carolina General Statute § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2019). Similarly, North Carolina General Statute § 15A-1232 states, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved[.]" N.C. Gen. Stat. § 15A-1232 (2019). "Whether the judge's language amounts to an expression of opinion is determined by its probable meaning to the jury, not by the judge's motive." *State v. McEachern*, 283 N.C. 57, 59–60, 194 S.E.2d 787, 789 (1973) (citations omitted). This Court has explained, "[t]he slightest intimation from the trial judge as to the weight or credibility to be given evidentiary matters will always have great weight with the jury, and great care must be exercised to [e]nsure that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial." *State v. Grogan*, 40 N.C. App. 371, 374, 253 S.E.2d 20, 22 (1979) (citation omitted).

¶ 11 We review the totality of the circumstances "[i]n evaluating whether a judge's comments cross into the realm of impermissible opinion," *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citation omitted), as "[t]here must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct," *State v. Benton*, 226 N.C. 745, 749, 40 S.E.2d 617, 619 (1946) (citation and quotation marks omitted). "Additionally, the timing of the remarks must be considered." *State v. Foye*, 220 N.C. App. 37, 47, 725 S.E.2d 73, 81 (2012) (citation omitted). However, "[a] remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced [the] defendant's case. The burden rests on the defendant to show that the trial court's remarks were prejudicial." *State v. Anderson*, 350 N.C. 152, 179, 513 S.E.2d 296, 312 (1999) (citations and quotation marks omitted).

¶ 12 Here, after instructing the jury on each relevant charge, the trial court stated:

> Let me just mention also that the fact that other people were charged during the course of this investigation. Anyone else charged with this or involved with this will have their day in court. Your focus today is on that evidence against this defendant, and the State has the burden of proof of guilt beyond a reasonable doubt based on the evidence that has been presented during the course of this trial as to her. You should not be distracted or influenced by the fact that someone else may be charged or what may or may not happen in their cases. Again that's your focus and will not be a focus for you to – or it should not influence you in any way in your decision making progress.

Defendant argues that the challenged instruction could be reasonably interpreted by the jury to convey three impermissible opinions: (1) "the instruction opines that 'this,' meaning the crimes charged, occurred and that the others 'charged' or 'involved' in 'this' will have their day in court"; (2) "the instruction expresses the court's opinion that *all evidence* related to anyone else being responsible for putting the drugs in the van is not credible and the jury should not let it influence its verdict 'in any way' "; and (3) "the instruction characterizes [Defendant's] defense as, in the court's opinion, a distraction that should be ignored." (Emphasis in original.)

¶ 13 First, the trial court did not express an *opinion* that the crimes for which Defendant was charged actually occurred. Defendant does not dispute that drugs were seized from a van she was driving on 10 March 2018. As stated in her brief, Defendant's "sole defense was that she did not know that any drugs were in the van and had nothing to do with the sale of any drugs[,]" and "[t]hus, the men traveling with her must have been transporting the drugs without her knowledge." The disputed question of fact for the jury's determination was whether Defendant was guilty of the crimes charged, not whether the crimes occurred.

¶ 14 Second, the trial court did not express an opinion that all evidence related to the defense's theory that someone else was responsible for transporting the drugs was "not credible" and should be ignored. Read in context, the trial court's statement did not touch on Defendant's evidence; the instruction referred to the "evidence against this defendant," and the State's "burden of proof of guilt beyond a reasonable doubt based on the evidence that has been presented during the course of this trial

as to her." The trial court's statement did not refer to the credibility of any evidence. Therefore, it is not probable that the jury inferred that the trial court's instruction regarding the State's evidence against Defendant expressed an opinion on the credibility of Defendant's evidence.

¶ 15 Third, the trial court's statement did not imply an opinion that Defendant's defense was a distraction that should be ignored. Defendant argues that in *State v. Springs*, 200 N.C. App. 288, 683 S.E.2d 432 (2009), "this Court held a much less egregious expression of opinion that the jury should ignore the defense that another person committed the crime to be an impermissible expression of opinion requiring a new trial." In *Springs*, after officers found marijuana and a digital scale at the defendant's apartment, the defendant admitted "that the drugs and scale were hers[;]" however, at trial, the defendant testified that the drugs and scale actually belonged to her boyfriend, Mr. Greer, and that she had only claimed ownership "because she was afraid of Greer[.]" 200 N.C. App. at 290, 683 S.E.2d at 434. During the defendant's testimony, the following exchange occurred:

> Q: During that time, was [Greer] working?
>
> A: Yes.
>
> Q: And how often would you say that was?
>
> A: Not that often because he knew that he could not be there, so he didn't stay there that much.
>
> THE STATE: Objection. Your Honor. Where he was or was not has nothing to do with this charge.
>
> THE COURT: Sustained. Let's move on to something else.
>
> Q: Are you aware though of him staying . . .
>
> THE COURT: Let[']s move on to another area. *He has no involvement with these charges.*

Id. at 291, 683 S.E.2d at 434 (alterations in original) (emphasis added). This Court explained that "[a] reasonable interpretation of the statement is that Greer was not involved in defendant's purported possession of the drugs and scale" so the statement could have discredited both the defendant and a corroborating witnesses' testimony that Greer "had easy access to the apartment and that he frequently sold marijuana . . . , effectively rendering the defense's theory invalid or unbelievable." *Id.* at 293, 683 S.E.2d at 435–36. And because "the trial judge's statement occurred near the beginning of defendant's testimony[,]" it "may have

discredited the remainder of defendant's testimony in the eyes of the jury." *Id.* at 293, 683 S.E.2d at 436. As a result, this Court held:

> [t]he statement rose to the level of an impermissible opinion that Greer was not involved with the possession of the drugs or scales. Whether Greer was involved with the drugs and scales, and to what degree, were factual questions for the jury to decide. Although surely unintentional, the trial judge's statement suggested that he had already assessed the credibility of defendant's evidence and found it lacking.

Id.

¶ 16 Here, the trial court did not affirmatively state that a certain person crucial to the defense's theory was not involved in the charges. To the contrary, the trial court instructed the jury that "[a]nyone else charged with this or involved with this will have their day in court." The trial court's instruction, therefore, did not reflect an opinion on the credibility of Defendant's evidence but, instead, reminded the jury it must only consider the evidence presented during the course of the hearing. Viewed in context, the instruction to "not be distracted or influenced by the fact that someone else may be charged or what may or may not happen in their cases" refers to the State's burden to prove beyond a reasonable doubt Defendant's guilt. Indeed, in the sentence preceding the challenged instruction, the trial court stated to the jury, "[y]our focus today is on that evidence against this defendant, and the State has the burden of proof of guilt beyond a reasonable doubt based on the evidence that has been presented during the course of this trial as to her."

¶ 17 In contrast, in *Springs*, 200 N.C. App. 288, 683 S.E.2d 432, the trial court's statement during the defendant's testimony could be interpreted as the trial court's opinion on a disputed fact, whereas the challenged statement here was in the form of an instruction made to the jury after the close of the evidence. The jury had heard all the evidence and had been instructed on all the charges. The trial court had also specifically instructed the jury as follows:

> The law, as indeed it should, requires the presiding judge to be impartial and fair. You're not to draw any inference from any ruling that I may have made or any inflection in my voice or any expression on my face or any question that I may have asked a witness or anything else that I may have done by saying anything to the lawyers or anything else that I have an opinion or that I have intimated an opinion as to whether

> any part of the evidence should be believed or disbelieved or as to whether any fact has or has not been proven or as to what your findings should be.

Thus, before making the statement in question, the trial court had specifically instructed the jury to not glean any indication of an opinion from the trial court's statements or actions. Moreover, because the trial court's instruction to the jury occurred at the very end of the trial after the close of evidence, it could not have discredited any subsequent testimony. Reviewing the totality of the circumstances, we hold that the trial court did not express an impermissible opinion to the jury.

IV. Indictment

¶ 18 **[2]** Defendant contends that "the indictment in 18 CRS 2453 [(the "Indictment")] is facially invalid because it did not identify a substance listed in the Controlled Substances Act." (Original in all caps.) "The purpose of an indictment is to give a defendant notice of the crime for which he is being charged[.]" *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). "It is well settled that a felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged[,]" and this Court has held that "[i]dentity of a controlled substance allegedly possessed constitutes such an essential element." *State v. Sullivan*, 242 N.C. App. 230, 232, 775 S.E.2d 23, 26 (2015) (citations omitted); *see also State v. Stith*, 246 N.C. App. 714, 717, 787 S.E.2d 40, 43 (2016) ("It is true that *the identity of the controlled substance is an essential element of the crime of possession of a controlled substance* with the intent to sell or deliver." (emphasis in the original (citation omitted))). "An indictment is invalid where it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005) (citations and quotations omitted).

¶ 19 Here, the Indictment alleged that Defendant "possess[ed] with the intent to manufacture, sell and deliver"

> a controlled substance, namely Methyl(2S)-2-{{1-(5-fluoropentyl)-1H-indazol-3-yl]formamido}-3,3-dimethylbutanoate (5F-ADB), which is included in Schedule I of the North Carolina Controlled Substances Act.

¶ 20 The State's evidence at trial revealed that it had intended the Indictment charge Defendant with possession with the intent to manufacture, sell and deliver a synthetic cannabinoid. Schedule I of the

Controlled Substances Act is contained in North Carolina General Statute § 90-89 and enumerates seven categories of controlled substances: opiates, opium derivatives, hallucinogenic substances, systemic depressants, stimulants, NBOMe compounds, and synthetic cannabinoids. N.C. Gen. Stat. § 90-89 (2019). North Carolina General Statute § 90-89(7) identifies 18 "examples of synthetic cannabinoids"; however, neither of the chemical names in the Indictment—"Methyl(2S)-2-{[1-(5-fluoropentyl)-1H-indazol-3-yl]formamido}-3,3-dimethylbutanoate" nor (5F-ADB)—is listed among them. N.C. Gen. Stat. § 90-89(7)(a)-(r). Although the Indictment alleged that the chemical formula charged was "included in Schedule I of the North Carolina Controlled Substances Act[,]" no such formula appears in any section of Schedule I of the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-89. This Court has held when "the substance listed in [a] defendant's indictment does not appear in Schedule I of our Controlled Substances Act, the indictment is fatally flawed[.]" *State v. Turshizi*, 175 N.C. App. 783, 786, 625 S.E.2d 604, 606 (2006); *see also Ledwell*, 171 N.C. App. at 333, 614 S.E.2d at 415 (vacating the defendant's conviction for possession of "methylenedioxyamphetamine (MDA)" when "the substance listed in [the d]efendant's indictment d[id] not appear in Schedule I of the North Carolina Controlled Substances Act").

¶ 21 The State asserts that "no advanced knowledge of chemistry is needed to further identify and place 5F-ADB within the Controlled Substance Act as a synthetic cannabinoid" because "[a] simple on-line search 5F-ADB as an indazole-based synthetic cannabinoid used as an active ingredient in synthetic cannabis products." The State cites the website Wikipedia in support of this argument. North Carolina courts have never recognized Wikipedia as an authoritative source for any factual evidence or any legal argument, nor may this Court use Wikipedia to supplement the language of indictment. Wikipedia itself has a disclaimer which includes the following caveats regarding its reliability:

> Wikipedia is written collaboratively by largely anonymous volunteers who write without pay. Anyone with Internet access can write and make changes to Wikipedia articles, except in limited cases where editing is restricted to prevent further disruption or vandalism.
>
> . . .
>
> Wikipedia is a live collaboration differing from paper-based reference sources in important ways. It is

> continually created and updated, with articles on new events appearing within minutes, rather than months or years. Because everybody can help improve it, Wikipedia has become more comprehensive than any other encyclopedia. Besides quantity, its contributors work on improving quality, removing or repairing misinformation, and other errors. Over time, articles tend to become more comprehensive and balanced. However, because anyone can click "edit" at any time and add content, any article may contain undetected misinformation, errors, or vandalism. Readers who are aware of this can obtain valid information, avoid recently added misinformation [ ] and fix the article.

https://en.wikipedia.org/wiki/Wikipedia:About

¶ 22 The facial validity of an indictment "should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading." *State v. White*, 372 N.C. 248, 254, 827 S.E.2d 80, 84 (2019) (citation and quotation marks omitted). And "[a] court may not look to extrinsic evidence to supplement a missing or deficient allegation in an indictment." *Id.* at 254, 827 S.E.2d at 84 (citation omitted). The State's contention that "a simple on-line search" would have revealed what Defendant was being charged with appears to be a concession that the controlled substance was not identifiable within the four corners of the Indictment, *i.e.*, the Indictment did not set forth an essential element of the crime charged. Accordingly, the Indictment is fatally flawed, and we vacate Defendant's conviction in 18 CRS 2453. Because we vacate this conviction, we need not address Defendant's final assertion that the trial court erred in denying her motion to dismiss this charge.

V. Conclusion

¶ 23 We hold that the trial court did not convey impermissible opinions on disputed facts to the jury. As a result, no new trial is warranted. However, because the Indictment did not set forth the essential elements of one of the crimes charged, we vacate Defendant's conviction in 18 CRS 2453 for possession with intent to manufacture, sell, and deliver a Schedule I controlled substance synthetic cannabinoid.

NO ERROR IN PART; VACATED IN PART.

Judges DIETZ and ZACHARY concur.

STATE v. LOGAN

[278 N.C. App. 319, 2021-NCCOA-311]

STATE OF NORTH CAROLINA
v.
WILLIAM MAURICE LOGAN, DEFENDANT

No. COA20-650

Filed 6 July 2021

Search and Seizure—search warrant application—affidavit—probable cause—timing of events—sufficiency of information

In a prosecution for possession of a firearm by a felon, the denial of defendant's motion to suppress was reversed and a new trial granted where the search warrant application—issued to search defendant's building after officers responding to a noise complaint at that location detected an odor of marijuana—was not supported by sufficient facts to establish probable cause because the accompanying affidavit did not include any information about when the alleged criminal activity took place. Further, the record was not clear on whether the trial court used the correct standard in evaluating the search warrant.

Appeal by defendant from judgment entered 30 October 2019 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 26 May 2021.

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

W. Michael Spivey for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 William Maurice Logan ("Defendant") appeals from judgment entered upon a jury's verdict finding him guilty of possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1 and attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. On appeal, Defendant argues the trial court erred by denying his motion to suppress evidence obtained by a search warrant that was based on stale information, unsupported by probable cause, and overbroad. For the following reasons, we reverse the trial court's ruling on Defendant's motion to suppress, vacate the judgment, and grant Defendant a new trial.

I. Factual & Procedural Background

¶ 2 The evidence at trial tended to show the following: at approximately 2:48 a.m. on 17 December 2017, officers from the Shelby Police Department were dispatched to the business address of 801 South Lafayette Street in Shelby, North Carolina, in response to a citizen's service call regarding a "loud noise" complaint.

¶ 3 At about 2:53 a.m., Detective Brandon Smith ("Detective Smith"), the lead officer on the case, and Officer Brent Walker ("Officer Walker") arrived at the address in response to the call. The officers parked across the street "[b]ecause the parking lot of the building was packed with other vehicles." As the officers reached the parking lot, they heard loud music and detected "a strong odor of burnt marijuana" coming from the building. Detective Smith testified that there were approximately one hundred people in the building before the officers were able to enter and secure it. Defendant corroborated this estimate in his affidavit in support of the motion to suppress by stating that on the evening in question, he "opened [his] place of business to be used as a venue for a party and had over one hundred guests . . . come."

¶ 4 Defendant approached the officers as they walked into the parking lot of 801 South Lafayette Street; he told them several times it was "his building," and he was throwing a party. In his affidavit, Defendant declared he was "the lawful occupant/tenant of the premises" located at that address, and he used the building as an "auto detail shop." The officers informed Defendant that their "reason for being there was the noise ordinance." Defendant responded that he would "try to get the music turned down." The officers advised Defendant that they would have to further investigate the issue of the marijuana odor. Defendant did not consent to the officers searching the building. Detective Smith then called Sergeant Gabe McKinney ("Sergeant McKinney") on the dispatch radio and requested that he come to the location and "assist with the application of a search warrant." As they prepared to apply for the warrant, Defendant ran to the door of the building and told the attendees, "[l]ock the door, don't let anybody in." An attendee locked the door from the inside.

¶ 5 Defendant remained outside with Officer Smith and the other officers while the warrant was obtained. Detective Smith and Officer Walker testified that while they were waiting, the officers heard a "metallic bang" come from inside the building. According to Detective Smith, they then saw through a crack in the curtains "flashing lights[,] someone erecting a ladder," and then someone climbing up the ladder.

¶ 6 Approximately twenty to thirty minutes after the officers arrived, they made entry as individuals exited from the door, and secured the building to ensure officer safety. The officers attempted to search consenting individuals as they exited the building; however, because those consenting outnumbered officers, not everyone could be searched. Of the individuals who were searched, no "guns, ammunition, contraband, or narcotics" were found on their persons.

¶ 7 Sergeant McKinney arrived at the location and spoke with Detective Smith regarding the odor of marijuana. Sergeant McKinney then left the scene to apply for the search warrant with the magistrate's office between 3:30 a.m. and 4:00 a.m. At 4:05 a.m. the same morning, Magistrate Joshua Bridges issued the search warrant. Approximately thirty minutes after Sergeant McKinney had initially arrived at 801 South Lafayette Street, he returned and executed the search warrant. He read the search warrant to Defendant, and officers began to search the building.

¶ 8 During the officers' search, they initially found two firearms in a locked supply closet: a pistol up on a horizontal structural beam above the closet and a shotgun in the corner of the closet floor. Detective Smith testified that this locked supply closet could not be seen through the window from the outside of the building; therefore, it was not the same room in which he saw the ladder being erected. Sergeant McKinney notified Defendant when the first two firearms were located, and Defendant responded that "he didn't know anything about a pistol but did own that shotgun." Defendant made this statement to Sergeant McKinney before Defendant was charged with or arrested for any crimes.

¶ 9 An officer subsequently located two additional firearms "on top of a heater that was suspended from the ceiling" in the same storage room. The officers were not aware of Defendant's convicted felon status until after they conducted the search. Detective Smith testified during *voir dire* on the motion to suppress that "[o]nce [the officers] had located the firearms in the building [they] called in to dispatch to check and see if [Defendant] had any felony convictions"—it was confirmed that he did.

¶ 10 In addition to the four firearms, the officers also found and seized ammunition, shotgun shells, a glass smoking pipe, a pill bottle containing one white pill, a digital scale with marijuana residue, and a Mason jar containing marijuana residue. Following the search, Defendant was arrested and charged by magistrate's order with one count of possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1.

¶ 11 On 19 March 2018, a Cleveland County grand jury indicted Defendant on one charge of possession of a firearm by a felon pursuant to N.C. Gen.

Stat. § 14-415.1. Defendant was later indicted for having attained habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1 on 16 September 2019.

¶ 12 On 28 October 2019, Defendant filed a pretrial motion to suppress all evidence obtained as a result of the 17 December 2017 search of 801 South Lafayette Street on the basis that the search warrant lacked sufficient probable cause and violated Defendant's constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19, 20, and 23 of the North Carolina Constitution. He also prayed the court to suppress his arrest for possession of a firearm by a felon, to dismiss his charge of possession of a firearm by a felon, and to suppress any statements made by Defendant in conjunction with or following the alleged illegal search.

¶ 13 On 28 October 2019, the Cleveland County Superior Court conducted a suppression hearing before the Honorable Gregory Hayes on Defendant's motion to suppress to determine whether the magistrate properly concluded that probable cause was established based on the supporting affidavit to the search warrant. At the conclusion of the hearing, Judge Hayes orally denied Defendant's motion to suppress on the grounds that the State "prove[d] by the preponderance of the evidence that probable cause exist[ed] for the issuance of the search warrant . . . ." On 3 December 2019, the trial court filed a written order on Defendant's motion to suppress (the "Order"), concluding, *inter alia*, that the 17 December 2017 entry and search of Defendant's building was "legal and based on probable cause."

¶ 14 On 29 October 2019, a jury trial began before the presiding judge, Judge Hayes. The jury returned verdicts finding Defendant guilty of possession of a firearm by a felon and attaining habitual felon status. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 15 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

III. Issue

¶ 16 The sole issue on appeal is whether the trial court erred in denying Defendant's motion to suppress evidence obtained pursuant to a search warrant where the supporting affidavit lacked information as to when the alleged events occurred.

IV. Standard of Review

¶ 17 Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206, *disc. rev. denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

V. Motion to Suppress

¶ 18 Defendant challenges the trial court's denial of his motion to suppress on three separate grounds: (1) the search warrant did not provide sufficient information from which the magistrate could find probable cause; (2) the information contained in the affidavit was stale because the affidavit did not state when the offenses used to establish probable cause occurred; and (3) the search warrant was overly broad because it included firearms and other items in the description of evidence to be seized without providing a reasonable basis for the seizure of such items.

¶ 19 The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV, XIV. Under the Fourth Amendment, a search warrant may be issued only "upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause" despite its divergent language from the United States Constitution. *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016); *see* N.C. Const. art. I, § 20; *see also* N.C Gen. Stat. § 15A-245 (2019) (describing the information an issuing officer may consider "in determining whether probable exists for the issuance" of a search warrant).

¶ 20 "Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128–29, 191 S.E.2d 752, 755 (1972) (citation omitted).

¶ 21 North Carolina courts have adopted the "totality of the circumstances" analysis for determining sufficiency of search warrant applications to establish probable cause. *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984); *see State v. Walker*, 70 N.C. App. 403, 405, 320 S.E.2d 31, 32 (1984). Under the "totality of the circumstances" test, the magistrate's task in issuing a search warrant "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983) (citation omitted); *see also Arrington*, 311 N.C. at 638, 319 S.E.2d at 257–58. Thus, in applying the "totality of the circumstances" test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989).

¶ 22 Under North Carolina law, an application for a search warrant must meet certain requirements. *See* N.C. Gen. Stat. § 15A-244 (2019). One such requirement is "each application . . . must be made in writing upon oath or affirmation." *Id.* Furthermore, each application must contain:

> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under [N.C. Gen. Stat. §] 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. § 15A-244(1)–(4). Additionally, our case law indicates that an affidavit supporting a search warrant application "is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will

reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971), *disc. rev. denied sub nom. Vestal v. North Carolina*, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973).

¶ 23 It is well-established in North Carolina that "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005). However, "[b]efore a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982).

A. Four Corners of Affidavit & Lack of a Temporal Component

¶ 24 In his first argument, Defendant contends that "[t]he circumstances set forth in the search warrant were not sufficient to permit the magistrate to arrive at a common-sense decision that there was a fair probability that contraband or evidence of a crime would be found in [his] building." Specifically, Defendant argues that the affidavit's absence of information as to "*when* the officers smelled marijuana" prevented the magistrate from making "a reasoned determination" that there was probable cause to issue the search warrant. Hence, the "trial court cured the deficiencies" of the affidavit by relying on information outside the four corners of the search warrant to find probable cause. The State argues the trial court's order denying Defendant's motion to suppress was not improperly based on evidence outside of the four corners of the warrant application. And even if the court did err in relying on evidence beyond the affidavit, the State argues "the remaining findings of fact support a conclusion that the warrant was issued based on probable cause."

¶ 25 The State correctly asserts in its brief that Defendant failed to preserve the issue of "staleness" for appellate review; however, because the issues—whether the trial court considered only the four corners of the affidavit, and whether the affidavit contained current information upon which proximate cause could be found—are inexorably intertwined in this case, we consider the arguments together. Although the affidavit failed to provide any reference of time to indicate when the alleged facts occurred, the State contends "the magistrate was permitted to infer that the officers' observations occurred shortly before [Sergeant] McKinney applied for a search warrant" at around 4:00 a.m. due to "the nature of the investigation and the early hour at which [Sergeant] McKinney appeared to apply for the search warrant . . . ."

¶ 26 After careful review, we agree with Defendant that the affidavit in support of the search warrant application did not provide sufficient facts from which the magistrate could conclude there was probable cause because it did not specify when the purported events occurred nor did it indicate sufficient facts from which the magistrate could reasonably infer the timing of such events; therefore, for the reasons set forth below, the search warrant obtained as a result of the affidavit was invalid and resulted in an unreasonable search and seizure. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20.

¶ 27 In addition to ensuring an application for a search warrant meets the requirement imposed in N.C. Gen. Stat. § 15A-244, the issuing official is charged with verifying the basis for the issuance of a search warrant is justified. As part of this duty,

> the issuing official may examine on oath the applicant or any other person who may possess pertinent information, *but information other than that contained in the affidavit may not be considered* . . . in determining whether probable cause exists . . . unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.

N.C. Gen. Stat. § 15A-245(a) (emphasis added). Similarly, our Supreme Court has affirmed that a trial court may not consider facts "beyond the four corners" of a search warrant in determining whether a search warrant was supported by probable cause at a suppression hearing. *State v. Benters*, 367 N.C. 660, 673, 766 S.E.2d 593, 603 (2014) (internal quotation marks omitted). Therefore, evidence "outside the four corners" should not be considered by the trial court at a suppression hearing, and any findings of fact made by the trial court referencing such information are considered "immaterial to [the reviewing court's] determination of whether probable cause existed." *State v. Parson*, 250 N.C. App. 142, 154, 791 S.E.2d 528, 537 (2016).

¶ 28 Here, Sergeant McKinney included with his application for a search warrant an affidavit in which he recited his training and experience and swore to the following facts to establish probable cause for the issuance of a search warrant:

> [t]his search warrant pertains to an investigation being conducted by the Shelby Police Department concerning 801 S. Lafayette St. Shelby, NC. Officers were dispatched to 801 S. Lafayette St. in reference to

> a loud music complaint. Upon Officers Brandon Smith and Officer Brent Walker [sic] arrival they spoke with a William Logan about the loud music. While speaking with Mr. Logan the Officers could smell marijuana coming from inside the business.
>
> Based on the totality of the circumstances[,] Sergeant McKinney believes a reasonable person would suspect that illegal narcotics and drug paraphernalia are being kept at this residence. And a search of this residence is warranted.

Sergeant McKinney described the evidence to be seized as: (1) marijuana; (2) any other controlled substance; (3) currency (domestic or foreign); (4) guns/ammunition; (5) ledgers or any other similar documentation; (6) drug paraphernalia; (7) documentation to establish residency; (8) any other item of evidentiary value; and (9) cellular phone. He provided in his application a description of the location and address of the residence to be searched.

¶ 29 Following the hearing on Defendant's motion to suppress, the trial court made the following pertinent findings of fact:

> (1) That on December 17, 2017, Officers with the Shelby Police Department (SPD) responded to 801 S. Lafayette Street, Shelby, North Carolina 28150 in reference to a loud noise complaint at approximately 2:48 AM.
>
> (2) Upon Officer Brandon Smith and Officer Brent Walker's arrival, they observed a lot of vehicles in this building[']s parking lot, they heard the loud noise coming from the building and smelled marijuana emitting from the building in question.
>
> (3) While approaching said building, the Officers were approached by the Defendant. The Defendant told the Officers this was his building and he was in control of the building. The Officers informed him of the loud noise complaint and the odor of marijuana coming from the Defendant[']s building.
>
> (4) Officer Smith and Officer Walker contacted other SPD Officers for assistance, including [Sergeant] McKinney who had sixteen years of experience with the SPD, about obtaining

a search warrant and assisting them with this investigation.

(5) [Sergeant] McKinney, as well as other Officers, arrived at said location and noticed the smell of marijuana coming from the Defendant[']s building as well.

(6) [Sergeant] McKinney left the scene to obtain a search warrant.

(7) In [Sergeant] McKinney's experience as a law enforcement officer, firearms, ammunition, drugs including marijuana, and U.S. currency go hand in hand.

(8) While waiting for the search warrant, Officers with the SPD at 801 S. Lafayette St. were able to make entry to the building and lock down the building for community safety and officer safety while awaiting the search warrant.

(9) [Sergeant] McKinney applied for the search warrant in writing upon oath that contained the name and title of the applicant, [Sergeant] McKinney on 12/17/2017 for a search of 801 S. Lafayette St., Shelby, NC 28150 and its curtilage. That there was probable cause to search said place due to the smell and odor of marijuana emitting from said building. The place to be searched was properly described. The description of evidence to be seized was properly described and contained items that go hand in hand with marijuana. [Sergeant] McKinney outlined in detail his experience as a law enforcement officer and that the Officers could smell marijuana coming from inside this building in an affidavit establishing probable cause.

(10) [Sergeant] McKinney returned with a valid search warrant for 801 S. Lafayette St. and executed the search warrant. The search warrant was read to the Defendant. Officers with SPD then began with the search of the building.

(11) Among other things, while searching said building Officers located documents indicating the building was in the Defendant's control, drug

paraphernalia, marijuana, ammunition and four firearms. The firearms located were in a locked room that the Defendant informed the Officers was his room and the room he kept all his supplies. One of the firearms was a loaded shotgun.

(12) The Defendant also made a statement to [Sergeant] McKinney that he knew about the shotgun located but did not know about the pistol.

(13) The Defendant made such statements about the room with the firearms and the admission about knowing about the shotgun on his own free will. The Defendant was not in custody when making such statements and was not being interrogated.

(14) Through the investigation, the Officers learned the Defendant was a convicted felon and was therefore not legally allowed to possess a firearm.

(15) The Defendant was charged according.

¶ 30 Defendant challenges findings of fact 1 through 15 of the Order on the ground the trial court relied on information outside the four corners of the warrant to determine whether the magistrate had probable cause to issue the search warrant. The State concedes that numerous findings of fact are based on information either outside the affidavit or are related to matters that occurred subsequent to the magistrate issuing the search warrant, but nonetheless the State argues that there were sufficient findings of fact to support the trial court's determination that probable cause existed.

¶ 31 Our Supreme Court has stated "[t]he question for review [of a motion to suppress] is whether the ruling of the trial court was correct . . . ." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987). Thus, "[t]he crucial inquiry for th[e appellate c]ourt is admissibility and whether the ultimate ruling was supported by the evidence." *Id.* at 290, 357 S.E.2d at 650.

¶ 32 In this case, we need not consider Defendant's specific challenges to the findings of fact and conclusions of law because we conclude the trial court erred in denying Defendant's motion to suppress and finding probable cause existed for the search warrant based on the affidavit, which lacked sufficient facts to show when the alleged criminal activ-

ity occurred. The "ultimate ruling" concluding probable cause existed for the search warrant could not be "supported by the evidence" because the search warrant was based on a facially insufficient and thus deficient supporting affidavit. *See id.* at 290, 357 S.E.2d at 650. However, we note the trial court improperly applied the preponderance of the evidence standard at the hearing on the motion to suppress in determining whether probable cause existed for the search warrant. Moreover, the written order denying the motion to suppress does not reference the "totality of the circumstances" test; rather, it concludes that the search warrant was "valid and legal" pursuant to N.C. Gen. Stat. § 15A-244. Therefore, it is unclear from the record whether the Order reflects the correct standard by which the trial court was to review the search warrant.

¶ 33 Our Court has not previously determined whether a search warrant affidavit based on officers' personal observations is fatally defective where the affidavit fails to specify when the purported facts occurred. In *State v. Campbell*, our Court considered whether an affidavit upon which a search warrant was issued provided "a sufficient basis for the finding of probable cause." 14 N.C. App. 493, 494, 188 S.E.2d 560, 561, *aff'd*, 282 N.C. 125, 191 S.E.2d 752 (1972). Our Court noted the affidavit contained

> statements that some undisclosed issuing officer on dates not stated, upon complaints, the factual basis for which is not revealed, made to him by complainants whose identity and reliability are not indicated, had found probable cause to order the arrest of the persons accused for offenses allegedly committed by them at places not specified on dates ranging from approximately three to seven weeks previous to the date of the affidavit.

Id. at 496, 188 S.E.2d at 562. We held that the trial court erred in overruling the defendant's objections to the admission of evidence; thus, we remanded the case for a new trial. *Id.* at 497, 188 S.E.2d at 562. Since the affidavit did not provide sufficient facts from which a magistrate could conclude that the purported events had "occurred on or in connection with the premises to be searched," we did not reach the issue of whether the lack of timing as to the purported events made the affidavit defective. *Id.* at 497, 188 S.E.2d at 562.

¶ 34 In *State v. Newcomb*, our Court considered a supporting affidavit which was based on information obtained by an informant whose credibility was not known. 84 N.C. App. 92, 95, 351 S.E.2d 565, 567 (1987). Moreover, the affiant did not attempt to corroborate the informant's

statements before applying for the search warrant. *Id.* at 95, 351 S.E.2d at 567. The affidavit did not indicate when the informant had last been in the residence in which the officer sought to search, nor did it indicate whether the informant had "current knowledge of details" surrounding the alleged events. *Id.* at 95, 351 S.E.2d at 567. We held the affidavit failed to demonstrate probable cause, and our Court refused to apply the *Leon* "good faith exception" because "the officer took no reasonable steps to comply with the fourth amendment." *Id.* at 96, 351 S.E.2d at 567; *see United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986).

¶ 35 Similarly, in *State v. Brown*, our Court found the affidavit at issue to be substantially similar to the affidavit considered by the *Newcomb* Court because it failed to specify when an informant had witnessed the defendant's purported criminal activities—it only provided timing as to when an officer had spoken to the informant. 248 N.C. App. 72, 77, 79–80, 787 S.E.2d 81, 86–87 (2016). Therefore, we held the information in the affidavit was stale. *Id.* at 80, 787 S.E.2d at 88. Accordingly, we reversed the trial court's order denying suppression and vacated the judgment. *Id.* at 80, 787 S.E.2d at 88.

¶ 36 We are cognizant that the cases of *Newcomb* and *Brown* are distinguishable on the grounds that those cases involved information provided by confidential informants whereas the case *sub judice* concerns information obtained from the personal observations of police officers. We nevertheless find the cases instructive in reaching our conclusion that the search warrant at issue was invalid on the ground the affidavit lacks a sufficient nexus between the odor of marijuana and the building to be searched at the time the warrant was executed. Our holding is also consistent with the rule of law that a magistrate must be able to reasonably infer when alleged facts occurred to find probable cause. *See Lindsey*, 58 N.C. App. at 565, 293 S.E.2d at 834 ("The test for 'staleness' of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued."); *State v. Cobb*, 21 N.C. App. 66, 69, 202 S.E.2d 801, 804 (1974) (holding a "magistrate could realistically and reasonably conclude *from the affidavit* that the informer observed the events so recently that reasonable cause existed to believe that the illegal activities were occurring at the time of the issuance of the warrant.") (emphasis added). Other jurisdictions have adopted similar approaches in considering the validity of search warrants where trial courts found probable cause based on affidavits lacking any reference to time. *See United States v. Doyle*, 650 F.3d 460, 475 (4th Cir. 2011) (rejecting the *Leon* good faith exception

"where the totality of the information provided to the magistrate included no indication as to when the events supposedly creating probable cause to search took place"); *Herrington v. State*, 287 Ark. 228, 233, 697 S.W.2d 899, 901 (1985) ("An affidavit . . . with absolutely no reference to a time frame, does not provide sufficient information upon which a probable cause determination can be made."); *Garza v. State*, 120 Tex. Crim. 147, 151, 48 S.W.2d 625, 627 (1932) (holding an affidavit was inadequate to support a search warrant where the statements in the affidavit did not "convey[ ] any definite idea as to when the incident [the affiant] describe[d] took place"); *Welchance v. State*, 173 Tenn. 26, 28, 114 S.W.2d 781, 781 (1938) (stating the date of the alleged offense was "essential" in order for the magistrate to determine whether probable cause existed); *see also United States v. Zayas-Diaz*, 95 F.3d 105, 114–15 (1st Cir. 1996) ("[A] reasonably well-trained law enforcement officer should be familiar with the fundamental legal principle that both the 'commission' and 'nexus' elements of 'probable cause' include an essential temporal component.").

¶ 37 Here, the supporting affidavit to the search warrant application was completely devoid of any indication as to when the events used to establish probable cause occurred. The affidavit did not include the date on which the officers' investigation began, the date when the officers were dispatched to Defendant's address, the date when the officers spoke to Defendant regarding loud music, or the date when the officers smelled marijuana coming from inside Defendant's building. The magistrate could not reasonably conclude that the search warrant application established probable cause because it failed to provide "facts so closely related to the time of issuance of the warrant," as required for a valid search warrant. *See Lindsey*, 58 N.C. App. at 565, 293 S.E.2d at 834. To allow issuance of a search warrant without such essential temporal information would encourage magistrates to make speculations and assumptions regarding probable cause, which would in turn violate constitutional protections against unreasonable searches and seizures. The State has provided no arguments on appeal to justify the officers' otherwise warrantless search. Therefore, we hold the trial court erred in denying Defendant's motion to suppress where the supporting affidavit provided no indication as to when the alleged criminal activities occurred. The affidavit was invalid; thus, any evidence obtained as a result of the search warrant was erroneously admitted at trial. *See* N.C. Gen. Stat. § 15A-974(a)(1) (2019) ("Upon timely motion, evidence must be suppressed if: [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina . . . ."); *see Campbell*, 282 N.C. at 132, 191 S.E.2d at 757.

¶ 38 Because we conclude the trial court erred in denying Defendant's motion to suppress, we do not need to address his remaining argument that the search warrant was overly broad in scope.

VI. Conclusion

¶ 39 For the foregoing reasons, we reverse the order denying Defendant's motion to suppress, vacate the judgment, and grant Defendant a new trial.

NEW TRIAL.

Judges DILLON and GORE concur.

STATE OF NORTH CAROLINA
v.
CARLOS GARCIA LOWERY, A/K/A CARLOS GARCIA LOWERY, JR.

No. COA20-528

Filed 6 July 2021

1. Evidence—hearsay—exceptions—excited utterance—unknown time between statement and startling event

In a second-degree murder prosecution, where a friend who found the victim injured at the scene testified that the victim identified defendant as his attacker, the trial court properly admitted the friend's testimony under the excited utterance exception to the hearsay rule. Although the record did not disclose how much time had elapsed between the attack and the victim's statement to his friend, the fact that he made the statement while suffering from serious injuries that eventually contributed to his death—multiple rib fractures, damage to internal organs, and difficulty breathing (because he was bleeding from the mouth)—strongly suggested that he was still "under the stress of excitement" caused by the attack when he spoke.

2. Appeal and Error—preservation of issues—motion to exclude testimony—Confrontation Clause—failure to obtain ruling—general objection only

In a second-degree murder prosecution, where the trial court denied defendant's pretrial motion to exclude testimony from two

officers and an emergency medical technician (who were present at the crime scene and to whom a witness identified defendant as the victim's assailant), defendant's argument that the testimony violated his constitutional rights under the Confrontation Clause was not preserved for appellate review. Although defendant raised the constitutional issue in his pretrial motion, the trial court based its ruling on a different objection and without reference to the Confrontation Clause. Moreover, although defendant also objected to the testimony at trial, the objection was general and did not specifically raise any constitutional ground.

3. Evidence—lay opinion—contents of recorded phone call—murder trial—no prejudicial error

The trial court in a murder prosecution did not abuse its discretion by allowing an undercover detective to testify about defendant's phone call from jail on the day of the victim's death, where defendant did not dispute the detective's ability to identify him as the caller and the detective otherwise provided a proper lay opinion based on her perceptions from listening to the call. Although a recording of the call was played for the jury, the detective's familiarity with defendant, the person he called, and their respective voices (as well as the jail's telephone system) made her more likely than the jury to correctly discern what was said in the "garbled" and "distorted" recording. Further, the detective's testimony did not prejudice defendant where it was not the only evidence from which the jury could have inferred defendant's guilt.

Appeal by Defendant from Judgment entered 24 January 2019 by Judge Joseph N. Crosswhite in Davie County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Solicitor General Fellow Heyward Earnhardt, Solicitor General Ryan Y. Park, and Assistant Solicitor General Nicholas S. Brod for the State.

Attorney Paul F. Herzog for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Carlos Lowery (Defendant) appeals from Judgment entered 24 January 2019 upon his conviction of Second-Degree Murder. The Record before us, including evidence presented at trial, tends to show the following:

¶ 2 Terry Smoot (Smoot) was "the neighborhood runner" for a neighborhood near downtown Mocksville. As the "neighborhood runner," Smoot would sometimes buy items, like beer, from the store for people in the neighborhood but would also obtain "crack or weed" for people. Smoot also allegedly worked for Defendant as a runner for drug sales in order to reduce the number of people coming and going from Defendant's residence.

¶ 3 On 25 October 2016, Smoot visited the "Soda Shop," a convenience store in the neighborhood. Recordings from that day showed Smoot enter the store, purchase a pack of cigarettes, and leave at 3:08 p.m.

¶ 4 Edgar Pozo (Pozo) and Smoot had been friends since 2004. At 4:30 p.m. on 25 October 2016, Pozo finished his shift at Panel Service Component International (PSC) and began walking home. Pozo's residence was approximately a five-minute walk from the PSC facility, and the walk required Pozo to cross some railroad tracks. As Pozo approached the railroad tracks, he heard someone call out "Ed." "Ed" was a nickname given to Pozo by Smoot. Pozo saw Smoot "lying there" and bleeding from the mouth.

¶ 5 Pozo asked Smoot what happened, to which Smoot replied, "Red beat me up." Evidence at trial revealed Defendant was known to go by the nickname "Red."

¶ 6 Smoot asked Pozo to "[t]ell [Smoot's] dad to tell [Smoot's] brother come get [Smoot]." Pozo left Smoot to inform Smoot's father of Smoot's condition, before heading home. After returning home, Pozo noticed that neither Smoot's father nor brother had left to help Smoot. As a result, Pozo went back to where he had found Smoot. Upon returning, Pozo found Smoot "hunched" over in the same spot. Pozo tried helping Smoot to his feet, but Smoot "screamed and fell back down." Pozo realized Smoot was severely injured, prompting Pozo to call 9-1-1 around 4:55 p.m.

¶ 7 Shortly after, around 5:00 p.m., EMTs and local law enforcement began arriving. Roger Spillman (Officer Spillman), an on-duty patrol officer with the Mocksville Police Department, was the first to arrive. At trial Officer Spillman testified that upon arriving and seeing Smoot, he asked "[w]hat happened[?]" and "who did this to you?" Smoot responded, "Carlos Lowery" and "Red beat me up."

¶ 8 Around the same time Officer Spillman arrived, Detective Brian Nichols (Detective Nichols), with the Mocksville Police Department, also joined the scene. Detective Nichols testified he also approached Smoot and asked what happened, to which Smoot responded, again, by

identifying Carlos Lowery as his attacker. The law enforcement officers then began securing the scene.

¶ 9 William Frye (Frye), a volunteer EMT, arrived on the scene near the time when Officer Spillman and Detective Nichols arrived. According to Frye, prior to conducting an initial medical assessment, he overheard Smoot tell Detective Nichols the name "Carlos Lowery" and "[he] jumped me." He further testified Smoot's speech had become garbled indicating Smoot was in pain, as he was unable to speak in complete sentences. Upon his initial assessment Frye observed Smoot was suffering from "labored breathing," "bleeding from the face," and "his cheeks [were] swollen and around his eyes." However, Smoot remained adamant he wanted to go home rather than to the hospital. Chris Hefner (Lieutenant Hefner), a patrol supervisor for the Mocksville Police Department, was also at the scene that day. He also heard Smoot identify "Carlos Lowery" as his attacker.

¶ 10 Last at the scene were paramedics Brian Williams (Williams) and Kristie McManus (McManus). Williams described Smoot's mental state as "somewhat altered," as a result of his severe injuries. Williams and McManus placed Smoot in an ambulance to be transferred to Wake Forest Baptist Hospital for treatment. Before the ambulance left, Detective Nichols got in the ambulance and again asked Smoot who attacked him, to which Smoot again responded, "Carlos Lowery."

¶ 11 After the ambulance left, Detective Nichols canvassed the neighborhood to try and locate any potential witnesses. While canvassing, Detective Nichols came across two men sitting in front of a house near the scene. Detective Nichols asked the men if they knew a "Carlos Lowery," to which both men responded they did not. Detective Nichols later discovered one of the two men was, in fact, Carlos Lowery.

¶ 12 Smoot died at Wake Forest Baptist Hospital at 11:39 p.m. An autopsy found numerous abrasions and bruises on the exterior of Smoot's body. An internal examination revealed multiple rib fractures, likely caused by "blunt force injury," which would have made it difficult for Smoot to breathe. Smoot's lungs contained substantial amounts of blood, and both his liver and kidneys were lacerated. The blood vessels to Smoot's kidney were also transected.

¶ 13 A Davie County Grand Jury indicted Defendant on charges of First-Degree Murder and Common Law Robbery. Defendant's case came for trial in Davie County Superior Court on 14 January 2019.

¶ 14 Prior to trial, Defendant filed a Motion to Limit Evidence/Testimony to exclude testimony of the statements Smoot made to Pozo, EMTs, and

law enforcement on the bases these statements were inadmissible hearsay and their admission would violate Defendant's constitutional rights to due process and to confront witnesses. On 10 January 2019, the trial court entered an Order denying Defendant's Motion to Limit Evidence/Testimony. Specifically, the trial court determined the statements made by Smoot to Pozo and Detective Nichols were "admissible under the excited utterance exception to the hearsay rule." The trial court further concluded the testimony of the other law enforcement officers and EMTs was admissible as corroborative of the statements to Pozo and Detective Nichols. The trial court did not separately address the constitutional grounds alleged in Defendant's Motion.

¶ 15 At trial, Pozo, the EMTs, and law enforcement officers testified as to the statements Smoot made to them at the scene of the incident. Defendant made general objections to the testimony regarding Smoot's statements about the identity of his assailant to Pozo, the EMTs, and law enforcement officers.

¶ 16 The State also presented testimony from Major Koula Black (Major Black), an Operations Manager for the Mocksville Police Department. In October 2016, Major Black was an undercover narcotics detective. Through the course of her employment, Major Black had become familiar with the phone system at the Davie County jail, including the use of PIN numbers and voice recognition to identify an inmate making a call. Major Black was called, in part, to testify about a phone call made from the Davie County jail between Defendant and Tanisha Gaither (Gaither). Major Black testified she was familiar with the voices of both Defendant and Gaither from her time in undercover work where she observed Defendant "very regular[ly]" at an address in the same Mocksville neighborhood where Smoot was assaulted, and identified Defendant as "the person [Major Black] came to know as Red or Carlos Lowery." The State then elicited testimony from Major Black about "general topics of conversation" in the call, before playing the call for the jury. Over Defendant's general objection, the trial court allowed Major Black to testify that during the call, Defendant said that on the day of the Smoot's death Defendant "got the cigarettes and the change, but not the phone." Major Black confirmed a "cell phone, U.S. currency and cigarettes" were items alleged to have been stolen from Smoot in the attack.

¶ 17 The jury found Defendant guilty of Second-Degree Murder, but acquitted Defendant on the charge of Common Law Robbery. The trial court sentenced Defendant to 339 to 419 months in prison. Defendant gave oral Notice of Appeal in open court.

Issues

¶ 18 The issues raised by Defendant on appeal are whether the trial court erred in admitting: (I) testimony from Pozo of statements made to him by Smoot identifying Defendant as the assailant under the excited utterance exception to the hearsay rule; (II) testimony from Officer Spillman, Detective Nichols, and Frye as to Smoot's statements identifying Defendant as the assailant in violation of Defendant's constitutional rights under the Confrontation Clause; and (III) testimony from Major Black about the contents of the recorded telephone call between Defendant and Gaither.

Analysis

I. Excited Utterance

¶ 19 **[1]** Defendant first contends the trial court committed prejudicial error by admitting Pozo's testimony that Smoot identified Defendant by Defendant's nickname "Red" as Smoot's assailant under the "excited utterance" exception to the hearsay rule pursuant to N.C. R. Evid. 803(3). "When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

¶ 20 " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). Generally, "[h]earsay is not admissible, except as provided by statute[.]" N.C. Gen. Stat. § 8C-1, Rule 802 (2019). One such exception are statements that may be classified as "excited utterances." Excited utterances are defined by statute as "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2) (2019). "In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

¶ 21 First, on appeal, Defendant makes no argument the alleged assault on Smoot would not qualify as a "sufficiently startling experience" under the excited utterance exception. *See generally State v. Coria*, 131 N.C. App. 449, 508 S.E.2d 1(1998) (statements following an assault qualifying as an excited utterance). Rather, Defendant argues Smoot's statements to Pozo were sufficiently remote in time from the assault and that Smoot was not in a condition of excitement when he made the statements such

that Smoot's statements were not "a spontaneous reaction," but instead "one resulting from reflection or fabrication." Specifically, Defendant contends because it is impossible to pinpoint the exact time of the attack given the approximate hour and a half between the time Smoot left the Soda Shop and when Smoot made the statements to Pozo, after Pozo first discovered Smoot, it is possible the assault had occurred "perhaps as much as 75 to 90 minutes" earlier. Defendant's argument, however, rests on a speculative assessment of the facts precisely because the Record does not disclose how much time elapsed from the assault until the statements were made. Put another way, the assault may have occurred just minutes before Pozo found Smoot but no more than approximately 75-90 minutes before.

¶ 22 "Moreover, '[w]hile the period of time between the event and the statement is without a doubt a relevant factor, the element of time is not always material,' and the 'modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.' " *Coria*, 131 N.C. App. at 451, 508 S.E.2d at 3 (alterations in original) (quoting *State v. Thomas*, 119 N.C. App. 708, 712-13, 460 S.E.2d 349, 352 (1995)). As the Official Commentary to Rule 803 notes: "the standard of measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.' " N.C. Gen. Stat. Ann. § 8C-1, Rule 803 cmt. (2019). For example, in *State v. Hamlette*, our Supreme Court concluded statements were properly admitted as excited utterances where:

> only three minutes passed between the witness Betterton's hearing of the shots and [the victim's] statement that defendant shot him. Within thirteen minutes after the shooting, [the victim] told [Officer] Clayton that defendant had shot him. When he made these statements, he was suffering from three gunshot wounds, was bleeding from the mouth and chest, was at the crime scene and, at the time of the second statement, was being prepared by ambulance attendants for the trip to the hospital.

302 N.C. 490, 495, 276 S.E.2d 338, 342 (1981). The Court reasoned: "These circumstances support the trustworthiness of these statements made while the victim was under the immediate influence of the act." *Id.* Notably, the Court also observed: "The statements do not in any way lose their spontaneous character because they were in response

to questions such as: 'What is wrong?' 'Who shot you?' 'How did they leave?' " *Id.* (citations omitted).

¶ 23 This Court has focused the temporal inquiry in terms of whether the declarant "was still under the stress of a startling event and . . . therefore had no opportunity to reflect on her statements." *Coria*, 131 N.C. App. at 452, 508 S.E.2d at 3. *Coria* is particularly instructive in this case because there, as here, the record did not disclose the lapse in time between the assault and the declarant's statements first to a witness and later to a law enforcement officer. *Id.* at 450, 508 S.E.2d at 2. In that case, a witness observed the female victim running out of the woods having crossed a ravine. *Id.* The victim was upset and had a bruised and swollen face and bloody nose and lip. The victim told the witness the defendant had assaulted her while they were at the defendant's home, and she had subsequently fled. *Id.* The victim also recounted similar statements to a law enforcement officer who later responded to the witness's home. *Id.* Our Court determined these statements were made while the victim was still under the stress of a startling event and properly admitted as excited utterances where, in part, the victim was "very excited and upset, had obviously been hit about the face, and at times lapsed into her native tongue[.]" *Id.* at 452, 508 S.E.2d at 3.

¶ 24 Here, the witness, Pozo, found the victim, Smoot, at the apparent crime scene, injured and bloody following the assault, hunched on the ground requesting help. Defendant nevertheless argues because Pozo initially described Smoot as "calm" and that although Smoot was in pain, Pozo's first observation was that he "didn't think it was that bad really," Smoot was neither excited nor in such pain from his injuries that he made these statements under the stress or excitement of the assault. Defendant's arguments, however, ignore the facts that at the time Smoot had sustained multiple rib fractures, internal bleeding, damage to internal organs, and was aspirating blood. These injuries made it difficult for Smoot to breathe or move, and eventually contributed to his death. On these facts, we cannot conclude Smoot no longer acted under the stress of excitement caused by the assault, when he made the statements to Pozo.[1] *See State v. Kerley*, 87 N.C. App. 240, 243, 360 S.E.2d 464, 466

1. Defendant cites *State v. Riley*, 154 N.C. App. 692, 572 S.E.2d 857 (2002), and *State v. Little*, 191 N.C. App. 655, 664 S.E.2d 432 (2008), as support for his position. Both cases are, however, inapposite to this case. In both of those cases, we affirmed instances where the trial court sustained an objection to hearsay and excluded statements as not constituting excited utterances. Furthermore, in *Riley*, the defendant, who was charged with felony speeding to elude arrest, told the officer who arrested him following a crash that another occupant of the car told [the] defendant to flee because the person "had warrants against him" and had a gun at the time. *Riley*, 154 N.C. App. at 694, 572 S.E.2d at 858. Our Court

(1987). Thus, Pozo's testimony as to Smoot's statements identifying Defendant as the assailant were properly admitted as excited utterances. Therefore, the trial court did not err in denying Defendant's pre-trial Motion to exclude these statements or by overruling Defendant's objection to this testimony at trial.

II. Confrontation Clause

¶ 25 **[2]** Defendant contends the trial court violated his constitutional right to confront witnesses under the Confrontation Clause, when it admitted the statements by Smoot identifying him as the assailant through the testimony of Officer Spillman, Detective Nichols, and Frye.

¶ 26 However, as a threshold matter:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2021). More specifically, our Courts consistently recognize "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001).

¶ 27 Here, Defendant did raise the Confrontation Clause objection in his pretrial Motion to Limit Evidence/Testimony. However, in ruling on that Motion, the trial court based its decision solely on the statutory hearsay objection and made no reference to any state or federal constitutional provision, including the Sixth Amendment or the Confrontation Clause. Moreover, although Defendant also objected to the testimony at trial, the objection was general and did not specifically raise any constitutional ground for the exclusion of Smoot's statements. Thus, Defendant has not preserved this constitutional issue for appeal. *See* N.C. R. App.

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stated: "defendant had only minor injuries and did not require medical treatment. Although the record does not indicate the amount of time between [the] defendant's crashing the vehicle and making the statement, the record is clear that a sufficient amount of time had lapsed to provide [the] defendant with an opportunity to fabricate a statement." *Id.* at 695, 572 S.E.2d at 859. Likewise in *Little*, we upheld the trial court's exclusion of a witness statement given to a SBI agent "several hours" after the shooting in that case where the statement was "[c]learly . . . not the product of a 'spontaneous reaction, not one resulting from reflection or fabrication.' " *Little*, 191 N.C. App. at 665, 664 S.E.2d at 439.

P. 10(a)(1) (2021); *see also State v. Lemons*, 352 N.C. 87, 91, 530 S.E.2d 542, 544 (2000) ("While [the] defendant clearly objected to the admission of . . . statements . . . on evidentiary grounds, we are unable to find any indication that at trial [the] defendant cited the Sixth Amendment or any constitutional grounds as the basis for his objection to the admission of . . . [these] statements into evidence."); *State v. Mobley*, 200 N.C. App. 570, 572, 684 S.E.2d 508, 510 (2009) (objection on hearsay grounds did not invoke the Confrontation Clause). Furthermore, Defendant has not requested we invoke N.C. R. App. P. 2 or apply plain error review to this issue. Therefore, as the issue was not preserved for appeal, we do not address it.[2]

III. Telephone Call

¶ 28 **[3]** Defendant also contends the trial court erred in admitting testimony from Major Black regarding the contents of Defendant's telephone call to Gaither made from the Davie County jail. Specifically, Defendant argues the testimony constituted improper lay opinion testimony under Rule 701 of the North Carolina Rules of Evidence in that the recording itself was available and played for the jury and, thus, Major Black's testimony would not have been helpful to the jury's determination as to the content of the telephone conversation. First, however, Defendant raised only a general objection to this testimony. Thus, the basis for Defendant's objection at trial is unclear and this argument could also be deemed unpreserved. *See* N.C. R. App. P. 10(a)(1) (2021).

¶ 29 Nevertheless, assuming Defendant's general objection preserved this issue for review, Rule 701 states: "If [a] witness is not testifying as an expert, [the witness's] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [the witness's] testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019). "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. rev. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned

2. In a footnote in his brief to this Court, Defendant submits he is also renewing his hearsay arguments raised as to Pozo's testimony to the testimony of these three witnesses. However, Defendant makes no specific argument the trial court erred in admitting the testimony of these witnesses. Moreover, unlike Pozo's testimony, the trial court did not expressly ground admission of the law enforcement and EMT witnesses in the excited utterance hearsay exception. We deem those arguments abandoned. N.C. R. App. P. 28(b)(6) (2021).

decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

¶ 30 As a general proposition:

> For a court to allow a witness in a criminal case to testify to the content of a telephone conversation, the identity of the person with whom the witness was speaking must be established. In such cases identity may be established by testimony that the witness recognized the other person's voice, or by circumstantial evidence.

State v. Dial, 122 N.C. App. 298, 309, 470 S.E.2d 84, 91 (1996) (citations omitted). Here, Major Black opined the speakers in the recorded telephone call were Defendant and Gaither based on both her familiarity with the procedures employed in the jail's telephone system used to identify the inmate making the call—Defendant—along with her own familiarity with both Defendant and Gaither and their respective voices. Major Black's lay opinion as to the identity of the speakers was therefore based on her own knowledge and perceptions. Indeed, Defendant did not object at trial and raises no argument on appeal about Major Black's identification of Defendant and Gaither as the speakers in the recording, instead focusing solely on Major Black's testimony about the general topics discussed in the telephone call. Thus, Major Black's testimony about the contents of the recorded telephone call was admissible on this basis.

¶ 31 Assuming further that Major Black's testimony about the general topics of conversation in the telephone call, based on Major Black's direct personal knowledge of the content of the recording, in fact, constitutes a lay opinion, it was plainly rationally based in Major Black's perception from listening to the recorded call. Again, Defendant does not contest this point. Instead, Defendant argues the trial court abused its discretion in admitting the testimony because Major Black's testimony was not helpful to the jury's clear understanding of the content of the call or its determination of any fact in issue where the jury heard the recording and could draw its own conclusions as to the content of the conversation.

¶ 32 In support of his position, Defendant relies on our decision in *State v. Belk*, 201 N.C. App. 412, 689 S.E.2d 439 (2009). In *Belk*, the defendant argued that the trial court erred in allowing a police officer to testify to the defendant's identity in a surveillance video tape. *Belk*, 201 N.C. App. at 413, 689 S.E.2d at 440. This Court recognized lay opinion testimony

identifying a criminal defendant may be admissible where the testimony "would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from an admission of the testimony." *Id.* at 415, 689 S.E.2d at 441 (citation omitted).

¶ 33 However, there, the officer's familiarity with the defendant's appearance was confined to a few brief encounters of "minimal contact." *Id.* at 417, 689 S.E.2d at 442. Furthermore, "there was no evidence presented by either party tending to show that the individual depicted in the surveillance footage had disguised his appearance at the time of the offense or that Defendant had altered his appearance prior to trial." *Id.* Additionally, although the video initially was " 'very fuzzy' when shown on the large projection screen to the jury," any prejudice to the defendant was abated as the jurors also "had the opportunity to view the video footage on a personal computer." *Id.* at 417, 689 S.E.2d at 443. Thus, "[t]he only factor supporting the trial court's conclusion [was the officer's] familiarity with Defendant's appearance, based on . . . brief encounters." *Id.* at 418, 689 S.E.2d at 443. This Court determined: "there was no basis for the trial court to conclude that the officer was more likely than the jury to correctly identify Defendant as the individual in the surveillance footage." *Id.* Accordingly, we held "the trial court erred by allowing [the officer] to testify that, in her opinion, the individual depicted in the surveillance video was Defendant." *Id.*

¶ 34 *Belk* is not applicable here. First, the issue in *Belk* was the officer's identification of the defendant. Identity—specifically, whether Major Black was better positioned to identify Defendant as the caller than the jury because of Major Black's familiarity with Defendant and Gaither or her ability to identify them or their voices on the call—is not at issue here. Further, unlike *Belk* where there were no issues of the clarity of the surveillance video and any issues with the projection to the jury were ameliorated, here, Defendant describes the recording of the call and Defendant's voice as "garbled," and the State describes the recording as "distorted." Given Major Black's familiarity with both the telephone system and with Defendant and Gaither and their voices, we cannot say then that there was "no basis for the trial court to conclude that the officer was more likely than the jury to correctly identify" the contents of the recording of the telephone call between Defendant and Gaither. *Id.*

¶ 35 Moreover, in *Belk*, we concluded the error in admitting the officer's testimony was prejudicial where "the State's case rested exclusively on the surveillance video and [the officer's] identification testimony."

Id. Here, Major Black's testimony and the recording were not the only evidence from which the jury could conclude Defendant was Smoot's assailant. Indeed, as noted, there were numerous instances of witnesses identifying Defendant at trial. Thus, we cannot conclude there is a reasonable possibility that, had this testimony been excluded, the jury would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a) (2019) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). Therefore, even if admission of Major Black's testimony constituted error, it did not rise to the level of prejudicial error requiring reversal or a new trial. Consequently, the trial court did not abuse its discretion or commit reversible error in admitting Major Black's testimony.

Conclusion

¶ 36 Accordingly, for the foregoing reasons, there was no error in Defendant's trial and the Judgment is affirmed.

NO ERROR.

Judges DIETZ and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES GREGORY MEDLIN

No. COA20-563

Filed 6 July 2021

Probation and Parole—obtaining property by false pretenses—special condition of probation—no contact with victim of crime—interference with child visitation rights

In a prosecution for obtaining property by false pretenses, where defendant stole gold coins and jewelry from his mother-in-law, who had legal custody of his three children, the trial court did not abuse its discretion in ordering defendant—as a special condition of his probation pursuant to N.C.G.S. § 15A-1343(b1)(10)—not to contact his mother-in-law. The condition was reasonably related

to the mother-in-law's protection and to defendant's rehabilitation, and it did not prevent defendant from exercising his child visitation rights where the length and frequency of his visitation remained undisturbed and where nothing prevented the mother-in-law from initiating contact with defendant—or defendant's wife from contacting her own mother—to arrange visits with the children.

Judge WOOD dissenting.

Appeal by defendant from judgment entered 17 September 2019 by Judge Anna M. Wagoner in Cabarrus County Superior Court. Heard in the Court of Appeals 12 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General William F. Maddrey, for the State.

Sandra Payne Hagood for defendant-appellant.

TYSON, Judge.

¶ 1 James Medlin ("Defendant") appeals the judgment entered upon his conviction for felony obtaining property by false pretenses on 12 February 2018. We find no error.

I. Background

¶ 2 Defendant and his wife, Mary, lived in a house owned by Mary's mother, Ellen Mitchner ("Mitchner"). Defendant and Mary were both addicted to illegal drugs. Defendant's and Mary's three daughters have been living with Mitchner since October 2017. Mitchner acquired and maintained legal custody of the three children in May 2019.

¶ 3 In October 2017, Mitchner asked Defendant and Mary to store a box of Mitchner's valuables inside a safe located inside the home she owned where they lived. The box contained gold coins and inherited jewelry.

¶ 4 Mitchner testified she never indicated to Defendant or her daughter the coins or jewelry were a gift. Mitchner asked for the box to be returned several times. Defendant and Mary made excuses for not returning the box.

¶ 5 Mitchner eventually retrieved the box and discovered all the gold coins and most of the jewelry were missing. Some of the rings had been replaced with crystal and cubic zirconia rings. Mitchner reported the

coins and jewelry stolen and gave the police a description of the items. Mitchner also learned Defendant had pawned items at a local pawn shop.

¶ 6 Police found a ring at the City Pawn Shop that matched the description given by Mitchner. Mitchner identified the ring as one of her rings from the box she had left with Defendant. The owner of City Pawn testified Defendant had pawned the ring.

¶ 7 Defendant and Mary testified the ring found at City Pawn, which Mitchner claims was hers, is Mary's engagement ring. Defendant testified when he returned to City Pawn to redeem Mary's engagement ring and "to pay it off," the police had taken it.

¶ 8 The jury returned a verdict of guilty for feloniously obtaining property by false pretenses. Prior to sentencing, the following colloquy occurred:

> [DISTRICT ATTORNEY]: I would just ask that this defendant have no contact with Ms. Mitchner . . . but if this family, either one of them, have any harassment with this victim over this verdict they will be charged, any kind of harassment.
>
> . . . .
>
> [DEFENDANT]: We do get along fine. When it comes to the children, we get along just perfectly.
>
> . . . .
>
> THE COURT: Let me ask you this; [Mitchner], right now, do they visit with these children any?
>
> MITCHNER: Yes, ma'am.
>
> THE COURT: And that's ok with you.
>
> MITCHNER: Yes, ma'am. The custody order is for one hour or more every two weeks.
>
> THE COURT: And where do y'all do that.
>
> MITCHNER: They have been coming over to the house.
>
> THE COURT: And that's okay with you.
>
> MITCHNER: I don't want them at the house. I prefer to meet them at a restaurant or park or some place like that.

> [DISTRICT ATTORNEY]: I think that's probably a good idea.
>
> THE COURT: I'm just worried about having to work out where they're going to meet.
>
> . . . .
>
> [DISTRICT ATTORNEY]: Your Honor, that's how it's written in the custody order. They're allowed to do that. If Ms. Mitchner wants to set that up at some supervised location, I think that that's what they need to do.
>
> . . . .
>
> THE COURT: This sentence is suspended. He is placed on supervised probation for 30 months under the following terms and conditions. . . . He is not to threaten, harass or molest Ms. Mitchner during the suspension of this sentence. . . . He is to abide by the custody and visitation agreement currently in effect.
>
> . . . .
>
> [DISTRICT ATTORNEY]: I want no contact then because if he's going to try to talk to her - - he's already tried to do it in the past - - talk to her about this case, there doesn't need to be any communication I don't think if he's going to enter notice of appeal.
>
> [DEFENDANT]: That's not going to work.
>
> THE COURT: Well, sooner or later, something's got to work because the way y'all are doing right now, nothing's working. I'm just going to order that you have no contact with Ms. Mitchner. Hopefully you can find a third person who y'all can get together and talk about visitation with your children.

¶ 9 Defendant was sentenced to a term of five to fifteen months, suspended, and placed on supervised probation for thirty months. The court imposed a special condition of probation requiring Defendant, to "not assault, threaten, harass, be found in or on the premises or workplace of, or have any contact with" Mitchner.

¶ 10 As noted above, the trial court stated, "contact includes any defendant-initiated contact, direct or indirect, by any means, includ-

ing, but not limited to, telephone personal contact, e-mail, pager, gift giving, telefacsimile machine or through any other person." Form AOC-CR-603D provides a space after this provision for exceptions. That space is left blank. Under "Other" on the form, Defendant is ordered to comply with the custody order and not to harass Mitchner. Defendant entered oral notice of appeal in open court.

II. Jurisdiction

¶ 11 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2019).

III. Issue

¶ 12 Defendant's sole argument on appeal asserts the trial court abused its discretion by ordering him not to have contact with Mitchner as a special condition of probation when it is unclear how his child custody order would be affected. Defendant has waived all other remaining challenges.

IV. Standard of Review

¶ 13 A trial court's decision to impose a condition of probation is reviewed on appeal for abuse of discretion. *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not be the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "[A] probationer does not have to object to a condition of probation at the time probation is imposed, but may object at a later time . . . [if] he raises the issue [before] the hearing at which his probation is revoked." *State v. Williams*, 230 N.C. App. 590, 596, 754 S.E.2d 826, 830 (2013) (citation and internal quotation marks omitted).

V. Analysis

¶ 14 Defendant does not challenge his conviction nor any of the remaining terms and conditions of his probationary sentence. Defendant argues the trial court's condition of probation prohibiting contact with his mother-in-law is abuse of discretion and does not satisfy the requirements of N.C. Gen. Stat. § 15A-1343(b1), which provides:

> Special Conditions.–In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions: . . .

> (10) Satisfy any other conditions determined by the court to be *reasonably related to his rehabilitation*.

N.C. Gen. Stat. § 15A-1343(b1)(10)(2019) (emphasis supplied). If the trial court imposes probation, it must determine which conditions are to apply to Defendant. N.C. Gen. Stat. § 15A-1342(c) (2019).

¶ 15 The trial court ordered Defendant not to have "contact with ELLEN MITCHNER. 'Contact' includes any defendant-initiated contact, direct or indirect, by any means." Mitchner had told the trial court, "I don't want them at the house. I prefer to meet them at a restaurant or park or some place like that." Defendant had stated, "We do get along fine. When it comes to the children, we get along just perfectly," purportedly emphasizing the parties had no conflicts when the children were involved.

¶ 16 Defendant does not challenge the special condition of probation to the extent that it forbids him from harassing Mitchner. He argues he is not allowed to contact Mitchner at all, and it is unclear how Defendant is supposed to exercise his child custody visitation, while not violating his probation special condition.

> [W]hen 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. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

In re Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

¶ 17 Here, the frequency and length of Defendant's visitation with his children is established in the prior child custody order. That order is not before us. The frequency and length of Defendant's visitation with his children remain undisturbed. Defendant and Mary have consistently visited with their children without issues from Mitchner. The trial court stated, "I'm just worried about having to work out where they're going to meet." "I'm just going to order that you have no contact with Ms. Mitchner. Hopefully you can find a third person who y'all can get together and talk about visitation with your children."

¶ 18 The State correctly argues, nothing prevents Mitchner from calling Defendant or Mary and setting up a time and place for Defendant and Mary to meet with their children. The State also notes, nothing in the order prevents Mary from speaking to her own mother about arranging a time and place to see her own children.

¶ 19 Mitchner is also the legal and physical custodian of Defendant's and Mary's three daughters. She stated in open court she does not want Defendant at or in her home, which is her prerogative. She was providing Defendant and Mary, her daughter, a safe home and was caring for their children, while he stole, sold, and pawned her property to fuel his illegal drug use.

¶ 20 The trial court's special condition of probation, ordering no contact between the victim of the crime and Defendant, is reasonably related to protection of the victim, Defendant's rehabilitation, and his compliance with his probation. N.C. Gen. Stat. § 15A-1343(b1)(10). Under the facts before us, Defendant has failed to show any abuse of discretion in the trial court's imposing the special condition. Defendant failed to raise any constitutional challenge before the trial court and has waived any unpreserved challenges on appeal. N.C. R. App. P. 10.

VI. Conclusion

¶ 21 The trial court acted within its discretion to order and enter as a special condition of probation for Defendant to not have any contact with Mitchner, the victim, directly or indirectly, and did not alter his visitation rights or frequency. The special condition is related to the protection of the victim and to Defendant's crime, conviction, and rehabilitation. Defendant does not challenge the condition for him not to harass Mitchner.

¶ 22 Defendant has failed to show any abuse of discretion in the special condition of probation to prohibit Defendant from having any contact with his mother-in-law. Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge HAMPSON concurs.

Judge WOOD dissents by separate opinion.

WOOD, Judge, dissenting.

¶ 23 I respectfully dissent from the majority opinion finding the trial court did not abuse its discretion in the sentence it imposed on Defendant. On appeal, Defendant contends the trial court abused its discretion by ordering as a condition of probation that Defendant have no contact, direct or indirect, with his mother-in-law, Mitchner, the legal custodian of his three daughters, although he has child custody visitation rights under the custody order. This condition of probation imposed by the trial court does not tend to reduce his exposure to crime or aid in his rehabilitation, nor does it bear a reasonable relationship to Defendant's conviction for obtaining property by false pretenses.

¶ 24 The sentencing judge "may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a) (2020). "In addition to the regular conditions of probation[,] . . . the court may, as a condition of probation, require that during the probation the defendant comply with one or more . . . special conditions[.]" N.C. Gen. Stat. § 15A-1343(b1). In *State v. Harrington*, this Court held that a sentencing judge enjoys "substantial discretion" to devise and impose special conditions of probation, but that these conditions must still be "reasonably related to [defendant's] rehabilitation" under Section 15A-1343(b1)(10). 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). As this Court has observed,

> [t]he extent to which a particular condition of probation is authorized by [Section] 15A-1343(b1)(10) hinges upon whether the challenged condition bears *a reasonable relationship to the offenses committed by the defendant*, *whether the condition tends to reduce the defendant's exposure to crime*, *and whether the condition assists in the defendant's rehabilitation.*

State v. Allah, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013) (emphasis added).

¶ 25 Forbidding Defendant to have contact with Mitchner directly or even through a third party does not tend to reduce his exposure to crime or aid in his rehabilitation, nor does it bear a reasonable relationship to Defendant's crime, under a N.C. Gen. Stat. § 15A-1343 analysis. It does, however, prevent him from having contact with the custodian of his children and arranging visitation with them as afforded by the custody order. It substantially impairs, if not outright thwarts, his ability to arrange

visitation with his children as was determined to be in the children's best interests under the custody order. The custody order does not set forth specific days and times for visitation, but does allow for bi-weekly visitation. The trial court's initial concern about how visitation would be arranged was valid; notwithstanding, the trial court subsequently ordered that Defendant have no contact with Mitchner at the request of the district attorney. The trial court stated, "Hopefully you can find a third person who y'all can get together and talk about visitation with your children." The trial court recognized the need for Defendant to have some type of contact with the custodian of his children so that visitation could be arranged. The State's argument that "nothing prevents Mitchner from calling Defendant or Mary and setting up a time and place for Defendant and Mary to meet with their children" is unpersuasive. This imposes a new duty on the custodian to arrange the date, time, and location of visitation between Defendant and his children, and it prohibits Defendant from contacting the custodian if visitation is not arranged by her or if other arrangements must be made. By the terms of the order, it would be a violation of the special condition of probation for Defendant to ask a third party to call Mitchner to arrange visitation. The date, time, and location for Defendant's court ordered visitation with his children is thereby left solely to the discretion of the custodian. "[T]rial courts have the discretion to devise and impose special conditions of probation other than those specified in N.C. Gen. Stat. § 15A-1343(b1)"; however, "N.C. Gen. Stat. § 15A-1343(b1)(10) 'operates as a check on the discretion [available to] trial judges' during that process." *Id.* at 98, 750 S.E.2d at 911 (quoting *State v. Lambert*, 146 N.C. App. 360, 367, 553 S.E.2d 71, 77 (2001)). Although the decision of a sentencing judge to impose a special condition of probation is reviewed for an abuse of discretion, id., "statutory errors regarding sentencing issues . . . are questions of law, and as such, are reviewed *de novo*." *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (internal quotation marks and citation omitted). Whether the reasonable relationship requirement under Section 15A-1343(b1)(10) is met depends on "whether the . . . condition bears a reasonable relationship to the offense[] committed . . . [or] assists in the defendant's rehabilitation." *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

¶ 26 On September 17, 2019, a Cabarrus County jury convicted Defendant of obtaining property by false pretenses. Pursuant to N.C. Gen. Stat. § 14-100, our Supreme Court has defined the offense of false pretenses as "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain

value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); N.C. Gen. Stat. § 14-100 (2020).

¶ 27 The condition imposed by the sentencing judge requiring Defendant to refrain from having any contact with Mitchner, directly or indirectly, is not reasonably related to Defendant's conviction for obtaining property by false pretenses. In the commission of his crime, Defendant defrauded the owner of the City Pawn Shop to whom he sold the ring and from whom he took payment. Consequently, the condition of probation imposed on Defendant forbidding him from having any contact with Mitchner, who was not the victim of Defendant's offense, is overly restrictive and does not bear a reasonable relationship to Defendant's offense, as required by Section 15A-1343(b1)(10). Accordingly, this condition of Defendant's probation should be vacated. I otherwise find no error in the sentence imposed by the trial court.

STATE OF NORTH CAROLINA
v.
WILLIAM LEE SCOTT

No. COA19-250-2

Filed 6 July 2021

Search and Seizure—blood evidence—unlawfully obtained from hospital—second-degree murder prosecution—harmless beyond a reasonable doubt analysis

The constitutional error in admitting evidence of the alcohol concentration of defendant's blood, which was unlawfully seized from the hospital where defendant was treated after a car accident, was not harmless beyond a reasonable doubt. Even though the State presented sufficient evidence of defendant's high rate of speed, reckless driving, and prior record to show the malice required to convict defendant of second-degree murder, the jury's verdict form did not specify the ground or grounds upon which it found malice, which meant that it may have found malice based solely on his intoxication.

Appeal by defendant from judgment entered 23 July 2018 by Judge Paul C. Ridgeway in Alamance County Superior Court. Heard in the Court of Appeals 15 October 2019. A divided panel of this Court found no prejudicial error in defendant's conviction by opinion filed 21 January

2020. *State v. Scott*, 269 N.C. App. 457, 838 S.E.2d 676 (2020). By opinion filed 16 April 2021, the Supreme Court of North Carolina remanded to this Court "to apply the proper standard and review this matter[.]" *State v. Scott*, 377 N.C. 199, 2021-NCSC-41, ¶ 11 (2021).

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

TYSON, Judge.

¶ 1 The Supreme Court of North Carolina remanded this case to this Court to determine whether the State has carried its burden to prove and to apply a harmless error beyond a reasonable doubt standard of review to Defendant's claim of constitutional error. Defendant's blood had been unlawfully seized from a hospital where Defendant was treated following an auto collision. This Court previously concluded the admission of blood alcohol concentration ("BAC") search results of Defendant's blood was error. On remand, we determine whether the State has proved the Fourth Amendment seizure violation was harmless beyond a reasonable doubt. *See* U.S. Const. amend. IV.

I. Fourth Amendment Search

¶ 2 The Fourth Amendment of the Constitution of the United States guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. The Supreme Court of the United States observed:

> [t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. California, 384 U.S. 757, 769-70, 16 L. Ed. 2d 908, 919 (1966). "The [Fourth] Amendment thus prohibits 'unreasonable searches,' . . . [and] the taking of a blood sample . . . is a search." *Birchfield v. North Dakota*, 579 U.S. ___, ___, 195 L. Ed. 2d 560, 575 (2016); *see also State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017)

("drawing blood . . . constitutes a search under both the Federal and North Carolina Constitutions.").

¶ 3 The Supreme Court of the United States also concluded: "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459 (2015) (*per curiam*). Blood tests: (1) "require piercing the skin and extract[tion of] a part of the subject's body"; (2) are "significantly more intrusive than blowing into a tube"; and (3) place in the hands of law enforcement "a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 579 U.S. at ___, 195 L. Ed. 2d at 565-66 (citations and internal quotation marks omitted).

¶ 4 Without probable cause, exigent circumstances, or an exception to the warrant requirement, a warrantless search violates the Fourth Amendment to the Constitution of the United States. This Court unanimously agreed Defendant's constitutional rights were violated. *State v. Scott*, 269 N.C. App. 457, 465, 838 S.E.2d 676, 681 (2020), *rev'd*, 377 N.C. 199, 2021-NCSC-41 (2021). *See* U.S. Const. amend. IV; *State v. Welch*, 316 N.C. 578, 587, 342 S.E.2d 789, 794 (1986) (interpreting the balancing test set forth in *Schmerber*, 384 U.S. at 770–72, 16 L. Ed. 2d at 919-20, as "forbidding law enforcement authorities acting without a search warrant from requiring a defendant to submit to the drawing of a blood sample unless probable cause and exigent circumstances exist to justify a warrantless seizure of the blood sample").

¶ 5 This Court also unanimously agreed Defendant's motion to suppress should have been allowed. *Scott*, 269 N.C. App. at 465, 838 S.E.2d at 681. The order resulting in the production of the blood to the State was not based on either probable cause or exigent circumstances. *Id.* at 464–65, 838 S.E.2d at 681.

¶ 6 We previously concluded Defendant's Fourth Amendment rights were violated by law enforcement officers, compelling the production and seizure of his blood from the hospital without a warrant. We review whether the State has proved the subsequent introduction of evidence obtained from the State Bureau of Investigation laboratory's analysis of Defendant's blood and its admission at trial, was harmless beyond a reasonable doubt.

II. Standard of Review

¶ 7 Upon remand, the State must show, and this Court applies a harmless error beyond a reasonable doubt standard of review. The standard

of review for federal constitutional errors applies to this case. *See State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) ("When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts." (quoting *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012)); *State v. Autry*, 321 N.C. 392, 399, 364 S.E.2d 341, 346 (1988) ("[If] the search violated defendant's constitutional rights and . . . the evidence . . . was improperly admitted at trial, we find any such error in its admission harmless beyond a reasonable doubt."); *State v. Peterson*, 361 N.C. 587, 594, 652 S.E.2d 216, 222 (2007).

¶ 8 N.C. Gen. Stat. § 15A-1443(b) "reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as set out in the case of *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d at 705 (1967)." N.C. Gen. Stat. § 15A-1443 official cmt. (2019). The burden falls "upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2019); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630, 123 L. Ed. 2d 353, 367 (1993); *Chapman*, 386 U.S. at 24; 17 L. Ed. 2d at 710-11; *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 708; *see also Davis v. Ayala*, 576 U.S. 257, 267, 192 L. Ed. 2d 323, 332-33 (2015); N.C. Gen. Stat. § 15A-1443(b).

III. Harmless Error Beyond a Reasonable Doubt

¶ 9 This Court allowed and received supplemental briefing on this issue from both parties. The State argues any error in the introduction and admission of the blood evidence and the results of BAC testing performed on the blood was harmless error beyond a reasonable doubt. The State argues other overwhelming evidence was properly admitted into evidence to show both: (1) Defendant was passing another vehicle at a high rate of speed in a no passing zone; and, (2) his admission he was driving recklessly and grossly speeding at and near the time of the collision with Veocia Warren's vehicle. The State asserts this evidence independently supports the jury's conclusion to prove the malice required for a conviction of second-degree murder by a motor vehicle to support the verdict beyond a reasonable doubt.

¶ 10 The State also argues Defendant's multiple prior convictions for impaired driving and speeding show knowledge, intent, and absence of mistake independently support the verdict and prove the introduction of the blood evidence was harmless beyond a reasonable doubt. The trial court also instructed the jury disjunctively that to convict, it must

find "the defendant drove while impaired, *and or* drove in excess of the posted speed limit, *and or* drove recklessly." (emphasis supplied).

¶ 11 The trial court stated, "I'm not sure what the evidence of impairment is. You know, there will be a motion to dismiss at the end of the State's case. And as I understand the case, it rises or falls on the blood evidence." As the trial court predicted, this Court and the Supreme Court of North Carolina agreed, "[t]he first and only indication of Defendant's intoxication were results of tests on Defendant's blood samples taken from the hospital and tested over a week later at the SBI laboratory." *Scott*, 269 N.C. App. at 463, 838 S.E.2d at 680.

¶ 12 No person involved in the accident or investigation suspected Defendant was impaired. No one noticed any odor of alcohol on his breath, slur in his speech, nor any other signs of impairment at the scene of the collision, while being transported to the hospital, while at the hospital, nor at the home interview with officers after his release.

¶ 13 The State's evidence overcomes a motion to dismiss based upon Defendant's speeding and reckless driving and his prior record to show malice. This showing does not end the inquiry. The State has not carried its burden to prove the admission of the blood evidence to demonstrate the federal constitutional error is "harmless beyond a reasonable doubt." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (citation omitted). *See* N.C.P.I. -- Crim. 206.32A (2010).

¶ 14 The jury returned a general verdict form that did not specify the specific ground or grounds upon which it found to support malice. The day prior to trial, the State dismissed the misdemeanor death by vehicle count. The State proceeded to trial with the second-degree murder and felony death by vehicle charges. After the jury's guilty verdicts on both charges, the trial court arrested judgment on the felony death by vehicle charge.

IV. Conclusion

¶ 15 The State presented sufficient evidence to survive Defendant's motion to dismiss. The State failed to carry its burden to demonstrate the constitutional error in the admission of the blood evidence was "harmless beyond a reasonable doubt." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331. We vacate Defendant's conviction for second-degree murder, the trial court's judgment entered thereon, and remand for a new trial. *It is so ordered.*

NEW TRIAL.

Judges GORE and GRIFFIN concur.

WELLS FARGO BANK, N.A. v. ORSBON & FENNINGER, LLP

[278 N.C. App. 359, 2021-NCCOA-315]

WELLS FARGO BANK, N.A., AS TRUSTEE OF THE JANE RICHARDSON MCELHANEY REVOCABLE TRUST, WELLS FARGO BANK, N.A., AS TRUSTEE OF THE SAMUEL CLINTON MCELHANEY REVOCABLE TRUST, AND WELLS FARGO BANK, N.A., AS EXECUTOR OF THE ESTATE OF JANE RICHARDSON MCELHANEY, PLAINTIFFS
v.
ORSBON & FENNINGER, LLP, AND R. ANTHONY ORSBON, DEFENDANTS

No. COA20-560

Filed 6 July 2021

1. Appeal and Error—interlocutory orders—summary judgment—collateral estoppel—election of remedies

An interlocutory order denying defendants' motion for summary judgment on the defense of collateral estoppel was immediately appealable because it affected defendants' substantial right to avoid litigating issues that had already been determined in a final judgment. However, defendants' writ of certiorari requesting review of the interlocutory order denying their motion for summary judgment on the defense of election of remedies was denied.

2. Collateral Estoppel and Res Judicata—identical issue—actually and necessarily determined in prior determination—trusts—grantor's intent

In an action against attorney defendants for negligence and legal malpractice arising from estate planning work, plaintiffs' claims were not barred by collateral estoppel where, although the issue of the grantor's intent had been raised in prior actions (a declaratory action by the trustee bank and a claim for reformation of the trust by the grantor's grandchildren), defendants failed to show with clarity and certainty that the issue of the grantor's intent was actually and necessarily determined in the prior actions.

Appeal by Defendants from order entered 3 March 2020 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2021.

McGuireWoods, L.L.P., by T. Richmond McPherson, III and Anne L. Doherty, for Plaintiffs-Appellees.

Brooks Pierce McClendon Humphrey & Leonard, L.L.P., by Gary S. Parsons and Kimberly M. Marston, for Defendants-Appellants.

COLLINS, Judge.

¶ 1 Anthony Orsbon and his law firm, Orsbon & Fenninger, LLP, (collectively, "Defendants") appeal from an order denying their motion for summary judgment on certain defenses and granting Wells Fargo Plaintiffs' motion for partial summary judgment. Defendants argue that the trial court erred by denying their motion for summary judgment as to the defenses of collateral estoppel and election of remedies and granting Wells Fargo Plaintiffs summary judgment on those defenses. Because Defendants have not shown sufficient grounds for immediate appellate review of the trial court's interlocutory order as to the election of remedies defense, we deny Defendants' petition for writ of certiorari and dismiss Defendants' arguments concerning that defense. Because Defendants cannot show that each element of collateral estoppel is satisfied, we affirm the trial court's order as to that defense.

I. Procedural History

¶ 2 The present action follows a declaratory judgment action ("Declaratory Action") brought by Wells Fargo Bank, N.A., as trustee of the Jane Richardson McElhaney Revocable Trust ("Wells Fargo as Jane's Trustee"), and a claim for reformation of that trust ("Reformation Claim") brought by Jacob and Julia McElhaney. On 7 December 2018, the Mecklenburg County Superior Court announced its ruling from the bench on a motion for summary judgment and judgment on the pleadings in those actions.

¶ 3 The same day, Wells Fargo as Jane's Trustee, along with Wells Fargo Bank, N.A., as trustee of the Samuel Clinton McElhaney Revocable Trust, and Wells Fargo Bank, N.A., as executor of the Jane Richardson McElhaney Estate (together, "Wells Fargo Plaintiffs") brought this action against Defendants alleging negligence and legal malpractice. Simultaneously, Jacob and Julia McElhaney brought an action against Defendants alleging negligence, legal malpractice, and breach of contract arising from the same set of facts. Upon consent motions in both cases, the trial court consolidated the actions for the purposes of discovery. With leave of the trial court, Defendants filed amended answers in each action. Defendants asserted as defenses that each of the plaintiffs lacked standing and that collateral estoppel and election of remedies barred each of the plaintiffs' claims. Defendants also contended that Wells Fargo Plaintiffs' claims were barred by contributory negligence and the equitable doctrines of estoppel and laches.

¶ 4 Defendants moved for summary judgment in both actions on their defenses of collateral estoppel and election of remedies, as well as an alleged lack of damages from some or all of Defendants' alleged negli-

gent acts. Defendants also moved for summary judgment against Wells Fargo Plaintiffs on the defense of lack of standing. Wells Fargo Plaintiffs moved for partial summary judgment on standing, collateral estoppel, equitable estoppel, laches, and election of remedies. Likewise, Jacob and Julia McElhaney moved for partial summary judgment on standing, collateral estoppel, and election of remedies.

¶ 5 In a consolidated order ("Order on Appeal"), the trial court granted the motions for partial summary judgment by Wells Fargo Plaintiffs and Jacob and Julia McElhaney and denied Defendants' motions. Defendants timely appealed.

II. Factual Background

A. The Estate Planning Documents

¶ 6 In May 1996, both Samuel and Jane McElhaney established revocable trusts, Samuel's Trust and Jane's Trust, respectively. In the fall of 2010, attorney Anthony Orsbon ("Orsbon") assisted Samuel and Jane in amending these trusts and preparing other estate planning documents. On 12 October 2010, Samuel and Jane executed separate trust agreements amending and restating their trusts. As amended, both provided that the trust of the first spouse to die would be divided into a marital share and a family share, each share to be administered as a trust. During the surviving spouse's lifetime, he or she would be entitled to certain distributions from both the marital trust and the family trust.

¶ 7 Upon the surviving spouse's death, the surviving spouse's entire trust would be allocated to the family share which, along with any remains of the marital share, would be distributed to an identified set of beneficiaries ("Specific Beneficiaries"). Following amendments in 2011, Samuel's and Jane's Trusts each provided for identical bequests to identical lists of Specific Beneficiaries, comprised of relatives and private organizations.

¶ 8 Each Specific Beneficiary would receive both the bequest provided in Samuel's Trust and the bequest provided in Jane's Trust. The surviving spouse held a limited power of appointment "at any time and from time to time by and through [his or her] Last Will and Testament to reduce or decrease any or all bequest amounts bequeathed to" the Specific Beneficiaries.

¶ 9 After disbursement to the Specific Beneficiaries, any remainder would be held by the trustee "for the benefit of [Samuel and Jane's] grandchildren who are living at the Division Date." Samuel and Jane's one son, Scott McElhaney, had two children, Jacob and Julia McElhaney.

Following Scott McElhaney's death in 2010, Jacob and Julia ("Residuary Beneficiaries") were the sole living descendants of Samuel and Jane. After Samuel died in August 2015, Jane consulted Orsbon concerning her estate planning documents. In October 2015, Orsbon provided drafts of updated estate documents to Jane's Wells Fargo financial advisor, Linda Montgomery. In November, Montgomery had discussions with Orsbon concerning changes Jane desired to make to the draft documents.

¶ 10 On 8 December 2015, Jane executed a new Last Will and Testament ("Jane's Will") and an Amended and Restated Trust Agreement modifying her Trust. Jane's Will disposed of certain personal property and otherwise left the remainder of her estate to her Trust via a pour-over clause. Jane's Trust, as amended in 2015, stated that "[t]he Family Share shall be administered as a Family Trust" with a changed list of specific bequests. The amendment eliminated certain Specific Beneficiaries, reduced bequests to others, and added one new Specific Beneficiary. The remainder of Jane's Trust after payment to the Specific Beneficiaries was to be divided in equal shares and held in trust for Jane's grandchildren or, if applicable, the issue of her deceased grandchildren. Jane died on 21 April 2017.

B. The Declaratory Action and Reformation Claim

¶ 11 On 3 October 2017, Wells Fargo as Jane's Trustee instituted the Declaratory Action in Mecklenburg County Superior Court. Its petition for declaratory judgment included the following allegations:

> 22. Specifically, as [Jane's] Trust does not provide for the creation and disposition of a Family Share or Family Trust, the reference to the Family Trust contained in [Jane's] Trust creates a latent ambiguity as to whether by making such reference Jane intended to exercise her testamentary limited power of appointment over the Family Trust created under Samuel's Revocable Trust.
>
> 23. [Jane's] Trust does not reference the testamentary limited power of appointment granted to Jane. Even if it did, the power of appointment granted to Jane was limited to the power to "reduce or decrease" the bequest of the specific beneficiaries named in Samuel's Trust, and the provision in [Jane's] Trust adds a beneficiary, Ellen McElhaney, which is not authorized by the testamentary limited power of appointment granted to Jane . . . .

> 24. [Jane's] Will does not reference the testamentary limited power of appointment granted to Jane in the Family Trust or any attempt to exercise such power of appointment.
>
> . . . .
>
> 35. The Trustee is not aware of any evidence that would be admissible to clarify Jane's intent in using the term "Family Share" and/or "Family Trust" in [Jane's] Trust.

¶ 12 Wells Fargo as Jane's Trustee requested the trial court to:

> 1. Declare that [Jane's] Will did not exercise Jane's testamentary limited power of appointment over the Family Trust.
>
> 2. Absent the admissibility of evidence to clarify the latent ambiguity in [Jane's] Trust sufficient to find that Jane exercised her testamentary limited power of appointment over the Family Trust, declare that [Jane's] Trust does not exercise Jane's testamentary limited power of appointment over the Family Trust[.]
>
> 3. Absent the admissibility of evidence to clarify the latent ambiguity in [Jane's] Trust sufficient to find that Jane exercised her testamentary limited power of appointment over the Family Trust, declare that the Trustee shall distribute the property of the Family Trust as set forth in . . . Samuel's Revocable Trust.
>
> 4. Absent the admissibility of evidence to clarify the latent ambiguity in [Jane's] Trust sufficient to find that Jane exercised her testamentary limited power of appointment over the Family Trust, declare that the references to Family Share and Family Trust in [Jane's] Trust refer to all of the property of [Jane's] Trust and that the Trustee shall distribute the property of [Jane's] Trust pursuant to the provisions of . . . the Trust.

¶ 13 On 19 March 2018, the Residuary Beneficiaries filed a response to the petition for declaratory judgment and asserted the Reformation Claim against Wells Fargo as Jane's Trustee and the Specific Beneficiaries. The Residuary Beneficiaries alleged that

> [Jane's] Trust's express references to "The Family Share" and "Family Trust" created under Samuel's Revocable Trust, the substantial identity in beneficiaries between [Jane's] Trust and Samuel's Revocable trust, and [Jane's] Trust's reduction of the specific bequests set forth in Samuel's Revocable Trust each are indicative of Jane's desire and intent to exercise the testamentary limited power of appointment granted to her under Samuel's Revocable Trust.

The Residuary Beneficiaries contended that additional extrinsic evidence "further reveals that Jane intended, through execution of her Will and the Trust, to exercise the testamentary limited power of appointment granted to her under Samuel's Revocable Trust."

¶ 14 The Residuary Beneficiaries sought reformation of Jane's Trust under N.C. Gen. Stat. § 36C-4-415 on the ground that it "fail[ed] to include language clearly expressing Jane's intent to exercise the testamentary limited power of appointment granted to her under Samuel's Revocable Trust." The Residuary Beneficiaries sought to eliminate the bequests to Specific Beneficiaries in Jane's Trust as contrary to Jane's intent.

¶ 15 Several of the Specific Beneficiaries moved for summary judgment and, in the alternative, judgment on the pleadings, arguing that reformation was not available as a matter of law. The Residuary Beneficiaries filed a brief and multiple affidavits in opposition. On 7 December 2018, the trial court orally announced its ruling:

> I did read everything because I wanted to make sure that in addition to the arguments that I went back and reviewed everything in context of your arguments. . . . I read the depositions, read the affidavits, read the arguments and reformation and extrinsic evidence.
>
> . . . .
>
> [I]n reviewing everything that was provided to me regarding Jane's [T]rust and the issue of power of appointment and whether it was exercised. . . . I have to find that I don't see any issues of material fact in this case as relates to what her intentions were at the time of the execution.
>
> So as to the petition for declaratory judgment, I'm finding that Jane did not exercise her testamentary

> limited . . . power of appointment in either her will or her trust and that the claim for reformation will not be available based on the evidence of her intent at the time of execution. So again, as to the motion for summary judgment, I cannot find there are any genuine issues of material fact . . . .
>
> I will also grant the motion for judgment on the pleadings after reviewing the pleadings in the file in this case, and that will be my order.

¶ 16 The trial court entered a written order ("Underlying Order") on 20 December 2018 stating as follows:

> After review of the matters of record including, without limitation, the pleadings, including the Petition, the Counterclaim, the Crossclaim, the Answers, and the exhibits referenced therein, the parties' submissions to the Court and materials filed in support of and in opposition to [the Specific Beneficiary] Movants' Motions, including sworn deposition testimony, and having the benefit of legal briefs and oral argument by counsel for the parties, the Court finds and determines that there exists no genuine issue as to any material fact and that Movants are entitled to Judgment as a matter of law on all claims and causes of action asserted in this action, except the Movants' Motion for attorneys' fees and costs . . . .

The trial court granted the Specific Beneficiary Movants' motion for summary judgment and, in the alternative, granted their motion for judgment on the pleadings. As to the petition for declaratory judgment, the trial court declared that Wells Fargo Bank, N.A., shall distribute the property in Samuel's Trust and Jane's Trust as written in the trust instruments. Finally, the trial court dismissed the Reformation Claim with prejudice. The Residuary Beneficiaries timely appealed to this Court, but withdrew their appeal after the parties entered into a confidential settlement agreement.

C. The Negligence and Malpractice Actions

¶ 17 On 7 December 2018, shortly after the trial court orally announced its decision in the Declaratory Action and Reformation Claim, Wells Fargo Plaintiffs and the Residuary Beneficiaries filed their respective actions for negligence and legal malpractice. The trial court granted

summary judgment in favor of Wells Fargo Plaintiffs and the Residuary Beneficiaries on the defenses of lack of standing, collateral estoppel, equitable estoppel, laches, and election of remedies, and against Defendants with respect to their defenses of collateral estoppel, election of remedies, standing, and the alleged lack of damages due to some or all of Defendants' alleged negligent acts. Defendants appealed.

III. Appellate Jurisdiction

¶ 18 **[1]** We first address whether Defendants' appeal is properly before this Court. The Order on Appeal is interlocutory because it does not "dispose[] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). There is generally no right to immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). The purpose of this rule is to "prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985) (citation omitted). A party may immediately appeal an interlocutory order, however, if the order "affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat § 1-277(a) (2021).

¶ 19 Defendants contend that the Order on Appeal is immediately appealable to the extent that its denial of their motion for summary judgment on the defense of collateral estoppel affects a substantial right. "The doctrine [of collateral estoppel] is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Thus, "[i]t is well established that the denial of a motion for summary judgment 'affects a substantial right when the motion . . . makes a colorable assertion that [a] claim is barred under the doctrine of collateral estoppel.' " *Gray v. Fannie Mae*, 264 N.C. App. 642, 645, 830 S.E.2d 652, 655-56 (2019) (quoting *Turner*, 363 N.C. at 558, 681 S.E.2d at 773); *see also Fox v. Johnson*, 243 N.C. App. 274, 281, 777 S.E.2d 314, 321 (2015) (holding that appellants made a colorable assertion of collateral estoppel by including the defense in their answer and as a basis for their motion for judgment on the pleadings); *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 35, 738 S.E.2d 819, 823 (2013) (concluding that appellant made a colorable assertion of collateral estoppel because the prior and instant lawsuits both arose from the same building demolition).

¶ 20 In this case, before the trial court, Defendants moved for summary judgment based on collateral estoppel. Defendants thoroughly briefed and argued each element of collateral estoppel and referenced numerous citations to caselaw and the evidentiary record. We conclude that Defendants have made a colorable assertion of collateral estoppel and the Order on Appeal may affect their "substantial right to avoid litigating issues that have already been determined by a final judgment." *See Turner*, 363 N.C. at 558, 681 S.E.2d at 773. Accordingly, we will review the Order on Appeal's denial of the defense of collateral estoppel.

¶ 21 Defendants aptly concede that no precedent holds that the denial of summary judgment on the defense of election of remedies affects a substantial right. Indeed, "[t]he avoidance of one trial is not ordinarily a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). As such, Defendants have petitioned for a writ of certiorari requesting this Court to review the Order on Appeal as to their defense of election of remedies.

¶ 22 This Court may issue the writ of certiorari "in appropriate circumstances . . . to permit review of . . . orders of trial tribunals when . . . no right of appeal from an interlocutory order exists . . . ." N.C. R. App. P. 21(a). We assess petitions seeking review of interlocutory orders in light of our "general policy against the piecemeal review of" such orders. *See Harbor Point Homeowners' Ass'n ex rel. Bd. of Directors v. DJF Enterprises, Inc.*, 206 N.C. App. 152, 165, 697 S.E.2d 439, 448 (2010). We have emphasized that "the routine allowance of interlocutory appeals would have a tendency to delay, rather than advance, the ultimate resolution of matters in litigation." *Newcomb v. Cnty. of Carteret*, 207 N.C. App. 527, 554, 701 S.E.2d 325, 344 (2010).

¶ 23 Defendants argue that this Court should grant certiorari because (1) the issue of election of remedies "arises from substantially the same facts as the collateral estoppel issue; (2) the issue could be equally dispositive; (3) the issue is ripe; and (4) it would promote judicial economy by eliminating the need for a later appeal on this issue." These arguments are unavailing because "similar considerations would support the issuance of a writ of certiorari in virtually any case in which a trial court refuses to grant summary judgment" on one out of several affirmative defenses. *See id.* at 553, 701 S.E.2d at 344. Additionally, as Wells Fargo Plaintiffs argue, a decision by this Court on the merits of the issue would not necessarily dispose of all claims as to all parties. Accordingly, in our discretion, we deny Defendants' petition for a writ of certiorari and decline to review the merits of their arguments concerning the defense of election of remedies.

IV. Discussion

¶ 24 **[2]** Defendants argue that the trial court erred by denying their motion for summary judgment on the defense of collateral estoppel and granting Wells Fargo Plaintiffs' motion as to that defense. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2020). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

¶ 25 "Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (alteration, citation, and quotation marks omitted). "The issues resolved in the prior action may be either factual issues or legal issues." *Doyle v. Doyle*, 176 N.C. App. 547, 549, 626 S.E.2d 845, 848 (2006). The party alleging collateral estoppel must demonstrate

> that the earlier suit resulted in a final judgment on the merits, that the *issue in question was identical to an issue actually litigated and necessary to the judgment*, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

State ex rel. Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (emphasis added) (brackets, quotation marks, and citation omitted). For issues to be considered "identical" to ones "actually litigated and necessary" to a previous judgment:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation omitted). "The burden is on the party asserting [collateral estoppel] to

show with clarity and certainty what was determined by the prior judgment." *Miller Bldg. Corp. v. NBBJ N.C., Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (internal quotation marks and citation omitted); *accord Powers v. Tatum*, 196 N.C. App. 639, 642, 676 S.E.2d 89, 92 (2009).

¶ 26 Defendants argue that the instant malpractice and negligence suits present the identical issue as the Declaratory Action and Reformation Claim: whether Jane intended to exercise her limited power of appointment. Defendants contend that this issue was actually litigated and that in the course of deciding the motions for summary judgment and judgment on the pleadings in the Declaratory Action and Reformation Claim, the trial court actually and necessarily determined that Jane did not intend to exercise her limited power of appointment.

¶ 27 Wells Fargo Plaintiffs respond that (1) the trial court did not actually determine whether Jane intended to exercise the power of appointment, but instead only determined that the issue of Jane's intent was immaterial; (2) even if the trial court did determine the issue of Jane's intent, that determination was unnecessary to the Underlying Order; (3) Wells Fargo Plaintiffs were not all parties in the Declaratory Action and Reformation Claim, so they did not all have a full and fair opportunity to litigate the issue; (4) the heavier burden of proof applicable to the Reformation Claim bars the application of collateral estoppel; and (5) the Declaratory Action and Reformation Claim involved different facts than the present action.

¶ 28 The Residuary Beneficiaries did raise the issue of Jane's intent in the Declaratory Action. Specifically, they argued that a material issue of Jane's intent precluded summary judgment as to the petition for declaratory judgment. They contended the issue was material to whether Jane had successfully exercised her power of appointment by substantially complying with the terms set out in Samuel's Trust, as required by N.C. Gen. Stat. § 31D-3-304.

¶ 29 The Residuary Beneficiaries also raised the issue of Jane's intent while pursuing their Reformation Claim, which sought "to correct a mistake that occurred as the result of a scrivener's error which caused [Jane's Trust] to fail to conform the terms of trust to [Jane's] intent." Both the Residuary Beneficiaries and Specific Beneficiaries extensively litigated the issue of Jane's intent prior to entry of the Underlying Order. Nonetheless, Defendants cannot meet their burden of showing "with clarity and certainty" that the issue of Jane's intent was actually and necessarily determined by the Underlying Order. *See Miller Bldg. Corp.*, 129 N.C. App. at 100, 497 S.E.2d at 435.

¶ 30 When the trial court orally announced its ruling, it stated in pertinent part that

> in reviewing everything that was provided to me regarding Jane's [T]rust and the issue of power of appointment and whether it was exercised . . . . *I have to find that I don't see any issues of material fact in this case as relates to what her intentions were at the time of the execution.*
>
> So as to the petition for declaratory judgment, I'm finding that Jane did not exercise her testamentary limited . . . power of appointment in either her will or her trust and that *the claim for reformation will not be available based on the evidence of her intent at the time of execution. So again, as to the motion for summary judgment, I cannot find there are any genuine issues of material fact* . . . . (emphasis added).

The written Underlying Order stated in pertinent part that

> there exists no genuine issue as to any material fact and that [the Specific Beneficiary] Movants are entitled to judgment as a matter of law on all claims and causes of action asserted in this action, except the Movants' Motion for attorneys' fees and costs . . . .

¶ 31 The Underlying Order granted the moving Specific Beneficiaries' motion for summary judgment and, in the alternative, the motion for judgment on the pleadings.[1] While the "slightest doubt" as to a material fact entitles a party opposing summary judgment to trial, *Adventure Travel World, Ltd. v. Gen. Motors Corp.*, 107 N.C. App. 573, 577, 421 S.E.2d 173, 176 (1992) (citation omitted), a dispute as to an immaterial fact will not preclude summary judgment, *Capps v. City of Raleigh*,

1. We note that where "matters outside the pleadings are presented to and not excluded by the court," a motion seeking judgment on the pleadings must be treated as a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 12(c) (2018). Because the trial court explicitly stated that it considered matters outside the pleadings, it was improper to grant judgment on the pleadings in the alternative. *See Battle v. Clanton*, 27 N.C. App. 616, 618, 220 S.E.2d 97, 98 (1975) (holding that judgment on the pleadings was inappropriate where "matters outside the pleadings were presented to and considered by the court"). Even so, the Underlying Order's grant of judgment on the pleadings in the alternative illuminates the possible bases of the trial court's dismissal of the Reformation Claim.

35 N.C. App. 290, 293, 241 S.E.2d 527, 529 (1978). Likewise, "[j]udgment 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.' " *Shearin v. Brown*, 2021-NCCOA-4, ¶ 11 (quoting *Samost v. Duke Univ.*, 226 N.C. App. 514, 518, 742 S.E.2d 257, 260 (2013)). The petition for declaratory judgment and the counterclaim and crossclaim for reformation took inconsistent positions on the issue of Jane's intent. Prior to entry of the Underlying Order, the parties submitted plainly conflicting evidence on this issue to the trial court.[2]

¶ 32 The trial court may have determined the issue of Jane's intent by concluding that it was required to disregard some of the conflicting evidence of Jane's intent as a matter of law. But it is also possible that the trial court merely determined that the conflicting evidence of Jane's intent was immaterial as a matter of law. Specifically, the trial court could have resolved the Declaratory Action by determining that Jane had not substantially complied with the requirements on her limited power of appointment, regardless of her intent. *See* N.C. Gen. Stat. § 31D-3-304 (2015). Section 31D-3-304 provides that

> [a] power holder's substantial compliance with a formal requirement of appointment imposed by the donor . . . is sufficient if both of the following apply:
>
> (1) The power holder knows of and intends to exercise the power.
>
> (2) The power holder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

Id. The Underlying Order could be based on a determination under section 31D-3-304 that Jane's "manner of attempted exercise . . . impair[ed] a material purpose" of the restrictions in Samuel's Trust, and Defendants cannot show that Jane's intent was material to, and therefore actually and necessarily determined in, the Declaratory Action.

¶ 33 Nor can Defendants show that the issue of Jane's intent was material to the Reformation Claim, and therefore actually and necessarily

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2. This evidence included, *inter alia*, Orsbon's deposition testimony denying that Jane intended to exercise the limited power of appointment or directed him to draft her estate documents to do so, Linda Montgomery's deposition testimony that Jane did intend to exercise the limited power of appointment, and affidavits from various witnesses attesting that Orsbon had acknowledged Jane's intent to exercise the limited power of appointment during a "family meeting" concerning trust administration.

determined. The trial court's oral announcement could be understood as stating that reformation was unavailable because there was no genuine issue that Jane did not intend to exercise the power of appointment. But a closer examination of the Record and Underlying Order demonstrates that, as Wells Fargo Plaintiffs argue, the trial court likely determined that Jane's intent was immaterial to the Reformation Claim. Residuary Beneficiaries did not cite any precedent supporting the proposition that a court may reform a trust under § 36C-4-415 based on the settlor's intent to exercise a power of appointment that by its terms could only be exercised in the power holder's will. The moving Specific Beneficiaries underscored this issue and argued that "the relief [the Residuary Beneficiaries] seek far exceeds the scope of permissible reformations under North Carolina Law."

¶ 34 On these facts, Defendants cannot show with clarity and certainty that the issue of Jane's intent was actually and necessarily determined in the Declaratory Action or Reformation Claim.[3] Accordingly, collateral estoppel does not bar Wells Fargo Plaintiffs' claims. *See Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128-29. The trial court did not err in denying Defendants' motion for summary judgment and granting Wells Fargo Plaintiffs' motion for partial summary judgment on the defense of collateral estoppel.

V. Conclusion

¶ 35 We deny Defendants' petition for a writ of certiorari to review the Order on Appeal as to the defense of election of remedies. Because Defendants cannot show that each element of the affirmative defense of collateral estoppel is satisfied, the trial court did not err in denying their motion for summary judgment and granting Wells Fargo Plaintiffs' motion for partial summary judgment as to that defense.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

3. We therefore need not reach Wells Fargo Plaintiffs' additional arguments that collateral estoppel cannot apply here.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 JULY 2021)

CINCINNATI INS. CO. v. HALL 2021-NCCOA-316 No. 20-537	Guilford (18CVS5632)	Affirmed
CLEMONS v. CLEMONS 2021-NCCOA-317 No. 20-762	Cabarrus (15CVD2160)	Vacated and Remanded
FERRERA v. ROBBINS 2021-NCCOA-318 No. 20-339	Durham (19CVS2099)	Reversed and Remanded
IN RE B.A.M.A. 2021-NCCOA-319 No. 21-176	Robeson (19JA165-166) (20CVD3170) (20CVD519)	19 JA 166 AND 20 CVD 519: APPEAL DISMISSED. 19 JA 165 AND 20 CVD 3170: VACATED AND REMANDED.
IN RE D.A. 2021-NCCOA-320 No. 20-878	Wake (20JA60-62)	Affirmed
IN RE D.K. 2021-NCCOA-321 No. 20-270	Pitt (16JB27)	Vacated and Remanded
IN RE E.R. 2021-NCCOA-322 No. 21-1	Alleghany (19JA5) (19JA6)	Affirmed
IN RE J.U. 2021-NCCOA-323 No. 20-812	Cumberland (19JB477)	ADJUDICATION VACATED IN PART; DISPOSITION VACATED; REMANDED WITH INSTRUCTIONS.
IN RE V.A.M. 2021-NCCOA-324 No. 20-826	Union (19JA61)	Dismissed
JMS ROOFING & SHEET METAL, INC. v. SULLIVAN SQUARE, INC. 2021-NCCOA-325 No. 20-374	Iredell (19CVS1519)	Affirmed in part, Vacated in part, and Remanded

STATE v. ALLEN 2021-NCCOA-326 No. 18-1150-2	Mitchell (15CRS50346) (15CRS50474) (16CRS28)	No Error In Part; Remanded For Correction of Clerical Errors.
STATE v. BAILEY 2021-NCCOA-327 No. 20-658	Wake (18CRS223247) (18CRS223278)	No Error
STATE v. BARR 2021-NCCOA-328 No. 20-754	Forsyth (17CRS60340) (18CRS1959)	Affirmed.
STATE v. BEST 2021-NCCOA-329 No. 20-543	Mecklenburg (17CRS206110-11) (17CRS206113)	No Error
STATE v. BROWN 2021-NCCOA-330 No. 20-501	Guilford (16CRS82548) (16CRS82550) (18CRS83426-28) (18CRS83429) (19CRS25113) (19CRS25563) (19CRS79114-17) (19CRS79119) (20CRS28051)	Affirmed
STATE v. FREEMAN 2021-NCCOA-331 No. 20-530	Alamance (17CRS55089) (17CRS55101)	No Error
STATE v. FRYE 2021-NCCOA-332 No. 20-705	Rowan (17CRS51921-22) (18CRS4008-09)	No plain error.
STATE v. HARRIS 2021-NCCOA-333 No. 20-735	Durham (17CRS50973)	NO ERROR; IAC CLAIM DISMISSED WITHOUT PREJUDICE.
STATE v. KEARNEY 2021-NCCOA-334 No. 20-486	Vance (18CRS50265)	New Trial
STATE v. MILES 2021-NCCOA-335 No. 20-118	Cumberland (17CRS54855)	DISMISS WITHOUT PREJUDICE IN PART, AFFIRM IN PART, REMAND IN PART.
STATE v. MOORE 2021-NCCOA-336 No. 20-53	Durham (16CRS2168-71)	No Error

STATE v. SALAZAR 2021-NCCOA-337 No. 20-593	Wake (18CRS223141)	No Error
STATE v. SHOOK 2021-NCCOA-338 No. 20-887	Catawba (20CRS572)	Vacated and Remanded.
STATE v. STEVENS 2021-NCCOA-339 No. 20-421	Wake (16CRS216558-59) (16CRS216562) (16CRS216564)	No Error
VAN KAMPEN v. GARCIA 2021-NCCOA-340 No. 20-439	Union (19CVS2491)	Affirmed
WELCH v. WELCH 2021-NCCOA-341 No. 20-535	Guilford (07CVD3230)	Affirmed

BROWN v. PATEL

[278 N.C. App. 376, 2021-NCCOA-342]

DEBRA FAIRLEY, PRO SE, PLAINTIFF
v.
ANAND PATEL, REGISTERED AGENT FOR SHREE BHAVANI, LLC DBA DAYS INN HOTEL, WELDON, NC, DEFENDANT

JANE DORSEY, PRO SE, PLAINTIFF
v.
ANAND PATEL, REGISTERED AGENT FOR SHREE BHAVANI, LLC DBA DAYS INN HOTEL, WELDON, NC, DEFENDANT

PRICILLA BROWN, PRO SE, PLAINTIFF
v.
ANAND PATEL, REGISTERED AGENT FOR SHREE BHAVANI, LLC DBA DAYS INN HOTEL, WELDON, NC, DEFENDANT

No. COA19-973

Filed 20 July 2021

Collateral Estoppel and Res Judicata—prior small claims actions—punitive damages pled—not considered—bed bug bites

Plaintiffs' actions in district court seeking punitive damages for bed bug bites sustained at defendant's hotel were barred by res judicata where plaintiffs had already sought punitive damages for the same injuries in small claims actions and obtained final judgments—even if the magistrate erred in the small claims actions by not actually considering the punitive damage allegations.

Appeal by defendant from orders entered 24 June 2019 by Judge Teresa R. Freeman in District Court, Halifax County. Heard in the Court of Appeals 17 March 2020.

Jane Dorsey, pro se, Debra Fairley, pro se, and Pricilla Brown, pro se, for plaintiff-appellees.

Young, Moore, and Henderson, P.A., by Robert C. deRosset and Matthew C. Burke, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Anand Patel, registered agent for Shree Bhavani, LLC d/b/a/ Days Inn Hotel ("defendant"), appeals from orders denying its motions for summary judgment for Pricilla Brown, Jane Dorsey, and Debra Fairley (collectively, "plaintiffs"). Defendant contends that *res judicata* barred plaintiffs' second attempt to recover punitive damages. Because we

hold that *res judicata* barred plaintiffs' claims, we reverse the trial court's orders.

I. Background

¶ 2 On 1 October 2018, each plaintiff filed a "complaint for money owed" against defendant in Halifax County Small Claims Court (the "small claims actions"). Alleging they had sustained bed bug bites during an overnight stay at the Days Inn Hotel in Weldon, plaintiffs each sought $5,000.00 in damages. The damages alleged were "medical costs, legal costs[,] and punitive damages for pain and suffering." Although defendant was served with the small claims complaints, it did not appear at the 29 October 2018 hearing before Magistrate Guy Knapp (the "magistrate" or "Magistrate Knapp"). On the day of the hearing, Magistrate Knapp entered judgments in favor of each plaintiff and taxed defendant with the costs of each action. Specifically, plaintiff Brown was awarded $101.58 for "medical copay" and "room rate," plaintiff Dorsey was awarded $62.40 for "medical copay," and plaintiff Fairley was awarded $5.00 for "medicine." Neither plaintiffs nor defendant appealed the magistrate's judgments to district court.

¶ 3 On 1 and 2 November 2018, each plaintiff filed a "complaint for punitive damages" in Halifax County District Court (the "district court actions"). Alleging that defendant was "guilty of premises liability," each plaintiff sought between $8,000.00 and $10,000.00 in punitive damages for pain and suffering. On 4 and 7 January 2019, defendant filed motions to dismiss plaintiffs' complaints under Rule 12(b)(6) alleging, *inter alia*, each plaintiff had "already obtained a judgment against the real party in interest for the same injuries she alleges in this action, and her claims are barred by the doctrine of *res judicata*." Plaintiffs and defendant attended both hearings on defendant's motions to dismiss.

¶ 4 At the 25 February 2019 hearing, defendant's counsel argued that the district court actions were barred by *res judicata*. The trial court stated that *res judicata* only barred the district court actions if Magistrate Knapp "ruled upon" plaintiffs' punitive damages claims in the small claims actions. The trial court continued the hearing so plaintiffs could subpoena Magistrate Knapp.

¶ 5 At the 25 April 2019 hearing, Magistrate Knapp testified that he ruled on the evidence plaintiffs presented at the small claims hearing but stated he "was not comfortable with awarding punitive damages in that case at that time." According to Magistrate Knapp, when he heard the small claim actions, he was new in his position and was not trained to award punitive damages. Magistrate Knapp testified that he explained

to plaintiffs "[i]f they, in any fashion, weren't satisfied with the judgment in the Magistrate's court, they ha[d] the right to appeal to a District Court Judge."

¶ 6 After Magistrate Knapp's testimony, the trial court explained that, because the small claims judgments were "completely silent as to the issue of punitive damages," they corroborated Magistrate Knapp's "credible testimony . . . that he did not hear that issue." Defendant's counsel acknowledged that the motions to dismiss were actually motions for summary judgment.

¶ 7 On 24 June 2019, the trial court entered written orders denying defendant's motions for summary judgment because each plaintiff "was not afforded ample opportunity to litigate her punitive damages claim in Magistrate's Court." Defendant filed notice of appeal on 22 July 2019.

II. Jurisdiction

¶ 8 "An order denying of a motion for summary judgment is an interlocutory order because it leaves the matter for further action by the trial court." *Brown v. Thompson*, 264 N.C. App. 137, 138, 825 S.E.2d 271, 272 (2019) (citation omitted). As a matter of course, this Court does not review interlocutory orders. *McCallum v. N.C. Co-op. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230 (2001). Although interlocutory, "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citations omitted). The Supreme Court has explained:

> [A] motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*.

Id. at 491, 428 S.E.2d at 161. This case presents just such a scenario. As a result, defendant's appeal is properly before this Court.

III. Res Judicata

¶ 9 Defendant argues the trial court erred in denying its motions for summary judgment because plaintiffs' claims for punitive damages were barred by *res judicata*. Plaintiffs contend *res judicata* did not bar

their district court actions because they "were not afforded their right to have a fair and full opportunity to litigate the claim of punitive damages in small-claims court against the defendant[.]" Therefore, we must determine whether *res judicata* bars an action in district court when the same claim was previously pled and adjudicated in a small claims action, but the small claims judgment did not award punitive damages.

¶ 10 Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56(c) (2019). "An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 166, 684 S.E.2d 41, 46 (2009). "We review a trial court's order granting or denying summary judgment *de novo*." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted).

¶ 11 "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citation omitted). "For *res judicata* to apply, a party must 'show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413–14, 474 S.E.2d 127, 128 (1996) (citation and brackets omitted). Once the final judgment is entered, "all matters, either fact or law, that were or *should have been adjudicated* in the prior action are deemed concluded." *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (emphasis added) (citation omitted).

¶ 12 Here, there is no dispute that the small claims actions and the district court actions involve the same dates, facts, injuries, causes of action, and parties. Therefore, we must determine whether the small claims actions resulted in final judgments on the merits as to plaintiffs' claims for punitive damages. The North Carolina Supreme Court held that "[a] judgment is conclusive as to all issues raised by the pleadings." *Hicks v. Koutro*, 249 N.C. 61, 64, 105 S.E.2d 196, 199 (1958). Plaintiffs' small claims complaints sought "medical costs, legal

costs[,] and punitive damages for pain and suffering." Each respective small claims judgment stated, "[t]his action was tried before the undersigned *on the cause stated in the complaint*." (Emphasis added.) It is well established as to judgments or orders entered in district court or superior court that the written judgment establishes the ruling of the court, and the same is true for small claims court. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2019) ("A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."); *see* N.C. Gen. Stat. § 7A-224 (2019) ("Judgment in a small claim action is rendered in writing and signed by the magistrate. The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally. Entry is made as soon as practicable after rendition."); *see generally In re O.D.S.*, 247 N.C. App. 711, 718, 786 S.E.2d 410, 415 (2016). We cannot discern why there would be any need to require a judicial officer to testify regarding his thought process in making a decision where the small claims judgments were properly written, signed, and filed in accord with North Carolina General Statute § 7A-224. Regardless of what the judicial officer may have thought or intended, the written, signed, and filed judgment remains the final and controlling judgment of the court unless it is appealed.

¶ 13 Whatever the reason the small claims judgments did not address punitive damages—and defendant argues many potential reasons—the small claims judgments did not include punitive damages but only the actual damages shown by plaintiffs, and plaintiffs did not exercise their right to appeal the judgments to district court for trial de novo. *See* N.C. Gen. Stat. § 7A-229 (2019) ("Upon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed."); *see* N.C. Gen. Stat. § 7A-230 (2019) ("The appellant in his written notice of appeal may demand a jury on the trial de novo. Within 10 days after receipt of the notice of appeal stating that the costs of the appeal have been paid, any appellee by written notice served on all parties and on the clerk of superior court may demand a jury on the trial de novo.").

¶ 14 Even if the magistrate erred by not considering the punitive damage allegations,

> [t]o be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has

> binding *res judicata* and collateral estoppel effect in all courts, Federal and State, on the parties and their privies.

King v. Grindstaff, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973) (citation omitted). If plaintiffs were dissatisfied with the amount of the judgments in small claims court, they had a right of appeal to district court to have a trial de novo. N.C. Gen. Stat. § 7A-230. The small claims judgments were final judgments as to the claims stated by the plaintiffs and they had *res judicata* effect as to all matters plaintiffs pled, as well as all matters that "should have been adjudicated in the prior action[.]" *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556.

¶ 15 Section 7A-228 (a) of the North Carolina General Statutes provides that "the sole remedy for an aggrieved party [after final disposition before the magistrate] is appeal for trial de novo before a district court judge or a jury." N.C. Gen. Stat. § 7A-228(a) (2019). "A judgment from which no appeal is taken, however erroneous, is *res judicata*." *In re Atkinson-Clark Canal Co.*, 234 N.C. 374, 378, 67 S.E.2d 276, 278 (1951). Plaintiffs sought punitive damages through new district court actions instead of availing themselves to the "sole remedy"– appeal from the small claims judgments for trials de novo. The small claims judgments, from which no appeals were taken, remained binding and barred plaintiffs from litigating the same claims. *Worthington v. Wooten*, 242 N.C. 88, 92, 86 S.E.2d 767, 770 (1955) ("The judgment of [the trial court] (affirming on appeal the judgment of the clerk) from which no appeal was taken was conclusive and binding as to all matters therein decided and also as to all matters which could properly have been determined in that action." (citation omitted)). Thus, defendant met its burden on summary judgment of showing that plaintiffs obtained final judgments on their small claims actions, so their new claims were barred by *res judicata*.

IV. Conclusion

¶ 16 *Res judicata* barred plaintiffs' district court actions because plaintiffs' small claim actions sought punitive damages and resulted in final judgments. As a result, the trial court erred in denying defendant's motions for summary judgment.

REVERSED.

Judges DIETZ and HAMPSON concur.

IN RE B.R.W.

[278 N.C. App. 382, 2021-NCCOA-343]

IN THE MATTER OF B.R.W., B.G.W.

No. COA20-675

Filed 20 July 2021

1. Child Abuse, Dependency, and Neglect—findings of fact—support by competent evidence—conclusions labeled as findings

The findings of fact in a permanency planning order awarding guardianship of respondent-mother's daughters to their paternal grandmother were supported by competent evidence, and some findings that were actually conclusions of law were considered separately from the mother's challenges to the findings of fact.

2. Child Abuse, Dependency, and Neglect—preservation of issues—objections—conclusions of law

Respondent-mother was not required to object to the trial court's conclusion that she had acted in a manner inconsistent with her constitutionally protected status as a parent in order to preserve the issue for appellate review. At the hearing, she properly asked the trial court not to adopt the department of social services' recommendation to grant custody to the grandmother and presented evidence and arguments in favor of reunification.

3. Child Abuse, Dependency, and Neglect—constitutionally protected status as parent—ceding primary parental role—leaving children with grandparent

The trial court did not err by concluding that a mother had acted in a manner inconsistent with her constitutionally protected status as a parent where the mother left her daughters in the care of their grandmother for several years with no indication that the arrangement was temporary, ceding her primary parental role to the grandmother.

4. Child Abuse, Dependency, and Neglect—fitness of parent—support by findings of fact—guardianship

The trial court erred by concluding that a mother was unfit where the findings of fact did not support such a conclusion. However, because the trial court's conclusion that the mother had acted in a manner inconsistent with her constitutionally protected status as a parent was supported by the findings of fact, which were supported by competent evidence, the trial court did not err by applying the "best interests" standard and granting guardianship to the children's grandmother.

Judge DIETZ concurring with separate opinion.

Judge CARPENTER concurring in part and dissenting in part.

Appeal by respondent-mother from order entered 27 March 2020 by Judge Jeanie R. Houston in District Court, Yadkin County. Heard in the Court of Appeals 9 March 2021.

James N. Freeman, Jr,. for petitioner-appellee.

J. Thomas Diepenbrock, for respondent-appellant-mother.

Paul W. Freeman, Jr., for Guardian ad Litem.

STROUD, Chief Judge.

¶ 1 Mother appeals a permanency planning review order awarding guardianship of her daughters to their paternal grandmother. Mother argues that the trial court's determination that she was unfit and acted in a manner inconsistent with her constitutionally protected status was not supported by clear and convincing evidence and, therefore, the trial court erred by applying the "best interest of the child" standard in its custody determination. Mother also challenges the evidentiary support for several of the trial court's findings of fact and conclusions of law.

¶ 2 Because the trial court's determination that Mother acted in a manner inconsistent with her constitutionally protected status was supported by clear and convincing evidence, making the "best interest of the child" standard applicable, we affirm that portion of the permanency planning order. The trial court's determination that Mother was unfit, however, was not supported by clear and convincing evidence, and we reverse that portion of the order.

I. Background

¶ 3 On 1 May 2018, the Yadkin County Human Services Agency ("DSS") received a Child Protective Services report alleging that Brittany and Brianna,[1] ages four and seven at the time, were at home when their intoxicated father ("Father") began "busting plates and throwing glasses[.]" Brittany and Brianna lived in a house with Father, Father's mother ("Grandmother"), and Father's grandmother ("Great Grandmother").

1. Pseudonyms are used.

Grandmother removed Brittany and Brianna from the house and called law enforcement. Father[2] was arrested, cited for a probation violation, charged with resisting a public officer and drunk and disorderly conduct, and scheduled to appear in court on 27 June 2018. On 14 June 2018, DSS filed a juvenile petition alleging that Brittany and Brianna were neglected juveniles in that they "live[d] in an environment injurious to [their] welfare." The trial court approved the children's relative placement with Grandmother and Great Grandmother.

¶ 4 Following a 25 June 2018 hearing, the trial court entered an order finding that Mother lived in Alexander County with her husband ("Stepfather"), who had "an extensive criminal history including drug-related convictions, assault on a female, larceny, and multiple DWIs." Following her separation from Father in 2015, Mother had "occasionally visited" with her daughters at Father's home or family gatherings, but the court found that Mother had "not made decisions regarding the minor children's education or welfare, contributed financially to their support and maintenance, or otherwise filled the role of parent/caretaker of the minor children[.]" The trial court directed DSS to coordinate with Alexander County to conduct a home study on Mother's home in order "to assess whether it is a suitable and appropriate placement for the minor children" and awarded "bi-weekly visitation, lasting at least one hour per visit, contingent upon the parents not being incarcerated."

¶ 5 On 13 July 2018, Mother and Stepfather each entered an Out of Home Family Services Agreement ("OHFSA") with DSS which required: completion of psychological assessments and any resulting recommendations; participation in substance abuse assessments and any resulting recommendations; submission to random drug screens; completion of a parenting education program; and demonstration of stable employment.

¶ 6 On 31 August 2018, the trial court entered an Adjudication and Dispositional Order which adjudicated the children neglected. The written order found that Mother and Stepfather had been participating in biweekly telephone conversations and had visited with the children on "multiple" occasions. Although the trial court noted "the fact that a significant period of time ha[d] elapsed since [Mother] ha[d] been involved in the lives of the minor children on a regular basis[,]" the court found that Mother still appeared to have "some bond" with her daughters. Mother was given "a minimum of biweekly visitation, for at least one hour per visit . . . with [DSS] having the discretion to increase the dura-

2. Father is not a party in this appeal.

tion and frequency of visitation." The trial court established a primary permanent plan of reunification and a secondary plan of guardianship.

¶ 7 Mother informed the Alexander County Department of Social Services on 16 August 2019 "that her landlord [was] selling their mobile home and they [were] going to be forced to move. She stated, 'I don't know how we are going to do this' in regards [sic] to completing the home study." Subsequently, citing concerns regarding the lack of stable housing and Stepfather's criminal history, the Alexander County Department of Social Services denied Mother and Stepfather's home study on 29 August 2018.

¶ 8 In a 90 Day Review Order entered on 6 December 2018, the trial court found that Mother was in compliance with many requirements of her OHFSA: she was employed, had access to transportation, found a temporary residence in Thurmund, North Carolina, maintained regular contact with DSS, submitted to random drug screens at DSS's request, and completed a psychological evaluation. However, Mother had "not completed a substance abuse assessment" or "a parenting education program[.]" Stepfather had completed a psychological assessment and was "regularly attending visitation" with the children, maintaining communication with DSS, and submitting to random drug screens, but the trial court found that Stepfather was not employed "due to a back injury" and, like Mother, had not completed a substance abuse assessment or a parenting education program. Finding that Mother "consistently visited" with her daughters, the trial court awarded Mother "a minimum of biweekly visitation, for at least one hour per visit . . . with [DSS] having the discretion to increase the duration and frequency of visitation and to allow unsupervised visitation." The permanent plan remained reunification with a secondary plan of guardianship.

¶ 9 Prior to the 16 May 2019 permanency planning hearing, DSS filed a report noting that Mother had "been working diligently on her OHFSA" and Stepfather had "made substantial progress on his OHFSA[.]" The DSS report indicated that Mother and Stepfather had been participating in unsupervised visitation with the children on Sundays from 12:00 p.m. to 6:00 p.m. and had been taking the children to church on the last Sunday of each month. Mother was in compliance with the terms of her child support order and "ha[d] sent extra money to pay down her arrears on her own." Noting that Mother and Stepfather had made "substantial progress" on their respective OHFSAs, DSS recommended the children remain in their placement with Grandmother and Great Grandmother, as "[p]arenting classes need to be completed and the home is not yet

ready to house the children." DSS recommended that "overnight visits [with Mother and Stepfather] begin at the discretion of the agency[.]"

¶ 10 In a report revised on 3 May 2019, the guardian ad litem ("GAL") reported that she witnessed Stepfather "become increasingly angry" with social workers before "storming out mad" and demanding Mother follow at a 26 April 2019 Child and Family Team meeting. The GAL expressed her "extreme . . . concern . . . about the safety of the girls, as well as [Mother] after this display" as well as her concern

> that a primary desire for [Mother] and Stepfather . . . for gaining custody of the girls involves regaining the multiple $thousands [sic] tax refund that comes along with them. When [Mother] left 3 years ago, she threatened [G]randmother . . . that she would take the girls if [Father] and [Grandmother] didn't allow her and [S]tepfather to claim the girls for tax refunds even though they did not live with them. This went on for 3 years prior to the current [DSS] issue. This was the first year [Mother] and Stepfather did not receive that money. Grandmother . . . told GAL she only cares about keeping peace and making sure the girls are safe.

The GAL recommended Stepfather be assessed for "domestic violence and anger issues" and Mother "be assessed for effects of domestic violence."

¶ 11 On 16 July 2019, the trial court entered a permanency planning order finding that Mother and Stepfather's home in Thurmond was "safe and appropriate for the minor children." The court found Mother was an "active participant" in her parenting classes and her parenting educator reported that she was "implementing the lessons she [was] learning during her interactions with the minor children." Mother's visitation remained unchanged except that DSS was "given the discretion to implement overnight visitation[,]" and the primary plan remained reunification with a secondary plan of guardianship. The trial court directed Mother and Stepfather to participate in domestic violence assessments.

¶ 12 On 13 July 2019, the children began overnight visitation with Mother at Stepfather's mother's two-bedroom house. The GAL reported that Mother and the children slept in one bedroom, Stepfather's mother slept in one bedroom, Stepfather slept on the recliner in the living room, and Stepfather's uncle slept on the couch. DSS reported that Mother had "completed all objectives on her OHFSA[,]" and "recommended that a Trial Home Placement begin immediately" with Mother and Stepfather.

DSS recommended a primary plan of reunification with a concurrent plan of guardianship.

¶ 13 On 23 August 2019, the doctor who conducted the anger and domestic violence assessments on Mother and Stepfather wrote "after a very extensive domestic violence evaluation of both individuals and an anger management assessment of the husband plus having interviewed the couple separately and together, there is no indication of any domestic violence or anger issues." On 3 September 2019, the children began weekend visitation with Mother and Stepfather.

¶ 14 The permanency planning hearing was continued until 26 September 2019 "[t]o allow [M]other to have stable housing"; the trial court indicated on the continuance order it was Mother's "last continuance." The GAL stated in a report revised on 17 September 2019 that Mother was working and had transportation; however, her home was "not appropriate for full time care of the girls." Stepfather was "on crutches after being injured in a fall" and "continue[d] to try to qualify for disability payment, which he was also attempting prior to his injury." The GAL further reported:

> [Mother] and Step[father] are living with Step[father's] . . . mother in Wilkes County. They have said they are looking for a home for themselves and the girls but have made no progress in a year. [Mother] has told GAL she doesn't want to take [Brianna] out of the Jonesville school district "because she loves it so much" but there is no evidence they have looked in Jonesville. [Mother] told GAL she could bring the girls to Jonesville school on her way to work, but this is a different county.

The GAL noted the following other "issues for the court's attention": Brittany told the GAL, and Mother confirmed, she and Brianna had ridden in the back bed of Stepfather's pickup truck; Mother was late picking the children up from school on a Friday and the following Monday, Brittany complained of a headache and Brianna's teacher reported that Brianna would not sit down at her desk and would not work; Brittany told the GAL that Stepfather "said from now on he would be sleeping in the bed with [Mother] rather than on the recliner and they could sleep at the bottom of the bed[;]" and Mother collected tax refunds of at least $7,000 for at least three years despite not providing for the children's primary care and now "continues the girls' lifelong pattern of pushing responsibility for the children off on the grandmother." The GAL indicated she did not

believe it was possible for the children to be returned to their parents within a reasonable period of time:

> The children have been in [DSS] custody for over a year now and overnight visits only began in July with [Mother], even though her housing is inadequate, and [Stepfather] is not working. Father should be returning home from prison soon and will have to get back on his feet. It seems very unlikely that either parent can be responsible for the girls without support from their own parents. It is in the best interest of the children that someone more dependable has legal custody, while still allowing them to have [a] relationship with their parents.

The GAL recommended the permanent plan be "Custody/Guardianship to [G]randmother[.]"

¶ 15 Following a 26 September 2019 hearing, the trial court entered a permanency planning consent order on 6 November 2019. The trial court found that Mother was compliant in her OHFSA except in terms of housing; specifically, the two-bedroom home where Mother resided with Stepfather was "occupied by no less than four adults and lack[ed] sufficient space for the minor children to return to on a permanent basis under these circumstances." The trial found that Stepfather, who was also in compliance with his OHFSA except in terms of housing and employment, was unemployed "due to a back injury" and was "seeking disability benefits." Additionally, the trial court found that Mother and Stepfather had completed domestic violence assessments. The trial court concluded that "in light of [Mother and Stepfather's] near-completion of their OHFSAs, it is likely the minor children can be returned home within the next six months." The permanent plan remined reunification with a secondary plan of guardianship.

¶ 16 On 21 November 2019, DSS filed a "Motion for Review" for each child, "requesting a permanency planning hearing" be held on 5 December 2019 "for finalizing and obtaining permanency[.]" The motions reflected DSS's revised recommendation that the trial court award guardianship of Brittany and Brianna to Grandmother. The 5 December 2019 hearing was continued to 2 January 2020; the 2 January 2020 hearing was continued to 16 January 2020.

¶ 17 Before the hearing, DSS revised a report it had prepared on 17 December 2019. DSS reported that Brittany, in third grade at the time,

> [h]as displayed some attachment and adjustment issues after weekend visitation with her mother. [Brittany] is having transition issues on Mondays at school once she had spent the weekend with [Mother]. The school guidance counsel, the principle [sic] and her therapist Amber Dillard have reported issues with school transitions on Monday's and lasting all day. [Brittany's] cry's [sic] and asked for her grandmother and is sad until time to be picked up. When [Brittany] is ask [sic] what is wrong she states she misses her grandmother and wants to be with her. [Brittany] has stated to [DSS] at the last couple of home visits, and at a permanency planning meeting, that she wanted to live with her grandmother and visit with her mother.

DSS reported that Brianna, who had started kindergarten, had also "displayed some attachment and adjustment issues after weekend visitation with her mother" and was seeing a therapist "for her transition issues but does not talk a lot." Based on the new information, DSS recommended:

> due to the continued statements and reports from other professionals, that [Brittany] has made in regards to waning [sic] to remain in her grandmother['s] home [DSS] is requesting that Guardianship of both girls be granted to [Grandmother] on this date and that [DSS] be released of any further efforts.

However, DSS's report also provided: "[i]t is possible for the children to be returned to the care of their mother within the next six months. [Mother and Stepfather] have completed their OHFSA. [Mother and Stepfather] have been doing weekend and overnight visits also."

¶ 18 In preparation of the 16 January 2020 hearing, the GAL issued an updated report stating, "[b]oth girls are having very concerning emotional problems that seem to be tied to their weekend visits with their mom and stepfather." Specifically, the GAL noted that Brittany's "teacher said [Brittany] is often so distraught on Monday mornings that she cannot focus on classwork and often breaks into tears[;]" however, "[w]hen asked about this, [Brittany] told [the] GAL she likes seeing her mother but misses her grandmother." Likewise, Brianna's "teacher reported that after weekend visits, [Brianna] would not sit down at her desk to work and also wouldn't talk. This is unusual behavior for her." The GAL reported that "[b]oth girls say they want to live with their paternal grandmother

and great-grandmother" and, according to Brittany, Mother " 'pays more attention to [Stepfather] than to [them]' and 'sometimes doesn't even talk to' them." The GAL also addressed her concerns about the children riding in the back bed of Stepfather's pickup truck and opined that it was not possible for the children to be returned to Mother within a reasonable time:

> The children have been in [DSS] custody for over a year now and overnight visits only began in July with [Mother]. After these visits, the girls exhibit extreme emotional distress. On at least two occasions – involving the girls riding in the back of the pickup truck, and involving the Step[father's] sleeping on the couch rather than the bedroom – [Mother] was less than forthcoming about what was happening in her home and only discussed it after one of the children told their GAL. Because of this, GAL has concerns about [Mother] putting the girls' best interest [sic] above her husband's.
>
> Their father is only recently released from prison and is not yet on his feet with either employment or housing.
>
> In addition, the girls' primary care bond is to their grandmother, who has essentially raised them their entire lives. Even when their mother and father were married, they lived with their grandmother. When [Mother] left 3-4 years ago, she only visited sporadically, and often only for an afternoon.
>
> It is in the best interest of the children that they remain in their current home, where they are most secure – their grandmother's.

¶ 19 The 16 January 2020 hearing was continued to 30 January 2020 "to allow time to review [the] new court report." In preparation for the hearing, DSS issued a report recommending the following:

> [DSS] recognizes that [Mother] has completed all requirements of her OHFSA. However, while the children do have a bond with [Mother], their bond and connection is primarily with their grandmother . . . . Both [Brittany and Brianna] primarily have always resided with their grandmother who has provided the most stability and consistency regarding their

> care and supervision. [Mother] was absent from the children's lives for approximately three years (prior to the children coming into foster care) and during this time the children were cared for by their paternal grandmother.
>
> The children have continued to make statements to their social worker, GAL, and other professionals that they wish to reside with their grandmother but have visits with their parents. [DSS] is requesting that Guardianship of both girls be granted to [Grandmother] on this date and that the agency be released of any further efforts.

¶ 20 On 30 January 2020, the trial court held the permanency planning review hearing that is the subject of this appeal. At the hearing, Grandmother testified that she had lived with the children, whom she described as her "life," for the entirety of their lives. Grandmother explained that Mother, despite residing in the same county as her daughters for approximately three years, only visited the children on holidays and birthdays; however, Mother still claimed the children as dependents on her tax returns.

¶ 21 Mother testified that she and Stepfather had recently moved into a three-bedroom, two-bathroom, house and that she was working full time. She explained that she left the children in 2013 because Father "was back doing drugs, drinking" but, after she left, she saw her daughters "a lot more than what was said." Mother claimed that in the years before she started officially paying Grandmother child support, she had given Grandmother $2,000 to $3,000 in financial assistance, and she denied claiming the children as dependents on her tax returns. Mother testified that she had completed a parenting class, psychological exam, anger management classes, and "everything that they told [her] to go through." She explained that for approximately five months, she had been picking the children up from school every Friday, taking them to church on Sunday, and dropping them back off at school Monday morning. She testified to her "great" bond with her daughters, explaining that they all "have a ball" together. Mother "just want[ed] to make it clear" that she had "been there" for her "girls and [she] love[s] them."

¶ 22 DSS social worker Steven Corn testified that one reason DSS's primary plan recommendation changed from reunification to guardianship was Brittany's statements to DSS and other professionals "that she has a bond with her mother, but she feels more secure with her grandmother[.]"

Mr. Corn testified that the children's therapist relayed to him that "it was very hard on Monday mornings at school for the girls to readjust" and "sometimes those transition episodes would last into maybe Tuesday also." The trial court announced its decision to award guardianship of the children to Grandmother and award Mother visitation every other weekend from Friday to Sunday, in hopes of alleviating the children's Monday transition issues.

¶ 23 On 27 March 2020, the trial court entered a permanency plan review order finding that Mother was unfit and had acted in a manner inconsistent with her constitutionally protected status and concluding that "the best interest of the minor children, [Brittany and Brianna], would be served by awarding guardianship to [Grandmother]." In addition to awarding visitation every other weekend, Mother was also given "unsupervised visitation as she and [Grandmother] can mutually agree." The order decreed that "[a]ny party may file a motion for review at any time upon proper notice to all parties." Mother appeals.

II. Standard of Review

¶ 24 Our review of a trial court's permanency planning review order " 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' " *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* (citation omitted). "[W]e review [a] conclusion [that the natural parent's conduct was inconsistent with her constitutionally protected right] de novo, and determine whether it is supported by 'clear and convincing evidence.' " *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (citation omitted).

III. Findings of Fact

¶ 25 **[1]** Mother argues that several of the trial court's findings of fact were not supported by clear and convincing evidence[3] and/or were based on a misapplication of the law.

¶ 26 Mother raises several arguments regarding finding of Fact #24:

> 24. The Court finds requiring the children to live with the mother and step-father is not in their best interest

3. Contrary to Mother's assertion, this Court reviews whether the trial court's findings of fact were supported by competent evidence, not clear and convincing evidence. *See In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455.

> and is contrary to their health, safety and welfare. Therefore it is not possible for the children to be reunified to the mother's home immediately or within the next six months.

¶ 27 Mother argues the portion of Finding of Fact #24 stating "it is not possible for the children to be reunified to the mother's home immediately or in the next six months" is not supported by the evidence because it is contrary to DSS's court reports.[4] Mother points to the language of DSS's 17 December 2019 report, entered into evidence and incorporated in the permanency planning order, which states that "[i]t is possible for the children to be returned to the care of their mother within the next six months." However, the GAL offered a contrary opinion, indicating in her report she did "not believe" it was possible for the children to be returned to Mother's home within a reasonable time. The trial court is the sole judge of the weight and credibility of the evidence, and even if there is contrary evidence, the trial court's finding is supported by the evidence presented by the GAL, as well as by other evidence regarding Mother and Stepfather. *See In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Thus, that portion of Finding of Fact #24 is supported by competent evidence.

¶ 28 Mother argues the portion of Finding of Fact #24 that a return to her home would be contrary to the children's health, safety, and welfare was not supported by clear and convincing evidence, given Mother and Stepfather's compliance with their respective case plans and the trial court allowing them unsupervised visitation with the children. Similarly, Mother challenges Finding of Fact #30:

> 30. At this time reunification efforts clearly would be unsuccessful and/or would be inconsistent with [Brittany] and [Brianna's] health or safety and need for a safe, permanent home within a reasonable period of time.

She argues that "[g]iven that [she] and her husband had completed their case plan and were deemed by the trial court to be able to provide proper care and supervision in their home, since they were awarded unsupervised visitation, this finding is not supported by clear and convincing evidence." Although Mother did complete most of her OHFSA, the evidence shows that she did not fulfill the provision she find housing

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4. The first sentence of this finding is a conclusion of law, as noted by the dissent, and thus Mother's argument as to the conclusion of law is addressed separately below.

adequate for the children until right before the 30 January 2020 permanency planning hearing – approximately nineteen months after Mother entered into her OHFSA and over 50 months after she left the children with Grandmother to find "stable" housing. In addition to the concerns about Mother's home, DSS and the GAL stated in their respective reports that Brittany and Brianna struggled with adjustment issues at school on Mondays following weekend visitation with Mother. Both children also expressed their preference to live with Grandmother and visit with Mother. Although the children's preferences are not controlling, the trial court may consider their preferences along with the other evidence. *See Reynolds v. Reynolds*, 109 N.C. App. 110, 112–13, 426 S.E.2d 102, 104 (1993) ("The 'paramount consideration' in matters of custody and visitation is the best interests of the child, and in determining such matters the trial judge may consider the wishes of a child of suitable age and discretion. The child's wishes, however, are never controlling, 'since the court must yield in all cases to what it considers to be the child's best interests, regardless of the child's personal preference.' " (citations omitted)). Thus, competent evidence in the record supports the trial court's finding that placing the children in Mother's home would be contrary to their health, safety, and welfare.

¶ 29 Mother argues the conclusion of law included within Finding of Fact #24 that requiring the children to return to Mother's home would be contrary to their best interests is based on a misapplication of the law given that the "best interest of the child" standard is inapplicable. Similarly, Mother asserts that Finding of Fact #43 (best interest of children served by awarding guardianship to Grandmother) "is based on a misapplication of law, given that the best interest standard is inapplicable, since the finding that [Mother] is unfit and has acted in a manner inconsistent with her constitutionally-protected status is not supported by clear and convincing evidence." It has been long established in North Carolina that "[o]nce a court determines that a parent has actually engaged in conduct inconsistent with the protected status, the 'best interest of the child test' may be applied without offending the Due Process Clause." *Owenby v. Young*, 357 N.C. 142, 146, 579 S.E.2d 264, 267 (2003) (citation omitted). Thus, this argument is not really a challenge to a finding of fact but instead is a challenge to the trial court's conclusion of law that Mother acted in a manner inconsistent with her constitutionally protected status and was unfit. We will address Mother's arguments regarding these legal conclusions below.

¶ 30 Finally, Mother argues that Findings of Fact #35 (that guardianship is the best permanent plan for the children) and #43 (that awarding

guardianship to Grandmother is in the best interest of the children) are conclusions of law, not findings of fact. This Court has held "[i]f the finding of fact is essentially a conclusion of law, . . . it will be treated as a conclusion of law which is reviewable on appeal." *Bowles Distrib. Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984). Again, both of these "findings" present issues more appropriately considered as part of our discussion of Mother's challenges to the trial court's conclusions regarding acting inconsistently with her parental rights and her fitness, and we will address them below. Thus, the trial court's substantive findings of fact are supported by competent evidence and are binding on appeal.

IV. Acting in a Manner Inconsistent with Constitutionally Protected Status

¶ 31 Mother contends that the trial court's finding she was unfit and had acted in a manner inconsistent with her constitutionally protected status as a parent is unsupported by evidence and is contrary to the trial court's other findings of fact. Mother's argument challenges Finding of Fact #34:

> 34. The Court finds the mother and the father by clear and convincing evidence are unfit to provide for [Brittany] and [Brianna's] needs and have acted in a manner inconsistent with their constitutionally protected status as a parent. [Brittany] and [Brianna] have been in non-secure custody for 19 months. The mother has completed her family service case plan but the children have, since birth, resided in the home of [Grandmother] and wish to remain there. The mother has not resided with the girls for now five years. The father is incarcerated again and has not completed a family services agreement.

¶ 32 We first note that although the trial court's Finding of Fact #34 includes both factual findings and conclusions of law, Mother does not challenge the last four sentences of Finding of Fact #34 which are actually findings of fact. Mother challenges only the first sentence of Finding of Fact #34, which presents two conclusions of law. The first sentence of this finding treats unfitness and acting inconsistently with constitutionally protected rights as a single determination, but these are two separate determinations, and each must be reviewed independently. *See Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994) ("We hold that absent a finding that parents (i) are unfit *or* (ii) have neglected the welfare of their children, the constitutionally-protected paramount

right of parents to custody, care, and control of their children must prevail." (citation omitted (emphasis added))).

¶ 33 The first sentence of Finding of Fact #34 is actually a conclusion of law. Our standard of review is not controlled by the label assigned by the trial court but by the substance of the determination:

> As a general rule, "[t]he labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review." Thus, "[i]f the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*."

In re V.M., 273 N.C. App. 294, 298, 848 S.E.2d 530, 534 (2020) (alterations in original) (citation omitted).

¶ 34 Prior cases have often not been clear on whether the determination of unfitness or acting inconsistently with a constitutionally protected right is a conclusion of law or a finding of fact. But however characterized, prior cases have stated the determination must be based upon clear and convincing evidence, and it has been reviewed de novo. *Id.* at 298, 848 S.E.2d at 534. In 1996, as to unfitness of a parent, in *Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996), this Court stated:

> No decisions in North Carolina have defined precisely what findings are necessary for the trial court to conclude that a natural parent is unfit. Although *In re Poole*, 8 N.C. App. 25, 28, 173 S.E.2d 545, 548 (1970) was prior to *Peterson* [sic], the *Poole* Court found that the natural mother should not be denied custody of her child where the only change of condition shown was that the mother had been adjudged in contempt for violating an order of the court. The order there had provided that she not associate with a certain individual, but failed to find that continued association with that individual was immoral or detrimental to the child. *Poole*, 8 N.C. App. at 28, 173 S.E.2d at 548.
>
> Although no decisions have established the standard of review for the legal conclusion that a parent is unfit under *Peterson* [sic], a finding of unfitness should be reviewed de novo on appeal by examining the totality of the circumstances.

Id. at 731, 478 S.E.2d at 659 (citations omitted). In a similar manner, this Court reviews the conclusion of whether a parent has acted inconsistently with her constitutionally protected rights de novo and to "determine whether it is supported by 'clear and convincing evidence.' " *Boseman*, 364 N.C. at 549, 704 S.E.2d at 502 (citation omitted).

¶ 35 As noted above, our Supreme Court in *Petersen v. Rogers*, 337 N.C. at 403, 445 S.E.2d at 905, held that "absent a finding that the natural 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." *Raynor*, 124 N.C. App. at 731, 478 S.E.2d at 659 (emphasis in original). Fitness and whether a parent acted inconsistently with her constitutionally protected right present two separate issues, and we will review each one separately. *See id.*

A. Preservation of Issue for Review

¶ 36 **[2]** Initially, we note that both DSS and the GAL argue that by not lodging an objection at the hearing to the trial court's determination that she acted in a manner inconsistent with her protected status, despite having advance notice and the opportunity to object, Mother waived this argument on appeal. DSS argues specifically:

> respondent mother made no objection or argument against the trial court finding she was unfit or had acted in a manner inconsistent with her constitutionally protected status. Respondent mother had the opportunity to make an argument to the trial court and failed to address the required finding that she was unfit or had acted in a manner inconsistent with her protected status. . . . [N]o mention or objection was made at trial by respondent mother to the court making this finding. As such, respondent mother has waived her right to make any such argument on appeal.

¶ 37 At the hearing, Mother presented evidence and specifically argued against granting guardianship of the children to Grandmother. She argued the trial court should not adopt DSS's recommendations of guardianship but should continue working on reunification and should allow a trial home placement with Mother. The trial court did not announce any findings of fact or conclusions of law and did not make a detailed rendition of its order from the bench but indicated only the general outline of the ruling. The details of the ruling are contained in the written order, filed about three months after completion of the hearing.

¶ 38 Rule 10(a)(1) of the Rules of Appellate Procedure addresses preservation of issues during a trial.

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). Prior cases have held that a parent may fail to preserve the constitutional issue of whether the parent has acted inconsistently with her constitutionally protected rights as a parent by failing to raise the issue before the trial court because " '[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.' " *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (quoting *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001)) (alteration in original). In this case, the trial court found Mother acted in a manner inconsistent with her protected status and that it was required to address the best interest of the children, and Mother did not raise an objection at trial.

¶ 39 Yet this Court must review the record to determine if the parent had the opportunity to raise this issue or to object to the trial court's ruling before we may find a parent has waived review:

> 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 with Chris 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) (citation omitted).

¶ 40 DSS does not cite any authority for the proposition that a party may "object" at trial *to a trial court's findings of fact* or conclusions of law, nor does it suggest how a party may "object" during the hearing to a trial court's conclusion of law contained only in the written order entered

months after completion of the hearing. At trial, a parent may present evidence and may object to evidence presented against her. As to legal issues, a parent may make arguments seeking to convince the trial court to make the conclusions and decree the parent desires and opposing those recommended by DSS or the GAL. A parent may argue that the trial court should not adopt the recommendations of DSS or the GAL, as Mother did. A parent may object to the introduction of *evidence*, and if she fails to object, she has waived any argument regarding that evidence on appeal. *See In re A.B.*, 272 N.C. App. 13, 17, 844 S.E.2d 368, 370–71 (2020). But a trial court's findings of fact are not evidence, and a parent may not "object" to a trial court's rendition of an order or findings of fact, even if these are announced in open court at the conclusion of a hearing. If a party has presented evidence and arguments in support of her position at trial, has requested that the trial court make a ruling in her favor, and has obtained a ruling from the trial court, she has complied with the requirements of Rule 10 and she may challenge that issue on appeal. An appeal is the procedure for "objecting" to the trial court's findings of fact and conclusions of law.

¶ 41 Here, at the hearing, Mother had notice of the recommendation of guardianship, so she had the "opportunity to object or raise the issue at the hearing." *In re C.P.*, 258 N.C. App. at 246, 812 S.E.2d at 192 (citation omitted). Mother took advantage of this opportunity to raise the issue by presenting evidence and specifically "asking the Court not to adopt [DSS's] recommendations and grant custody to [Grandmother], but . . . to leave reunification the plan and allow [Mother] to begin a trial home placement with the girls," contending that when she left Grandmother's home in 2015 "due to an abusive environment," "she did wait until she felt she had a stable environment . . . to make a stand and try to be reunified with [her] girls" and, further, that "she hit the ground running and has completed all the objectives on her case plan." Thus, Mother presented evidence regarding her ability to care for the children, opposed the recommendation of guardianship, and requested that the trial court reject the recommendation of guardianship and allow a trial home placement. Although the trial court made findings of fact or conclusions of law in the written order entered several months after the conclusion of the hearing, Mother had no opportunity to "object" to those findings or rulings during the hearing, as argued by DSS, nor is such an objection proper, other than by presenting the argument on appeal. Mother preserved this issue for appellate review by her evidence, arguments, and opposition to guardianship at the trial.

B. Analysis

¶ 42 **[3]** Cases addressing loss of custody by a parent to a nonparent may be based upon unfitness of the parent or actions inconsistent with constitutionally protected parental rights. Although in some cases, the parent's actions inconsistent with parental rights may include abuse or neglect and the parent may be also "unfit" as a parent for the same reasons, not all cases include both elements. Even where there is no question of a parent's fitness, a parent may act inconsistently with her parental rights by voluntarily ceding her parental rights to a third party. A "period of voluntary nonparent custody," where a parent voluntarily allows her children to reside with a nonparent and allows the nonparent to support the children and make decisions regarding the children's care and education presents this type of issue. The Supreme Court has explained:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, *see* N.C.G.S. § 7A–289.32 (1995), would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. *Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.*

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997) (citations omitted) (emphasis added). In certain circumstances, a parent may cede her constitutionally protected status to another by leaving her child in that person's care:

> [T]he legal right of a parent to custody may yield to the interests of the child where the "parent has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in [the child], thereby substituting such others in his own place, so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness[.]"

Id. at 75, 484 S.E.2d at 532 (quoting *In re Gibbons*, 247 N.C. 273, 280, 101 S.E.2d 16, 21–22 (1957)). A " 'failure to maintain personal contact with the child or failure to resume custody when able' could amount to conduct inconsistent with the protected parental interests[.]" *Owenby*, 357 N.C. at 146, 579 S.E.2d at 267 (citation omitted). The pivotal question, therefore, is "[d]id the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child?" *Mason v. Dwinnell*, 190 N.C. App. 209, 222, 660 S.E.2d 58, 67 (2008). And, "in answering this question, it is appropriate to consider the legal parent's intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated." *Estroff v. Chatterjee*, 190 N.C. App. 61, 69, 660 S.E.2d 73, 78 (2008).

¶ 43 Mother has not challenged most of the trial court's findings as unsupported by the evidence, so they are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." (citation omitted)). Most of the findings Mother addresses on appeal are more appropriately considered as conclusions of law, and we will address them accordingly. *See In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." (citation omitted)). Our summary of facts noted above is based upon those unchallenged

findings of fact. As directly relevant to Mother's arguments on appeal, the trial court made the following pertinent findings of fact:

> 13. [Brittany] and [Brianna] have been placed with their paternal grandmother, [Grandmother], since June 14, 2018 (now 19 months). Both children have actually resided in [Grandmother's] home since birth – prior to June 14, 2018 either both or one of their parents also resided in the home. The mother and father resided in the home together with the children until September 2015 when the mother left (the parents separated).
>
> 14. After September 2015 the mother would visit the children on holidays, birthdays but did not take the children overnight.
>
> 15. [Brittany] is in the 3rd grade at Jonesville Elementary School. [Brittany] is in counseling with Amber Dillard through Jodi Province Counseling. She has been vocal that she would like to continue living with her grandmother. She has had adjustment issues upon return from weekend visitation with her mother and step-father.
>
> 16. [Brianna] is in kindergarten at Jonesville Elementary School. [Brianna] is also in counseling with Amber Dillard and is vocal she wants to continue living with her grandmother. [Brianna] has also had adjustment issues upon return from weekend visitation with her mother and step-father.
>
> . . . .
>
> 22. That [DSS] has made efforts for each of the concurrent plans to timely achieve permanence for the children and prevent placement in foster care. The reunification efforts to finalize permanency are as follows:
>
> ·Collateral contacts (children's therapist, school officials);
>
> ·Contact with the mother and step-father;
>
> ·Contact with the father;
>
> ·Medical and dental appointments;
>
> ·Referral for father to attend parenting classes;

·Referral for father to have psychological assessment;

·Referral for father to have substance abuse assessment;

·Supervised visitation with father;

·Unsupervised visitation with mother and step-father;

·Referral for [Brittany and Brianna] to have therapy;

·Transportation;

·Child and family team meetings;

·Maintained contact with the children and placement provider;

·Permanency planning review team meeting.

. . . .

24. The Court finds requiring the children to live with the mother and step-father is not in their best interest and is contrary to their health, safety and welfare. Therefore it is not possible for the children to be reunified to the mother's home immediately or within the next six months.

. . . .

28. When the mother left [Grandmother's] home in September 2015 she was scared. She did not take the children with her because of being frightened and because she did not have a stable home to provide the children. The mother married [Stepfather] is [sic] 2016. She has not had a stable home that was large enough for the girls until recently.

. . . .

30. At this time reunification efforts clearly would be unsuccessful and/or would be inconsistent with [Brittany] and [Brianna's] health or safety and need for a safe, permanent home within a reasonable period of time.

31. Both [Brittany] and [Brianna] want to live with their paternal grandmother and visit their parents.

. . . .

> 34. . . . . [Brittany] and [Brianna] have been in non-secure custody for 19 months. The mother has completed her family service case plan but the children have, since birth, resided in the home of [Grandmother] and wish to remain there. The mother has not resided with the girls for now five years. The father is incarcerated again and has not completed a family services agreement.
>
> 35. The Court finds as a fact that the best permanent plan for the children, [Brittany and Brianna] within a reasonable period of time is guardianship.
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> . . . .
>
> 39. [Grandmother] has provided all care for the children for much of their lives and especially the past 19 months. [Grandmother] understands the legal significance of caring for the children until they reach 18 years of age.
>
> . . . .
>
> 43. Having considered possible placement with a relative, the best interest of the minor children, [Brittany and Brianna] would be served by awarding guardianship to [Grandmother].

¶ 44 Here, the trial court's unchallenged findings note that Brittany and Brianna resided with Grandmother since their birth, years prior to involvement by DSS. Without notice, Mother left Grandmother's home in 2015, leaving both children with Grandmother and Father. After Father was incarcerated, Grandmother and the children moved in with Great Grandmother, and Grandmother began working the night shift at her job so she could tend to the day-to-day care of the children. Although Mother testified that she moved into a stable residence in 2017 at Stepfather's mother's house, she made no effort to change the children's living arrangement until DSS got involved in 2018. After moving in with Stepfather, Mother rarely called the children or inquired about seeing them. Indeed, even before DSS's involvement in the case, Mother only picked up and visited with her children on holidays and birthdays "but always brought them home afterward" and never had the children spend the night. During this time, although Mother did not pay Grandmother child support, she claimed the children as dependents on her tax returns. Grandmother and Great Grandmother made essentially all

parental decisions for the children and provided financial support for both children since birth.

¶ 45 Our dissenting colleague would not consider the time Mother left the children in the care of Grandmother about three years prior to DSS's involvement for the purposes of determining whether she had acted in a manner inconsistent with her constitutionally protected rights as a parent but instead would consider only the time since July 2018, when Mother signed the OHFSA. But DSS had to become involved when Father was arrested because Mother had already left their home three years earlier. In addition, the trial court's findings show that Mother had little involvement with the children during those three years. She not only ceased to live in the home with the children; she also ceded her parental role. The trial court properly considered Mother's absence from the home and her lack of involvement with the children for the three years prior to Father's arrest to support its conclusion that Mother had acted inconsistently with her constitutionally protected rights.

¶ 46 Mother chose to forgo her constitutionally protected rights when she left her daughters in the care of Grandmother for an indefinite period with no express or implied intention that the arrangement was temporary. *See Boseman*, 364 N.C. at 552, 704 S.E.2d at 504 ("[I]f a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status." (citation omitted)). In other words, Mother "created the existing family unit that includes [Grandmother] and the child[ren], but not herself." *Price*, 346 N.C. at 83, 484 S.E.2d at 537 (1997). We hold the trial court's conclusion that Mother acted in a manner inconsistent with her constitutionally protected status was supported by the findings of fact, considering the totality of the circumstances. *Adams v. Tessener*, 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001) ("The trial court's findings of fact are sufficient, when viewed cumulatively, to support its conclusion that [the father's] conduct was inconsistent with his protected interest in the child.").

V. Unfitness as a Parent

¶ 47 **[4]** As noted above, the trial court's conclusion of Mother's unfitness as a parent is a separate legal conclusion which requires a separate analysis. In Finding of Fact #34, the trial court also determined that Mother was unfit. As noted above, the determination of unfitness of a parent is a conclusion of law, so we must review this conclusion to determine if it is supported by the findings of fact. *See Raynor*, 124 N.C. App. at 731, 478 S.E.2d at 659 ("[T]he legal conclusion that a parent is unfit under

Peterson [sic], a finding of unfitness should be reviewed de novo on appeal by examining the totality of the circumstances." (citation omitted)).

¶ 48 Many of the findings of fact regarding Mother address her compliance with most of the requirements of the OHFSA. She "completed parenting classes and a Domestic Violence and Anger Management Assessment," with "no recommendations for further services." She had submitted to random drug screens and all were negative. She had exercised "unsupervised visitation including overnight and weekend visitation" and moved to a home "that allows the children to have a bedroom." She had "participated with the service plan" and "made adequate progress within a reasonable period of time." She attended court hearings and stayed in contact with the GAL. The other substantive findings of fact, as quoted above, address Mother's leaving the children with Grandmother in 2015 and her failure to provide any financial support or consistent parental care for the children after she left, allowing Grandmother to take on the primary parental responsibilities for the children. Thus, although we have already determined that Mother had voluntarily ceded her primary parental role to Grandmother years before DSS's involvement, the trial court's findings of fact do not support a conclusion that Mother is unfit. We reverse the portion of the permanency planning order concluding that Mother was unfit as a parent. However, because the trial court's determination that Mother acted in a manner inconsistent with her constitutionally protected status was supported by the findings of fact, the trial court did not err in its grant of guardianship to Grandmother. *See Bennett v. Hawks*, 170 N.C. App. 426, 429, 613 S.E.2d 40, 42 (2005) ("Therefore, where the trial court finds that a parent is fit to have custody, it does not preclude the trial court from granting joint or paramount custody to a nonparent where the trial court finds that the parent's conduct was inconsistent with her constitutionally protected status." (citation omitted)).

VI. "Best Interest of the Child" Standard

¶ 49 Mother contends "[b]ecause the trial court's finding that [Mother] is unfit to provide for her daughter's [sic] needs and has acted in a manner inconsistent with her constitutionally-protected status as a parent is not supported by clear and convincing evidence, the trial court erred when it applied a best interest standard." Because the trial court concluded that Mother had acted inconsistently with her constitutionally protected rights as a parent, as discussed above, we hold the trial court did not err in its application of the best interest standard. *Owenby*, 357 N.C. at 146, 579 S.E.2d at 267.

VII. Conclusions of Law

¶ 50 Mother contends that several of the trial court's conclusions of law are not supported by adequate findings of fact and are based on a misapplication of the law. We first note Mother's argument regarding misapplication of the law is based upon her contention the trial court erred concluding that she had acted inconsistently with her constitutionally protected rights as a parent. As we have already addressed this issue and determined the trial court did not err in its conclusion, we will not address this issue again. Thus, we will consider only whether the conclusions of law are supported by the findings of fact.

¶ 51 The trial court made these pertinent conclusions of law:

> 2. Placement of the children, [Brittany and Brianna], to the mother or father's home at this time is contrary to their health, safety, welfare and best interest. Conditions that led to custody of the children by [DSS] and removal from the home of the parent(s) continue(s) to exist.
>
> . . . .
>
> 4. That after considering priority placement of the minor child with a relative who is willing and able to provide proper care and supervision in a "safe home," the best interest of the minor children, [Brittany and Brianna], would be served by awarding guardianship to [Grandmother].

¶ 52 Mother argues these conclusions of law are not supported by adequate findings of fact based upon her compliance with her plan, DSS's recommendation for a trial home placement, and the trial court's approval of unsupervised visitation. But as discussed above, Findings of Fact #24 and #30 are supported by competent evidence and support the conclusion that placement in Mother's home would be contrary to Brittany and Brianna's health, safety, welfare, and best interest. Mother also argues, in one sentence, based solely on the fact that she and her husband had completed their case plan, the portion of Conclusion of Law #2 that the "[c]onditions that led to custody of the children by [DSS] and removal from the home of the parent(s) continue(s) to exist" was not supported by competent evidence. But Mother's success in her case plan does not automatically lead to a conclusion that the conditions which led to removal do not continue to exist.

¶ 53 The removal of the children from the home occurred in 2018 and was necessary based on the 1 May 2018 incident when Father was intoxicated and began throwing and smashing plates *and* Mother's absence as a caretaker for the children. When Father was arrested, there was no parent available to care for the children. Mother had already left the home in 2015, and she did not have a suitable residence for the children at that time. Thus, Mother is correct that the immediate impetus for removal of the children from the home where they had resided since birth—Father's intoxication and violence in the home—did not continue to exist, as Father was removed from the home when he was arrested and incarcerated.[5] And as of 30 January 2020, because of Father's incarceration, he remained unavailable to care for the children. But the other condition leading to DSS's custody of the children and removal from the home where Father, the children, and Grandmother lived was Mother's absence and lack of a suitable home. Mother had left the home in 2015. After she left, she "occasionally" visited with her daughters but had not participated in any decision making, contributed financially towards their care, or "otherwise filled the role of parent/caretaker." In 2018, Mother lived in Alexander County with Stepfather who "ha[d] an extensive criminal history" and suspected issues with alcohol abuse. Mother is correct that by the time of the permanency planning hearing, her circumstances had changed in many ways, but the trial court's conclusions were supported by the findings of fact, so this argument is overruled.

¶ 54 Mother also challenges Conclusion of Law #3, which provides:

> [DSS] has made reasonable efforts to finalize the permanent plan to timely achieve permanence for the children and prevent placement in foster care, reunify this family, and implement a permanent plan for the children. Foster placement has been avoided by placement with [Grandmother].

Mother does not challenge this conclusion as unsupported by the findings of fact, but her entire argument is as follows:

> N.C. Gen. Stat. § 7B-906.2(c) requires a trial court, for each subsequent permanency planning hearing, to make [a] written finding about the efforts a department of social services made toward both the primary and secondary permanent plans in effect prior to the hearing, and to make a conclusion about whether

5. Father did not appeal from the trial court's order, so we have not addressed the trial court's findings or conclusions regarding Father.

> efforts to finalize such permanent plans were reasonable. The primary and secondary permanent plans in effect prior to the 30 January 2020 hearing were reunification and guardianship, pursuant to the trial court's permanency planning order entered on 6 November 2019. Given that [Mother] mostly completed her case plan before [DSS] abruptly moved the court to award guardianship to the paternal grandmother, the trial court erred when it concluded that [DSS's] efforts to finalize the permanent plan of reunification were reasonable.

As discussed above, we have already determined Finding of Fact #30 was supported by the evidence.

> 30. At this time reunification efforts clearly would be unsuccessful and/or would be inconsistent with [Brianna and Brittany's] health or safety and need for a safe, permanent home within a reasonable period of time.

In addition, Conclusion of Law #3 is supported by Finding of Fact #22 and because Finding of Fact #22 is not challenged by Mother, it is "deemed supported by competent evidence and [is] binding on appeal." *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58 (citation omitted).

¶ 55 Mother does not argue the trial court failed to address the factors and findings as required by N.C. Gen. Stat. § 7B-901(c) but argues only that the trial court made an "abrupt" change to the plan, even though she was making some progress. Mother cites no authority regarding the timing or "abruptness" of a change in the plan to achieve permanence, and as long as the trial court considers the factors as required by N.C. Gen. Stat. § 7B-901(c) and makes the appropriate findings, we can find no abuse of discretion by the trial court's decision to change to guardianship.

VIII. Conclusion

¶ 56 Although the trial court's conclusion that Mother was unfit was not supported by the findings of fact, its conclusion that Mother acted in a manner inconsistent with her constitutionally protected status was supported by the findings of fact, based upon clear and convincing evidence, making the "best interest of the child" standard applicable. Additionally, competent evidence supported the trial court's findings of fact and those findings supported the challenged conclusions of law.

AFFIRMED IN PART; REVERSED IN PART.

Judge DIETZ concurs with separate opinion.

Judge CARPENTER concurs in part and dissents in part with separate opinion.

DIETZ, Judge, concurring.

¶ 57 I concur in the judgment but note that this Court could benefit from the guidance of our Supreme Court concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court. It is hard to square this case with *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018), and the resulting conflict between this case and *In re C.P.* is likely to lead to confusion among litigants and future panels of this Court.

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

¶ 58 The majority's opinion holds: (1) the trial court's findings of fact are supported by competent evidence; (2) the trial court's factual findings support its conclusions of law; (3) the trial court's findings of fact do not support a conclusion that Respondent Mother is unfit; and (4) Respondent Mother acted in a manner inconsistent with her constitutionally protected status, making the "best interest" analysis applicable. I disagree and respectfully dissent in part.

¶ 59 I agree that the trial court's findings of fact are supported by competent evidence; however, I disagree with the majority's conclusion that the trial court's findings of fact support the conclusions of law. Specifically, I do not agree that Conclusion of Law 2 is supported by adequate factual findings. Conclusion of Law 2 states:

> 2. Placement of the children, [Brittany and Brianna], to the mother or father's home at this time is contrary to their health, safety, welfare, and best interest. Conditions that led to custody of the children by YCHSA and removal from the home of the parent(s) continue[ ] to exist.

¶ 60 The trial court made the following pertinent findings of fact:

4. The mother and her husband have completed parenting classes and a Domestic Violence and Anger Management Assessment. The assessment had no recommendations for further services.
5. The mother has submitted to random drug screens; all have been negative for substances.
6. The mother and step-father have had unsupervised visitation including overnight and weekend visitation (every Friday – Monday morning). They have moved to a home that allows the children to have a bedroom.
7. The mother had participated with the services plan and has made adequate progress within a reasonable period of time. She has generally attended court hearings and has stayed in contact with the agency and the GAL Program.

. . . .

15. Brittany has had adjustment issues upon return from weekend visitation with her mother and step-father.
16. Brianna has also had adjustment issues upon return from weekend visitation with her mother and step-father.

. . . .

23. Although the mother and step-father have completed their family service agreement and have a bond with the children, the strongest bond is with the paternal grandmother. Ms. Williams' home is where the children want to live. The children want to continue to visit with their mother and step-father.
24. The Court finds requiring the children to live with the mother and step-father is not in their best interest and is contrary to their health, safety and welfare. Therefore, it is not possible for the children to be reunified to the mother's home immediately or within the next six months.

¶ 61 First, I note the initial sentence of Finding of Fact 24 is a conclusion of law: "The Court finds requiring the children to live with the mother

and step-father is not in their best interest and is contrary to their health, safety and welfare."

¶ 62 As our Court has held, when a "finding of fact is essentially a conclusion law, . . . it will be treated as a conclusion of law . . . ." *Stan D. Bowles Distrib. Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) (citation omitted). Therefore, I review Finding of Fact 24 as a conclusion of law. Upon review, I do not find adequate factual findings in the Permanency Plan Review Order (the "Order") to support such a conclusion. The majority, in reviewing Finding of Fact 24, relies on Respondent Mother's delay in finding adequate housing per the Out of Home Family Services Agreement ("OHFSA") as sufficient competent evidence to support the finding. However, the trial court made no findings with respect to Respondent Mother's delay in obtaining housing. On the contrary, in Finding of Fact 7 the trial court found, *inter alia*, Respondent Mother "has participated with the service plan and has made adequate progress within a reasonable period of time." As the majority notes, adequate housing for the children was ultimately obtained before the 30 January 2020 permanency planning hearing. For the foregoing reasons, I would hold the trial court failed to make sufficient factual findings to support the conclusion that it is not in the best interest of the minor children to live with Respondent Mother and doing so would be contrary to the children's health, safety, and welfare.

¶ 63 Similarly, a review of the remaining factual findings reveals there are not adequate findings to support Conclusion of Law 2, which stated that "[p]lacement of the [minor children] to the mother['s] . . . home at this time is contrary to their health safety, welfare and best interest. Conditions that led to custody of the children by YCHSA and removal from the home of the parent(s) continue[ ] to exist." Although there may have been evidence in the record to support Conclusion of Law 2, there were insufficient findings to support such a conclusion in the Order before the Court.

¶ 64 As an initial concern, I note the children were never removed from Respondent Mother's home; therefore, it was inaccurate for the trial court to conclude, as it did in Conclusion of Law 2, that the conditions that led to the children's removal from the *parents'* home continue to exist. In fact, it was the paternal grandmother's home, the home to which the court ordered the children to return when it awarded guardianship to the parental grandmother in the Order, from which the children were removed. Nevertheless, the court found Respondent Mother's home "contrary to [the children's] health, safety and welfare" and the paternal grandmother's home to be safe and in the children's best interest.

¶ 65 Further, Finding of Fact 23, stating that Respondent Mother has "completed [her] family service agreement" is inconsistent with Conclusion of Law 2 that states, *inter alia*, "[c]onditions that led to custody of the children by YCHSA and removal from the home of the parent(s) continue[ ] to exist." *See In re A.S.*, 275 N.C. App. 506, 514, 853 S.E.2d 908, 914 (2020) (vacating an order concluding the mother was unfit and had acted inconsistently with her constitutionally protected status, and eliminating reunification efforts where the trial court found the mother had not alleviated the conditions leading to the removal of her minor children for lack of support of competent evidence because that finding of fact was inconsistent with a finding of fact, which stated the mother was in compliance with her case plan). Additionally, if Respondent Mother had completed her family service agreement and was presumably in compliance with the agreement, including housing requirements, then the conditions that led to the children's removal from their parents' home would surely have been eliminated in Respondent Mother's home. Because there are not sufficient factual findings to show that Respondent Mother was "acting in a manner inconsistent with the health or safety of the juvenile," I would hold the trial court erred in ceasing reunification efforts. *See* N.C. Gen. Stat. § 7B-906.2(d)(4) (2019).

¶ 66 Next, I disagree with the majority's conclusion that Respondent Mother lost "her constitutionally protected rights when she left her daughters in the care of [the paternal grandmother] for an indefinite period with no express or implied intention that the arrangement was temporary."

¶ 67 The trial court made the following pertinent findings of fact:

> 13. [Brittany and Brianna] have been placed with their paternal grandmother . . . since June 14, 2018 (now 19 months). Both children have actually resided in Ms. Williams' home since birth—prior to June 14, 2018 either both or one of their parents also resided in the home. The mother and father resided in the home together with the children until September 2015 when the mother left (the parents separated)
> 14. After September 2015 the mother would visit the children on holiday, birthdays but did not take the children overnight.
>
> . . . .

> 28. When the mother left the [family] home in September 2015, she was scared. She did not take the children with her because of being frightened and because she did not have a stable home to provide the children. The mother married [step-father in] 2016. She has not had a stable home that was large enough for the girls until recently.
>
> . . . .
>
> 30. At this time reunification efforts clearly would be unsuccessful and/or would be inconsistent with [Brittany] and [Brianna's] health or safety and need for a safe, permanent home within a reasonable period of time.
>
> 31. The Court finds the mother and father by clear and convincing evidence are unfit to provide for [Brittany] and [Brianna's] needs and have acted in a manner inconsistent with their constitutionally protected status as a parent. [Brittany] and [Brianna] have been in non-secure custody for 19 months. The mother has completed her family service case plan but the children have, since birth, resided in the home of [Grandmother] and wish to remain there. The mother has not resided with the girls for now five years. The father is incarcerated again and has not completed a family services agreement.

¶ 68 Here, the record reveals Respondent Mother did indeed leave the father's home in 2015 while the minor children remained in the grandmother's and father's care. However, the record also reveals Respondent Mother signed and completed an OHFSA on 13 July 2018, with which she made reasonable progress throughout the course of the plan. With the exception of the housing requirement, which was fulfilled right before the 30 January 2020 hearing, Respondent Mother had substantially complied with the terms and conditions of the OHFSA before the permanency planning hearing.

¶ 69 The majority concludes the facts that Respondent Mother left the marital home—in which the parent grandmother also resided—in 2015 and that Respondent Mother "visit[ed] the children on holidays [and] birthdays" are sufficient findings for the trial court to conclude she had acted in a manner inconsistent with her constitutionally protected

status as a parent. However, as with Conclusion of Law 2, there are insufficient findings to support the conclusion that Respondent-Mother acted in a manner inconsistent with her constitutionally protected status. Although there may have been clear and convincing evidence in the record that Respondent-Mother acted inconsistently with her constitutionally protected status, the trial court's findings of fact were inadequate to support such a conclusion. *See Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) ("[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be clear and convincing evidence."); *In re D.A.*, 258 N.C. App. 247, 252, 811 S.E.2d 729, 733 (2018) ("Absent clear findings, based upon clear, cogent, and convincing evidence, demonstrating how [the respondent parent] acted inconsistently with his [or her] constitutionally protected status," it is error for the trial court to award permanent custody of a minor child to a third party.).

¶ 70 Additionally, the trial court repeatedly found that a primary plan remained for reunification. Similarly, DSS's recommended permanent plan was for reunification. Based on Respondent Mother's case plan and her level of compliance as of 19 August 2019, DSS recommended in its report "to start a trial home placement" with Respondent Mother. Pursuant to N.C. Gen. Stat. § 7B-906.2:

> [r]eunification shall be a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c) or [N.C. Gen. Stat. §] 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsections (a1) of this section, 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). As discussed above, the trial court failed to make findings of fact that reunification would be inconsistent with the children's health and safety. *See id.* Moreover, the record reveals Respondent Mother substantially complied with her case plan, including the housing requirement, by the 30 January 2020 permanency planning hearing. To ignore compliance with a case plan would serve to discourage parents who, like Respondent Mother, comply with DSS's requirements and recommendations and seek reunification with their children. Moreover, it will assuredly be detrimental to the success of this DSS program and similar programs.

¶ 71 For the foregoing reasons, I would hold: (1) the trial court's findings of fact are supported by competent evidence; (2) the trial court's conclusions of law are not supported by adequate findings of fact; and (3) the trial court made insufficient findings to support the conclusions that Respondent Mother was unfit or had acted in a manner inconsistent with her constitutionally protected status; thus, the "best interest" standard was inapplicable. I would vacate the Order and remand to the trial court for further proceedings. I respectfully dissent.

IN THE MATTER OF C.G.

No. COA20-520

Filed 20 July 2021

1. Appeal and Error—involuntary commitment—petition for certiorari—no written notice of appeal—mootness

The Court of Appeals allowed respondent's petition for a writ of certiorari to review an involuntary commitment order where, although respondent failed to file a written notice of appeal pursuant to Appellate Rule 3, his counsel demonstrated at least the intent to appeal by objecting to the involuntary commitment proceedings at the outset and by giving oral notice of appeal in court. Furthermore, involuntary commitment was a significant incursion to respondent's liberty interests, and although respondent's commitment period had already expired, his appeal was not moot because it was possible that his commitment in this case could form the basis for a future commitment.

2. Constitutional Law—right to an impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses

The trial court in an involuntary commitment hearing involving a private hospital did not deprive respondent of his due process right to an impartial tribunal, where counsel from the Attorney General's office did not appear at the hearing to represent the State and where the trial court questioned witnesses without acting as the State's de facto counsel, prejudicing any party, or impeaching any witness's credibility.

3. Constitutional Law—involuntary commitment—Confrontation Clause—psychological examination reports—harmless error

The trial court in an involuntary commitment hearing violated respondent's right to confront witnesses under the Confrontation Clause by incorporating psychological examination reports into its findings of fact, where the reports were never formally admitted into evidence, the doctors who wrote them were not present to testify, and where respondent did not waive his confrontation rights despite not having the chance to object to the reports' admission (respondent's counsel did object to the reports as insufficient bases for respondent's initial commitment and objected when a witness who did not write the reports testified about them). Nevertheless, the error was harmless because other evidence and the court's remaining factual findings supported the involuntary commitment order.

4. Mental Illness—involuntary commitment—danger to self—sufficiency of findings and evidence—prima facie inference

The trial court in an involuntary commitment proceeding properly found by clear, cogent, and convincing evidence that respondent was a danger to himself. The court's finding that respondent could not "take care of his nourishment and dental needs" established respondent's current danger to himself, while the finding that his Assertive Community Treatment (ACT) team could no longer "sufficiently" care for respondent's needs showed a nexus between his mental illness and future harm to himself. Furthermore, testimony regarding respondent's recurring hallucinations (which often led to him wandering the streets and being assaulted) and his belief that he did not need medication created a prima facie inference of his inability to care for himself.

Judge DILLON concurring in a separate opinion.

Judge GRIFFIN dissenting.

Appeal by Respondent from an Order entered 7 February 2020 by Judge Doretta Walker in Durham County District Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. McKee, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for respondent-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Appellant C.G. (Respondent) appeals from an Involuntary Commitment Order entered in Durham County District Court declaring Respondent mentally ill, a danger to self and others, and ordering Respondent be committed to an inpatient facility for thirty days. The Record reflects the following:

¶ 2 On 30 January 2020, Dr. Phillip Jones, with the Duke University Medical Center (Duke), signed an Affidavit and Petition for Involuntary Commitment stating Respondent: "presents [as] psychotic and disorganized . . . [Respondent's] ACTT team being unable to stabilize his psychosis in the outpatient treatment. He is so psychotic he is unable to effectively communicate his symptoms and appears to have been neglecting his own care." Dr. Jones also stated: "Per [Respondent's] ACTT he threw away his medications and has not been taking them. He needs hospitalization for safety and stabilization." This affidavit was filed on 31 January 2020 in the Durham County District Court and Dr. Jones submitted a First Examination for Involuntary Commitment report with the Affidavit. The report lists the exact same findings supporting commitment as the Affidavit. On 31 January, a Durham County magistrate issued a Findings and Custody Order finding Respondent was mentally ill and a danger to self or others. Respondent was subsequently delivered to Duke's 24-hour facility.

¶ 3 That same day, Dr. Miles Christensen, also with Duke, signed a 24-Hour Facility Exam for Involuntary Commitment report; the report was filed on 3 February 2020. In this report, Dr. Christensen concluded Respondent was mentally ill and a danger to self and others. In the description of findings supporting commitment, Dr. Christensen noted, when asked about his goals for hospitalization, Respondent replied: "I don't know, 30, 40, 50 pounds probably." Dr. Christensen stated Respondent said he would like to gain weight while he was in the hospital. Dr. Christensen further noted: "Patient perseverates on being 'Blessed and highly favored' . . . Talks to other people in the room during interview . . . States 'gods people putting voices in my head' " and "[s]uddenly begins crying without any precipitant."

¶ 4 On 7 February 2020, the trial court heard Respondent's case pursuant to N.C. Gen. Stat. § 122C-268. At the outset, Respondent's counsel

objected to the proceedings because there was no representative for the State present. Respondent's counsel stated, "the judge, on its own initiate---or volition, cannot conduct the business of the State and these proceedings to move forward." The trial court responded:

> Because it sounds like the DA's office is refusing to do anything, and then it sounds like the Attorney General's office is refusing to do anything, and Duke and the VA are private and/or federal entities; therefore, they can't. So you're suggesting we do nothing and not have these cases at all as a result of people failing to do their duty? . . . I'm not gonna do that.

¶ 5 Respondent's counsel continued:

> Additionally, beyond that issue, I would argue that, in this case, the paperwork was also improper . . . based on 122C-281 and 285, in that while there is an allegation that [Respondent] is an individual with a mental illness and dangerous to himself, the description of findings in both the first examination and the examination done by the 24-hour facility does not allege facts that would be sufficient pursuant to the statute to--to meet those criteria and what is contained therein is more conclusory, and according to In Re: Reid and In Re: Ingram [phonetic spellings], the Court of Appeals has held that conclusory statements are not sufficient in the description of findings to proceed in that.

The trial court stated: "Okay. That's gonna be denied."

¶ 6 The hearing continued and the trial court asked if any witnesses were present in this case. The trial court called Dr. Max Schiff, also with Duke, to the witness stand. Respondent's counsel objected as Dr. Schiff was not the doctor who completed or signed either of the evaluation or reports in this case. The trial court overruled the objection and noted, "if [Dr. Schiff] doesn't know anything about this case, you can keep making your objection and we will go from there."

¶ 7 The trial court stated to Dr. Schiff: "you or someone in your organization has indicated that [Respondent] has a mental illness and is a danger to himself and others, and I will leave you to tell me whether or not you can give me enough evidence on this to go forward." Dr. Schiff responded: "So, yes. [Respondent] has a long-standing history of mental

illness with psychosis. He currently carries a diagnosis of schizoaffective disorder, for which he's been treated since his late teens." Dr. Schiff continued to explain Respondent had been brought to Duke by "his ACT team" because of "an acute change in his mental status with increasing disorganization, hallucinations, delusions, abnormal psychomotor behavior, wandering around the streets" and because "he had not been taking his medications and had thrown them away[.]"

¶ 8 Dr. Schiff also stated: "On my evaluation . . . [Respondent] continued to demonstrate very profound disorganization of thought and behavior responding to hallucinations or internal stimuli"; that it was "very difficult to elucidate a narrative from [Respondent]"; and that Respondent was "reporting that thoughts were being inserted into his head and occasionally controlling him, as well as containing derogatory content that was quite disturbing to him." The trial court interjected: "I'm sorry. Say -- I didn't quite get the last thing you said. You said some kind of behavior and then you said disturbing?" Dr. Schiff clarified that Respondent heard voices in his head and that some of the content was derogatory and disturbing to Respondent. Dr. Schiff testified Respondent was compliant with treatment while at Duke but that "[Respondent] has stated he does not feel that he really needs the medication, nor does he have a long-standing issue." Dr. Schiff continued: "Although he is accepting of help and has improved," Dr. Schiff was "still concerned that, if he were to be discharged, that there would be an immediate decompensation, given his . . . hallucinations which are disturbing and to him and, in the past, have led him to have aggressive behaviors in the community."

¶ 9 After questioning by the trial court, Respondent's counsel questioned Dr. Schiff. When Respondent's counsel asserted Dr. Schiff was not the doctor who completed Respondent's first examination, Dr. Schiff responded that he was not but that he was present for the second examination and was Respondent's attending physician since the second examination. Respondent's counsel asked Dr. Schiff if Respondent had an "ACT team" that was able to assist Respondent when he was not in the hospital. Dr. Schiff replied: "That's right . . . but they felt that . . . they could no longer support him in the community based on his level of disorganization and decompensation[.]" Dr. Schiff testified that he was not aware of any prior suicide attempts by Respondent, but that Respondent had exhibited "aggressive behavior" and been subject to assaults in the past. Dr. Schiff further testified Respondent had improved and was taking his medication while at Duke, but Dr. Schiff was concerned Respondent would decompensate if discharged especially because Respondent's ACT team—who would normally encourage Respondent to take his medication—felt it could not support Respondent in the community.

¶ 10 After Dr. Schiff testified, Respondent took the stand. Counsel asked Respondent with whom Respondent lived. Respondent replied: "My brother and my friend. My -- he's my brother first, but he's my friend second. . . . And his best friend, which is my roommate, which is my brother." Respondent also testified that he had previously "gotten into it" with a man named William on the street when William became angry. Respondent stated he thought William had an anger management problem. However, Respondent said he had never thought of harming William. Respondent stated he had been taking his medication and would continue to do so if discharged, but that he could not "tell the difference" when asked if he thought the medication was helping him. Respondent also stated that his ACT team and Easterseals could provide him assistance if discharged, but that his ACT team wanted him to "take care of [his] teeth more," and Respondent "just disregarded it." Respondent also testified he did not eat "three meals a day," but that "they have started to give me at least breakfast" and he was "gonna have to eat more." When counsel asked Respondent if he would like to be released from Duke, he replied: "I see her ankles and Amy -- the Amy at Williams Ward -- Williams Ward remind me of my mom's ankles, and she takes her water pills in the morning. I remind her." Counsel then asked if Respondent was okay.

¶ 11 After questioning by Respondent's counsel, the trial court asked Respondent: "Your ACT team, tell me about what they do to help you." Respondent testified he would see his ACT team on Monday, Wednesday, and Thursday and that Fridays were for group substance abuse meetings. Respondent stated he went to group sessions "once in a blue" and that he received a bus ticket every time he went. He also stated Easterseals gave him weekly checks that he used to buy groceries. The trial court asked: "So right before they took you to the hospital, what was going on?" Respondent said, "I don't . . . everything was the same, you know?" When the trial court asked "[s]o you don't know why they took you there?" Respondent replied, "No, not really. I'm just there to eat and drink." The trial court asked Respondent about the hallucinations Dr. Schiff said Respondent had experienced; Respondent replied: "I see angels, white dots." The trial court asked: "You see angels?" Respondent explained he saw white dots and black dots floating in the air. The trial court asked how the angels made Respondent feel. Respondent replied he knew the white dots were angels and that the black dots might be hallucinations or "negativity."

¶ 12 The trial court asked Respondent if he felt better when he was in the hospital or when he was not. Respondent replied that he had "bad habits." The trial court asked Respondent to tell the trial court about

his bad habits. Respondent stated he smoked cigarettes and marijuana. Respondent continued:

> I pick up Black & Mild filters that's wooden. . . . I clean up cigarette butts. I have picked up a piece of glass . . . in our apartment that was right there in the corner near our trash can, but I didn't vacuum the floor over there in that area. I try.

The trial court asked: "You try?" Respondent replied: "Yes."

¶ 13 After Respondent's counsel gave closing arguments, the trial court found "by clear, cogent, and convincing evidence that the Defendant, in fact, has a mental issue of illness that is schizoaffective disorder and has a long-standing history of mental illness since his late teens." The trial court further found Respondent: suffered from hallucinations and disorganized thoughts; was "noncompliant with his medication when" not in the hospital; and was a danger to himself and others due to his active psychosis. The trial court continued: "[Respondent's] ACT team initially had him committed, as they are unable to see to his needs" and that "[Respondent] was unable to sufficiently care for his needs, that being dental and his nourishment needs." Moreover, the trial court found, "[Respondent] has, in fact become a victim of assaultive behavior and disturbing thoughts, which caused deterioration and leaves him unable to perceive dangers to himself[.]" Accordingly, the trial court ordered Respondent be committed for an additional thirty days. Respondent's counsel gave oral Notice of Appeal in open court.

¶ 14 That same day, the trial court entered its written Order. The trial court checked a box incorporating the examination reports signed by Dr. Jones and Dr. Christensen as Findings of Fact supported by clear, cogent, and convincing evidence. The trial court found by clear, cogent, and convincing evidence the following additional Findings of Fact: Respondent had long-standing mental illness dating back to his teens; Respondent suffered from hallucinations; Respondent did not take his medication when he was not hospitalized; Respondent's psychosis caused him to be a danger to himself; Respondent's ACT team was "unable to sufficiently take care" of Respondent's dental and nourishment needs; and Respondent had been the victim of assaults and disturbing thoughts "which cause deterioration and leaves [Respondent] unable to perceive dangers to himself[.]" Accordingly, the trial court concluded Respondent was mentally ill and was dangerous to himself and to others. Consequently, the trial court ordered Respondent committed for thirty days.

Issues

¶ 15 The issues on appeal are: (I) whether this Court should exercise its discretion and allow Respondent's appeal when Respondent's counsel did not file a written notice of appeal as required by our Rules of Appellate Procedure; (II) whether the trial court violated Respondent's due process right to an impartial tribunal by calling and examining a witness in order to elicit evidence, in the absence of any representative of the State; and (III) whether the trial court erred in incorporating examination reports as Findings of Fact when the reports were not formally admitted into evidence and trial, and whether, absent those reports, the trial court's underlying Findings of Fact were supported by competent evidence and, in turn, supported its ultimate Findings Respondent was dangerous to himself and to others.

Analysis

I. Jurisdiction

¶ 16 **[1]** Recognizing Respondent's trial counsel never filed a written Notice of Appeal, Respondent's appellate counsel has filed, concurrently with Respondent's brief, a Petition for Writ of Certiorari with this Court to allow review of the trial court's Order.

¶ 17 Respondents in involuntary commitment actions have a statutory right to appeal a trial court's order. N.C. Gen. Stat. § 122C-272 (2019) ("Judgment of the district court [in involuntary commitment cases] is final. Appeal may be had to the Court of Appeals by the State or by any party on the record as in civil cases."). Rule 3 of our Rules of Appellate Procedure governs such appeals. N.C. R. App. P. 3(a) (2021) ("Any party entitled to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court[.]"). Rule 3 requires parties to file written notice of appeal thirty days after the entry of such a judgment or order. N.C. R. App. P. 3(a), (c) (2021). "Rule 3 is a jurisdictional rule" and "a party's compliance with Rule 3 is necessary to establish appellate jurisdiction[.]" *Am. Mech., Inc. v. Bostic*, 245 N.C. App. 133, 143, 782 S.E.2d 344, 350 (2016). "[A] jurisdictional rule violation . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 142, 782 S.E.2d at 350 (citation and quotation marks omitted). Thus, in the absence of a properly filed notice of appeal, this Court has no jurisdiction to consider Respondent's appeal as of right.

¶ 18 However, Rule 21 of our Rules of Appellate Procedure provides: "[t]he 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) (2021); *see also* N.C. Gen. Stat. § 7A-32(c) (2019). Respondent concedes his counsel did not file written notice of appeal, but, because counsel objected to the proceedings and gave oral Notice of Appeal in open court, asks this Court to exercise its discretion and issue a writ of certiorari to review his case. Because Respondent's counsel objected to the proceedings and demonstrated at least the intent to appeal the trial court's order, and because involuntary commitment is a significant incursion to one's liberty interests, *Humphrey v. Cady*, 405 U.S. 504, 509, 31 L. Ed. 2d 394 (1972), we grant Respondent's Petition and review the trial court's Order.

¶ 19 Additionally, although neither party argues this case is moot because the period of commitment has expired, discharge from involuntary commitment does not render an appeal moot. "The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot." *In re Moore*, 234 N.C. App. 37, 41, 758 S.E.2d 33, 36 (2014) (citation and quotation marks omitted). Accordingly, Respondent's appeal is properly before this Court.

II. Impartial Tribunal

¶ 20 **[2]** Respondent argues the trial court violated his due process right to an impartial tribunal because the State was not represented by counsel and the trial court elicited evidence in favor of committing Respondent. The due process right to an impartial tribunal raises questions of constitutional law that we review de novo. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 66, 468 S.E.2d 557, 562 (1996). "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. Rule 10(a)(1) (2021). Although Respondent's counsel did not expressly state an objection on constitutional grounds, it is apparent from the context Respondent objected on due process grounds as counsel objected to the nature of the proceedings where there was no counsel for the State present and where the trial court was the only entity to elicit evidence on direct examination.

¶ 21 N.C. Gen. Stat. § 122C-268 provides for how both a respondent and the State are to be represented in an involuntary commitment proceeding. N.C. Gen. Stat. § 122C-268(d) mandates a "respondent shall be represented by counsel of his choice; or if he is indigent within the meaning

of G.S. 7A-450 or refuses to retain counsel if financially able to do so, he shall be represented by counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 122C-268(d) (2019). As to representation of the State's interests, the statute has separate provisions depending on whether the proceeding arises out of a state facility or not:

> The attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill, shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held for respondents admitted pursuant to this Part or G.S. 15A-1321 at the facility to which he is assigned.
>
> In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

N.C. Gen. Stat. § 122C-268(b) (2019).[1]

¶ 22 The State takes the position that the latter provision means the Attorney General has complete discretion whether or not to appear in involuntary commitment proceedings at non-state-owned facilities and, thus, involuntary commitment proceedings at private hospitals may proceed without the State's interests being represented, as occurred in this case. We express no opinion on the correctness of the State's statutory interpretation or as to the soundness of such practice. However, our Court has previously rejected arguments respondent's due process rights were violated in involuntary commitment proceedings where the State, as petitioner, was not represented by counsel and where:

> [t]he gravamen of [respondent's] contention is (1) that he was denied a fair hearing because, due to

1. In addition: "If the respondent's custody order indicates that he was charged with a violent crime, including a crime involving an assault with a deadly weapon, and that he was found incapable of proceeding, the clerk shall give notice of the time and place of the hearing as provided in G.S. 122C-264(d). The district attorney in the county in which the respondent was found incapable of proceeding may represent the State's interest at the hearing." N.C. Gen. Stat. § 122C-268(c) (2019).

> absence of counsel for petitioner, the court acted as petitioner's de facto counsel; and (2) that he was denied equal protection of the law because petitioners in hearings at state regional psychiatric facilities are represented by counsel, G.S. 122-58.7(b), -58.24, while petitioners in hearings held elsewhere are not.

In re Perkins, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983). There, this Court noted: "We are aware of no *per se* constitutional right to opposing counsel. Nothing in the record indicates language or conduct by the court which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to respondent." *Id.* We reached the same conclusion in a companion case filed the same day as *Perkins*, rejecting the argument "it is unconstitutional to allow the trial judge to preside at an involuntary commitment hearing and also question witnesses at the same proceeding." *In re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983). Therefore, because our Court has previously upheld involuntary commitments where the State has not appeared and where the trial court has questioned witnesses and elicited evidence, we are bound by our prior precedent to conclude the same. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 23 Moreover, "[j]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness[.]" *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 596 (1979) (citation and quotation marks omitted). However, trial courts must be careful to avoid prejudice to the parties and may not impeach a witness's credibility. *State v. Howard*, 15 N.C. App. 148, 150-51, 189 S.E.2d 515, 517 (1972) (citation omitted).[2]

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2. We note that, although involuntary commitment cases involve significant curtailment of individual liberty interests, these proceedings are not adversarial in the respect that the State seeks to convict and incarcerate a respondent for allegedly violating the criminal code. Rather, these proceedings are inquisitorial as to whether a respondent is a danger to self or to others. *Cf. Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992) ("However, there is no burden of proof on either party on the 'best interest' [of a child in child custody cases] question. Although the parties have an obligation to provide the court with any pertinent evidence relating to the 'best interest' question, the trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue. The 'best interest' question is thus more inquisitorial

¶ 24 In this case, as in *Perkins*, the Record does not evince language or conduct by the trial court that could be construed as advocacy for or against either petitioner or Respondent. Here, the trial court called Dr. Schiff to testify. The trial court's only questions of Dr. Schiff on direct examination were: "you or someone in your organization has indicated that [Respondent] has a mental illness and is a danger to himself and others, and I will leave you to tell me whether or not you can give me enough evidence on this to go forward[;]" and "I'm sorry. Say -- I didn't quite get the last thing you said. You said some kind of behavior and then you said disturbing?"

¶ 25 The trial court asked Respondent: "Your ACT team, tell me about what they do to help you[;]" "So right before they took you to the hospital, what was going on?"; "[s]o you don't know why they took you there?"; whether Respondent experienced hallucinations and saw angels; whether Respondent felt better when he was in the hospital or in the community; and "tell me about [Respondent's bad habits]." As such, the trial court only elicited evidence that would otherwise be overlooked as no counsel for the State was present. The trial court did not ask questions meant to prejudice either party or impeach any witness. Accordingly, the trial court did not violate Respondent's right to an impartial tribunal.

III. Findings of Fact

¶ 26 Respondent also argues the trial court violated his confrontation rights by incorporating examination reports signed by Dr. Jones and Dr. Christensen in its Findings of Fact when the trial court did not admit the reports into evidence and where Dr. Jones and Dr. Christensen were not present to testify at the hearing. Consequently, according to Respondent, the trial court's underlying Findings were insufficient to support its ultimate Findings Respondent was a danger to himself and to others.

A. Confrontation

¶ 27 **[3]** "Certified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f) (2019). The Record does not indicate the reports were ever formally introduced at the hearing. As such, Respondent claims he never had a chance to properly

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in nature than adversarial. (citation omitted)). As such, even though the trial court—at least initially—elicits a petitioner's evidence, and, thus, facilitates a petitioner's case at the outset, a trial court that maintains objectivity and does not prejudice either party does not advocate for a petitioner in an adversarial manner.

object to their admission or confront the reports or the doctors who signed them, and the State argues Respondent waived his confrontation rights because he failed to object during the hearing.

¶ 28 Although the trial court never formally admitted the reports into evidence and, thus, Respondent did not object to the reports' admission, the Record reflects Respondent's counsel did object to the reports as insufficient bases for Respondent's initial commitment. Moreover, Respondent's counsel objected to Dr. Schiff testifying because he was not the doctor who completed and signed the examination reports. The trial court overruled the objection stating, "if he doesn't know anything about this case, you can keep making your objection and we will go from there." Because Respondent asserted his right to confront Dr. Jones and Dr. Christensen, as the doctors who completed and signed the examination reports, Respondent did not waive his confrontation rights. *See In re J.C.D.*, 265 N.C. App. 441, 446, 828 S.E.2d 186, 190 (2019) ("Since respondent did not object to admission of the report, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report."). Therefore, the trial court erred by incorporating the reports as Findings of Fact in its Order.

¶ 29 However, even absent the reports, Dr. Schiff's testimony and the trial court's Findings were sufficient to support the trial court's Order. *See In re Benton*, 26 N.C. App. 294, 296, 215 S.E.2d 792, 793 (1975) (reversing the trial court's order where the doctor, who signed an affidavit incorporated by the trial court, was not present to testify because "[n]o evidence, except for the [improperly admitted] affidavit, was adduced to show that the respondent was imminently dangerous to herself or others."). Consequently, here, the trial court's error was harmless. *See State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) ("Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.").

B. Sufficiency of the Evidence

¶ 30 **[4]** "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, . . . or dangerous to others . . . ." N.C. Gen. Stat. § 122C-268(j) (2019). Our General Statutes define dangerous to self and others as:

> a. Dangerous to self.—Within the relevant past, the individual has done any of the following:
>
> 1. The individual has acted in such a way as to show all of the following:

> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.
>
> . . . .
>
> b. Dangerous to others.—Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11) (2019).

¶ 31 Thus, the trial court must satisfy two prongs when finding a respondent is a danger to self or others on any of the bases above: "A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's 'history of mental illness or . . . behavior prior to and leading up to the commitment hearing,' but must [also] include findings of 'a reasonable probability' of some future harm absent treat-

ment[.]" *In re J.P.S.*, 264 N.C. App. 58, 62, 823 S.E.2d 917, 921 (2019) (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)). "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." *Id.* at 63, 823 S.E.2d at 921.

¶ 32 It is the role of the trial court to determine whether the evidence of a respondent's mental illness and danger to self or others rises to the level of clear, cogent, and convincing. *In re Whatley*, 224 N.C. App. at 270-71, 736 S.E.2d at 530 (citation omitted). "Findings of mental illness and dangerousness to self are ultimate findings of fact." *In re B.S.*, 270 N.C. App. 414, 417, 840 S.E.2d 308, 310 (2020) (citing *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980)). On appeal, "[t]his Court reviews an involuntary commitment order to determine whether the ultimate findings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence." *B.S.*, 270 N.C. App. at 417, 840 S.E.2d at 310 (citing *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016)). As such, the trial court must also record the facts that support its "ultimate findings[.]" *Whatley*, 224 N.C. App. at 271, 736 S.E.2d at 530. "If a respondent does not challenge a finding of fact, however, it is presumed to be supported by competent evidence and [is] binding on appeal." *Moore*, 234 N.C. App. at 43, 758 S.E.2d at 37 (citation and quotation marks omitted).

¶ 33 Here, Respondent does not challenge the trial court's ultimate Finding he was mentally ill. Respondent challenges the trial court's ultimate Findings he was a danger to himself and to others. Because we conclude the trial court properly found Respondent was a danger to himself, we do not reach the issue of whether he was a danger to others.

¶ 34 As to whether Respondent was a danger to himself, Respondent challenges the trial court's underlying Findings Respondent could not "take care of his nourishment and dental needs" because, according to Respondent, these Findings were not supported by the testimony. However, the trial court heard testimony from Respondent that his ACT team wanted him to take better care of his teeth and that Respondent "disregarded" that advice. Respondent also told the trial court he needed to eat more, and that his ACT team was able to provide him "at least one meal" at breakfast. But, Dr. Schiff testified that Respondent's ACT team brought Respondent to Duke's attention because the team felt like it could no longer care for Respondent in the community. Therefore, there was some competent evidence as to Respondent's inability to care for his own nourishment and dental needs. It is the trial court's role, and not this Court's role, to determine whether this evidence rises to the level

of clear, cogent, and convincing. *Whatley*, 224 N.C. App. at 270-71, 736 S.E.2d at 530. Thus, these underlying Findings satisfied the first prong requiring the trial court find Respondent was unable to care for himself.

¶ 35 The trial court's Finding Respondent's ACT team was unable to "sufficiently" care for Respondent's "dental and nourishment" needs also created the nexus between Respondent's mental illness and future harm to himself. Accordingly, the trial court satisfied the requirement it find a reasonable probability of future harm absent treatment.

¶ 36 Moreover, the trial court heard testimony from Dr. Schiff that, while under Dr. Schiff's care, Respondent experienced hallucinations and stated "thoughts were being inserted to his head and occasionally control[ed] him." Dr. Schiff testified these hallucinations and disturbing thoughts had led to Respondent "wandering the streets" and being assaulted in the past and that Respondent would decompensate if discharged. Respondent confirmed he saw "angels" and "black dots" he thought were hallucinations. Dr. Schiff also testified Respondent said he did not need his medication and did not think he had a long-standing issue. "A showing of behavior that is grossly irrational, of actions that the individual is unable to control, . . . or of other evidence of severely impaired insight and judgment shall create a *prima facie inference* that the individual is unable to care for himself or herself." N.C. Gen. Stat. § 122C-3(11)(a)(1)(II) (2019) (emphasis added). Here, the trial court heard evidence of actions Respondent was unable to control and of Respondent's severely impaired insight as to his own condition. As such, the evidence supported the *prima facie* inference Respondent could not care for himself. Consequently, the trial court did not err in finding Respondent was a danger to himself.

Conclusion

¶ 37 For the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judge DILLON concurs in a separate opinion.

Judge GRIFFIN dissents in a separate opinion.

DILLON, Judge, concurring.

¶ 38 I fully concur in the majority opinion and its reasoning. I write separately to expound on two issues.

I. Due Process Concerns

¶ 39 First, as noted in the majority opinion, the calling/questioning of Dr. Schiff by the trial court, where the State's interest was not represented at the hearing, was not a *per se* constitutional violation. An involuntary commitment hearing is civil in nature, the purpose of which is to determine whether an individual is a danger to self or others such that (s)he needs to be further evaluated/treated; the matter is not criminal in nature. The State typically does not instigate the process. Rather, the process is instigated by a concerned private citizen – typically a doctor or a guardian. And while the State has the right to have its interests represented at the hearing, the State is not required to have representation.

¶ 40 The individual respondent, whose liberty interests are at issue, has constitutional rights, such as to counsel, to present evidence, to cross-examine witnesses, and to an impartial judge; however, the individual does not have the constitutional right to have *the State's interests* represented at the hearing. As noted in the majority opinion, our Court has so held in the context of involuntary commitment hearings, and we are so bound to hold. *See*, *e.g.*, *In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983).

¶ 41 It may be that the Attorney General's Office simply did not have the resources or the desire to appear. However, this decision does not divest the trial court from the ability to seek the truth concerning a petition, to determine whether a respondent is a danger to self or others.

¶ 42 Further, the respondent's constitutional rights are not violated simply because the trial court calls the person (typically the petitioner) who has appeared at the hearing and to question that witness, so long as the trial court remains impartial in its search for the truth. Indeed, our Rules of Evidence allow for the trial court to call witnesses and question them. N.C. Gen. Stat. § 8C-1, Rule 614(b) (2020). Our Supreme Court has described this principle, that "the trial judge may interrogate a witness for the purpose of developing a relevant fact . . . in order to ensure justice and aid [the fact-finder] in their search for a verdict that speaks the truth." *State v. Pearce*, 296 N.C. 281, 285, 250 S.E.2d 640, 644 (1979). That Court has further held that it is not a *per se* constitutional violation for the trial court to exercise its right to call or question witnesses. *State v. Quick*, 329 N.C. 1, 21-25, 405 S.E.2d 179, 192-93 (1991). And our Court has held that it is not *per se* prejudicial for a judge to question a witness, even where the answer provides the *sole proof* of an element which needs to be proved. *See State v. Lowe*, 60 N.C. App. 549, 552, 299 S.E.2d 466, 468 (1983); *see also State v. Stanfield*, 19 N.C. App. 622, 626, 199 S.E.2d 741, 744 (1973).

¶ 43 Other state courts held similarly. For instance, the Indiana Court of Appeals held that there was no violation of due process when the presiding judge called and questioned witnesses during an involuntary commitment hearing where the State was unrepresented. *In re Commitment of A.W.D.*, 861 N.E.2d 1260, 1264 (Ind. App. 2007).

¶ 44 A Florida appellate court has held that the calling and questioning of the witness by the judge due to the absence of any attorney representing the State's interest was harmless and that the respondent's constitutional rights were not violated based on the procedure. *Jordan v. State*, 597 So.2d 352, 353 (Fla. App. 1992). However, that same year, that same court – though recognizing *Jordan* as good law – held that the due process rights of another respondent were violated when the trial judge called and questioned the petitioning doctor. *Jones v. State*, 611 So.2d 577, 580-81 (Fla. App. 1992). The *Jones* court so held, though, *not* because the State was not represented at the hearing. Rather, the court so held because the treating doctor did not provide testimony sufficient to support the trial court's subsequent order for involuntary placement. *Id.* at 580. Perhaps the doctor would have provided sufficient testimony in that case had the State's attorney been present to ask more probing questions. But a trial court is more limited, from a due process perspective, in its questioning, as the judge may not appear to be advocating to reach a particular result.

II. Evidentiary Concerns

¶ 45 Second, I appreciate the dissent's concern regarding the trial court's incorporation of the reports of doctors who had examined Respondent in the past but who did not testify. However, all the evidence which the trial court relied on to make its ultimate findings was supported by the testimony of either Dr. Schiff, whom Respondent's counsel was allowed to cross-examine, or of Respondent himself. And, as noted by the majority, the trial court stated at the outset that it was concerned that any evidence supporting a commitment order needed to come from Dr. Schiff based on what he knew and not from the opinions of doctors who had drafted the reports based on their prior examinations. Dr. Schiff had conducted the most recent evaluation of Respondent and was the current doctor caring for him.

GRIFFIN, Judge, dissenting.

¶ 46 In this case, an individual was deprived of his liberty by an officer of the court who, after expressing some reluctance, offered and admitted

evidence against that individual, called an adverse witness to testify on his adversary's behalf, and examined that witness to elicit the State's evidence. I therefore cannot conclude that Respondent received a full and fair hearing before a neutral officer of the court, as is his right under Article I, Section 19, of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution. Additionally, the majority holds that, although the trial court erred by incorporating into its findings of fact examination reports written by physicians who did not testify at the hearing, the trial court's error was harmless. I would hold that this assignment of error was not preserved for appellate review, as Respondent was deprived of the opportunity to object to the reports' admission, making preservation of this argument for appellate review impossible under N.C. R. App. P. 10(a)(1).

I. Analysis

¶ 47 Respondent argues that he was deprived of his right to an impartial tribunal because, in the absence of representation for the State, the trial judge impermissibly "present[ed] the State's evidence in support of [the State's] claim" and called and questioned the State's witness on its behalf. I agree.

¶ 48 The trial court violated Respondent's right to due process by (1) offering and admitting examination reports into evidence without the knowledge of Respondent or his counsel; (2) depriving Respondent of his opportunity to object to the reports it offered and admitted; and (3) calling and examining the State's witness on the State's behalf. Each of these errors are discussed below in turn.

A. Offering and Admitting the Examination Reports

¶ 49 "A judge's impartiality . . . implicates both federal and state constitutional due process principles." *State v. Oakes*, 209 N.C. App. 18, 29, 703 S.E.2d 476, 484 (2011) (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). The Fourteenth Amendment of the United States Constitution provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Law of the Land Clause contained in Article I, Section 19, of the North Carolina Constitution "guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before an impartial tribunal, where he may contest the claim set up against him, and . . . meet it on the law and the facts and show if he can that it is unfounded." *In re Edwards' Estate*, 234 N.C. 202, 204, 66 S.E.2d 675, 677 (1951) (citations omitted); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("The term 'law of the land' as used in Article I, Section 19, of

the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." (citation omitted)).

¶ 50 In cases where an individual's "claim or defense turns upon a factual adjudication," as here, "the constitutional right of the litigant to an adequate and fair hearing *requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it.*" *In re Gupton*, 238 N.C. 303, 304-05, 77 S.E.2d 716, 717-18 (1953) (emphasis added) (citations omitted); *see also State v. Gordon*, 225 N.C. 241, 246, 34 S.E.2d 414, 416 (1945) (" 'The basic elements' of a fair and full hearing on the facts 'include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence[.]' " (quoting *Carter v. Kubler*, 320 U.S. 243, 247 (1943))); *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953) ("In a judicial proceeding the determinative facts upon which the rights of the parties must be made to rest must be found from . . . evidence offered in open court . . . . Recourse may not be had to records, files, or data not thus presented to the court for consideration."). Our Supreme Court has previously held that "manifestly there is no hearing in any real sense when the litigant does not know what evidence is received and considered by the court." *Edwards' Estate*, 234 N.C. at 204, 66 S.E.2d at 677.

¶ 51 In this case, the trial court considered as evidence examination reports written by two physicians who did not testify at the hearing. Critically, the trial court never offered the reports into evidence in open court, nor did it make any ruling on the reports' admissibility as evidence. Respondent was thus not "apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it[,]" in accordance with his constitutional right to a full and fair hearing on the facts. *Gupton*, 238 N.C. at 304-05, 77 S.E.2d at 717-18. Instead, the trial court unilaterally offered the reports as evidence in the State's stead, admitted them as evidence, and proceeded to incorporate the evidence into its findings of fact. All of this occurred without the knowledge of Respondent or his counsel. Such a practice cannot comport with the bedrock procedural safeguards demanded by our State and federal constitutions. It is a basic guarantee of due process that every litigant be informed of the evidence considered by the court. *In re Gibbons*, 245 N.C. 24, 29, 95 S.E.2d 85, 88 (1956) ("The basic and fundamental law of the land requires that parties litigant be given an opportunity to be present in court when evidence is offered in order that they may know what evidence has been offered[.]").

B. Opportunity to Object

¶ 52 Respondent was also deprived of an opportunity to object to the admission of the reports as required to preserve the issue of their admissibility for appellate review.

¶ 53 N.C. Gen. Stat. § 122C-268(f) provides that "[c]ertified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f) (2019). It follows that an examination report authored by a physician who does not appear to testify at trial is normally inadmissible as evidence. *In re Hogan*, 32 N.C. App. 429, 432-33, 232 S.E.2d 492, 494 (1977). However, this Court has held that a respondent must "object to admission of the report" or "assert her right to have [the physician who authored the report] appear to testify" at trial in order to preserve the issue of the report's admissibility for appellate review under N.C. R. App. P. 10(a)(1). *In re J.C.D.*, 265 N.C. App. 441, 446, 828 S.E.2d 186, 190 (2019).

¶ 54 As noted by the majority, "the trial court never formally admitted the reports into evidence and, thus, Respondent did not object to the reports' admission." Nonetheless, the majority holds that the issue of the reports' admissibility as evidence was adequately preserved by Respondent, reasoning that Respondent asserted his right to confront the two physicians who authored the reports:

> Respondent's counsel objected to Dr. Schiff testifying because he was not the doctor who completed and signed the examination reports. The trial court overruled the objection stating, "if he doesn't know anything about this case, you can keep making your objection and we will go from there." Because Respondent asserted his right to confront Dr. Jones and Dr. Christensen, as the doctors who completed and signed the examination reports, Respondent did not waive his confrontation rights. *See In re J.C.D.*, 265 N.C. App. 441, 446, 828 S.E.2d 186, 190 (2019) ("Since respondent did not object to admission of the report, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report.").

¶ 55 The majority does not explain how Respondent managed to assert his right to confront Dr. Jones and Dr. Christensen by lodging an

objection to the admissibility of Dr. Schiff's testimony. Considering the context in which the objection was made, along with the trial court's ruling in response, Respondent's objection was clearly based on the grounds that Dr. Schiff lacked the personal knowledge necessary to provide admissible testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (2019) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."). The trial court made it clear that it understood this to be the grounds for Respondent's objection when it ruled on the objection, stating "if [Dr. Schiff] doesn't know anything about this case, you can keep making your objection and we will go from there." This ruling can hardly be interpreted as a ruling made in response to a party asserting his right to confront two witnesses who were not present at the hearing.

¶ 56 The majority also notes that "the Record reflects Respondent's counsel did object to the reports as insufficient bases for Respondent's initial commitment." This specific objection was directed at whether the reports were sufficient "to establish reasonable grounds for the issuance of [the original] custody order" by the magistrate. *See In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978). Given that this objection was made on specific grounds wholly unrelated to the admissibility of the reports as evidence at the district court hearing or Respondent's right to confrontation, it cannot extend to preserve the issue at bar for appellate review. *See*, *e.g.*, *Powell v. Omli*, 110 N.C. App. 336, 350, 429 S.E.2d 774, 780 (1993) ("A specific objection that is overruled is effective only to the extent of the grounds specified." (citation omitted)).

¶ 57 Respondent was deprived of his opportunity to object to the admissibility of the reports as evidence. I would therefore hold that his argument regarding the reports' admissibility is not preserved for appellate review under N.C. R. App. P. 10(a)(1). As discussed above, however, the trial court deprived Respondent of his constitutional right to an impartial tribunal by offering the reports into evidence, admitting them as evidence, and incorporating them into its findings of fact. The trial court also violated Respondent's right to due process by depriving him of his opportunity to object to the admissibility of the reports, and thus depriving him of the opportunity to have the question of the reports' admissibility reviewed on appeal.

C. Calling and Examining the State's Witness

¶ 58 The trial court impermissibly assumed the role of Respondent's adversary by calling and examining the State's witness on the State's

behalf. "A commitment order is essentially a judgment by which a person is deprived of his liberty, and as a result, he is entitled to the safeguard of a determination by a neutral officer of the court . . . just as he would be if he were to be deprived of liberty in a criminal context." *Reed*, 39 N.C. App. at 229, 249 S.E.2d at 866 (citation omitted). This Court has previously held that, because a commitment order involves a deprivation of liberty, a trial judge may not "assume[] the role of prosecuting attorney [by] examining the State's witnesses" on its behalf during "juvenile proceedings that could lead to detention." *In re Thomas*, 45 N.C. App. 525, 526, 263 S.E.2d 355, 355 (1980).

¶ 59 This Court's decision in *Thomas* involved a juvenile proceeding in which the respondent was represented by counsel but where "[t]he State was not represented by the District Attorney or other counsel." *Id.* at 526, 263 S.E.2d at 355. In the absence of counsel for the State, "the trial judge examined all three witnesses" on the State's behalf. *Id.* Although the record on appeal did "not reveal that [the trial judge] asked leading questions or was otherwise unfair during the course of the hearing[,]" this Court held that the respondent's right to due process was violated because "the judge, at least technically, assumed the role of prosecuting attorney in examining the State's witnesses." *Id.*

¶ 60 Here, the trial judge similarly called and examined the State's witness on the State's behalf. The judge did not ask any "leading questions[,]" nor was she "otherwise unfair during the course of the hearing." *Id.* Nonetheless, as this Court reasoned in *Thomas*, the "dual role of judge and prosecutor" simply cannot "measure up to the essentials of due process and fair treatment" in a proceeding where an individual's physical liberty is at stake. *Id.* at 527, 263 S.E.2d at 356.

¶ 61 Although this Court's opinion in *Thomas* involved a civil commitment order in the context of juvenile proceedings, "as in both proceedings for juveniles and mentally deficient persons [where] the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process[.]" *In re Watson*, 209 N.C. App. 507, 516, 706 S.E.2d 296, 302 (2011) (citations omitted). Moreover, "the Due Process Clause *requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous*." *U.S. v. Jones*, 463 U.S. 354, 362 (1983) (emphasis added) (citing *Addington v. Texas*, 441 U.S. 418, 426-27 (1979)); *Foucha v. Louisiana*, 504 U.S. 71, 76 (1992) ("[T]he State is required by the Due Process Clause to prove by clear and convincing evidence the . . . statutory preconditions to commitment[.]" (citation omitted)). The trial

court thus cannot relieve the State of its burden of proof by calling the State's witnesses when the State fails to prosecute its case.[3]

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1. The majority contends that involuntary commitment proceedings are not "adversarial" but are instead "inquisitorial[,]" citing the "best interest" of a child in custody cases as analogous to the nature of the inquiry in involuntary commitment proceedings. However, caselaw clearly indicates that involuntary commitment proceedings are not only adversarial in nature but are necessarily so as a matter of due process. *See Vitek v. Jones*, 445 U.S. 480, 485, 495-97 (1980) (holding that, because individuals "facing involuntary [commitment] to a mental hospital are threatened with immediate deprivation of liberty . . . and because of the inherent risk of a mistaken [commitment], the District Court properly determined that" involuntary commitment "must be accompanied by adequate notice, *an adversary hearing before an independent decisionmaker*, a written statement by the factfinder of the evidence relied on and the reasons for the decision[,]" and independent assistance provided to the respondent by the State (emphasis added)); *Foucha*, 504 U.S. at 81 (holding that Louisiana's civil commitment statute did not comply with due process because, pursuant to the statute, the respondent was not "entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); *Demore v. Kim*, 538 U.S. 510, 550 (2003) (Souter, J., concurring in part and dissenting in part) (noting that the Court in *Foucha* "held that Louisiana's civil commitment statute failed due process because the individual was denied an 'adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community'" (quoting *Foucha*, 504 U.S. at 81)).

Moreover, unlike in involuntary commitment proceedings where "the State is required by the Due Process Clause to prove by clear and convincing evidence the . . . statutory preconditions to commitment[,]" *Foucha*, 504 U.S. at 75, "there is no burden of proof on either party" when determining the "best interest" of a child in custody cases. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). This distinction is critical; "[i]n cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." *Addington*, 441 U.S. at 425 (1979). "The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests, and therefore it should be guarded carefully and rigidly enforced by the courts." *Skyland Hosiery Co. v. American Ry. Express Co.*, 184 N.C. 478, 480, 114 S.E. 823, 824 (1922).

It is clear that the State may only "confine a mentally ill person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous[.]'" *Foucha*, 504 U.S. at 80. "Here, the State has not carried that burden." *Id.* The State's burden of proof does not suddenly vanish when the State fails to prosecute its case. *Id.* Instead, the burden must be assumed by either the trial court or the respondent, or the case must be dismissed. The trial court cannot simultaneously bear the incompatible burdens of neutrality and proof without depriving litigants of the right to due process. Indeed, the burden of proof is inherently adversarial and unneutral. *See Skyland Hosiery Co.*, 184 N.C. at 480, 114 S.E. 823, 824. The trial court therefore necessarily deprived Respondent of his right to an impartial tribunal by prosecuting the State's case in the State's absence. *See Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 567, 140 S.E.2d 17, 22 (1965) ("Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge . . . . This right can neither be denied nor abridged." (citations and internal quotation marks omitted)).

¶ 62 The majority holds that "because our Court has previously upheld involuntary commitments where the State has not appeared and where the trial court has questioned witnesses and elicited evidence, we are bound by our prior precedent to conclude the same." In so holding, the majority relies exclusively on this Court's decisions in *In re Perkins*, 60 N.C. App. 592, 299 S.E.2d 675 (1983), and *In re Jackson*, 60 N.C. App. 581, 299 S.E.2d 677 (1983). Neither *Perkins* nor *Jackson* passed on the constitutional question we are being asked to decide. Both cases involved constitutional challenges to the involuntary commitment statutes. This Court disposed of both cases on the same grounds, holding that neither respondent could demonstrate standing sufficient to challenge the constitutionality of the statutes. *See Perkins*, 60 N.C. App. at 594, 299 S.E.2d at 677 (holding that the respondent failed "to show that he ha[d] been adversely affected by the involuntary commitment statutes as applied, and he therefore ha[d] no standing to challenge their constitutionality"); *Jackson*, 60 N.C. App. at 584, 299 S.E.2d at 679 ("A litigant who challenges a statute as unconstitutional must have standing. To have standing, he must be adversely affected by the statute. We find no prejudice to the respondent in the challenged portions of the statute. Thus, she has no standing to challenge their constitutionality." (citations omitted)).

¶ 63 The majority's reliance on *Perkins* and *Jackson* is misplaced for two reasons. First, "standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[.]" *Willowmere Community Assoc., Inc. v. City of Charlotte*, 370 N.C. 553, 563, 809 S.E.2d 558, 560 (2018) (citations and quotation marks omitted). By holding that the respondents in *Perkins* and *Jackson* lacked standing to challenge the involuntary commitment statutes, this Court declined to decide the underlying constitutional question in both cases. Accordingly, *Perkins* and *Jackson* cannot stand for the proposition that the trial court's conduct in this case complied with due process requirements.

¶ 64 Second, unlike in *Perkins* and *Jackson*, Respondent does not challenge the constitutionality of the involuntary commitment statutes as applied to him. He alleges that *the trial court* deprived him of his right to have his case decided by a neutral officer of the court when it presented the State's case in the State's absence. He does not argue that the involuntary commitment statutes unconstitutionally vest discretion in the State to either send a representative to pursue its interest in court or not. He argues that a trial judge's absolute duty of impartiality cannot be waived without depriving litigants of their right to due process.[4]

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2. Because Respondent does not raise a constitutional challenge to the involuntary commitment statutes on appeal, neither *Perkins* nor *Jackson* assists us in addressing the

D. Discretion of the Attorney General

¶ 65 The State argues on appeal that N.C. Gen. Stat. § 122C-268(b) "specif[ies] that the Attorney General has discretion on whether to send a member of his staff to a hearing outside a State facility for the mentally ill." Respondent does not challenge the Attorney General's statutory authority to choose not to send a representative to represent the State in involuntary commitment proceedings involving non-State facilities. Respondent alleges that the trial court deprived him of his right to an impartial tribunal by presenting the State's case in the State's absence.

¶ 66 Nonetheless, in evaluating the adequacy of procedural protections afforded to an individual in a government proceeding, the due process inquiry under the federal constitution considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). While this is not a consideration under our State Constitution, "[a] judge's impartiality . . . implicates both federal and state constitutional due process principles." *Oakes*, 209 N.C. App. at 29, 703 S.E.2d at 484 (citing *Tumey*, 273 U.S. at

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constitutional question raised by Respondent. For the same reason, the standing analyses in both cases are inapplicable in this case. Writing for our Supreme Court in Committee to *Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 2021-NCSC-6, Justice Hudson delineated the key distinctions between the standing requirements under our State and federal constitutions. Among those distinctions is that, unlike the federal constitution, "the federal injury-in-fact requirement has no place in the text or history of our [State] Constitution" and is "inconsistent with the caselaw of this Court." *Id.* ¶¶ 73-74. "[A]s a rule of prudential self-restraint," however, our caselaw requires "a plaintiff to allege 'direct injury'" before a court can "invoke the judicial power to pass on the constitutionality of a legislative or executive act." *Id.* ¶ 73.

In cases where an individual is not challenging the constitutionality of a statute, as here, our caselaw only requires that the individual allege a legal injury in order to establish standing: "When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . *the legal injury itself gives rise to standing*." *Id.* ¶ 82. (emphasis added). This is because the "remedy clause [of our State Constitution] should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed." *Id.* ¶ 81 (emphasis in original) (citing N.C. Const. Art. I, § 18, cl. 2).

Here, Respondent alleges that he has the right pursuant to our State and federal constitutions to have his case decided by an impartial tribunal and that he was deprived of this right when the trial court prosecuted the State's case in the State's absence. Because Respondent does not challenge the involuntary commitment statutes as unconstitutional, his allegation of a legal injury "itself gives rise to standing." *Id.* ¶ 82. Accordingly, none of this Court's reasoning in *Perkins* or *Jackson* has any application to the constitutional concerns raised in this case.

523). Accordingly, it is helpful to address the State's argument in order to thoroughly examine the due process concerns at issue in this case.

¶ 67 In "striking the appropriate due process balance" under the Fourteenth Amendment, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Matthews*, 424 U.S. at 347-48. N.C. Gen. Stat. § 122C-268(b) provides that

> [t]he attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill, shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held for respondents admitted pursuant to this Part or G.S. 15A-1321 at the facility to which he is assigned.
>
> In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

N.C. Gen. Stat. § 122C-268(b) (2019). According to the language of the statute, the Attorney General has the discretion to choose whether to send a representative to pursue the State's interest in cases where, as here, a respondent has been committed to a non-State facility.

¶ 68 It is clear that the statute has given the Attorney General discretion. There is no indication, however, that he is so lacking in administrative and financial resources that he is unable to send a member of his staff to represent the State's interest at involuntary commitment proceedings. In recent years, the Attorney General has devoted immense State resources to national litigation in which North Carolinians have much less at stake than their constitutionally protected liberty interests. *See*, *e.g.*, Complaint for Declaratory and Injunctive Relief, *California v. Chao*, No. 19-CV-02826 (D.D.C. Sept. 20, 2019) (joining other states' attorneys general in suit seeking injunctive relief to allow California to set independent standards for vehicle emissions); Complaint for Declaratory and Injunctive Relief, *New York v. Trump*, No. 20-CV-05770 (S.D.N.Y. July 24,

2020) (joining other states' attorneys general in suit seeking to enjoin the Trump Administration from adding a citizenship questionnaire to the 2020 U.S. Census).

¶ 69 I do not question the Attorney General's judgment in pursuing such claims. He has been elected by the citizens of North Carolina to make such decisions. Nonetheless, ensuring that North Carolina citizens' due process rights are observed prior to depriving them of their physical liberty is indisputably of paramount, steadfast importance. At a bare minimum, each of our branches of government must observe the constitutional rights guaranteed to the citizens of this State. These rights are not waivable by the Attorney General, the General Assembly, or this Court. The State's interest in declining to have an individual represent its interest in this case must yield to the constitutionally guaranteed right that each individual has in having his cause heard by an impartial tribunal prior to being deprived of his physical liberty.

¶ 70 Finally, the instant case is one of several cases pending before this Court in which the respondents argue that they were deprived of their right to an impartial tribunal. In each proceeding, the Attorney General chose not to send a member of his Office to represent the State's interest. It is apparent from the Record in this case that no one present at the proceeding, including the trial judge, was provided any explanation as to why a representative did not appear for the State. In response to Respondent's objection for lack of representation for the State, the trial judge stated,

> Because it sounds like the DA's office is refusing to do anything, and then it sounds like the Attorney General's office is refusing to do anything, and Duke and the VA are private and/or federal entities; therefore they can't.
>
> So you're suggesting we do nothing and not have these cases at all as a result of people failing to do their duty?
>
> . . . .

¶ 71 I'm not gonna do that.

¶ 72 The Attorney General places North Carolina trial judges in an impossible situation by choosing to not send a representative to prosecute the State's case at involuntary commitment proceedings. The trial judge can either abandon her constitutional duty to remain impartial by prosecuting the State's case in the State's absence, or she can dismiss the

commitment petition for lack of evidence to support commitment. The former has the effect of denying parties their constitutional right to a full and fair hearing before an impartial tribunal. The latter may prevent an individual suffering with mental illness from receiving the medical care he needs. This could be at the expense of his safety, or the safety of others. Regardless of which choice the trial judge makes, the result is a disservice to the respondents in these proceedings and to the citizens of this State.

II. Conclusion

¶ 73 The process of involuntary commitment necessarily involves "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. 418, 429 (1979). "The medical nature of the inquiry, however, does not justify dispensing with due process requirements[,]" as "[i]t is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Vitek v. Jones*, 445 U.S. 480, 495 (1980) (citation, internal quotation marks, and alteration in original omitted).

¶ 74 Each of the errors discussed above would not have occurred were Respondent afforded the transparent structure of an adversarial proceeding held in open court with all parties present. Each of the foregoing errors, standing alone, were enough to deprive Respondent of his constitutional right to an impartial tribunal.

IN RE N.Z.B.

[278 N.C. App. 445, 2021-NCCOA-345]

IN THE MATTER OF N.Z.B.

No. COA21-4

Filed 20 July 2021

Child Abuse, Dependency, and Neglect—constitutionally protected status as parent—clear and convincing evidence standard—application by trial court

The trial court's permanency planning order awarding guardianship of respondent-mother's child to the paternal grandmother was vacated and remanded where there was no indication that the trial court applied the clear and convincing evidence standard in determining that the mother had acted inconsistently with her constitutionally protected status as a parent.

Appeal by Respondent-Mother from order entered 16 October 2020 by Judge Eula E. Reid in Currituck County District Court. Heard in the Court of Appeals 12 May 2021.

The Twiford Law Firm, PC, by Courtney S. Hull, for Currituck County Department of Social Services.

Matthew D. Wunsche, for the Guardian ad Litem.

Annick I. Lenoir-Peek, for Respondent-Mother.

No brief filed on behalf of Respondent-Father.

WOOD, Judge.

¶ 1 Respondent-Mother appeals a permanency planning order granting guardianship of the minor child to his paternal grandmother. On appeal, Respondent-Mother contends the trial court erred in finding she forfeited her constitutionally protected parental status. Respondent-Mother further contends the trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). After careful review, we deny Currituck County Department of Social Services' ("Currituck County DSS") motion to supplement the record on appeal; deny Respondent-Mother's motion to strike Currituck County DSS's appellee brief and proposed supplement to the record on appeal; vacate the order of the trial court; and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 Respondent-Mother has four children. O.D. was born on June 13, 2001; C.B. was born on January 4, 2003; Noah[1] was born on May 12, 2005; and A.B., whose birthdate is not included in the record on appeal.[2]

¶ 3 In 2002, the Pasquotank County, North Carolina, Department of Social Services ("Pasquotank County DSS") conducted a child protective services investigation, "which yielded a substantiation of neglect, improper care, and injurious environment in regard to [Respondent-Mother's] oldest child, [O.D.]" Thereafter, O.D. resided with her maternal grandparents. In 2004, the Dare County, North Carolina, Department of Social Services ("Dare County DSS") accepted a report alleging Respondent-Mother neglected C.B. The report alleged Respondent-Mother left C.B. "in the care of a man who had been beaten with a metal pipe, [C.B.] witnessed the assault, was covered in the blood of this man, and left alone without a caregiver." Subsequently, custody of O.D. and C.B. was awarded to their maternal grandparents on November 12, 2004.

¶ 4 On May 12, 2005, Respondent-Mother gave birth to Noah. In October 2005, Currituck County DSS "substantiated medical neglect regarding [Noah] for missing five medical appointments. The case was transferred to the Pasquotank County Department of Social Services and closed on February 9, 2006."

¶ 5 On July 19, 2006, Dare County DSS filed a petition to terminate Respondent-Mother's rights with respect to O.D. and C.B. On November 29, 2006, Currituck County DSS "substantiated a finding of neglect regarding [Noah]. [Respondent-Mother] was holding [Noah], who was an infant at the time, during a physical altercation with another individual." On September 21, 2006, the Dare County District Court terminated Respondent-Mother's parental rights with respect to O.D. and C.B.

¶ 6 While the juvenile proceeding concerning O.D. and C.B. was ongoing, Respondent-Mother moved several times. Respondent-Mother moved from Dare County to Currituck County, before relocating to James City County, Virginia. On May 4, 2007, the James City County Division of Social Services ("James City County DSS") filed an "[e]mergency [r]emoval [o]rder after a CPS report was received from Avalon

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1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

2. O.D., C.B., and A.B. are not subject to this appeal. O.D. and C.B. have reached the age of majority, and A.B. remains in Respondent-Mother's care.

shelter staff alleging that [Respondent-Mother] had left [Noah] unsupervised on a number of occasions." Thereafter, James City County DSS was granted custody of Noah. Ultimately, Mr. and Mrs. Z, relatives of Respondent-Mother, were granted custody of Noah in November 2008. Noah resided with Mr. and Mrs. Z in Point Harbor, North Carolina. Respondent-Mother continued to reside in Williamsburg, Virginia. In October 2019, Mrs. Z died. On October 19, 2019, Respondent-Mother petitioned the James City County Juvenile and Domestic Relations District Court (the "James City Court") for custody of Noah.

¶ 7 In December 2019, approximately two months after Mrs. Z's death, Mr. Z contacted Currituck County DSS. Mr. Z disclosed he could no longer provide for Noah due to Noah's behavior after Mrs. Z's death and Noah's contact with Respondent-Mother. Mr. Z expressed his concern for Noah's well-being and whether Respondent-Mother would be able to provide adequate care for him.

¶ 8 Currituck County DSS filed a juvenile petition alleging Noah was a dependent juvenile on December 20, 2019. That same day, Noah was placed with his paternal grandmother ("Mrs. S"). On December 30, 2019, a non-secure custody hearing was held. Respondent-Mother was present and requested custody of Noah.

¶ 9 The Currituck County District Court (the "Currituck Court") reviewed the file and exercised temporary emergency jurisdiction. The trial court continued custody with DSS, allowed Noah to remain with Mrs. S, and granted Respondent-Mother supervised visitation of two-hours per week. Currituck County DSS filed a "Motion to Determine Subject Matter Jurisdiction" on January 3, 2020. The Currituck Court entered an "Order on Jurisdiction" on January 7, 2020, finding Virginia had relinquished jurisdiction under the UCCJEA.[3]

¶ 10 On March 6, 2020, the adjudication and disposition hearing occurred. On March 16, 2020, the James City Court dismissed Respondent-Mother's petitions for custody because the petitions were "improperly filed. The proper filing would have been a [motion to amend]." The Currituck Court entered an order adjudicating Noah dependent on June 3, 2020.

¶ 11 In the adjudication and disposition order, the trial court made several findings about Respondent-Mother's history with North Carolina's child protective services and Virginia's child protective services. At

3. Both North Carolina and Virginia have adopted the UCCJEA. *See* N.C. Gen. Stat. § 50A-101 *et seq.* and Va. Code Ann. § 20-146.1 *et seq.*

disposition, Respondent-Mother was ordered to complete her "Out of Home Services Plan," which included completion of an online parenting course; cooperation with James City County DSS on the Interstate Compact on the Placement of Children ("ICPC") home study request; visitation; investigation of in-person parent resources; and payment of child support.

¶ 12 In March 2020, shortly after the adjudication and disposition hearing, COVID-19 restrictions were implemented. An in-person parenting class was cancelled, and Respondent-Mother's in-person visitations were suspended. Respondent-Mother began her ICPC home study, but James City County DSS could not approve Respondent-Mother's home as a placement for Noah because she had not completed the necessary paperwork for a home study.

¶ 13 On August 11, 2020, a tree fell on Respondent-Mother's residence during a storm related to Hurricane Isaias, injuring Respondent-Mother's fiancé. Respondent-Mother's home was destroyed and later condemned. Respondent-Mother, her fiancé, and Respondent-Mother's youngest child, A.B., moved into temporary housing paid for by the American Red Cross. The James City County Housing Authority was aiding Respondent-Mother in finding alternative housing.

¶ 14 On August 18, 2020, Respondent-Mother attempted to complete the outstanding paperwork for James City County DSS to perform a home study. Respondent-Mother and her fiancé "were asked to bring their driver's license, social security card, birth certificate[,] and rabies vaccination for their pets. They only provided their driver's license and reported that they were not able to bring copies of the other documents[.]" Due to the outstanding paperwork and Respondent-Mother's housing situation, James City County DSS was unable to complete the ICPC home study.

¶ 15 A permanency planning hearing occurred on September 4, 2020. The Currituck Court found

> 91. The Court finds that [Respondent-Mother] has acted inconsistently with her constitutionally protected right to parent [Noah] in that: the child was previously adjudicated in Virginia to be a neglected child due to her actions; she failed to make sufficient progress in her case plan; and on this date, the Court found, pursuant to North Carolina General Statute §7B-906.1(d)(3), that efforts for reunification with [Respondent-Mother] would clearly be futile or would be inconsistent with the child's health and safety, and

> need for a safe, permanent home within a reasonable period of time [] and that efforts for reunification as defined in North Carolina General Statute §7B-101 shall no longer be required.

The trial court concluded Respondent-Mother was "not a fit or proper person for the care, custody and control of [Noah]," and had "acted in ways that [were] inconsistent with her constitutionally protected status as a parent." The court awarded guardianship to Noah's paternal grandmother, Mrs. S. Respondent-Mother filed her notice of appeal on October 16, 2020.[4]

II. Discussion

¶ 16 Respondent-Mother contends the trial court erred in finding she acted inconsistently with her constitutionally protected parental status because the finding was not supported by clear, cogent, and convincing evidence. Respondent-Mother further argues the trial court erred in finding she had acted inconsistently with her constitutionally protected status because there was evidence to the contrary "and [] some of the trial court's findings [] would indicate the opposite conclusion." Respondent-Mother also contests the district court's subject matter jurisdiction to adjudicate Noah as a dependent juvenile when the James City Court did not formally relinquish jurisdiction.

¶ 17 After careful review, we vacate the order of the trial court due to the failure to apply the correct evidentiary standard in finding Respondent-Mother acted inconsistently with her constitutionally protected parental status. As we vacate the order of the trial court, we do not reach the merits of Respondent-Mother's other arguments on appeal.

¶ 18 We review the determination of whether parental conduct is inconsistent with the parent's constitutionally protected status *de novo*. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018). "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

4. Currituck County DSS moved to amend and supplement the record on appeal on March 8, 2021. In our discretion, we deny Currituck County DSS's motion.

their right to custody of their child by unfitness or acting inconsistently with their constitutionally protected status. *Id.*

¶ 19 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 J.L.*, 264 N.C. App. 408, 419, 826 S.E. 258, 266 (2019). "[T]he trial court must be clear that it is applying the 'clear, cogent, and convincing' standard" when it determines a parent has acted inconsistently with their paramount right to parent their children. *Moriggia v. Castelo*, 256 N.C. App. 34, 43, 805 S.E.2d 378, 383 (2017).

¶ 20 " '[T]here is no bright line beyond which a parent's conduct' amounts to action inconsistent with the parent's constitutionally protected paramount status." *In re A.C.*, 247 N.C. App. 528, 536, 786 S.E.2d 728, 735 (2016) (quoting *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503). Determining whether a parent has forfeited their constitutionally protected status is a fact specific inquiry. *Id.* (citations omitted). In making such a determination, the trial "court must consider 'both the legal parent's conduct and his or her intentions' *vis-à-vis* the child." *Id.* (quoting *Estroff v. Chatterjee*, 190 N.C. App. 61, 70, 660 S.E.2d 73, 78 (2008)).

¶ 21 Here, the trial court found

> 91. [T]hat [Respondent-Mother] has acted inconsistently with her constitutionally protected right to parent [Noah] in that: the child was previously adjudicated in Virginia to be a neglected child due to her actions; she failed to make sufficient progress in her case plan; and on this date, the Court found, pursuant to North Carolina General Statute §7B-906.1(d)(3), that efforts for reunification with [Respondent-Mother] would clearly be futile or would be inconsistent with the child's health and safety, and need for a safe, permanent home within a reasonable period of time [] and that efforts for reunification as defined in North Carolina General Statute §7B-101 shall no longer be required.

However, the trial court's written order does not state that it applied the clear and convincing evidence standard to its finding that

Respondent-Mother acted inconsistently with her constitutionally protected parental status; nor did the trial court state what standard it used in open court. Where the trial court fails to state the standard of proof applied in its decision, the case must be remanded. *In re J.L.*, 264 N.C. App. at 419-20, 826 S.E.2d at 266-67. Accordingly, we vacate and remand for the application of the clear and convincing standard.

¶ 22 Respondent-Mother further contends the Currituck Court lacked subject matter jurisdiction to enter an adjudication, disposition, and review and permanency planning order when it failed to follow the procedure set out in the UCCJEA for obtaining jurisdiction. As we vacate the trial court's order, we need not address Respondent-Mother's other arguments on appeal. On remand, however, the trial court should make findings addressing its exercise of jurisdiction under the UCCJEA.

III. Conclusion

¶ 23 The trial court's order fails to indicate that it applied the clear and convincing evidence standard in determining Respondent-Mother acted inconsistently with her constitutionally protected status as a parent. Therefore, we vacate the order of the trial court and remand this matter for the application of the clear and convincing standard and for appropriate findings regarding the Currituck Court's jurisdiction under the UCCJEA.

VACATED AND REMANDED.

Judges TYSON and HAMPSON concur.

IN RE Q.J.

[278 N.C. App. 452, 2021-NCCOA-346]

IN THE MATTER OF Q.J.

No. COA20-551

Filed 20 July 2021

1. Appeal and Error—involuntary commitment—petition for certiorari—no written notice of appeal—mootness

The Court of Appeals allowed respondent's petition for a writ of certiorari to review an involuntary commitment order where, although respondent failed to file a written notice of appeal pursuant to Appellate Rule 3, his counsel demonstrated at least the intent to appeal by objecting to the involuntary commitment proceedings at the outset and by giving oral notice of appeal in court. Furthermore, involuntary commitment was a significant incursion to respondent's liberty interests, and although respondent's commitment period had already expired, his appeal was not moot because it was possible that his commitment in this case could form the basis for a future commitment.

2. Constitutional Law—right to an impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses

The trial court in an involuntary commitment hearing involving a private hospital did not deprive respondent of his due process right to an impartial tribunal, where counsel from the Attorney General's office did not appear at the hearing to represent the State and where the trial court questioned witnesses without acting as the State's de facto counsel, prejudicing any party, or impeaching any witness's credibility. Further, after respondent initially declined to testify, and after the court had already issued its ruling committing respondent for thirty days, the trial court permitted respondent to testify on his own behalf.

3. Mental Illness—involuntary commitment—danger to self and others—sufficiency of findings

The trial court in an involuntary commitment proceeding properly found by clear, cogent, and convincing evidence that respondent was a danger to himself, where respondent suffered from schizoaffective disorder, had been hospitalized thirty times, and had a history of suicidal ideations. Although the court did not expressly find a reasonable probability that respondent would hurt himself in the future, the court made other findings establishing a danger

of future harm, including that respondent had not yet received a necessary medication, intended to fire his Assertive Community Treatment (ACT) team, and needed hospitalization for "stabilization and safety." These findings, along with a finding that respondent was hospitalized after expressing homicidal ideations toward his mother, also supported the court's ultimate finding that respondent was a danger to others.

Judge DILLON concurring in a separate opinion.

Judge GRIFFIN dissenting.

Appeal by Respondent from an Order entered 17 January 2020 by Judge Pat Evans in Durham County District Court. Heard in the Court of Appeals 10 March 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Shultz, for respondent-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Appellant Q.J. (Respondent) appeals from an Involuntary Commitment Order entered in Durham County District Court declaring Respondent mentally ill, a danger to self and others, and ordering Respondent be committed to an inpatient facility for thirty days. The Record reflects the following:

¶ 2 On 25 December 2019, Dr. Naveen Sharma with Duke University Medical Center (Duke), signed an Affidavit and Petition for Involuntary Commitment in Durham County District Court stating Respondent was mentally ill and a danger to himself or others or "in need of treatment in order to prevent further disability or deterioration" likely to result in dangerousness. Submitted with this Affidavit was an Examination for Involuntary Commitment report conducted by Dr. Sharma. Dr. Sharma stated Respondent had a "history of schizoaffective disorder" and "multiple hospitalizations[.]" Moreover, according to Dr. Sharma, Respondent presented "to the Duke emergency department with a similar presenta-

tion to previous [emergency department visits] that led to" Respondent being hospitalized in the past.

¶ 3 The report also stated: "Per the police officers, he was having thoughts of harming his mother, and has previously threatened to slit her throat with a knife, and also had expressed suicidal thoughts." Dr. Sharma noted, "[Respondent] presents with disorganized behavior and manic speech[,] . . . is unable to adequately care for himself in the community, and has not been regularly taking his prescribed medicine. As such it is my best clinical judgment that this patient will require inpatient hospitalization for stabilization and safety."

¶ 4 On 25 December 2019, a magistrate issued a Findings and Custody Order finding Respondent was mentally ill and a danger to himself or others, and ordering Respondent be delivered to Duke's "Williams Ward."[1]

¶ 5 Respondent underwent a second evaluation, conducted by Dr. Bryan Lao, at Duke's inpatient unit the next day. Dr. Lao's report stated Respondent "has a previous history of schizo-affective disorder, bipolar type . . . has been hospitalized over 30 times in the past due to the medication non-compliance . . . has a history of threatening his family[,] . . . and thoughts of hurting/killing his mother." The report also alleged Respondent "has had numerous suicide attempts in the past including . . . attempting to cut his own arm off."

¶ 6 On 17 January 2020, after granting two continuances, the trial court heard Respondent's case pursuant to N.C. Gen. Stat. § 122C-268. At the outset, Respondent's counsel objected to the proceedings because there was no representative for the State present. Defense counsel noted the district attorney's office believed it was not required to send a representative as did the Attorney General's office. The trial court overruled Respondent's objection and the hearing continued.

¶ 7 The trial court called Dr. Kristen Shirey as the only witness to testify for Duke. Respondent's counsel objected to the trial court allowing Dr. Shirey's testimony because Dr. Shirey did not complete either of Respondent's evaluations for commitment; the trial court overruled Respondent's objection.

¶ 8 The trial court asked Dr. Shirey: "All right, ma'am. Tell me what it is you want me to know about this matter." Dr. Shirey testified Respondent was brought to Duke after expressing homicidal ideations toward his

1. The Affidavit, examination report, and Findings and Custody Order were all filed on 27 December 2019.

mother. Respondent had an extensive history of schizoaffective disorder and past hospitalizations. Dr. Shirey testified despite Respondent "responding well" to his medication, he "has significantly limited insight into the nature of his illness or the need for ongoing medication." In Dr. Shirey's opinion, if Respondent were released, his risk of decompensating was high, possibly resulting in suicidal or homicidal ideations or actions. Dr. Shirey also testified Respondent's "assertive community treatment" team recommended Respondent "have a longer-term hospitalization in order to achieve more stabilization . . . with [a] long-acting injectable medication." The trial court asked if Dr. Shirey had "[a]nything else" to add. Dr. Shirey did not.

¶ 9 Upon cross-examination, Respondent's counsel confirmed Dr. Shirey was not "the doctor that completed the first evaluation[.]" Dr. Shirey testified despite having histories of threatening others and of suicide attempts, Respondent had not made any such threats or suicidal ideations during this visit to Duke. When asked whether Respondent had harmed himself after being released from his earlier hospitalizations, Dr. Shirey stated: "He has harmed himself a few times, but not others." The trial court asked: "Do you wish to explain your answer?" Dr. Shirey explained Respondent had a history of suicide attempts, including trying to cut off his own arm. The trial court asked Dr. Shirey: "I'm sorry, what was the last thing you said?" Dr. Shirey clarified: "Attempting to cut off his own arm."

¶ 10 Following cross-examination by Respondent's counsel, the trial court further inquired:

> Q. Doctor, is it your testimony that the Defendant is or is not a danger to himself now?
>
> A. He is a danger to himself now.
>
> Q. Is it your testimony that the Defendant is or is not a danger to others at this present time?
>
> A. He is a danger to others.
>
> Q. And how long are you asking to commit him?
>
> A. Thirty days.

¶ 11 Respondent's counsel called Respondent to testify. After some discussion between Respondent and the bailiff, where Respondent expressed reservations about testifying claiming to do so would be "sacrilegious," Respondent did not take the witness stand. Respondent's counsel gave closing remarks in which counsel asked the trial court to

release Respondent because, although the trial court heard evidence that Respondent was a danger to himself and others in the past, Respondent had made no suicidal ideations while at Duke and none of his previous threats to others had "come to fruition."

¶ 12 After Respondent's counsel gave her closing remarks, the trial court found Respondent was mentally ill, was a danger to himself and others, and ordered Respondent be committed for thirty days. Respondent then asked the trial court: "Can I still take the stand? Can I try again?" The trial court allowed Respondent to take the stand. Respondent testified he did not feel he was a threat to himself, to his mother, or to others. He also testified he would call 911 if he ever needed any help and that he would continue to take his medications if released. The trial court stated its ruling stood. Respondent's counsel gave oral Notice of Appeal in open court and asked that the Appellate Defender be appointed.

¶ 13 That same day, the trial court entered a written Order. The trial court found "by clear, cogent, and convincing evidence" Respondent: "suffers from s[c]hizoaffective disorder[;]" had been hospitalized thirty times; had previously exhibited homicidal ideations towards his mother; was in need of long-acting injectable medication; intended to fire his assertive community treatment team; had a history of suicide attempts, including attempting to cut off his own arm; was initially unwilling to testify because it was "sacrilegious"; and that "his speech was fast and somewhat incoherent." The trial court's Order also seemed to incorporate, as Findings of Fact, Dr. Sharma's Examination report; however, although the trial court listed the examination Dr. Sharma completed, the trial court did not check the box expressly incorporating the report as findings of fact.[2] The trial court concluded Respondent was mentally ill and a danger to himself and others. Accordingly, the trial court ordered Respondent committed for thirty days.

Issues

¶ 14 The issues on appeal are: (I) whether this Court should exercise its discretion and allow Respondent's appeal when Respondent's counsel did not file a written notice of appeal as required by our Rules of Appellate Procedure; (II) whether the trial court violated Respondent's due process right to an impartial tribunal by calling and examining a witness in order to elicit evidence, in the absence of any representative of the State; and (III) whether the trial court's underlying Findings of Fact

2. The trial court's Order references a 7 December 2019 report. However, the only such report related to Respondent made by Dr. Sharma occurred on 25 December 2019 and was filed on 27 December 2019.

supported its ultimate Findings Respondent was dangerous to himself and to others.

Analysis

I. Jurisdiction

¶ 15 **[1]** Recognizing Respondent's trial counsel never filed a written notice of appeal, Respondent's appellate counsel has filed, concurrently with Respondent's brief, a Petition for Writ of Certiorari with this Court to allow review of the trial court's Order.

¶ 16 Respondents in involuntary commitment actions have a statutory right to appeal a trial court's order. N.C. Gen. Stat. § 122C-272 (2019) ("Judgment of the district court [in involuntary commitment cases] is final. Appeal may be had to the Court of Appeals by the State or by any party on the record as in civil cases."). Rule 3 of our Rules of Appellate Procedure governs such appeals. N.C. R. App. P. 3(a) (2021) ("Any party entitled to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court[.]"). Rule 3 requires parties to file written notice of appeal thirty days after the entry of such a judgment or order. N.C. R. App. P. 3(a), (c) (2021). "Rule 3 is a jurisdictional rule" and " a party's compliance with Rule 3 is necessary to establish appellate jurisdiction[.]" *Am. Mech., Inc. v. Bostic*, 245 N.C. App. 133, 143, 782 S.E.2d 344, 350 (2016). "[A] jurisdictional rule violation . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 142, 782 S.E.2d at 350 (citation and quotation marks omitted). Thus, in the absence of a properly filed notice of appeal, this Court has no jurisdiction to consider Respondent's appeal as of right.

¶ 17 However, Rule 21 of our Rules of Appellate Procedure provides: "[t]he 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) (2021); *see also* N.C. Gen. Stat. § 7A-32(c) (2019). Respondent concedes his counsel did not file written notice of appeal, but, because counsel objected to the proceedings and gave oral Notice of Appeal in open court, asks this Court to exercise its discretion and issue a writ of certiorari to review his case. Because Respondent's counsel objected to the proceedings and demonstrated at least the intent to appeal the trial court's order, and because involuntary commitment is a significant incursion to one's liberty

interests, *Humphrey v. Cady*, 405 U.S. 504, 509, 31 L. Ed. 2d 394 (1972), we grant Respondent's Petition and review the trial court's Order.

¶ 18 Additionally, although neither party argues this case is moot because the period of commitment has expired, discharge from involuntary commitment does not render an appeal moot. "The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot." *In re Moore*, 234 N.C. App. 37, 41, 758 S.E.2d 33, 36 (2014) (citation and quotation marks omitted). Accordingly, Respondent's appeal is properly before this Court.

II. Impartial Tribunal

¶ 19 **[2]** Respondent argues the trial court violated his due process right to an impartial tribunal because the State was not represented by counsel and the trial court elicited evidence in favor of committing Respondent. The due process right to an impartial tribunal raises questions of constitutional law that we review de novo. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 66, 468 S.E.2d 557, 562 (1996). "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. Rule 10(a)(1) (2021). Although Respondent's counsel did not expressly state an objection on constitutional grounds, it is apparent from the context Respondent objected on due process grounds as counsel objected to the nature of the proceedings where there was no counsel for the State present and where the trial court was the only entity to elicit evidence on direct examination.

¶ 20 N.C. Gen. Stat. § 122C-268 provides for how both a respondent and the State are to be represented in an involuntary commitment proceeding. N.C. Gen. Stat. § 122C-268(d) mandates a "respondent shall be represented by counsel of his choice; or if he is indigent within the meaning of G.S. 7A-450 or refuses to retain counsel if financially able to do so, he shall be represented by counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 122C-268(d) (2019). As to representation of the State's interests, the statute has separate provisions depending on whether the proceeding arises out of a state facility or not:

> The attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel

> Hill, shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held for respondents admitted pursuant to this Part or G.S. 15A-1321 at the facility to which he is assigned.
>
> In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

N.C. Gen. Stat. § 122C-268(b) (2019).[3]

¶ 21 The State takes the position that the latter provision means the Attorney General has complete discretion whether or not to appear in involuntary commitment proceedings at non-state-owned facilities and, thus, involuntary commitment proceedings at private hospitals may proceed without the State's interests being represented, as occurred in this case. We express no opinion on the correctness of the State's statutory interpretation or as to the soundness of such practice. However, our Court has previously rejected arguments respondent's due process rights were violated in involuntary commitment proceedings where the State, as petitioner, was not represented by counsel and where:

> [t]he gravamen of [respondent's] contention is (1) that he was denied a fair hearing because, due to absence of counsel for petitioner, the court acted as petitioner's de facto counsel; and (2) that he was denied equal protection of the law because petitioners in hearings at state regional psychiatric facilities are represented by counsel, G.S. 122-58.7(b), -58.24, while petitioners in hearings held elsewhere are not.

In re Perkins, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983). There, this Court noted: "We are aware of no *per se* constitutional right to

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3. In addition: "If the respondent's custody order indicates that he was charged with a violent crime, including a crime involving an assault with a deadly weapon, and that he was found incapable of proceeding, the clerk shall give notice of the time and place of the hearing as provided in G.S. 122C-264(d). The district attorney in the county in which the respondent was found incapable of proceeding may represent the State's interest at the hearing." N.C. Gen. Stat. § 122C-268(c) (2019).

opposing counsel. Nothing in the record indicates language or conduct by the court which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to respondent." *Id.* We reached the same conclusion in a companion case filed the same day as *Perkins*, rejecting the argument "it is unconstitutional to allow the trial judge to preside at an involuntary commitment hearing and also question witnesses at the same proceeding." *In re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983). Therefore, because our Court has previously upheld involuntary commitments where the State has not appeared and where the trial court has questioned witnesses and elicited evidence, we are bound by our prior precedent to conclude the same. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 22 Moreover, "[j]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness[.]" *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 596 (1979) (citation and quotation marks omitted). However, trial courts must be careful to avoid prejudice to the parties and may not impeach a witness's credibility. *State v. Howard*, 15 N.C. App. 148, 150-51, 189 S.E.2d 515, 517 (1972) (citation omitted).

¶ 23 In this case, as in *Perkins*, nothing in the Record indicates language or conduct that could be construed as advocacy for or against either petitioner or Respondent. Here, the trial court called Dr. Shirey to testify. The trial court's only questions of Dr. Shirey on direct examination were: "All right, ma'am. Tell me what it is you want me to know about this matter[;]" "Anything else?"; and "I'm sorry. What was the last thing you said?" On redirect, the trial court only asked Dr. Shirey if her testimony was that Respondent was a danger to himself and to others, and how long Duke was requesting Respondent be committed. Moreover, after Respondent initially declined to testify, and after the trial court had already issued its ruling, the trial court permitted Respondent to testify on his behalf. During Respondent's testimony, the trial court only asked, "[y]ou wanted to tell me what?" when clarifying Respondent's previous statement. The trial court merely elicited evidence that would otherwise be overlooked as no counsel for the State was present. The trial court did not ask questions meant to prejudice either party or impeach any witness and afforded Respondent the opportunity to testify on his behalf even after the close of all the evidence. Accordingly, the trial court did not violate Respondent's right to an impartial tribunal.

III. Findings of Fact

¶ 24 Respondent also argues the trial court's underlying Findings were insufficient to support its ultimate Findings Respondent was a danger to himself and to others. "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, . . . or dangerous to others . . . ." N.C. Gen. Stat. § 122C-268(j) (2019). Our General Statutes define dangerous to self and others as:

> a. Dangerous to self.—Within the relevant past, the individual has done any of the following:
>
> 1. The individual has acted in such a way as to show all of the following:
>
> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to this Chapter.
>
> 3. The individual has mutilated himself or herself or has attempted to mutilate himself or herself and that there is a reasonable probability of serious

> self-mutilation unless adequate treatment is given pursuant to this Chapter.
>
> Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.
>
> b. Dangerous to others.—Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11) (2019).

¶ 25 Thus, the trial court must satisfy two prongs when finding a respondent is a danger to self or others on any of the bases above: "A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's 'history of mental illness or . . . behavior prior to and leading up to the commitment hearing,' but must [also] include findings of 'a reasonable probability' of some future harm absent treatment[.]" *In re J.P.S.*, 264 N.C. App. 58, 62, 823 S.E.2d 917, 921 (2019) (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)). "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." *Id.* at 63, 823 S.E.2d at 921.

¶ 26 It is the role of the trial court to determine whether the evidence of a respondent's mental illness and danger to self or others rises to the level of clear, cogent, and convincing. *Whatley*, 224 N.C. App. at 270-71, 736 S.E.2d at 530 (citation omitted). "Findings of mental illness and dangerousness to self are ultimate findings of fact." *In re B.S.*, 270 N.C. App. 414, 417, 840 S.E.2d 308, 310 (2020) (citing *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980)). On appeal, "[t]his Court reviews an involuntary commitment order to determine whether the ultimate find-

ings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence." *B.S.*, 270 N.C. App. at 417, 840 S.E.2d at 310 (citing *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016)). As such, the trial court must also record the facts that support its "ultimate findings[.]" *Whatley*, 224 N.C. App. at 271, 736 S.E.2d at 530. "If a respondent does not challenge a finding of fact, however, it is presumed to be supported by competent evidence and [is] binding on appeal." *Moore*, 234 N.C. App. at 43, 758 S.E.2d at 37 (citation and quotation marks omitted).

¶ 27 Respondent does not challenge the trial court's ultimate Finding he was mentally ill. Although Respondent challenges the trial court's ultimate Findings he was a danger to himself and others, Respondent only challenges the trial court's underlying Findings Respondent was unable to care for himself in the community, was not taking his medications, and that the trial court did not indicate how recently Respondent attempted suicide. Thus, the rest of the trial court's Findings are presumed to be supported by competent evidence. *Id.*

A. Danger to Self

¶ 28 **[3]** Respondent argues there is insufficient evidence to support the Finding Respondent was a danger to himself absent the challenged underlying Findings, and that the trial court did not expressly find a reasonable probability Respondent would harm himself in the future.

¶ 29 The trial court found Respondent was a danger to himself because Respondent: suffered from schizoaffective disorder; had been hospitalized thirty times; had a history of suicidal ideations; and exhibited speech that was "fast and somewhat incoherent." The trial court, by incorporating Dr. Sharma's report,[4] received evidence police brought Respondent to Duke in this instance, in part, because of suicidal ideations. Therefore, competent evidence supports the underlying Finding Respondent had a history of suicidal ideations in the relevant past. As

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4. Although the trial court did not check the box on the pre-printed form expressly incorporating Dr. Sharma's report, the trial court entered a date and Dr. Sharma's name in the spaces provided on the form that would list a report so incorporated. Because the trial court evidenced its intent to incorporate the specific report by listing the report, we conclude the trial court inadvertently failed to check the box expressly incorporating the report as findings of fact. *Cf. Rudder v. Rudder*, 234 N.C. App. 173, 181, 759 S.E.2d 321, 327 (2014) (holding the trial court satisfied the requirement it find there was a danger of domestic violence when it checked boxes related to specific findings under the box expressly finding a danger of domestic violence, but not that box itself). Moreover, Respondent concedes Dr. Sharma's "report was incorporated by reference."

such, the trial court satisfied the first prong by finding Respondent had a history, including a recent history, of suicidal ideations.

¶ 30 Although the trial court did not expressly state Respondent had a reasonable probability of decompensating and harming himself, the trial court did find Respondent: needed a long-acting, injectable medication that Respondent had not yet received; intended to fire his "assertive management team"; and—by incorporating Dr. Sharma's report—presented in the same manner as when he had been hospitalized in the past and needed inpatient treatment for "stabilization and safety." Therefore, the trial court's Findings " 'indicate that Respondent's illness or any of [his] aforementioned symptoms will persist and endanger [him] within the near future.' " *J.P.S.*, 264 N.C. App. at 63, 823 S.E.2d at 921 (quoting *Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531). Thus, these Findings also support the trial court's ultimate Finding Respondent was a danger to self.

B. Danger to Others

¶ 31 Respondent also challenges the trial court's ultimate Finding he was a danger to others because, according to Respondent, the trial court did not find a reasonable probability of future harm. However, as described above, trial court satisfied its requirement to find a reasonable probability of future harm because the trial court found: Respondent's last hospitalization was directly related to his homicidal ideations directed toward his mother; Respondent presented to Duke, in this instance, in a similar manner as he had when previously committed; needed long-acting, injectable medicine; planned to fire his management team; and required hospitalization for "stabilization and safety." All of these Findings indicate a risk of future harm absent commitment. Thus, the trial court properly found there was a reasonable probability of future harm and that Respondent was a danger to others.

¶ 32 The trial court only needed to find Respondent was a danger to himself or to others in conjunction with finding he was mentally ill. Because the trial court's underlying Findings supported its ultimate Findings Respondent was both a danger to himself *and* to others, the trial court supported its Order committing Respondent. N.C. Gen. Stat. § 122C-268(j) (2019).

Conclusion

¶ 33 For the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judge DILLON concurs in a separate opinion.

Judge GRIFFIN dissents in a separate opinion.

DILLON, Judge, concurring.

¶ 34 I fully concur in the majority opinion and its reasoning. I write separately to expound the due process issue based on the trial court calling and questioning witnesses where the State was not present at the hearing. Specifically, I note the points I make in the "Due Process Concerns" section of my concurring opinion in the companion appeal, *In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344.

GRIFFIN, Judge, dissenting.

¶ 35 I dissent from the majority opinion for the reasons stated in my dissenting opinion in *In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344, a companion case heard by this panel on 10 March 2021.

LARRY POWELL AND ALL AMERICAN BAIL BONDING, LLC,
A North Carolina Limited Liability Company, Plaintiffs
v.
MARK WAYNE CARTRET, Defendant

No. COA20-406

Filed 20 July 2021

1. Appeal and Error—interlocutory appeal—substantial right — motion to quash subpoena—confidential insurance documents

After the trial court denied the North Carolina Department of Insurance's motion to quash plaintiffs' subpoena to produce documents and appear at a deposition in a breach of contract action, the Department's interlocutory appeal from the order denying its motion was immediately appealable where the Department argued that the subpoena required disclosure of documents that were protected by confidentiality provisions of the North Carolina Captive Insurance Act, and therefore the court's order affected a substantial right.

2. Insurance—North Carolina Captive Insurance Act—confidentiality provisions—motion to quash subpoena of documents

In a breach of contract action, where the North Carolina Department of Insurance (a non-party to the suit) filed a motion to quash plaintiffs' subpoena to produce certain documents and appear at a deposition, the trial court's order denying the motion was vacated to the extent that it violated the North Carolina Captive Insurance Act's confidentiality provision in N.C.G.S. § 58-10-430(c), which plainly states that any documents related to audits of captive insurance companies "are confidential, are not subject to subpoena, and may not be made public." However, because N.C.G.S. § 58-30-62(f) states that records relating to the Department's administrative supervision of insurers "are confidential" but does not explicitly state that such records cannot be subpoenaed, the portion of the order requiring the Department to produce those records was affirmed.

Appeal by the North Carolina Department of Insurance from order entered 4 November 2019 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, Special Deputy Attorney General M. Denise Stanford, and Assistant Attorney General Heather H. Freeman, for Appellant North Carolina Department of Insurance.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson Jr. and Susan Renton, for Plaintiffs-Appellees.

COLLINS, Judge.

¶ 1 The North Carolina Department of Insurance ("Department") appeals from an order denying its motion to quash the subpoena of Larry Powell and All American Bail Bonding, LLC, ("Plaintiffs") to produce documents and to testify at a Rule 30(b)(6) deposition. The Department contends that the trial court's order fails to comply with the plain language of N.C. Gen. Stat. §§ 58-10-430(c) and 58-30-62(f) and erroneously orders the Department to release confidential documents.

I. Background

¶ 2 Plaintiffs filed a verified complaint on 20 August 2018 against Mark Wayne Cartret ("Defendant") alleging breach of contract. Defendant

filed an answer and counterclaims, alleging damages to himself and/or his company, Agent Associates Insurance, LLC, ("AAI"). Plaintiffs issued a subpoena to the Department on 22 August 2019 to produce documents relating to Defendant and AAI, and to testify at a Rule 30(b)(6) deposition. The Department timely served upon Plaintiffs an Objection and Motion to Quash Plaintiffs' Subpoena and 30(b)(6) Deposition ("Motion"). In its Motion, the Department argued that certain documents and information sought by the subpoena were confidential and could not be released, pursuant to numerous provisions in Chapter 58 of the North Carolina General Statutes, including, in relevant part, N.C. Gen. Stat §§ 58-10-430(c) and 58-30-62(f).

¶ 3 After a hearing on the Motion, the trial court entered an Order wherein it found, in relevant part:

> 9. None of the statutory provisions cited by the [Department] in its Quash Motion under Chapter 58 of the North Carolina General Statutes provide that records can never be obtained from the [Department]. Rather, the statutory provisions cited by the [Department] specifically provide that records requested by subpoena that may fall under Chapter 58 of the North Carolina General Statutes shall be provided "upon an order of a court of competent jurisdiction."

The trial court concluded, in relevant part:

> 3. The records requested in Plaintiffs' Subpoena may be produced under Chapter 58 of the North Carolina General Statutes "upon an order of a court of competent jurisdiction," notwithstanding assertions of statutory confidentiality by the [Department] or alleged statutory requirements that the information be kept confidential.

The trial court ordered the Department to "produce full and complete records to Plaintiffs' counsel pursuant to Plaintiffs' Subpoena" within sixty days and to "submit to [Plaintiffs'] deposition pursuant to N.C. R. Civ. P. 30(b)(6)" within forty-five days of the date of production of the Department's records. The Department timely appealed "from those parts of the Order . . . that ordered the Department to disclose subpoenaed documents that are confidential under N.C. Gen. Stat. § 58-10-430(c) and N.C. Gen. Stat. § 58-30-62(f)."

II. Appellate Jurisdiction

¶ 4 **[1]** Plaintiffs moved to dismiss the Department's appeal as the Order is interlocutory. The Department concedes the Order is interlocutory but argues that the Order affects a substantial right and is thus immediately appealable.

¶ 5 Interlocutory orders are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). Generally, there is no right to immediately appeal an interlocutory order compelling discovery, and "an appeal will lie only from a final judgment." *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963) (citation omitted).

¶ 6 However, "immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations omitted); *see* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2019). A two-part test is used to determine whether an interlocutory order affects a substantial right and is therefore immediately appealable. First, "the right itself must be substantial[,]" and second, "the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted).

¶ 7 The Department contends that the trial court's order affected a substantial right because the Department was ordered to disclose documents that are confidential and not subject to disclosure, pursuant to N.C. Gen. Stat. § 58-10-430(c) and N.C. Gen. Stat. § 58-30-62(f). Indeed, if the Department is required to disclose the very documents that it alleges are protected from disclosure by the statutory confidentiality provisions, then "a right materially affecting those interests which [an entity] is entitled to have preserved and protected by law – a substantial right – is affected." *Id.* at 164-65, 522 S.E.2d at 580-81 (quotation marks and citations omitted). Moreover, the substantial right asserted by the Department will be lost if the trial court's order is not reviewed before entry of a final judgment. *See Lockwood v. McCaskill*, 261 N.C. 754, 757, 136 S.E.2d 67, 69 (1964) ("If and when Dr. Wright is required to testify concerning privileged matters at a deposition hearing, *eo instante* the statutory privilege is destroyed. This fact precludes dismissal of the appeal as fragmentary and premature.") Accordingly, the Order on appeal affects a substantial right; we deny Plaintiffs' motion to dismiss and address the merits of the Department's arguments.

III. Standard of Review

¶ 8 Generally, a ruling on a motion to quash a subpoena is left to the sound discretion of the trial court and an order denying a motion to quash is reviewed only for an abuse of discretion. *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986). However, where, as here, an appeal presents a question of statutory interpretation, this Court conducts a de novo review of the trial court's conclusions of law. *Morgan v. Steiner*, 173 N.C. App. 577, 579, 619 S.E.2d 516, 518 (2005) (citation omitted).

IV. Analysis

¶ 9 The Department argues that the trial court's Order requiring disclosure of certain documents violates statutory confidentiality requirements established by the General Assembly. Specifically, the Department contends that N.C. Gen. Stat. §§ 58-10-430(c) and 58-30-62(f) bar the disclosure of certain confidential documents.

¶ 10 "Legislative intent controls the meaning of a statute." *State v. James*, 371 N.C. 77, 87, 813 S.E.2d 195, 203 (2018) (quotation marks and citations omitted). The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, "the spirit of the act and what the act seeks to accomplish." *Id.* (quotation marks and citation omitted). As a cardinal principle of statutory interpretation, "[i]f the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993) (citation omitted). "Thus, in effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009).

A. N.C. Gen. Stat. § 58-10-430(c)

¶ 11 **[2]** The North Carolina Captive Insurance Act, contained within Article 10 of Chapter 58 of our North Carolina statutes, "establish[es] the procedures for the organization and regulation of the operations of captive insurance companies transacting insurance business within this State[.]" N.C. Gen. Stat. § 58-10-335(b) (2019). N.C. Gen. Stat. § 58-10-430 governs audits of captive insurance companies and provides, in relevant part:

> (a) Whenever the Commissioner determines it to be prudent, the Commissioner shall audit a captive insurance company's affairs to ascertain its

> financial condition, its ability to fulfill its obligations, and whether it has complied with [N.C. Gen. Stat. §§ 58-10-335 through 58-10-655]. . . .
>
> . . . .
>
> (c) *All audit reports*, *preliminary audit reports or results*, *working papers*, *recorded information*, *documents*, *and copies thereof produced by*, *obtained by*, *or disclosed to the Commissioner or any other person in the course of an audit made under this section are confidential*, *are not subject to subpoena*, *and may not be made public by the Commissioner or an employee or agent of the Commissioner.* Nothing in this subsection shall prevent the Commissioner from using such information in furtherance of the Commissioner's regulatory authority under this Chapter. The Commissioner shall have the discretion to grant access to such information to public officials having jurisdiction over the regulation of insurance in any other state or country or to law enforcement officers of this State or any other state or agency of the federal government at any time only if the officials receiving the information agree in writing to maintain the confidentiality of the information in a manner consistent with this subsection.

Id. § 58-10-430 (2019) (emphasis added).

¶ 12 Contrary to the trial court's finding, this statute's provision that records "under this section are confidential, are not subject to subpoena, and may not be made public" essentially provides that "records can never be obtained from the [Department]." Additionally, this statute does not contain a provision that "specifically provide[s] that records requested . . . shall be provided 'upon an order of a court of competent jurisdiction[,]' " nor does this statute incorporate another statute in Chapter 58 that specifically requires disclosure upon court order.[1] The trial court's finding is erroneous.

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1. Section 58-10-345, which sets forth procedures for an entity to apply to be licensed as a captive insurance company, does provide that, "[i]nformation submitted *pursuant to this section* is confidential and may be made public by the Commissioner or the Commissioner's designee only upon an order of a court of competent jurisdiction[.]" N.C. Gen. Stat. § 58-10-345(f) (2019) (emphasis added). According to the plain language of this statute, only information submitted pursuant to N.C. Gen. Stat. § 58-10-345 may be made public "upon an order of a court of competent jurisdiction." This provision is

¶ 13 The conclusion of law based on this finding that "[t]he records requested in Plaintiffs' Subpoena may be produced under Chapter 58 of the North Carolina General Statutes 'upon an order of a court of competent jurisdiction,' notwithstanding assertions of statutory confidentiality by the [Department] or alleged statutory requirements that the information be kept confidential" is thus erroneous as applied to section 58-10-430.

¶ 14 According to the plain language of section 58-10-430, "[a]ll audit reports, preliminary audit reports or results, working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the Commissioner or any other person in the course of an audit made under [section 58-10-430] are confidential, *are not subject to subpoena*, and may not be made public by the Commissioner or an employee or agent of the Commissioner." N.C. Gen. Stat. § 58-10-430 (emphasis added). As "the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler*, 333 N.C. at 262, 425 S.E.2d at 701 (citation omitted). Accordingly, we reverse the portion of the trial court's order requiring the Department to "produce full and complete records to Plaintiffs' counsel pursuant to Plaintiffs' Subpoena and as ordered herein" with respect to documents and items that "are not subject to subpoena" pursuant to N.C. Gen. Stat. § 58-10-430.

B. N.C. Gen. Stat. § 58-30-62

¶ 15 Under N.C. Gen. Stat. § 58-30-62, which applies to captive insurance companies licensed under the Captive Insurance Act,[2] "[a]n insurer may be subject to administrative supervision by the Commissioner" if certain conditions arise. N.C. Gen. Stat. § 58-30-62(c) (2019). If the Commissioner determines administrative supervision is necessary, the Commissioner must notify the insurer that it is under the supervision

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specifically incorporated by other sections of Chapter 58, but it does not serve as a blanket provision for all of Chapter 58. *See* N.C. Gen. Stat. § 58-10-405(b) (2019) ("All other captive insurance companies shall report on forms adopted by the Commissioner. [N.C. Gen. Stat.] 58-10-345(f) shall apply to each report filed pursuant to this section."); N.C. Gen. Stat. § 58-10-415(c2) (2019) ("[N.C. Gen. Stat.] 58-10-345(f) shall apply to all information filed pursuant to this section.").

2. Under N.C. Gen. Stat. § 58-10-475, governing supervision, rehabilitation, and liquidation of captive insurance companies, the terms and conditions set forth in Article 30 of Section 58 shall apply in full, unless otherwise provided, to captive insurance companies licensed under the Captive Insurance Act. N.C. Gen. Stat. § 58-10-475 (2019).

of the Commissioner and give the insurer a written list of the requirements to abate the conditions which led to its supervision. *Id.* § 58-30-62(d).

> (f) *Notwithstanding any other provision of law and except as set forth in this section, all proceedings, hearings, notices, correspondence, reports, records, and other information in the possession of the Commissioner or the Department relating to the supervision of any insurer are confidential.* The Department shall have access to such proceedings, hearings, notices, correspondence, reports, records, or other information as permitted by the Commissioner. The Commissioner may open the proceedings or hearings, or disclose the notices, correspondence, reports, records, or information to a department, agency or instrumentality of this or another state of the United States if the Commissioner determines that the disclosure is necessary or proper for the enforcement of the laws of this or another state of the United States. The Commissioner may open the proceedings or hearings or make public the notices, correspondence, reports, records, or other information if the Commissioner considers that it is in the best interest of the insurer, its insureds or creditors, or the general public. This section does not apply to hearings, notices, correspondence, reports, records, or other information obtained upon the appointment of a receiver for the insurer by a court of competent jurisdiction.

N.C. Gen. Stat. § 58-30-62 (emphasis added).

¶ 16 Contrary to the trial court's finding, this statute contains no provision that "specifically provide[s] that records . . . shall be provided 'upon an order of a court of competent jurisdiction' " and does not incorporate another section in Chapter 58 that specifically requires disclosure upon court order.[3] However, unlike section 58-10-430 and in accordance with the trial court's finding of fact, this statute does not contain a provision that essentially provides that "records can never be obtained from the [Department]" in that section 58-30-62 does not explicitly state that the materials under this section "are not subject to subpoena." Had the legislature intended for materials to be protected from subpoena, it

3. *See* footnote 1.

could have explicitly done so as it did in section 58-10-430 and various other provisions of Chapter 58.[4]

¶ 17 The legislature established that the Commissioner "shall be a public office[,]" and its "records, reports, books and papers thereof on file therein shall be accessible to the inspection of the public[.]" N.C. Gen. Stat. § 58-2-100 (2019). Any exception to the public's accessibility to otherwise public records should be construed narrowly. *DTH Media Corp. v. Fult*, 374 N.C. 292, 301, 841 S.E.2d. 251, 258 (2020) (quotation marks and citation omitted).

¶ 18 The Department cites no authority supporting the proposition that labeling materials confidential, without more, bars those materials from being produced upon an order of a court of competent jurisdiction. Our courts routinely deal with confidential information and have the ability to ensure the information is not used improperly. *See*, *i.e.*, N.C. Gen. Stat. § 1A-1, Rule 26(c) (2019) (allowing trial courts to seal depositions and filed court documents to be opened as directed by the court); N.C. Gen. Stat. § 1A-1, Rule 45(c)(2) ("Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial.") N.C. Gen. Stat. § 1A-1, Rule 45(c)(7) ("When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information . . . the court may order a person to . . . produce the materials only on specified conditions stated in the order.").

¶ 19 Essentially, the Department is asking this Court to add an additional provision to section 58-30-62 that materials under this section "are not subject to subpoena." It is our duty to "give effect to the words actually used in a statute" and we cannot insert "words not used." *Watterson*, 198 N.C. App. at 505, 679 S.E.2d at 900. The conclusion of law that "[t]he records requested in Plaintiffs' Subpoena may be produced under Chapter 58 of the North Carolina General Statutes 'upon an order of a court of competent jurisdiction,' notwithstanding assertions of statutory confidentiality by the [Department] or alleged statutory requirements that the information be kept confidential" is not erroneous.[5]

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4. *See* N.C. Gen. Stat. §§ 58-2-132(f), 58-10-175(b), 58-10-430(c), 58-10-735(a), 58-10-780(a), 58-12-35(a), 58-19-40(a), 58-33-56(h), 58-58-50(j)(10), 58-58-268(c), 58-58-280(a), 58-71-115(c).

5. The Department asked the trial court to subject certain records "to a protective order issued by the Court maintaining the confidentiality of the information" in the event

¶ 20 Accordingly, we affirm the portion of the trial court's order requiring the Department to "produce full and complete records to Plaintiffs' counsel pursuant to Plaintiffs' Subpoena and as ordered herein" with respect to documents and items listed in N.C. Gen. Stat. § 58-30-62.

V. Conclusion

¶ 21 The trial court erred by ordering the disclosure of certain documents pursuant to N.C. Gen. Stat. § 58-10-430. The trial court did not err by ordering the disclosure of certain documents pursuant to N.C. Gen. Stat. § 58-30-62. We thus reverse the trial court's order in part and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges ARROWOOD and GORE concur.

STATE OF NORTH CAROLINA
v.
PATRICK JAMAAL CHAMBERS

No. COA20-238

Filed 20 July 2021

Homicide—felony murder—felonious child abuse—care or supervision element

In a trial for the murder of a two-year-old child, the State presented substantial evidence that defendant was a person providing care to or supervision of the victim for the offense of felonious child abuse (N.C.G.S. § 14-318.4(a)), which served as the underlying felony for felony murder. In considering the totality of the circumstances, along with the definition of "caretaker" in section 7B-101(3), the Court of Appeals determined that the jury could have inferred that defendant, who was not the victim's father, provided "parental-type" care to the victim where defendant spent his nights during the week at the victim's residence, helped potty train the victim, played with and supervised the victim and his siblings, and regularly prepared meals for them.

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that the records were "reviewed by the Court or admitted as evidence[.]" The trial court did not rule upon that request.

STATE v. CHAMBERS

[278 N.C. App. 474, 2021-NCCOA-348]

Appeal by Defendant from Judgment entered 29 April 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Patrick Jamaal Chambers (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of First-Degree Murder. The Record tends to reflect the following:

¶ 2 David,[1] the victim in this case, was two years old when he died. Jonathan David Privette (Dr. Privette), a forensic pathologist and medical examiner, performed an autopsy on David's body the day after David died. Dr. Privette noted David suffered multiple injuries. External injuries included: a contusion on his left forehead; numerous contusions on his chest (possibly from CPR), abdomen, pelvic area, lower back, and legs; and a burn scar on the right thigh. Internal injuries included: subgaleal hemorrhaging near the forehead and top of the head; a fracture of the sagittal suture of the skull; subdural and subarachnoid hemorrhages in the brain; internal bleeding in the abdomen; fractured ribs; lacerations of the liver and pancreas; and damage to the small bowel. According to Dr. Privette, David's abdominal injuries would have caused David to be in "real trouble" within "minutes to an hour" after David sustained those injuries. In Dr. Privette's opinion, David died as a result of the blunt force abdominal injuries, but that all the injuries contributed to David's death.

¶ 3 On the date of David's death, he was residing with his mother R.W., four siblings (two sisters and two step-sisters), and Defendant. R.W. met Defendant in 2009 when R.W. lived in the same apartment complex as Defendant. R.W. and Defendant lost contact at some point, but the two reconnected and started a sexual relationship in 2015. Defendant moved in with R.W. and the children in April of 2016 after David's father, S.W., moved out. While Defendant lived at the house during the weekdays, Defendant regularly: played with R.W.'s daughters; helped all of the

1. A pseudonym used to assist in preserving the identity of the minor victim and for ease of reading.

children get ready for bed, including helping David brush his teeth; helped potty train David; and checked in on the children at night. Defendant would also help with yardwork, cleaning, and cooking meals.

¶ 4 On one June evening in 2016, Defendant was outside grilling for the household while David was outside playing. R.W. was inside washing dishes. R.W. heard David scream. When R.W. got to David he was whimpering and would not tell R.W. what had happened. When R.W. asked Defendant what was wrong, he said "[n]othing" and that David was always "whining[.]" The next morning, when R.W. was helping David use the bathroom, she noticed a burn mark on David's leg. R.W. confronted Defendant about what happened the night before, and Defendant said that a coal had "popped out" of the grill and landed on David when Defendant added coals to the grill.

¶ 5 On 22 July 2016, the Friday before David died, R.W. noticed that David was walking abnormally and that he had a red eye. R.W. called David's father, S.W., and asked him to take David to the emergency room. S.W. picked David up after S.W. got off work at 11 p.m., and he took David to the emergency room. After three or four hours of waiting in the emergency room, David had still not been seen by a doctor. S.W. decided to take David back to S.W.'s home; he told R.W. David had been seen by a doctor and that there was nothing wrong with the child. S.W. took David back to R.W.'s house that Sunday, 24 July 2016.

¶ 6 On 25 July 2016, the next day, the children went to daycare and school. That evening, Defendant cooked dinner for R.W. and the children. After the children went to bed, R.W. engaged in a number of text and phone conversations with S.W. At some point, Defendant interrupted and asked R.W. if David ever slept with his eyes open; R.W. responded that David did at times. Shortly thereafter, Defendant asked R.W. if David ever had seizures or foamed at the mouth; R.W. said no. Then, R.W. heard David scream and saw Defendant rush through the dining room with David in his arms. Someone called 911 and Defendant performed CPR on David. The Charlotte Fire Department responded to the call. David was eventually transported to the hospital as he was not breathing. R.W. followed the ambulance transporting David to the hospital, and Defendant remained at the home with the other children. Hospital staff were unable to resuscitate David, and he died.

¶ 7 A Mecklenburg County Grand Jury indicted Defendant on a charge of First-Degree Murder, under N.C. Gen. Stat. § 14-17, on 15 August 2016. Defendant's case came on for trial on 22 April 2019. After the State rested its case, Defendant moved to dismiss for insufficiency of the

evidence. The trial court denied the Motion. Defendant did not present any evidence and renewed his Motion to Dismiss for insufficient evidence; the trial court denied the renewed Motion.

¶ 8 In its closing remarks, the State told the jury: "The crime, of course, is first-degree murder in the perpetration of a felony." The trial court instructed the jury:

> The defendant has been charged with first-degree murder in the perpetration of a felony, which is the killing of a human being by a person committing felonious child abuse with a deadly weapon.
>
> For you to find the defendant guilty of first-degree murder in the perpetration of a felony, the State must prove five things beyond a reasonable doubt:
>
> First, that the defendant was a person providing care to or supervision of the child.
>
> Second, that at the time, the child had not yet reached his sixteenth birthday.
>
> Third, that the defendant intentionally assaulted the child, which proximately resulted in serious physical injury to the child. A serious physical injury is such physical injury as causes great pain and suffering.
>
> Fourth, that the assault upon the child was committed with the use of a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. Hands or feet may be considered deadly weapons depending on the manner in which they are used and the size and strength of the defendant compared with the child.
>
> And fifth, that the defendant's assault was a proximate cause of the child's death. A proximate cause is a real cause, a cause without which the child's death would not have occurred.

¶ 9 The jury found Defendant guilty of First-Degree Murder. The trial court entered Judgment consistent with the jury verdict and sentenced Defendant to life in prison without the possibility of parole. Defendant gave oral Notice of Appeal in open court.

Issue

¶ 10 The sole issue raised by Defendant on appeal is whether there was sufficient evidence Defendant was a person providing care to or supervision of David as required by N.C. Gen. Stat. § 14-318.4(a) such that Defendant could have been guilty of the underlying felony of child abuse required in this case to convict Defendant of First-Degree Murder committed in the perpetration of a felony.

Analysis

¶ 11 Defendant argues the evidence at trial was insufficient to permit a reasonable juror to find beyond a reasonable doubt that he committed First-Degree Murder based on the underlying felony of child abuse. As a result, Defendant contends the trial court erred in denying his Motions to Dismiss. "When ruling on a defendant's motion to dismiss for sufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each element of the offense charged, . . . and (2) of defendant's being the perpetrator of such offense." *State v. China*, 370 N.C. 627, 632, 811 S.E.2d 145, 148 (2018) (citation and quotation marks omitted). On appeal "[w]hether the State has presented substantial evidence is a question of law," subject to de novo review. *Id.*, 811 S.E.2d at 149 (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). "[T]he evidence should be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Carrilo*, 149 N.C. App. 543, 548, 562 S.E.2d 47, 50 (2002) (citation omitted).

¶ 12 Relevant to this case, under N.C. Gen. Stat. § 14-17(a) a murder "committed in the perpetration . . . of any . . . felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." N.C. Gen. Stat. § 14-17(a) (2019). Here, the State proceeded on a theory that the underlying felony supporting the charge of First-Degree Murder was Felony Child Abuse. Felony Child Abuse is defined as when a parent or: "any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child . . . ." N.C. Gen. Stat. § 14-318.4(a) (2019).

¶ 13 Thus, in sum, and as the trial court instructed the jury in this case, the State was required to prove beyond a reasonable doubt: (1) Defendant was a person providing care to or supervision of the child;

(2) David had not yet reached his sixteenth birthday; (3) Defendant intentionally assaulted David, which proximately resulted in serious physical injury to David; (4) the assault upon the child was committed with the use of a deadly weapon, in this case Defendant's hands or feet; and (5) Defendant's assault was a proximate cause of David's death.

¶ 14 Here, the only argument Defendant advances is that the trial court erred in denying his Motions to Dismiss on the basis there was insufficient evidence on which a jury could find Defendant was providing care to or supervision of David as required under the Felony Child Abuse statute. The statute does not define what comprises "care and supervision." However, we have found guidance in our State's juvenile code under N.C. Gen. Stat. § 7B-101(3) defining a "caretaker." *Carrilo*, 149 N.C. App. at 549, 562 S.E.2d at 51 (holding the defendant was a caretaker under the statute such that the defendant could be found guilty of child abuse as the underlying felony in a first-degree murder case). N.C. Gen. Stat. § 7B-101(3) defines "Caretaker" as:

> Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a *residential* setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's *household*, an adult relative entrusted with the juvenile's care . . . .

N.C. Gen. Stat. § 7B-101(3) (2019) (emphasis added).

¶ 15 The North Carolina Supreme Court has further clarified N.C. Gen. Stat. § 7B-101(3) "protects children from abuse and neglect inflicted by people with significant, parental-type responsibility for the daily care of a child *in the child's residential setting*." *In re R.R.N.*, 368 N.C. 167, 170, 775 S.E.2d 656, 659 (2015) (emphasis added). In determining whether an adult had a significant enough degree of parental-type responsibility for a child, the trial court "must consider the totality of the circumstances . . . including the duration and frequency of care provided by the adult, the location in which that care is provided, and the decision-making authority granted to the adult." *Id.*

¶ 16 Our holding in *State v. Carrilo* is particularly instructive here. In *Carrilo*, the defendant was found guilty of first-degree murder of an infant. 149 N.C. App. at 544, 562 S.E.2d at 48. Defendant, who was not the infant's father, lived with the child and his mother from February to April 2000, when the infant died. *Id.* The day before the infant's death, the defendant shook the child because the child had been crying. *Id.* at 545,

562 S.E.2d at 48. After the incident: "the baby cried, got quiet, then fell asleep for a while," before waking up early the next morning coughing. *Id.* at 545, 562 S.E.2d at 49. Later that morning the infant was discovered not breathing, and after failed resuscitation attempts, was pronounced dead. *Id.* at 546, 562 S.E.2d at 49. On appeal this Court concluded that the defendant fell within the definition of a "caretaker" where:

> The evidence . . . establish[ed] that [the child] was dependent upon defendant for his care or supervision. The State's evidence showed that defendant had resided with [the child's] mother for two months prior to the murder, that [the child] and [the child's mother] shared the same bedroom with defendant, and that [the child's mother] had left [the child] in defendant's care for short periods of time.

Id. at 549, 562 S.E.2d at 51. Furthermore, "[o]n the day defendant allegedly inflicted the fatal injury upon the child, [the child] was left in defendant's care while his mother went to the kitchen to prepare a bottle." *Id.* Additionally, "on another occasion, [the child's mother] left the [the child] in defendant's care while she went to the store." *Id.* As a result, we held the evidence was sufficient for a jury to infer that the defendant " 'provided care to or supervision' of [the child] within the meaning of the felony child abuse statute." *Id.* (alterations in original).

¶ 17 Here, the evidence tended to show Defendant: slept at R.W.'s house every night from April to July 2016, except on weekends when he would visit his children; played with R.W.'s daughters regularly; helped potty train David; helped all the children get ready for bed; checked on the children at night; cooked meals for the household; did yardwork around the house; supervised David while the child played outside and Defendant cooked on the grill; and stayed with R.W.'s daughters when R.W. followed David to the hospital on the evening David died. Thus, based on the totality of the circumstances, the evidence in this case mirrors the evidence we found sufficient in *Carrilo*. Therefore, as in *Carrilo*, there was sufficient evidence upon which a jury could find Defendant provided "care and supervision" of David pursuant to N.C. Gen. Stat. § 14-318.4.

¶ 18 Nevertheless, Defendant argues the Court's holding in *In re R.R.N.* compels us to hold otherwise because the Court limited the definition of caretaker to those "with significant, parental-type responsibility for the daily care of a child in the child's residential setting." *In re R.R.N.*, 368 N.C. at 170, 775 S.E.2d at 659. However, the facts of that case are inapposite here. There, the defendant was convicted of child abuse for

having sexual encounters with a twelve-year-old child during an overnight stay where the child stayed at the defendant's house. *Id.* at 168-69, 775 S.E.2d at 658. The defendant was a family friend and had several sexual encounters with the child over the course of a summer. *Id.* However, the defendant was convicted for the sexual encounter that occurred during the overnight stay. *Id.* at 169, 775 S.E.2d at 658. On appeal, the Court held the statute did not apply because the encounter in question was limited to one sleepover and occurred outside the child's residential setting. *Id.* at 170-71, 775 S.E.2d at 659. The Court reasoned although "[the defendant] may have been responsible for [the child's] short-term safety while she visited his home for one night, [the child's] mother retained the ultimate decision-making authority over her health and welfare." *Id.* at 170, 775 S.E.2d at 659. This holding does not compel the same conclusion here.

¶ 19 In this case, Defendant lived in *David's home*, at least during the weekdays, and did so for months. Defendant's encounters with David were daily and, although Defendant may not have had plenary parental authority, the evidence was sufficient for a jury to find David depended on Defendant for "parental-type" care. Thus, there was sufficient evidence to support the charge of First-Degree Murder to be submitted to the jury on a theory it was committed in the perpetration of a felony: Felony Child Abuse. Therefore, the trial court did not err in denying Defendant's Motions to Dismiss. Consequently, the trial court did not err in entering Judgment upon the jury verdict.

Conclusion

¶ 20 Accordingly, for the foregoing reasons, there was no error at trial, and we affirm the Judgment.

NO ERROR.

Chief Judge STROUD and Judge GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
SHANNON NICOLE CHAVIS, DEFENDANT

No. COA20-139

Filed 20 July 2021

1. Robbery—with a dangerous weapon—taser—use

In a prosecution for robbery with a dangerous weapon, defendant's use of a taser to incapacitate the victim so that another assailant could beat him permitted the jury to conclude that the taser was used as a dangerous weapon.

2. Judges—impermissible expression of opinion—in presence of jury—deadly weapon

The trial court did not impermissibly express an opinion, in its jury instructions, that defendant's taser served as a dangerous weapon where, considered in context, the trial court was stating that it was for the jury to consider whether defendant's taser was a deadly weapon.

3. Robbery—with a dangerous weapon—jury instructions—serious bodily injury

Defendant's argument that the trial court committed plain error by failing to sufficiently instruct the jury on "serious bodily injury" in her trial for robbery with a dangerous weapon was rejected where "serious bodily injury" was not an element of the offense—rather, the trial court defined "dangerous weapon" as "a weapon which is likely to cause death or serious bodily injury," and the State did not have to prove that the victim actually suffered serious bodily injury.

4. Constitutional Law—effective assistance of counsel—concession of guilt—lesser-included offense

Defendant did not receive ineffective assistance of counsel in her trial for robbery with a dangerous weapon where her attorney conceded her guilt to the lesser-included offense of common law robbery and the trial court thereafter conducted a *Harbison* inquiry to ensure that the concession was made with defendant's knowing, voluntary consent. Defendant raised no argument on appeal regarding the timing of the trial court's inquiry.

5. Contempt—criminal contempt—reasonable doubt standard—transcript and order

An order holding defendant in criminal contempt for refusing to put on the clothes provided for her to wear in the courtroom was reversed where the transcript did not include any indication of the standard used and the order did not mention the "beyond a reasonable doubt" standard.

Judge MURPHY concurring in result only without separate opinion as to Parts V and VI.

Appeal by defendant from judgments entered on or about 27 February 2019 by Judge James G. Bell in Superior Court, Robeson County. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenzie M. Rakes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals judgments for her convictions of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Defendant raises several arguments on appeal but after consideration of each issue, we conclude there was no error with these convictions. However, defendant was also found guilty of direct criminal contempt; as to the contempt order and judgment, we reverse.

I. Background

¶ 2 The State's evidence tended to show that in May of 2015 defendant and her boyfriend entered Mr. Jones's home wanting his "gun and pills." Mr. Jones had previously dated defendant's mother. Defendant's boyfriend pinned down Mr. Jones, and they hit him with a stick. Defendant also tased Mr. Jones "two or three times" around the head and neck area. Defendant's boyfriend took Mr. Jones's wallet. As a result of the attack, Mr. Jones had blood coming out of his ear, a knot on his head, and a taser burn. Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The jury found defendant guilty of both charges; the trial court entered judgments, and defendant appeals.

II. Use of Dangerous Weapon

¶ 3 **[1]** During her trial defendant moved to dismiss the charges against her without giving any specific reason, and the trial court denied the motion. Defendant first contends that "[t]he trial court erred by denying" her "motion to dismiss because the evidence showed that the taser at issue was not a 'dangerous weapon[,]' " an essential element of both robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. *See generally State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707-08 (2008) ("Under N.C.G.S. § 14–87(a), the essential elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." (quotation marks and brackets omitted)); *see also State v. Lyons*, 268 N.C. App. 603, ___, 836 S.E.2d 917, 921 (2019), *disc. review denied*, 374 N.C. 744, 842 S.E.2d 592 (2020) ("To ultimately convict a defendant of conspiracy, however, the State must prove there was an agreement to perform every element of the underlying offense[.]" (quotation marks and brackets omitted)).

A. Standard of Review

¶ 4 Though defendant did not state the reason for her motion to dismiss, "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." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.
>
> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.*

State v. Rivera, 216 N.C. App. 566, 567-68, 716 S.E.2d 859, 860 (2011) (emphasis added) (citations and quotation marks omitted). Furthermore,

"[t]his Court reviews the trial court's denial of a motion to dismiss *de novo*. 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. Southerland*, 266 N.C. App. 217, 219, 832 S.E.2d 168, 170 (2019) (citation and quotation marks omitted).

B. Analysis

¶ 5 Defendant contends the taser was not a dangerous weapon. In *Rivera*, an assailant used a stun gun on the victim. *Rivera*, 216 N.C. App. at 567, 716 S.E.2d at 860. An officer testified during the defendant's trial that "the overall potential for serious physical injury or death from a stun gun is minimal, and the overall potential for serious physical injury or death from a stun gun would be consistent with being struck with a hand or foot." *Id.* (quotation marks and brackets omitted). The defendant in *Rivera* moved to dismiss the charge against him, robbery with a dangerous weapon. *See id*. The trial court denied the motion, and the jury found the defendant guilty of robbery with a dangerous weapon. *Id.* The defendant appealed, and this Court noted, "The dispositive issue in this case is whether there was sufficient evidence presented at trial to establish that the stun gun was a dangerous weapon that endangered or threatened [the victim's] life." *Id.* at 568, 716 S.E.2d at 860-61.

¶ 6 This Court explained,

> When deciding whether an object is a dangerous weapon, our Supreme Court has stated:
>
> > The rules are: (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could

> not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.
>
> We must look at the circumstances of use to determine whether an instrument is capable of threatening or endangering life.

Id. at 568–69, 716 S.E.2d at 861 (citations and quotation marks omitted).

¶ 7 In *Rivera*, this Court first determined that a stun gun can be a dangerous weapon. *Id.* at 569-570, 716 S.E.2d at 861-62. Here, we conclude that a taser is "what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim[.]" *Id.* at 568, 716 S.E.2d at 861. But since there was "some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened." *Id.* at 571, 716 S.E.2d at 862. Further, in this case, the trial court instructed the jury it should determine whether a taser was a dangerous weapon, and thus we turn to the second rule described in *Rivera* "which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened." *Id.* at 569, 716 S.E.2d at 861.

¶ 8 *Rivera* notes that "our courts have consistently held that an object can be considered a dangerous or deadly weapon based on the manner in which it was used even if the instrument is not considered dangerous *per se* and the weapon does not cause death or a life threatening injury." *Id.* at 571, 716 S.E.2d at 862. In *Rivera*, the victim "suffered significant pain from the shock, fell, and injured her rotator cuff. She endured two surgeries and extensive physical therapy. Two years after the robbery, Scott was still experiencing pain and a limited range of motion in her left arm." *Id.* at 570, 716 S.E.2d at 86. In fact, as noted in *Rivera*, in *State v. Gay*, 151 N.C. App. 530, 566 S.E.2d 121 (2002), a stun gun was deemed as a dangerous weapon where the defendant did not actually use the stun feature but instead placed it against the victim's neck in order to take her backpack. *Id.* at 570, 716 S.E.2d at 861-62.

¶ 9 Here, the evidence regarding the manner of use of the taser would permit the jury to find it was a dangerous weapon. After the attack,

Mr. Jones was bleeding from his ear, had a knot on his head, and had a taser burn. Defendant argues that the bleeding and head injury were caused by her boyfriend "punching Mr. Jones or hitting him with the walking stick[,]" but defendant used the taser as Mr. Jones was being beaten and held by her boyfriend when he removed Mr. Jones's wallet from his pocket. In other words, defendant incapacitated, with the taser, Mr. Jones while he was being beaten, including on his head, to ensure he could not defend himself. The jury could conclude the taser was used as a deadly weapon. Accordingly, the trial court did not err in denying defendant's motion to dismiss. This argument is overruled.

III. Judicial Opinion

¶ 10 **[2]** Defendant next contends that the trial court violated North Carolina General Statutes §§ 15A-1222 and -1232 by expressing the opinion that a taser was a dangerous weapon in its instructions to the jury. Defendant failed to raise this before the trial court but citing *State v. Johnson*, 253 N.C. App. 337, 801 S.E.2d 123 (2017), contends because it was a statutory violation it is preserved on appeal without objection and reviewable *de novo*. We agree. *See generally id.* at 345, 801 S.E.2d at 128 ("When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. Defendant alleges a violation of a statutory mandate, and alleged statutory errors are questions of law and as such, are reviewed *de novo*." (citations, quotation marks, and brackets omitted)). We note defendant does not challenge the jury instructions or argue plain error for failing to object to the instructions but bases this argument on appeal solely on a statutory violation, and we address it accordingly.

¶ 11 "An expression of judicial opinion is a statutory violation and a defendant's failure to object to alleged expressions of opinion by the trial court in violation of a statute does not preclude his raising the issue on appeal." *State v. Davis*, 265 N.C. App. 512, 514, 828 S.E.2d 570, 572 (citation, quotation marks, and brackets omitted), *disc. review denied*, 372 N.C. 709, 830 S.E.2d 839 (2019). We review this issue *de novo*. *See Johnson* at 345, 801 S.E.2d at 128. North Carolina General Statute § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury or any question of fact to be decided by the jury[,]" and North Carolina General Statute §15A-1232 similarly provides, "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. §§ 15A-1222, -1232 (2019).

¶ 12 Specifically, defendant contends the trial court expressed its opinion at least twice by instructing,

> Robbery with a dangerous weapon. The defendant has been charged with robbery with a dangerous weapon, which is taking and carrying away the personal property of another from his person or in his presence without his consent by endangering or threatening a person's life with a dangerous weapon –in this case *it's a taser*–the taker knowing that she was not entitled to take the property and intending to deprive another of its use permanently[,]

and a similar statement in laying out the elements for feloniously conspiring to commit robbery with a dangerous weapon by noting it required finding "endangering or threatening a person's life with a dangerous weapon, in this case a taser[.]"

¶ 13 But defendant fails to note that in the next paragraph after the first robbery with a dangerous weapon instruction the trial court stated it was for the jury "to consider whether a taser is a deadly weapon[.]" Further, read in context it is clear the trial judge was noting the alleged weapon in question for the jury to consider was identified in the evidence as a taser, not that the taser *was* a dangerous weapon. It was the jury's duty to determine if there was a dangerous weapon used, and that consideration involved whether the taser was a dangerous weapon. This argument is overruled.

IV. Serious Bodily Injury

¶ 14 **[3]** Defendant next contends the trial court committed plain error in failing to sufficiently instruct the jury on "serious bodily injury." Defendant admits this issue is unpreserved, and thus contends we review for plain error.

> As this Court and the Supreme Court have frequently stated, plain error consists of an error that is so fundamental that it undermines the fairness of the trial, or has a probable impact on the guilty verdict. In order to obtain relief on plain error grounds, an appealing party must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or a denial of a fair trial." Given that a prerequisite to our engaging in a plain error analysis is the determination that

> the trial court's ruling constitutes error at all we will initially determine if the trial court erred by denying Defendant's suppression motion and then ascertain whether any error committed by the trial court rose to the level of plain error.

State v. Harwood, 221 N.C. App. 451, 456, 727 S.E.2d 891, 896 (2012) (citations, quotation marks, and brackets omitted).

¶ 15 Here, the trial court defined "dangerous weapon" as "a weapon which is likely to cause death or serious bodily injury[.]" "Serious bodily injury" is not an element of robbery with a dangerous weapon or conspiracy to commit robbery with a dangerous weapon. *See generally Gwynn*, 362 N.C. at 337, 661 S.E.2d at 707-08; *see also Lyons*, 268 N.C. App. at ___, 836 S.E.2d at 921. Defendant argues that the "term 'serious bodily injury' has no commonly understood everyday meaning" but it does have "a fairly well-settled legal meaning." Defendant notes several statutes where this term is defined for purposes of the crime defined by that statute. But "serious bodily injury" is not an element of the offense charged in this case. Instead, "serious bodily injury" was part of the trial court's instructions defining the required element of "dangerous weapon" to the jury. Defendant focuses on Mr. Jones's *actual* injuries but fails to address defendant's "likely", possible, or threatened injuries. As we have already discussed above, the taser here could be considered a dangerous weapon based upon its use to incapacitate Mr. Jones while he was being beaten. The State was not required to show Mr. Jones actually sustained "serious bodily injury" to show the taser was used as a dangerous weapon; the State need only show that the taser was used in a manner which "is likely to cause death or serious bodily injury." *See generally Rivera*, 216 N.C. App. at 568-70, 716 S.E.2d at 860-62. This argument is overruled.

V. Ineffective Assistance of Counsel

¶ 16 **[4]** Defendant next contends that she received ineffective assistance of counsel where her attorney conceded her guilt of common law robbery without her knowing and voluntary consent shown on the record. This assertion is simply not true, and we need not address this argument in detail. The record shows the trial court conducted a *Harbison* inquiry[1]

1. "A *Harbison* inquiry regards the principle enunciated in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), in which the N.C. Supreme Court held that a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel. Accordingly, because of the gravity of the consequences of pleading guilty, an inquiry with defendant is conducted,

and directly asked defendant if she consented to her counsel's concession that she was guilty of common law robbery:

> THE COURT: All right. You heard [your attorney's] argument to the jurors?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And more or less, he argued that you were guilty of common law robbery and not the robbery with a dangerous weapon?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: More or less conceding that you were guilty of something but not the most serious, right? Did you understand that?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. You and [your attorney] talked about that?
>
> DEFENDANT: Yes.
>
> THE COURT: He told you the good and the bad about doing that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: He answered any questions you had about that?
>
> DEFENDANT: Yes.
>
> THE COURT: Are you satisfied with his legal services?
>
> DEFENDANT: Yes.
>
> THE COURT: And he did have your permission to concede that you were guilty of the lesser included of common law robbery when he made his argument to the jurors?
>
> DEFENDANT: Yes.

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which involves a thorough questioning of the defendant by the trial court in order to ensure that his decision to plead guilty is made knowingly and voluntarily after full appraisal of the consequences." *State v. Givens*, 246 N.C. App. 121, 126, 783 S.E.2d 42, 46 (2016) (quotation marks, ellipses, and brackets omitted).

THE COURT: All right. Have you got any questions?

DEFENDANT: No.

¶ 17 Although the colloquy occurred after defendant's counsel's argument, defendant has not raised any argument on appeal regarding the timing of the trial court's inquiry and her answers indicate that her counsel had discussed the argument with her in advance of the argument. The transcript indicates defendant's knowing acquiescence to her counsel's concession of guilt to common law robbery based on the trial court's colloquy. Defendant does not direct us to any case law supporting her argument that a defendant must completely understand every feasibly theoretical possible outcome, and demonstrate that via the record, or else her attorney has *per se* provided ineffective assistance of counsel by admitting to a lesser-included offense. This argument is without merit.

VI. Contempt

¶ 18 **[5]** Last, defendant contends the trial court erred in holding her in direct criminal contempt for refusing to put on the clothes provided for her because there was no finding of willfulness on her part nor did the trial court employ the required reasonable doubt standard.

> In criminal contempt proceedings, our standard of review is limited to determining
>
> > whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court's conclusions of law drawn from the findings of fact are reviewable de novo.

State v. Salter, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019) (citation omitted).

¶ 19 North Carolina General Statute § 5A-14(b) provides,

> Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting

> the summary imposition of measures in response to contempt. *The facts must be established beyond a reasonable doubt.*

N.C. Gen. Stat. § 5A-14 (2019) (emphasis added).

¶ 20 Here, the trial court's contempt order does not mention the standard of proof of beyond a reasonable doubt. The State directs us to *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999), and contends when there is no factual determination for a trial court to make, it need not explicitly state that it used the standard of beyond a reasonable doubt. But more recently than 1998, our Court has taken a plain reading approach to North Carolina General Statute § 5A-14 and required a finding that the trial court did use the proper standard, reasonable doubt. *See State v. Ford*, 164 N.C. App. 566, 571, 596 S.E.2d 846, 849-50 (2004) (reversing order for direct criminal contempt because "[t]he only indication that the proper standard of review was applied was that he asked to review the statute before making his findings and that at the beginning of his findings, the boilerplate language of the order states 'after consideration of the applicable law.' We do not believe this sufficient to meet the requirement of *Verbal* that the findings should *indicate* that that standard was applied. Here, at best, the transcript indicates the judge may or may not have applied the proper standard, and there is no indication of the standard applied by the district court." (emphasis in original) (citation, quotation marks, and brackets omitted)); *see also In re Contempt Proceedings Against Cogdell*, 183 N.C. App. 286, 290, 644 S.E.2d 261, 264 (2007) (reversing direct criminal contempt order because "the trial court's order failed to indicate that he applied the beyond a reasonable doubt standard to his findings as required by N.C.G.S. § 5A–14(b)"). Here, the transcript does not include any indication of the standard used, and the contempt order does not mention the standard of beyond a reasonable doubt, so we reverse the contempt order and judgment.

VII. Conclusion

¶ 21 We conclude there was no error with the judgment and reverse the contempt order and judgment.

NO ERROR IN PART; REVERSED IN PART.

Judge COLLINS concurs.

Judge MURPHY concurs as to Parts I through IV and concurs in result only without separate opinion as to Parts V and VI.

STATE v. ELDER

[278 N.C. App. 493, 2021-NCCOA-350]

STATE OF NORTH CAROLINA
v.
MICHAEL STEVEN ELDER

No. COA20-215

Filed 20 July 2021

1. Rape—first-degree—vaginal intercourse—infliction of serious injury

For purposes of proving first-degree rape, the State presented substantial evidence that defendant vaginally penetrated the victim, based on the victim's description of the incident to her family members and to law enforcement and on the collection of sperm cells from the victim's underwear. Further, sufficient evidence was presented to allow an inference that defendant inflicted serious personal injury on the victim where the victim was hospitalized due to pain and her injuries and thereafter she was unable to spend the night alone due to fear.

2. Kidnapping—first-degree—in furtherance of rape—movement after rape—conviction reversed

Where defendant was convicted of two counts of first-degree kidnapping based on moving the victim from one place to another in furtherance of committing first-degree rape, the second conviction was reversed because it was based on movement of the victim after the rape was completed.

3. Robbery—common-law—taking of property—sufficiency of evidence

The State presented substantial evidence from which a jury could conclude that defendant took property from the victim's person or presence in a non-consensual manner where defendant tied up the victim after raping her and took money, jewelry, and other items from the victim's dresser and pocketbook.

4. Evidence—expert witness—notice—qualifications—abuse of discretion analysis

In a trial for rape, kidnapping, and robbery, the trial court did not abuse its discretion by admitting the testimony of a nurse regarding the collection of a sexual assault victim kit where, although the State did not notify the defendant of its intent to call the nurse as an expert witness, the trial court limited the scope of the witness's testimony in accordance with N.C.G.S. § 15A-910. Further,

there was no abuse of discretion under Evidence Rule 702 where the nurse testified during voir dire regarding her relevant education and experience.

5. Evidence—hearsay—medical records—authentication—business records exception

In a trial for rape, kidnapping, and robbery, the victim's medical records were properly authenticated by a qualified witness under the business record exception to the hearsay rule (Evidence Rule 803(6)) where a staff nurse at the emergency department of the hospital where the victim was treated testified regarding the hospital's record-keeping procedures. The trial court provided additional safeguards by ordering that any language that could be construed as a legal conclusion be redacted prior to publication to the jury.

6. Evidence—hearsay—statements attributed to deceased victim—plain error analysis

There was no plain error in defendant's trial for rape, kidnapping, and robbery by the admission of testimony by the victim's family members regarding the victim's state of mind after the attack, items of personal property that were missing from the victim's house, or the victim's relation of events in an interview with law enforcement. The challenged statements either did not constitute hearsay but were based on a witness's personal observations or were corroborated by other witnesses.

7. Sentencing—rape—kidnapping—one charge used to elevate the other to first degree—resentencing required

Defendant could not be convicted of both first-degree kidnapping and the first-degree rape which was the basis for elevating the kidnapping charge to the first degree. On remand after the reversal of another kidnapping charge (for insufficient evidence), the trial court was directed to either arrest judgment on the remaining first-degree kidnapping conviction and resentence defendant to second-degree kidnapping or arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction.

8. Attorney Fees—criminal trial—notice and opportunity—fee application submitted after sentencing hearing

The civil judgment requiring defendant to pay attorney fees after his convictions of rape, kidnapping, and robbery was vacated and the matter remanded where there was no evidence that defendant was given notice and an opportunity to be heard on the amount

owed, since his attorney submitted a fee application several days after the sentencing hearing was held.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 3 April 2019, and by petition for writ of certiorari from an order entered 7 April 2019, by Judge Josephine Kerr Davis in Warren County Superior Court. Heard in the Court of Appeals 27 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Benjamin O. Zellinger, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Michael Steven Elder appeals from judgments entered upon a jury's verdicts finding him guilty of felonious breaking or entering, felonious common-law robbery, assault inflicting serious injury, second-degree sexual offense, first-degree rape, and two counts of first-degree kidnapping. He also appeals from the civil judgment entered against him for his court-appointed attorney's fees. On appeal, Defendant argues that the trial court erred by (1) denying his motions to dismiss the charges of first-degree rape, first-degree kidnapping, and common-law robbery; (2) admitting a nurse as an expert witness and allowing her to authenticate the victim's medical records; (3) admitting hearsay statements made by the victim; (4) sentencing Defendant for both first-degree rape and first-degree kidnapping; and (5) entering a civil judgment for attorney's fees without providing Defendant with notice and an opportunity to be heard. After careful review, we conclude that the trial court erred in denying Defendant's motion to dismiss one charge of first-degree kidnapping ("Count III"), and that the trial court erred by imposing a sentence on both the first-degree rape conviction and the remaining first-degree kidnapping conviction. Otherwise, Defendant received a trial free from error. However, we conclude that the trial court erred in entering a civil judgment against Defendant for attorney's fees without providing him with notice and an opportunity to be heard, and therefore, we vacate the civil judgment for attorney's fees. Accordingly, we reverse Defendant's second kidnapping conviction, and

remand the matter to the trial court for resentencing and for a hearing regarding the imposition of attorney fees.

Background

I. Factual Background

¶ 2 On 7 July 2007, A.H.[1] was 80 years old and lived alone in Afton, North Carolina. She was tending the flower garden in her front yard when she noticed a light-colored car slowly drive by, turn around, and then head back toward her house. She went inside and locked the storm door behind her.

¶ 3 Shortly thereafter, a man carrying a black satchel knocked on her door. A.H. opened the exterior door but kept the storm door locked. The man offered to demonstrate a vacuum cleaner. A.H. informed him that she was not interested in his services, and he offered his card should she change her mind. When A.H. unlocked the storm door and reached out her hand to take the card, the man grabbed her hand, pushed the door open, and entered her home. The man asked where she kept her money, and A.H. told him that she did not have any money. After binding her hands and feet with a black cord, the man shoved her toward a bedroom, pushed her onto the bed, and began to remove her clothes. The man "pulled his penis out[,]" told A.H. that he needed money, and demanded her jewelry. As he removed the jewelry that she was wearing, the man asked A.H. how long it had been since she "had been f*****."

¶ 4 After raping A.H. and forcing her to perform oral sex on him, the man began rifling through her dresser drawers, inquiring as to where she kept "her good stuff." He looked through A.H.'s pocketbooks and located approximately $450 in cash in her billfold.

¶ 5 A.H. told the man that her daughter was on her way to the house; he replied that he would kill A.H.'s daughter if she arrived before he left. The man then tied A.H.'s hands and put her in a bedroom closet. A.H. told him that she could not breathe in the closet, so he tied her to a chair in a different bedroom. The man informed A.H. that he was going to take a shower and left the room; A.H. heard the water running in the bathroom.

¶ 6 Eventually, A.H. was able to untie herself. Although the water was still running in the bathroom, she did not see the light-colored car outside her house. A.H. then checked the bathroom and saw that the man

1. In order to protect the identity of the victim, we refer to her by her initials.

was gone. She called her daughter Linda, and her daughter's husband Harry answered the phone. A.H. told him that she had been raped and robbed, and Linda and Harry hurried to her home. Upon their arrival, Linda and Harry found that the storm door had been partially torn away from the doorjamb.

¶ 7 Law enforcement officers and EMS personnel arrived shortly thereafter. EMS personnel transported A.H. to Maria Parham Hospital by ambulance. However, hospital personnel there could not complete a rape kit, so A.H. was transferred to WakeMed Hospital. At WakeMed, Sexual Assault Nurse Examiner ("SANE") Cindy Carter administered a rape kit, and provided the kit and other evidence collected from A.H. to Detective Sergeant Ben Jackson of the Warren County Sheriff's Office. Warren County law enforcement officers then submitted the rape kit to the State Bureau of Investigation ("SBI") Crime Lab for DNA processing.

¶ 8 Special Agent Russell Holley of the SBI forensic serology department identified sperm cells in smears collected from the rape kit. On A.H.'s underwear, Forensic Scientist Supervisor Timothy Baize of the State Crime Lab detected a mixture of DNA that was consistent with A.H.'s DNA along with that of one unknown male contributor.

¶ 9 A.H. died on 18 December 2015, and her attacker remained unidentified. Then, on 12 April 2016, Det. Sgt. Jackson received a letter from the State Crime Lab, which prompted him to contact the New York Police Department's forensic investigations liaison unit. Based on that communication, Det. Sgt. Jackson acquired and executed a search warrant to collect a sample of Defendant's DNA.

¶ 10 Officers collected a cheek swab from Defendant and submitted the swab to the State Crime Lab on 19 July 2016. On 17 January 2019, the State Crime Lab produced a report that concluded that Defendant's DNA was consistent with the sample collected from A.H.'s underwear. At trial, Mr. Baize testified regarding the significance of his findings:

> The probability of randomly selecting an unrelated individual with a D-N-A profile that is consistent with the D-N-A profile[ ] obtained from the second contributor, from the sperm fraction of the cutting from the panties, is approximately 1 in 10.7 trillion in the Caucasian population, one in 63.0 billion in the African-American population, and one in 312 billion in the Hispanic population.

Defendant was thereby identified from the DNA evidence.

II. Procedural History

¶ 11 On 17 January 2017, a Warren County grand jury indicted Defendant for one count of felony breaking or entering, one count of common-law robbery, one count of assault with a deadly weapon inflicting serious injury, one count of first-degree forcible sexual offense, one count of first-degree rape, and two counts of first-degree kidnapping. One count of first-degree kidnapping was based on Defendant's "moving [A.H.] from the kitchen to the back bedroom," and a second was based on Defendant's "moving [A.H.] from the back bedroom to another bedroom and put[ting] her into a closet." The State alleged that Defendant committed both kidnappings "for the purpose of facilitating the commission of a felony, first degree rape[.]" On 11 April 2017, officers executed a warrant for Defendant's arrest.

¶ 12 Defendant's case came on for trial on 27 March 2019 before the Honorable Josephine Kerr Davis in Warren County Superior Court. At the close of the State's evidence, Defendant moved to dismiss the charges against him for insufficient evidence and the trial court denied the motion. Defendant did not present evidence, and at the close of all evidence, renewed his motion to dismiss. The trial court denied the motion.

¶ 13 On 3 April 2019, the jury found Defendant guilty of felonious breaking or entering, felonious common-law robbery, assault inflicting serious injury, second-degree sexual offense, first-degree rape, and two counts of first-degree kidnapping. After consolidating Defendant's convictions for second-degree sexual offense, common-law robbery, and misdemeanor assault inflicting serious injury, the trial court entered judgment sentencing Defendant to a minimum of 84 and a maximum of 110 months of imprisonment. The trial court then consolidated Defendant's convictions for first-degree rape and two counts of first-degree kidnapping, and sentenced Defendant to a minimum of 240 and a maximum of 297 months of imprisonment, to run consecutively.

¶ 14 Defendant gave notice of appeal in open court.

¶ 15 On 7 April 2019, the trial court entered a civil judgment against Defendant in the amount of $17,212.50 for fees owed to his court-appointed attorney.

Analysis

¶ 16 Defendant raises several arguments on appeal. Defendant initially argues that the trial court erred by denying his motions to dismiss the charges of first-degree rape, first-degree kidnapping, and common-law robbery. Defendant also contends that the trial court erred by admit-

ting Nurse Marlene Malcolm as an expert witness and allowing Ms. Malcolm to authenticate A.H.'s medical records, and additionally, that the trial court committed plain error by admitting hearsay testimony. He further argues that the trial court erred by failing either to (1) arrest judgment on one first-degree kidnapping conviction and sentence him for second-degree kidnapping, or (2) arrest judgment on the first-degree rape conviction and sentence him on both first-degree kidnapping convictions. Finally, Defendant has filed a petition for a writ of certiorari requesting that this Court review the civil judgment for attorney's fees. Defendant maintains that the trial court erred by imposing a civil judgment against him without first providing him with notice and an opportunity to be heard on the issue of attorney's fees. We address each argument in turn.

I. Motions to Dismiss

¶ 17 We first consider Defendant's assertion that the trial court erred in denying his motion to dismiss the charges of first-degree rape, first-degree kidnapping, and common-law robbery. We conclude that the State presented sufficient evidence to submit the charges of first-degree rape and common-law robbery to the jury; however, the trial court erred by denying Defendant's motion to dismiss Count III, one of the first-degree kidnapping charges, due to insufficient evidence.

A. Standard of Review

¶ 18 A timely motion to dismiss based on the sufficiency of the evidence preserves for appellate review "all challenges to the sufficiency of the evidence[.]" *State v. Golder*, 374 N.C. 238, 248, 839 S.E.2d 782, 789 (2020). This Court reviews challenges to the sufficiency of the evidence de novo. *Id.* at 250, 839 S.E.2d at 790. "Upon [a] 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 [the] defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). We review "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 596, 573 S.E.2d at 869 (citation omitted). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Id.* (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). The Court may consider both direct and circumstantial evidence, "even when the evidence does not rule out every hypothesis of innocence." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826 (2015) (citation omitted).

B. First-Degree Rape

¶ 19 **[1]** Defendant argues that the trial court erred by denying his motion to dismiss the charge of first-degree rape because the State failed to present sufficient evidence that Defendant (1) engaged in vaginal intercourse with A.H., (2) used a dangerous or deadly weapon during the commission of the rape, or (3) caused a serious personal injury. We disagree.

¶ 20 First-degree rape is defined by statute as follows:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.2(a)(2) (2007).[2]

¶ 21 Defendant first argues that the State did not present sufficient evidence of vaginal intercourse. We disagree.

¶ 22 With regard to evidence of vaginal intercourse, "[t]he slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute." *State v. McNicholas*, 322 N.C. 548, 556, 369 S.E.2d 569, 574 (1988).

¶ 23 Here, there was ample testimony in support of penetration. A.H.'s son-in-law Harry testified that A.H. told him that she had been "raped." A.H.'s daughter Linda testified that A.H. told her that she had been "raped" and that A.H. told her that the perpetrator "took off her underwear[,] penetrated her[,] and made remarks such as . . . 'Did your husband's ever feel like this? Was your husband's this big?' " Sergeant Edward Phillips of the Warren County Sheriff's Office testified that when

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2. This crime has since been recodified, without substantial changes, as first-degree forcible rape. *See* N.C. Gen. Stat. § 14-27.21(a) (2019).

he responded to A.H.'s home after the attack, she told him that the perpetrator had "pulled her pants down and raped her." Another of A.H.'s daughters, Jeanette Harris, testified that A.H. said that the perpetrator "got on top of her and penetrated her vagina." Det. Sgt. Jackson testified that A.H. told him that the perpetrator "got on top of her and asked her . . . when was the last time she had been f*****" and that "he had sex with her[.]" Special Agent Holley testified that he identified sperm cells on the underwear collected from A.H.

¶ 24 Thus, "taking into account the definition of vaginal intercourse previously set out, we conclude there was substantial evidence that [D]efendant engaged in vaginal intercourse with the victim." *Id.* at 557, 369 S.E.2d at 574.

¶ 25 Defendant further contends that the State presented insufficient evidence of any of the other factors necessary to submit a charge of first-degree rape to the jury: specifically, Defendant argues that the State presented insufficient evidence that he "[e]mploy[ed] or display[ed] a dangerous or deadly weapon or an article which [A.H.] reasonably believe[d] to be a dangerous or deadly weapon[,]" or that he "[i]nflict[ed] serious personal injury upon" A.H. N.C. Gen. Stat. § 14-27.2(a)(2)(a)–(b) (2007).[3] Because we conclude that the State's evidence that Defendant inflicted serious personal injury upon A.H. was sufficient to send the charge of first-degree rape to the jury, we do not address Defendant's challenge to the sufficiency of the State's evidence regarding Defendant's employment or display of a dangerous weapon.

¶ 26 Proof of the element of "serious personal injury" for first-degree rape "may be met by the showing of mental injury as well as bodily injury." *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88, *reh'g denied*, 525 U.S. 1034, 142 L. Ed. 2d 483 (1998). In *Boone*, our Supreme Court explained the degree of mental anguish that the State must show to constitute a "serious personal injury" in order to elevate a rape to first degree:

> It is impossible to enunciate a "bright line" rule as to when the acts of an accused cause mental upset which could support a finding of "serious personal injury." It would defy reason and common sense to say that there could be a forcible rape or forcible sexual offense which did not humiliate, terrorize and inflict

3. Defendant raises no argument regarding N.C. Gen. Stat. § 14-27.2(a)(2)(c).

> some degree of mental injury upon the victim. Yet, the legislature has seen fit to create two degrees of rape and provide that one of the elements which may raise the degree of the crime from second degree to first-degree rape is the infliction of "serious personal injury." . . . We therefore believe that the legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case.

Id. at 205, 297 S.E.2d at 589–90.

¶ 27 "*Res gestae* results are those so closely connected to an occurrence or event in both time and substance as to be a part of the happening." *State v. Finney*, 358 N.C. 79, 90, 591 S.E.2d 863, 869 (2004) (citation and internal quotation marks omitted). Therefore, in order to prove a serious personal injury based on mental injury, the State must prove "that the mental injury extend[ed] for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape." *State v. Baker*, 336 N.C. 58, 64, 441 S.E.2d 551, 554 (1994).

¶ 28 The State shows sufficient evidence of serious personal injury based on bodily injury where it offers evidence of

> injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim . . . in an attempt to commit the crimes or in furtherance of the crimes[,] . . . or injury inflicted upon the victim . . . for the purpose of concealing the crimes or to aid in the assailant's escape.

State v. Blackstock, 314 N.C. 232, 242, 333 S.E.2d 245, 252 (1985).

¶ 29 In the instant case, the State offered evidence that A.H. was admitted to the hospital and remained there for one or two nights because

"she was unable to be discharged due to her pain, and she wasn't able to sit up and walk[.]" Jeanette testified that her mother's arms were bleeding after the attack and that she suffered scratches and bruises on her face and arms. The State also offered evidence that, although A.H. had lived alone prior to the attack, afterward, "she was extremely afraid to stay by herself at night." After the rape, one of A.H.'s five children stayed with her every night, so that she usually did not spend the night alone. Linda testified that this rotation continued until A.H. broke her hip and moved to a nursing home in April of 2015. A.H. also would not answer the door if a stranger knocked.

¶ 30 We conclude that this evidence was sufficient to prove that Defendant inflicted serious personal injury upon A.H., and was therefore sufficient to send the charge of first-degree rape to the jury.

C. First-Degree Kidnapping

¶ 31 **[2]** Defendant was convicted of two counts of first-degree kidnapping. In the indictment, the State alleged that Defendant perpetrated both kidnappings "for the purpose of facilitating the commission of a felony, first degree rape," with the first kidnapping occurring when Defendant moved A.H. "from the kitchen to the back bedroom[,]" before he raped her, and the second kidnapping occurring when he moved A.H. "from the back bedroom to another bedroom and put her into a closet[,]" after the rape was complete.

¶ 32 Defendant challenges the second kidnapping charge on the basis that all of the evidence tended to show that Defendant had completed the offense of first-degree rape prior to moving A.H. from one bedroom to another, and therefore he could not have moved A.H. "for the purpose of facilitating the commission of" first-degree rape. We agree and reverse Defendant's first-degree kidnapping conviction on Count III.

¶ 33 N.C. Gen. Stat. § 14-39 defines first-degree kidnapping, in pertinent 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:
>
> . . . .

> (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 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.

N.C. Gen. Stat. § 14-39(a)(2), (b) (2007).

¶ 34 In *State v. Jordan*, our Court explained that "an indictment under N.C. Gen. Stat. § 14-39(a)(2) need not allege the exact type of felony furthered by the restraint or confinement[.]" 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 492 (2008). However, in order for the State to prove that the defendant committed the kidnapping for the purpose of facilitating a felony, "the felony that is the alleged purpose of the kidnapping must occur after the kidnapping." *Id.*; *see also State v. Brooks*, 138 N.C. App. 185, 190–92, 530 S.E.2d 849, 853–54 (2000).

¶ 35 Moreover, although § 14-39(a)(2) permits a first-degree kidnapping conviction where the defendant committed the kidnapping either for the purpose of facilitating the commission of a felony *or* for the purpose of facilitating flight of any person after the commission of a felony, the State is obliged to prove the allegations made in the indictment. *See State v. Morris*, 147 N.C. App. 247, 251–53, 555 S.E.2d 353, 355–56 (2001) (reversing kidnapping conviction where the State alleged that the defendant kidnapped the victim to facilitate a rape, but the evidence tended to show only that the defendant kidnapped the victim to facilitate his flight *after* the rape), *aff'd per curiam*, 355 N.C. 488, 562 S.E.2d 421 (2002); *see also State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982) ("When an indictment alleges an intent to commit a particular felony, the [S]tate must prove the particular felonious intent alleged.").

¶ 36 Our Court's majority decision in *Morris* controls the outcome here. In that case, the defendant was charged with one count each of second-degree rape and second-degree kidnapping after luring the victim into an apartment, assaulting her, raping her, and then locking her in a storage closet outside of the apartment. 147 N.C. App. at 248–49, 555 S.E.2d at 353–54. The indictment charging the defendant with

second-degree kidnapping stated that he "kidnapped the victim for the purpose of facilitating the commission of a felony [namely, second-degree rape]. The indictment made no mention of facilitating [the] defendant's flight following the commission of a felony." *Id.* at 250, 555 S.E.2d at 355. Our Court noted that all of the evidence tended to show that the rape occurred *before* the kidnapping. *Id.* at 251, 555 S.E.2d at 355. It further noted that,

> [w]hile there is little question [the] defendant's actions made his flight from the scene easier and was an attempt to cover up his act, the removal of the victim to the storage closet in no way made [the] defendant's rape of her easier, as all of the elements of rape were completed before the removal.

Id. at 252–53, 555 S.E.2d at 356. In so observing, our Court rejected the State's argument that the kidnapping "facilitated" the defendant's rape of the victim by preventing her escape. *Id.* at 252, 555 S.E.2d at 356. Because "the evidence [did] not support the charge stated in the indictment," a majority of our Court reversed the defendant's second-degree kidnapping conviction. *Id.* at 253, 555 S.E.2d at 356.[4]

¶ 37 Here, the State alleged that Defendant committed Count III when he moved A.H. "from the back bedroom to another bedroom and put her into a closet[,]" which the parties agree occurred after Defendant committed first-degree rape. Thus, because "the felony that is the alleged purpose of the kidnapping must occur after the kidnapping[,]" we must reverse Defendant's first-degree kidnapping charge on Count III. *Jordan*, 186 N.C. App. at 584, 651 S.E.2d at 922.

¶ 38 We note that both of Defendant's first-degree kidnapping convictions and his rape conviction were consolidated for sentencing. Therefore, we remand the judgment in 17 CRS 4 for resentencing. Because "it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment," our Supreme Court has cautioned that "the better procedure" is to remand to the trial court for resentencing when this Court reverses

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4. One judge dissented from the majority in *Morris*, and would have held that, based on *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), our Court should decline to find a "bright line distinction between 'facilitating the commission of any felony' and 'facilitating flight[.]' " *Morris*, 147 N.C. App. at 254, 555 S.E.2d at 357 (Walker, J., dissenting). Our Supreme Court rejected the position of the dissent and affirmed *Morris* per curiam. 355 N.C. 488, 562 S.E.2d 421.

one or more but not all of the convictions consolidated for judgment. *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987).

D. Common-Law Robbery

¶ 39 **[3]** Defendant next asserts that the trial court erred by denying his motion to dismiss the charge of common-law robbery because the State failed to offer sufficient evidence that anything was taken from A.H.'s person or presence. We disagree.

¶ 40 Common-law robbery requires proof that the defendant committed a "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). "The force element required for common law robbery requires violence or fear sufficient to compel the victim to part with his property or to prevent resistance to the taking." *State v. Elkins*, 210 N.C. App. 110, 113–14, 707 S.E.2d 744, 748 (2011) (citation and internal quotation marks omitted). Proof of either violence or fear is sufficient to meet the force element. *Id.*

¶ 41 Here, the State offered evidence that A.H. called her daughter and son-in-law shortly after Defendant left her home and said that "she had been robbed and raped, and tied up." In addition, the State presented evidence that, as soon as Defendant forced his way into A.H.'s house, he asked where she kept her money. A.H. told her daughter Jeanette that Defendant ripped off her jewelry while he assaulted her, and she told Det. Sgt. Jackson that Defendant demanded her money and jewelry. The State further offered evidence that, after raping A.H. and while her hands and feet were bound, Defendant "started going through all of her drawers and wanted to know where she kept her good stuff." A.H. also told Jeanette that Defendant said that "he wanted money to go to Florida[,]" and that he went through her pocketbook and removed approximately $450 from A.H.'s billfold. A.H.'s daughter Linda testified that A.H. kept a ring on top of her dresser, and that the ring was missing after Defendant searched through her dresser. Linda also testified that the previous Friday she and A.H. had replenished A.H.'s "five dollar stash"—a cache of $5 bills that A.H. sent with birthday cards. Linda testified that the $5 bills were stored in A.H.'s pocketbook, and that after the attack, the five-dollar stash was "gone, along with [A.H.'s] food stamps and her Medicaid card and drivers license[.]"

¶ 42 We conclude that the State presented sufficient evidence of common-law robbery to send the charge to the jury. The evidence tended to show that A.H. was tied to a chair while Defendant rifled through

her dresser and pocketbooks; that evidence is sufficient to show that Defendant used force "to prevent resistance to the taking." *Id.* (citation omitted). The evidence also showed that the cash in A.H.'s pocketbook, a ring, her food stamps, her Medicaid card, and her driver's license were missing after Defendant left. This evidence is sufficient to create "a reasonable inference[,]" *Scott*, 356 N.C. at 596, 573 S.E.2d at 869, of the "non-consensual taking of money or personal property" from A.H.'s presence, *Smith*, 305 N.C. at 700, 292 S.E.2d at 270. Viewing "the evidence in the light most favorable to the State, [and] giving the State the benefit of all reasonable inferences[,]" *Scott*, 356 N.C. at 596, 573 S.E.2d at 869, we conclude that the State presented sufficient evidence to send the charge of common-law robbery to the jury.

II. Evidentiary Issues

¶ 43 Defendant next raises several arguments relating to the admission of evidence. He argues that the trial court erred by admitting Nurse Marlene Malcolm as an expert witness without sufficient notice from the State, by permitting Ms. Malcolm to authenticate A.H.'s medical records, and by admitting hearsay statements of A.H.

A. Expert-Witness Qualifications

¶ 44 **[4]** Defendant asserts that the trial court erred by admitting Ms. Malcolm as an expert witness because the State had not provided Defendant with notice of the State's intent to call Ms. Malcolm as an expert witness, and because Ms. Malcolm was not a certified SANE. However, Defendant does not contend that Ms. Malcolm testified to any improper expert opinion. Defendant's argument, therefore, seems to be twofold: First, that the State committed a discovery violation by failing to provide Defendant with sufficient notice of its intent to call Ms. Malcolm as an expert; and second, that the trial court abused its discretion by allowing Ms. Malcolm to testify regarding "her expertise in the sexual assault victim's kit collection process" because she was not sufficiently qualified as an expert. We disagree with both arguments.

¶ 45 At trial, the State called Ms. Malcolm to testify as an expert in the "sexual assault victim kit collection process[.]" Defendant objected, arguing that the State had neither provided him with the requisite notice of its intent to call Ms. Malcolm as an expert witness nor provided him with the substance of the expert opinion that she would offer at trial. Defendant also argued that Ms. Malcolm was not qualified to testify as an expert because she was not a certified SANE. The trial court overruled Defendant's objection and permitted Ms. Malcolm to testify as an expert witness.

¶ 46 To the extent that Defendant raises an argument regarding an alleged discovery violation, we review that claim for an abuse of discretion. *State v. Pender*, 218 N.C. App. 233, 240, 720 S.E.2d 836, 841, *appeal dismissed and disc. review denied*, 366 N.C. 233, 731 S.E.2d 414 (2012), *cert. dismissed*, 374 N.C. 262, 839 S.E.2d 845 (2020). "An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision." *Id.* (citation omitted).

¶ 47 N.C. Gen. Stat. § 15A-903 governs discovery matters in criminal cases:

> (a) Upon motion of the defendant, the court must order:
>
> . . . .
>
> (2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court. . . .

N.C. Gen. Stat. § 15A-903(a)(2). When a party voluntarily provides materials in response to a discovery request, "the discovery is deemed to have been made under an order of the court for the purposes of this Article." *Id.* § 15A-902(b).

¶ 48 Section 15A-910 provides the remedies available to a party alleging a discovery violation. In its discretion, the trial court may: "(1) [o]rder the party to permit the discovery or inspection, or (2) [g]rant a continuance or recess, or (3) [p]rohibit the party from introducing evidence not disclosed, or (3a) [d]eclare a mistrial, or (3b) [d]ismiss the charge, with or without prejudice, or (4) [e]nter other appropriate orders." *Id.* § 15A-910(a). "Although the court has the authority to impose such discovery violation sanctions, it is not required to do so." *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995). Because "[t]he purpose of discovery under our statutes is to protect the defendant

from unfair surprise by the introduction of evidence he cannot anticipate[, w]hich of the several remedies available under G.S. 15A-910(a) should be applied in a particular case is a matter within the trial court's sound discretion." *Pender*, 218 N.C. App. at 242, 720 S.E.2d at 842 (citations and internal quotation marks omitted).

¶ 49 Here, the prosecutor "readily admit[ted] we've not given any notice as to what her opinion would be if there was one." The State informed the trial court that it intended to offer Ms. Malcolm's testimony "to go through the sexual assault victim's kit collection process as it would be in the emergency department" at WakeMed in July 2007. The trial court ruled that Ms. Malcolm could testify regarding the general procedures for the sexual assault victim's kit collection, but could not offer any expert opinion beyond that testimony:

> [Ms. Malcolm may] testify as it relates to her expertise in the sexual assault victim's kit collection process as she would've understood it and participated in that process in 2007, with the understanding [that] Ms. Malcolm is not to testify as it relates to any expertise with regard[ ] to that collection, any medical opinions derived from that collection.

Even assuming a technical violation of the discovery statute, the trial court limited Ms. Malcolm's testimony in accordance with the discretion granted by § 15A-910. Defendant has not shown that the trial court abused its discretion.

¶ 50 We also review for an abuse of discretion the trial court's decision to qualify a witness as an expert. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). In the instant case, we cannot conclude that the trial court abused its discretion by permitting Ms. Malcolm to testify regarding "her expertise in the sexual assault victim's kit collection process[.]"

¶ 51 Rule 702(a) of the North Carolina Rules of Evidence ("the Rules") requires that, in order for a witness to be admitted as an expert, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a). Our Supreme Court in *McGrady* explained that the question courts must ask when faced with the qualification of a witness as an expert is: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" 368 N.C. at 889, 787 S.E.2d at 9. "Expertise can come from practical experience as much as from academic training." *Id.*

¶ 52 On voir dire, Ms. Malcolm testified that she had a degree in nursing, and that she received her North Carolina SANE certification in 1997 and her national SANE certification in 2009. Ms. Malcolm further testified that she had collected approximately 150 sexual assault victim kits, and that she had trained approximately ten nurses in the sexual assault victim kit evidence collection process throughout her career. When A.H. was admitted to WakeMed Hospital in 2007, Ms. Malcolm was a staff nurse in the emergency department and treated A.H.

¶ 53 Ms. Malcolm's testimony during voir dire revealed that she had approximately two decades of experience collecting sexual assault victim kits and had been trained on how to properly collect such kits. She further had experience in training other nurses in the collection process. We therefore conclude that the trial court did not abuse its discretion in determining that Ms. Malcolm had "enough expertise to be in a better position than the trier of fact" to testify generally to the sexual assault victim kit collection process. *Id.*

B. Medical Records

¶ 54 **[5]** Defendant next argues that the trial court erred by admitting A.H.'s medical records into evidence because the medical records contained hearsay, and were not admissible under an exception to the hearsay rule, namely, the business records exception.

¶ 55 In that Defendant objected to the admission of the medical records on these grounds at trial, we review the trial court's determination regarding the records' admissibility de novo. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015), *disc. review denied*, 368 N.C. 686, 781 S.E.2d 606 (2016). We conclude that the trial court did not err.

¶ 56 Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). Generally, "[h]earsay is not admissible except as provided by statute" or by the Rules. *Id.* § 8C-1, Rule 802. The Rules provide that certain statements may be admitted under exceptions to the hearsay rule, including records of regularly conducted business activity:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report,

> record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id. § 8C-1, Rule 803(6).

¶ 57 In the instant case, Defendant contends that the medical records at issue were not properly authenticated business records admissible under Rule 803(6) because the testifying witness, Ms. Malcolm, was not "the custodian [of the records] or other qualified witness." *Id.* We disagree.

¶ 58 Hospital records may be admitted as business records under Rule 803(6) if properly authenticated by a custodian or qualified witness, *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555, *appeal dismissed and disc. review denied*, 317 N.C. 711, 347 S.E.2d 448 (1986), unless the records bear indicia of a lack of trustworthiness, N.C. Gen. Stat. § 8C-1, Rule 803(6). However, "[t]here is no requirement that the records be authenticated by the person who *made* them." *State v. Romano*, 268 N.C. App. 440, 451, 836 S.E.2d 760, 770–71 (2019) (emphasis added) (citation omitted). Indeed, the statutory phrase "other qualified witness" "has been construed to mean a witness who is familiar with the business entries and the system under which they are made." *Miller*, 80 N.C. App. at 429, 342 S.E.2d at 556. "Trustworthiness is the foundation of the business records exception." *Id.*

¶ 59 In *State v. Tyler*, the defendant argued that a nurse's testimony regarding the victim's cause of death was inadmissible because her testimony was based in part on the victim's medical records. 346 N.C. 187, 204, 485 S.E.2d 599, 608, *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997). In considering the business-records exception to the rule against hearsay, our Supreme Court explained:

> The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam*. The court should exclude from jury

> consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.

Id. (citation omitted).

¶ 60 The Supreme Court noted that the nurse worked "in the burn-trauma unit . . . [and] was familiar with [the victim]'s medical records, that the records were made during [the victim]'s stay at [the h]ospital . . . [and] kept contemporaneously with [the victim]'s care, and that the records were kept by the hospital in the regular course of the hospital's business." *Id.* at 205, 485 S.E.2d at 609. Accordingly, the hospital records, and therefore the nurse's testimony based thereon, were admissible under Rule 803(6). *Id.*

¶ 61 Similarly, in the case at bar, Ms. Malcolm testified that she was a staff nurse in the emergency department of WakeMed during A.H.'s care. She further testified that she was familiar with WakeMed's medical recordkeeping procedures at the relevant time; that she was familiar with A.H.'s medical records; that she provided care to A.H. during a portion of her stay at WakeMed; and that A.H.'s medical records were created and maintained contemporaneously with her care. "The facts here raise no suspicion of untrustworthiness. Hospital protocol was strictly adhered to." *Miller*, 80 N.C. App. at 429, 342 S.E.2d at 556. Thus, we conclude that this testimony was sufficient to authenticate A.H.'s medical records.

¶ 62 Notably, the trial court ordered that any statements within the records that might be construed as legal conclusions bearing on the issues at hand—such as a note that A.H. had been "robbed and raped" —be redacted prior to publication to the jury. Because "[t]rustworthiness is the foundation of the business records exception[,]" *id.*, and because Defendant does not argue that the records were in any way untrustworthy or had been altered from their original form, we conclude that the trial court properly performed its gatekeeping function by "exclud[ing] from jury consideration matters in the record which are immaterial and irrelevant to the inquiry." *Tyler*, 346 N.C. at 204, 485 S.E.2d at 608.

C. Hearsay Statements of A.H.

¶ 63 **[6]** Defendant further argues that the trial court committed plain error by admitting the testimony of Linda Carter, Jeanette Harris, and Harry Carter as to certain out-of-court statements made by A.H. after her attack. We disagree.

1. Standard of Review

¶ 64 "Because our courts operate using the adversarial model, we treat preserved and unpreserved error differently." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Where, as here, "a criminal defendant has not objected to the admission of evidence at trial, the proper standard of review is a plain error analysis[.]" *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998).

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 516–17, 723 S.E.2d at 333 (citation and internal quotation marks omitted).

2. Merits

¶ 65 Defendant contends that the trial court committed plain error by admitting testimony regarding several statements made by A.H., who died prior to trial. This argument lacks merit.

¶ 66 To begin, Defendant argues that Linda's testimony of A.H.'s statements after the attack constituted hearsay sufficiently prejudicial to amount to plain error. Defendant points to Linda's testimony that A.H.'s ring, cash, food stamps, Medicaid card, and driver's license were missing after the attack. As a preliminary matter, we disagree that the challenged testimony was hearsay. To the contrary, Linda testified regarding her own perception of what was missing from A.H.'s home when Linda arrived there shortly after the rape and robbery:

> [LINDA]: . . . She had her mother's ring with her five children's birth stones in there. And that was laying there on top of the dresser in a little container that

> she kept it in. And she only wore it on Sundays or times that she got dressed up. And that was gone. I mean, she had worn it the Sunday before. But that was gone.
>
> . . . [H]er pocketbook that she used all the time was -- he did get that, and [M]omma and I had gone to the bank on Friday afternoon to get money out of the bank because we had to replenish her five dollar stash.
>
> And what that means, is that she had a long list of people that she sent birthday cards to, and she always put a five dollar bill in there, so we kept a little five dollar stash in with her birthday cards. So we got money out of the bank on Friday afternoon and run a few errands and so all of that money was in the pocketbook, and that was gone, along with her food stamps and her Medicaid card and drivers license, some of those things, were gone out of her purse.

¶ 67 This testimony does not recount an out-of-court statement made by A.H. Instead, Linda testified regarding her own personal actions—accompanying A.H. to the bank to withdraw cash—and perceptions—namely, observing that certain of her mother's possessions were conspicuously missing from her dresser and pocketbook. This testimony does not violate Rule 802's prohibition against hearsay.

¶ 68 Defendant further argues that certain testimony by Jeanette constituted hearsay sufficiently prejudicial to amount to plain error. Jeanette was present during Det. Sgt. Jackson's interview of A.H., and she testified with the assistance of notes she took during the interview. She testified that her mother said that the perpetrator entered her home, demanded money, removed her jewelry, penetrated her, and took approximately $450 from her billfold. This testimony does not amount to hearsay constituting plain error.

¶ 69 Defendant concedes that A.H.'s statements to Det. Sgt. Jackson are admissible. Therefore, Defendant cannot show that Jeanette's testimony—recounting her recollection of A.H.'s statements to Det. Sgt. Jackson—prejudiced Defendant because many of the same statements were admitted and heard by the jury during Det. Sgt. Jackson's testimony. Det. Sgt. Jackson testified that A.H. told him during the interview that the perpetrator demanded money and jewelry, had sex with her, and began going through her drawers. Even assuming that it was error

to admit Jeanette's similar testimony, Defendant cannot meet the high bar to establish that the jury probably would have returned a different verdict absent the challenged testimony because several witnesses corroborated this testimony, including Det. Sgt. Jackson. *See Gary*, 348 N.C. at 518, 501 S.E.2d at 63.

¶ 70 Defendant also contends that the following testimony from Linda constituted hearsay that amounts to plain error:

> [LINDA]: . . . [W]hen we got inside the storm door, I said, "Momma, what's going on?" And she was -- she was extremely terrified. It was in her eyes. And I said, "Are you okay?" And she said, "I'm okay." And she -- her eyes were just so fearful. And she was shaking like a leaf. And she was so white. And I knew she was crying, but she didn't have tears because she has macular degeneration, and that takes the moisture out. But you could tell by her face that she was just crying. So her heart was just crying.

Specifically, Defendant contends that Linda's testimony that A.H. said that she was "okay" but that Linda "could tell by her face that . . . her heart was just crying" was inadmissible hearsay, and that the admission of this testimony amounts to plain error because the State relied on this testimony to prove A.H.'s mental injury. This argument lacks merit.

¶ 71 First, A.H.'s statement that she was "okay" was not offered to prove the truth of the matter asserted, and thus was not hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c). That is, the State did not offer that statement to establish that A.H. was "okay" after the rape; indeed, the State sought to establish the very opposite—that she suffered serious personal injury, both bodily and mental, after she was raped. *See id.* § 14-27.2(a)(2). Similarly, Linda's testimony that she "could tell by [A.H.'s] face that . . . her heart was just crying" was not hearsay because it was not testimony of an out-of-court statement. *See id.* § 8C-1, Rule 801(c). Rather, as with her testimony concerning her observations of the state of her mother's home immediately after the incident, here, Linda permissibly testified regarding her own personal perception of A.H.'s mental state when she and Harry first arrived at A.H.'s house.

¶ 72 Defendant also argues generally that the trial court erred in admitting Harry's testimony as to statements made by A.H. after the rape and robbery. However, Defendant fails to identify any specific hearsay statements that he alleges were erroneously admitted. Because "it is not the role of the appellate courts to create an appeal for an appellant[,]" we

will not attempt to divine which statements Defendant believes that the trial court erred in admitting. *State v. Williams*, 218 N.C. App. 450, 452, 725 S.E.2d 7, 9 (2012) (citation and internal quotation marks omitted).

III. Sentencing

¶ 73 **[7]** Defendant next contends that the trial court erred by sentencing Defendant for both first-degree rape and the remaining first-degree kidnapping charge because the State used the first-degree rape conviction to elevate the kidnapping charge to first-degree kidnapping. The trial court entered judgment on the first-degree rape conviction and both first-degree kidnapping convictions, sentencing Defendant to a minimum of 240 and a maximum of 297 months of imprisonment on those charges, to run consecutively with his sentence on the remaining charges. The State contends that, because the trial court consolidated Defendant's sentences, this error is merely clerical in nature.

¶ 74 As explained above, Defendant's first-degree kidnapping conviction on Count III must be reversed, and the judgment in 17 CRS 4 remanded for resentencing on the remaining first-degree kidnapping and first-degree rape convictions. As explained below, on remand, the trial court may not sentence Defendant for both first-degree kidnapping and the underlying first-degree rape.

¶ 75 Kidnapping is elevated from the second degree to the first when "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" N.C. Gen. Stat. § 14-39(b) (2007). A criminal "defendant may not be punished for both the first-degree kidnapping and the underlying sexual assault." *State v. Daniels*, 189 N.C. App. 705, 709, 659 S.E.2d 22, 25 (2008). Where the State uses the commission of a sexual assault or rape "to elevate [a] kidnapping to first-degree kidnapping[,] . . . the trial judge err[s] in sentencing [a] defendant for both crimes." *Id.* at 710, 659 S.E.2d at 25. This is so because N.C. Gen. Stat. § 14-39, defining first-degree kidnapping, reflects the General Assembly's intent that "a defendant could not be convicted of both first degree kidnapping and a sexual assault that raised the kidnapping to first degree." *State v. Freeland*, 316 N.C. 13, 23, 340 S.E.2d 35, 40–41 (1986).

¶ 76 Here, like in *Daniels*, the jury found Defendant guilty of first-degree kidnapping but did not specify upon which theory it relied in reaching its verdict—whether it found that A.H. was not released by Defendant in a safe place, that she was seriously injured, or that she was sexually assaulted. 189 N.C. App. at 710, 659 S.E.2d at 25. As such, "we are required to assume that the jury relied on [D]efendant's commission of the sexual assault in finding him guilty of first-degree kidnapping." *Id.*

¶ 77 Therefore, upon Defendant's resentencing, "the trial court may 1) arrest judgment on the first-degree kidnapping conviction and resentence [D]efendant for second-degree kidnapping, or 2) arrest judgment on the first-degree rape conviction and resentence [D]efendant on the first-degree kidnapping conviction." *Id.* at 710, 659 S.E.2d at 25; *see also Freeland*, 316 N.C. at 24, 340 S.E.2d at 41.

IV. Civil Judgment for Attorney's Fees

¶ 78 **[8]** Defendant also appeals, by petition for writ of certiorari, from the trial court's imposition of a civil judgment against him for fees awarded to his court-appointed attorney without first giving him notice and an opportunity to be heard. As explained below, we allow Defendant's petition for writ of certiorari in order to reach the merits of this portion of his appeal, vacate the judgment, and remand for a new hearing on the issue of attorney's fees.

A. Jurisdiction

¶ 79 As a preliminary matter, Defendant concedes that his counsel failed to file proper written notice of appeal of the civil money judgment entered against Defendant as required by Rule 3 of our Rules of Appellate Procedure, governing appeal from civil judgments. N.C. R. App. P. 3(a). Accordingly, Defendant petitioned this Court to issue its writ of certiorari in order to review the civil judgment against him for attorney's fees. Because we conclude that the issue raised by Defendant is meritorious, we exercise our discretion to issue a writ of certiorari to review this issue. *See State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018).

B. Merits

¶ 80 This Court in *Friend* explained the process that trial courts must follow before imposing a money judgment against defendants for their court-appointed counsel:

> In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys' fees incurred by their court-appointed counsel. By statute, counsel's fees are calculated using rules adopted by the Office of Indigent Defense Services, but trial courts awarding counsel fees must take into account factors such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases. Before imposing a judgment for these attorneys' fees, the

> trial court must afford the defendant notice and an opportunity to be heard.

Id. at 522, 809 S.E.2d at 906 (citations and internal quotation marks omitted). Trial courts must ask defendants directly, not through their assigned counsel, whether they wish to be heard on the issue of attorney's fees. *Id.* at 523, 809 S.E.2d at 907. Where the trial court fails to comply with this directive, we must vacate the civil judgment imposing attorney's fees and remand for a new hearing on the issue. *Id.*

¶ 81 The trial court's entire colloquy with Defendant in the instant case proceeded as follows:

> [DEFENSE COUNSEL]: Your Honor, . . . I don't have an idea how many hours I have in this. I will submit that to the Court and ask for judgment to be made. I think he has to be asked if he was satisfied with the work that I did for him.
>
> THE COURT: Mr. Elder, your attorney is indicating that she [ha]s not tabulated all of her hours as it relates to your representation. You did indicate earlier that you were satisfied with her services. Sir, with respect to this case, I believe should the Court of Appeals uphold the Court's sentencing and the convictions of the jury, you w[ill] be 82 years old. So the Court is not going to impose attorneys fees. The Court will docket those attorney fees and costs of court as a civil judgment against you, sir, should you be released from custody at age 82.
>
> Is there anything else further?
>
> [DEFENSE COUNSEL]: No, Your Honor, thank you.
>
> THE COURT: We are adjourned.

Defense counsel then submitted a fee application dated 7 April 2019, four days after Defendant's sentencing hearing. Also on 7 April, the trial court entered a civil judgment against Defendant imposing attorney's fees in the amount of $17,212.50.

¶ 82 The State argues that because the record is silent as to whether Defendant had notice and an opportunity to be heard between his sentencing hearing and the entry of the civil judgment, we should "not presume error from [the] . . . record." *State v. Bond*, 345 N.C. 1, 26, 478 S.E.2d 163, 176 (1996), *reh'g denied*, 345 N.C. 355, 479 S.E.2d 210, *cert.*

denied, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). We disagree that the record here is "silent."

¶ 83 The matter at hand is indistinguishable from that presented in *State v. Harris*, 255 N.C. App. 653, 805 S.E.2d 729 (2017), *disc. review denied*, 370 N.C. 579, 809 S.E.2d 872 (2018). In that case, "the trial court simply stated that [the d]efendant was to be taxed, with the costs of court and attorney fees, if applicable, if [the d]efendant's counsel was court appointed." *Harris*, 255 N.C. App. at 664, 805 S.E.2d at 737 (internal quotation marks omitted). However, because the defendant's counsel did not know, at the time of the hearing, the number of hours that he had worked, the trial court later entered a civil judgment upon the attorney's submission of a fee application. *Id.* at 657, 805 S.E.2d at 732–33. Our Court concluded that "[b]ecause there [wa]s no indication in the record that [the d]efendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed, the imposition of attorney's fees must be vacated." *Id.* at 664, 805 S.E.2d at 737 (citation and internal quotation marks omitted).

¶ 84 The same is true here. Defendant could not have received a meaningful opportunity to be heard between his sentencing hearing and the imposition of the money judgment because his counsel had not yet submitted the fee application. The trial court entered the civil money judgment against Defendant on the same day that his counsel submitted the fee application, four days after Defendant's sentencing hearing. We therefore conclude that the trial court erred by failing to provide Defendant with notice and an opportunity to be heard regarding the amount of attorney's fees to be assessed against him. Accordingly, we must vacate the civil judgment against Defendant and remand for a new hearing on this issue. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that Defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* (citation omitted).

Conclusion

¶ 85 We conclude that the trial court erred in denying Defendant's motion to dismiss Count III, first-degree kidnapping, reverse that conviction, and remand the judgment in 17 CRS 4 for resentencing. We also conclude that the trial court erred in sentencing Defendant for both first-degree kidnapping and first-degree rape. On remand, the trial court may either "1) arrest judgment on the first-degree kidnapping conviction and resentence [D]efendant for second-degree kidnapping, or 2) arrest

judgment on the first-degree rape conviction and resentence [D]efendant on the first-degree kidnapping conviction." *Daniels*, 189 N.C. App. at 710, 659 S.E.2d at 25. We also vacate the civil judgment imposing attorney's fees and remand for a new hearing, during which Defendant shall be afforded the requisite notice and opportunity to be heard. Otherwise, Defendant received a fair trial, free from prejudicial error.

NO ERROR IN PART; REVERSED IN PART AND REMANDED FOR RESENTENCING; CIVIL JUDGMENT VACATED AND REMANDED FOR REHEARING.

Chief Judge STROUD concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

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

¶ 86 The majority opinion's analysis and conclusions to allow Defendant's motion to dismiss and disregard the jury's verdict of one count of first-degree kidnapping and to remand for re-sentencing on both the first-degree rape conviction and the first-degree kidnapping convictions are error. Defendant also failed to preserve or to carry his burden on appeal to show reversible error occurred in the imposition of a civil judgment for attorney's fees. I respectfully dissent in part.

¶ 87 Except for these errors, the majority opinion's analysis and conclusions of the Defendant's claims regarding his motion to dismiss the charges of first-degree rape and common law robbery, the admittance of a nurse as an expert witness and hearsay are proper. I fully concur with the remaining portions of the majority's opinion concluding no error.

I. Defendant's Conviction of First-Degree Kidnapping was Proper

¶ 88 Defendant asserts he had purportedly completed the offense of first-degree rape, prior to moving A.H. from one bedroom to another, and he could not have moved or restricted A.H. "for the purpose of facilitating the commission of" first-degree rape. Binding precedent from our Supreme Court negates this argument.

¶ 89 The occurrence of all essential elements of a crime does not mean the commission of a crime ceases. *State v. Hall*, 305 N.C. 77, 82-83, 286 S.E.2d 552, 556 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). The indictment in *Hall* charged the

defendant with asportation and kidnapping of the victim to facilitate armed robbery. *Id.* at 82, 286 S.E.2d at 555. The armed robbery in question had occurred before the kidnapping. *Id.* The defendant argued the armed robbery had occurred prior to the kidnapping and the kidnapping could not be in furtherance of the armed robbery. *Id.*

¶ 90 Our Supreme Court refused to establish hard distinctions between the purposes listed in N.C. Gen. Stat. § 14-39(a) (1981) and held "[t]hat the crime was 'complete' does not mean it was completed." *Id.* at 83, 286 S.E.2d at 556 (citation omitted). This reasoning has been sustained by both our Supreme Court and this Court. *See State v. Kyle*, 333 N.C. 687, 695, 430 S.E.2d 412, 416 (1993), *disapproved of on other grounds by State v. Golden*, 143 N.C. App. 426, 546 S.E.2d 163 (2001); *see also State v. Holloway*, 253 N.C. App. 658, 799 S.E.2d 466, 2017 WL 2118712 (2017) (unpublished).

¶ 91 Defendant's argument before us is the same our Supreme Court denied in *Hall*. *Hall*, 305 N.C. at 82, 286 S.E.2d at 555. After raping A.H., Defendant took her to another room where he tied her to a chair and blocked the door with a bed. This further restraint is clearly "separate and apart from, and not an inherent incident" of the underlying rape. *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978).

¶ 92 This second restraint prevented A.H. from seeking medical attention, contacting help, or fleeing from Defendant. Defendant's actions continued A.H.'s pain, damage, and trauma from the rape. These restraints also allowed Defendant a chance to shower, instead of needing to immediately flee. These additional restraints and asportation "ma[de] easier" the commission of the rape by allowing Defendant a chance to destroy evidence. *See Kyle*, 333 N.C. at 694, 430 S.E.2d at 415-16.

¶ 93 Reviewed in the light most favorable to the State, and allowing the benefit of all inferences therefrom, the evidence supports the conclusion that a purpose of the separate kidnapping was to facilitate the rape and the jury could conclude that the kidnapping was part of an ongoing criminal transaction. *State v. Chevallier*, 264 N.C. App. 204, 211, 824 S.E.2d 440, 446 (2019) (citation omitted).

¶ 94 Defendant committed a separate asportation by restraining and moving the victim to a new room against her will in furtherance of the rape. The fact all necessary elements of the underlying rape may have been "complete" does not warrant this Court overturning the jury's determination, concluding Defendant's second kidnapping furthered the rape. *See Hall* 305 N.C. at 83, 286 S.E.2d at 556. Defendant's claim is without merit and is properly overruled.

II. Defendant was Properly Sentenced at Trial

¶ 95 Defendant argues, and the majority's opinion holds, that a defendant "may not be punished for both the first-degree kidnapping and the underlying sexual assault." *State v. Daniels*, 189 N.C. App. 705, 709, 659 S.E.2d 22, 25 (2008).

¶ 96 Defendant relies upon *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986) and *Daniels* to argue that he was improperly sentenced. In both cases, Courts held the defendants could not be sentenced for both first-degree kidnapping and rape when the rape was the basis for raising the kidnapping from second to first degree. *Freeland*, 316 N.C. at 20, 340 S.E.2d at 39; *Daniels*, 189 N.C. App. at 709, 659 S.E.2d at 25; *see also Fulcher*, 294 N.C. at 525, 243 S.E.2d 352-53.

¶ 97 The Supreme Court of North Carolina and our Court noted the jury was erroneously instructed that it could rely upon a separately charged rape to raise the kidnapping to the first-degree. *Freeland*, 316 N.C. at 21, 340 S.E.2d at 39; *Daniels*, 189 N.C. App. at 709-10, 659 S.E.2d at 25. In doing so, the defendants were "unconstitutionally subjected to double punishment under statutes proscribing the same conduct." *Freeland*, 316 N.C. at 21, 340 S.E.2d at 39.

¶ 98 Defendant points to the written judgments as proof that Defendant's sentence for first-degree kidnapping relied upon his conviction for first-degree rape.

¶ 99 While a conviction of first-degree kidnapping predicated on a separately charged rape is a violation of double jeopardy, Defendant's first-degree kidnapping charges were not predicated upon his rape charge. The trial court instructed the jury they could find first-degree kidnapping if the victim "was not released in a safe place or was seriously injured" as provided in the statute. *See* N.C. Gen. Stat. § 14-39(b) (2007). Unlike the cases cited by Defendant, the trial court never instructed the jury that the first-degree kidnapping charges could be predicated upon the separately charged rape. Defendant's right to be free from double jeopardy was never violated and he was not convicted twice for the same conduct or offense. The jury's instruction, Defendant's conviction, and trial court's sentencing by the trial court were proper.

¶ 100 Because Defendant's first-degree kidnapping conviction did not rely upon the rape charge, there is no error in the jury considering and convicting Defendant of the two separate charges. Any asserted error is clerical error and is not prejudicial.

III. Defendant Failed to Properly Appeal the Attorney's Fees

¶ 101 Defendant admits he failed to file a written notice of appeal of the civil money judgment entered against Defendant as required by Rule 3 of the Rules of Appellate Procedure. N.C. R. App. P. 3(a). "The rules governing appeals are mandatory and not directory." *Womble v. Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927) (citation omitted). Defendant petitioned this Court for a writ of certiorari. This Court, in its discretion, may allow such writs if the petition "show[s] merit or that [prejudicial] error was probably committed." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted).

¶ 102 This Court presumes "in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant to show prejudicial error." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118, 665 S.E.2d 493, 497 (2008) (citation omitted).

¶ 103 Defendant's petition does not show merit nor prejudicial error. Defendant argues that he must be asked personally whether he wishes to be heard upon the issue of attorney's fees before they can be entered as a judgment against him. *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018). In *Friend*, this Court held that if there was "evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard" then the conditions of notice and opportunity prior to imposition of a civil attorney fee judgment are satisfied. *Id.*

¶ 104 Here, the trial court explicitly notified Defendant in open court "attorney fees and costs of court [will be docketed] as a civil judgment against you. . . ." Defendant's attorney also stated, with Defendant present, "[Defendant] has to be asked if he was satisfied with the work that I did for him." Having learned of this right, there is no indication that Defendant attempted to assert it or challenge the fees.

¶ 105 On appeal, Defendant does not contest the amount imposed, merely the method used. Defendant was afforded sufficient notice and opportunity to be heard on the matter in open court. He failed to argue or show that his claim has merit or he suffered prejudicial error. Following prior precedent, Defendant's petition for a writ of certiorari is properly dismissed. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

IV. Conclusion

¶ 106 The majority opinion's analysis of Defendant's claims regarding his motion to dismiss the charges of first-degree rape and common law

robbery, the admittance of a nurse as an expert witness, and hearsay is proper. I fully concur with those findings and conclusions of no error.

¶ 107 Defendant's claims regarding (1) his motion to dismiss a first-degree kidnapping charge, (2) sentencing on first-degree rape and both first-degree kidnapping charges, and (3) the imposition of attorney's fees as a civil judgment were either not appealed or have no legal basis and all are properly denied or dismissed.

¶ 108 Defendant received a fair trial, free from prejudicial errors he preserved and argued. There is no error in the jury's verdicts or in the judgments entered thereon. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
RICHARD ALAN GADDIS, JR.

No. COA20-396

Filed 20 July 2021

Continuances—motion for continuance—request for prior trial transcript—one week before retrial—invited error

At defendant's retrial for multiple driving offenses following a mistrial, the trial court properly denied defendant's motion for a continuance to produce a transcript from the prior trial. Because defendant's trial counsel waited until the week before the scheduled retrial to file the motion, any error was invited error, and therefore defendant could not shift blame to the State or the trial court by arguing that his denied request for a transcript violated his constitutional rights. Moreover, defendant was not prejudiced because he was present at both trials and his prior trial counsel testified at the retrial, providing similar information to what the denied transcript would have disclosed.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 6 September 2019 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 9 March 2021.

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

Jarvis John Edgerton, IV, for defendant-appellant.

TYSON, Judge.

¶ 1 Defendant asserts the trial court abused its discretion and committed prejudicial and reversible error when it denied his motion for a continuance to produce a transcript from a prior trial. We disagree and find no error.

I. Background

¶ 2 Defendant was charged 12 February 2018 with: (1) driving while impaired; (2) driving while his license was revoked for an impaired driving offense; (3) driving without a valid registration; and, (4) driving without a displayed license plate.

¶ 3 Defendant's actions were reported by eyewitnesses, who had called 911 to report Defendant's erratic and dangerous driving. Defendant crashed the vehicle he was driving. Multiple eyewitnesses saw Defendant behind the wheel of the vehicle with its engine running and detected a strong odor of alcohol on his person. Defendant attempted to flee from the scene of the wreck. He was caught and subdued by the civilian eyewitnesses until law enforcement officers arrived and took him into custody.

¶ 4 Defendant was initially tried 15 July 2019. This trial ended in a hung jury and a mistrial was declared. Defendant's current trial counsel was appointed immediately after his first trial on 18 July 2019. The trial court set the date for retrial for 3 September 2019. Defendant made a pretrial motion for production of the transcript from the mistrial a week prior to the scheduled retrial and a motion to continue to have sufficient time to receive the transcript. The motions were denied by the trial court.

¶ 5 At the retrial, Defendant renewed his motions and argued the denial of the motions was a violation of his due process rights. Defendant asserted he needed the transcript from the prior trial to effectively impeach and cross-examine the State's witnesses. The transcript raises an issue concerning trial counsel's strategy to request the continuance. When asked by the trial court: "do you really want the continuance." Trial counsel responded: "I do and I don't." The trial court denied both motions and proceeded to trial.

¶ 6 Defendant called his prior counsel, Onyema Ezeh, as a witness. The State objected and asserted Defendant should have timely requested and obtained a transcript. The trial court overruled the State's objection and allowed Ezeh to take the stand and testify. *See State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 419 (1982) (When a trial court denies an indigent defendant of a transcript, it must determine "(1) whether a transcript is necessary for the preparation of an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript.").

¶ 7 The jury's verdict found Defendant guilty of all charges. The trial court entered judgments on driving while impaired and driving while his license was revoked for an impaired driving offense, but arrested judgment on the remaining two charges of no registration or license plate. Defendant timely appealed.

II. Jurisdiction

¶ 8 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Standard of Review

¶ 9 "[A] motion to continue is addressed to the discretion of the trial court, and *absent a gross abuse of that discretion*, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citation omitted) (emphasis supplied). Denial of a motion to continue is grounds for a new trial *only if* the defendant shows the denial was erroneous *and* he suffered prejudice due to the error. *Id.*

¶ 10 To establish prejudice, the defendant carries the burden and must show he did not have time to confer with counsel, and to investigate, prepare, and present his defense. *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (citations omitted).

IV. Analysis

¶ 11 The State asserts Defendant's appointed counsel "waited until about a week before this trial was [scheduled] to happen to request a transcript." The State argues counsel was dilatory and used the motions to delay the trial from the prior established and known date. The State also argues Defendant has failed to show any prejudice occurred because prior counsel's testimony at the retrial was substantially similar to Defendant's dilatory request for the transcript a week before trial. The State reasons Ezeh's testimony may have been even more beneficial to Defendant than the prior trial transcript would have been.

¶ 12 Prior counsel called into question the eyewitnesses Porcello's and Daniel's truthfulness and accuracy. Alternatively, Defendant could have also subpoenaed the court reporter to review the tapes and read any of Porcello's and Daniel's prior and disputed testimony at trial, but he failed to do so. The State asserts it was unable to effectively impeach Ezeh's testimony because of the lack of transcript.

¶ 13 Defendant's appellate counsel argues trial counsel's dilatory request, Defendant's lack of the transcript, and the trial court's discretionary ruling to deny comprise a "constitutional violation." This assertion is nothing more than like a puffer fish, attempting to "blow up" Defendant's lack of a transcript. Defendant purports to shift the denial of Defendant's week-before-retrial motions for the transcript and continue the trial to the State with the burden to show such "error" was harmless beyond a reasonable doubt. This notion is unsupported by precedents.

¶ 14 Counsel's argument is more accurately described as a desiccated sardine, consciously canned by his trial counsel. Defense counsel's delay and inaction brought this notion of a "constitutional crisis" upon himself. Any purported remedy may well be asserted in an IAC claim against trial counsel, as opposed to puffing up and asserting blame on the trial court or the State for Defendant's lack of the transcript from the prior trial.

¶ 15 The State asserts this Court's opinion in *State v. McKeithan*, 140 N.C. App. 422, 437 537 S.E.2d 526, 536 (2000) supports their argument no prejudicial error occurred from the trial court failing to postpone the trial and allow Defendant to secure the transcript. In *McKeithan*, this Court held a trial court does not have to provide a transcript of a prior proceeding when counsel and the defendant were present at both proceedings and the testimony was substantially the same at both proceedings. *Id.* at 430, 537 S.E.2d at 536.

¶ 16 Here, as in *McKeithan*, Defendant was present for both proceedings and Ezeh testified at the second proceeding with new counsel appointed. Any purported error may be invited error if the motion was asserted a week prior to trial as a strategy and excuse to continue and delay the retrial. *Id.*

V. Conclusion

¶ 17 Even if not invited error, counsel's dilatory request for the transcript while knowing well in advance the retrial date deflates any prejudice argument, does not shift any burden onto the State of a purported "constitutional violation," and does not show any abuse of discretion by the

trial court. Defendant received a fair trial, free from prejudicial errors he preserved and argues. We find no error in the jury's verdicts or in the judgments entered therein. *It is so ordered.*

NO ERROR.

Judge GORE concurs.

Judge MURPHY dissents with separate opinion.

MURPHY, Judge, dissenting.

¶ 18 The Majority fails to engage with many of the arguments and cases relied upon by Defendant. In light of this failure and the reasons stated below, I dissent.

¶ 19 A trial court errs when it denies an indigent defendant's motion for a continuance to produce a prior proceeding's transcript without finding "[A] whether a transcript is necessary for preparing an effective defense and [B] whether there are alternative devices available to the defendant which are substantially equivalent to a transcript." *State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 419 (1982) (citing *Britt v. North Carolina*, 404 U.S. 226, 30 L. Ed. 2d 400 (1971)). Here, the denial of Defendant's motions for a continuance to produce the transcript from his mistrial was error due to the lack of findings regarding whether the transcript was necessary for Defendant's defense and whether there was an alternative device available to Defendant that was substantially equivalent to the transcript from his mistrial.

¶ 20 The denial of Defendant's motions also occurred without evidence that Defendant had no need for a transcript from his mistrial or that a substantially equivalent alternative was available to him. *See State v. Reid*, 312 N.C. 322, 323, 321 S.E.2d 880, 881 (1984) (per curiam).

BACKGROUND

¶ 21 Defendant Richard Gaddis, Jr., was charged with driving while impaired, driving while his license was revoked, driving without a valid registration, and driving without a displayed license plate. He was first tried on 15 July 2019, but the trial court declared a mistrial after the jury failed to reach a unanimous verdict. The trial court set retrial for 3 September 2019, and new counsel was appointed for Defendant. The 15 July 2019 and 3 September 2019 trials occurred before different judges.

¶ 22 In preparation for the retrial, Defendant made a pretrial motion for production of the mistrial transcript[1] and a motion to continue to have sufficient time to receive the mistrial transcript.[2] The motions were denied without any findings.

¶ 23 At the retrial, Defendant renewed his motions, arguing the denial of the motions would be a violation of his due process rights. Specifically, Defendant requested the transcript to effectively impeach and cross-examine the State's witnesses. Defendant's renewed motions were denied after the trial court found Defendant had "three prior attorneys" appointed to represent him before current Defense Counsel.

¶ 24 At the retrial, the State's witness Bryan Porcello testified he was driving with his family at night when he noticed a vehicle swerving and going through red stoplights. While following the vehicle, Porcello's wife called law enforcement and Porcello observed the vehicle veer off the road and get stuck. Porcello initially drove past the stuck vehicle, then turned around, noticed the vehicle was unstuck and continuing down the road again, and began following the vehicle again.

¶ 25 Porcello testified he saw "[a] white male" driving the vehicle, and "didn't see anyone else." After following the vehicle for some time, Porcello saw the vehicle veer off the road again, try to correct, but instead "[shoot] across both lanes and wreck[] into a ditch." Porcello then went to see whether the driver was injured but could not see into the vehicle. Porcello flagged down another vehicle for help while watching the wrecked vehicle to see whether the driver would emerge.

¶ 26 The driver of the flagged down vehicle, David Daniel, testified "[a]s I pulled up I saw [Defendant] in the driver's seat. My headlights shined right on him." Porcello and Daniel approached the vehicle with a flashlight and saw Defendant sitting in the driver seat of the vehicle alone. Daniel testified the vehicle was still running and Defendant's foot "was on the accelerator." Defendant appeared disoriented and was asking "where a girl was." Defendant exited the vehicle and walked toward a nearby neighborhood while Daniel and Porcello followed. Porcello eventually subdued Defendant and waited for law enforcement to arrive on scene. Porcello recalled talking with law enforcement but did not

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1. This is the proper method to acquire the transcript from a prior proceeding for an indigent defendant. *See Rankin*, 306 N.C. at 715, 295 S.E.2d at 418 (citing *Britt*, 404 U.S. 226, 30 L. Ed. 2d 400).

2. Although Defendant made one pretrial motion, the trial court treated the motion as a motion for a transcript and a motion for a continuance, and denied both.

make a written statement regarding the incident. Daniel made a written statement for law enforcement regarding the incident, which was read at trial.

¶ 27 During cross-examination, Defendant attempted to impeach Porcello and Daniel based on their prior testimony at the mistrial with notes from the mistrial Defense Counsel, Onyema Ezeh. At the conclusion of Daniel's testimony, Defendant notified the trial court of his intention to add Ezeh to his "witness list for impeachment purposes." After presenting its evidence, the State objected to Ezeh testifying:

> [THE STATE]: . . . . Based on the Rule 403 grounds that any testimony that he gives is just confusion of the issues and a reiteration of what's already been said in this trial. [Current Defense Counsel] could have -- there are multiple ways to be able to impeach a witness. He could have chosen to cross examine the witnesses on these issues.
>
> THE COURT: He did. He did cross examine them on the issue.
>
> [THE STATE]: And that now he's trying to use a different way and a former attorney to come in and when there are other ways to cross examine. And again that creates a host of issues in confusing the jury in this case and again he could have received a transcript which would have been a much more clear understanding.
>
> THE COURT: Well, he tried to do that but you all wanted to try the case so I told him he couldn't have it. He wanted a copy of the transcript but because of the case being a misdemeanor appeal and you all wanting to try it, his motion for the transcript was denied.
>
> [THE STATE]: And your Honor --
>
> THE COURT: So he attempted to go that route.
>
> [THE STATE]: I would also -- I mean, just for the record is that [current Defense Counsel] was appointed on this case on [18 July 2019], the day that [Defendant] -- the trial hung and that Mr. Ezeh withdrew and [current Defense Counsel] knew from other

> attorneys and myself that he was appointed that day and he waited until about a week before this trial was to happen to request a transcript.

¶ 28 Following the State's objection, the trial court allowed Ezeh to testify. Ezeh testified to certain discrepancies in Porcello's testimony. Specifically, Ezeh noted at the mistrial "[Porcello] was unable to tell [him] if [the driver] [was] black, white, male, female, race, nothing[,]" and "Porcello did not testify in the previous trial that [Defendant] was the driver of that vehicle." On cross-examination, the State questioned and impeached Ezeh's knowledge and recollection of the prior trial testimony, while also attacking his credibility:

> [THE STATE:] Mr. Ezeh, you're basing your testimony today on testimony you heard back in July?
>
> [EZEH:] Yes. From the testimony I heard back in July and from my notes, my closing statements and my mind's eye, my memory.
>
> [THE STATE:] And you can't say word for word what a witness said in that previous trial?
>
> [EZEH:] I cannot say word for word what a witness may have said but I do remember exactly what Mr. Porcello said with regards to not being able to identify [Defendant] as the driver of the vehicle. I remember that vividly.
>
> [THE STATE:] And you can't say word for word any of the questions that were asked in that previous trial?
>
> [EZEH:] I remember some of the questions I had asked Mr. Porcello at the previous trial, I remember some of the questions I asked him.
>
> [THE STATE:] But you still can't say word for word exactly what those were?
>
> [EZEH:] I cannot use the exact same verbiage I used when I asked the question . . . .
>
> [THE STATE:] And you haven't seen a transcript of the previous trial?
>
> [EZEH:] No. I have not seen a transcript of the previous trial, no.
>
> . . . .

> [THE STATE:] Are you relying on your memory of that?
>
> [EZEH:] . . . . I'm relying on everything that I remember from that trial, Mr. Porcello never said that.
>
> [THE STATE:] And your notes and everything, those notes aren't actual trial transcripts in this case; correct?
>
> [EZEH:] Those were notes that I used from the answers that were given to me during the trial based on questions[] . . . I had asked . . . at different times during the trial.
>
> [THE STATE:] Again, it's been two months since this prior testimony happened. Your recollection is not fresh in this case; correct?
>
> [EZEH:] It's been two months since it happened but I reviewed my notes from the trial, I have reviewed my closing statements . . . . So I'm giving you information that has been reviewed by myself.
>
> . . . .
>
> [THE STATE:] Mr. Ezeh, isn't it true your view of the testimony is biased from the first trial because you were interested in the outcome?
>
> [EZEH:] That's not true.
>
> [THE STATE:] And your view is still biased when recounting exactly what happened in that outcome.

¶ 29 The State also attacked Ezeh's credibility in closing arguments:

> [THE STATE:] You heard from Mr. Ezeh in this case, who was [Defendant's] lawyer at a previous trial, at a previous proceeding. You heard that he's an interested party in this case. He is interested in the outcome of this case. . . . [Current Defense Counsel] said that the witnesses are trying to convict [Defendant] without seeing anything. When in fact [current Defense Counsel] and Mr. Ezeh are trying to get [Defendant] out of criminal consequences by testimony that they provided when they actually haven't seen anything.

¶ 30 A jury found Defendant guilty of driving while impaired, driving while his license was revoked impaired revocation, driving without a valid registration, and driving without a displayed license plate.

¶ 31 Defendant appeals the trial court's denial of his motions to continue and to produce the transcript from the mistrial, arguing the lack of a determination regarding whether the transcript was necessary for the preparation of an effective defense, and whether there was a substantially equivalent alternative device available to Defendant was error.

ANALYSIS

¶ 32 "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). However,

> [w]hen a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when [the] defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Jones, 172 N.C. App. 308, 312, 616 S.E.2d 15, 18 (2005). "The issue presented here is one of law because the State must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *State v. Wells*, 73 N.C. App. 329, 330, 326 S.E.2d 129, 131 (1985).

¶ 33 When determining whether an indigent defendant shall be entitled to secure a transcript of a prior proceeding, the trial court

> examines [A] whether a transcript is necessary for preparing an effective defense and [B] whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. *If the trial court finds* there is either no need of a transcript for an effective defense or there is an available alternative which is 'substantially equivalent' to a transcript, one need not be provided and denial of such a request would not be prejudicial.

Rankin, 306 N.C. at 716, 295 S.E.2d at 419 (emphasis added) (citation omitted) (quoting *Britt*, 404 U.S. at 230, 30 L. Ed. 2d at 405); *see also*

Reid, 312 N.C. at 323, 321 S.E.2d at 881 (granting a new trial when the "[trial] court denied [the] defendant's motion without evidence or findings that [the] defendant had no need for a transcript or that there was available to [the] defendant a substantially equivalent alternative").

A. Findings Regarding Transcript Request Denial

¶ 34 The facts here are similar to *State v. Tyson*, where the trial court declared a mistrial due to a deadlocked jury and set a retrial for the next day. *State v. Tyson*, 220 N.C. App. 517, 518, 725 S.E.2d 97, 98 (2012). In *Tyson*, the defendant objected to the immediate retrial and requested the transcript from the prior trial. *Id.* The trial court denied the defendant's request, stating, "the anticipation or the speculation that a witness may get on the stand and alter their testimony" was an insufficient basis to continue trial and allow for the production of a transcript. *Id.* at 519, 725 S.E.2d at 99. The next day, the defendant renewed his request for the transcript, and the trial court denied it after finding "there are means [the trial court] can take to ensure that the defendant's due process rights are protected." *Id.* We applied the *Rankin* two-part test and held the trial court's findings were insufficient:

> [The] [d]efendant, in this case, argued he needed the transcript to effectively cross-examine the State's witnesses . . . . The trial court's ruling in this case that [the] defendant's asserted need constituted mere speculation that a witness might change his or her testimony would apply in almost every case. A defendant would rarely if ever be able to show that the State's witnesses would in fact change their testimony. The trial court's ruling makes no determination why, in this particular case, [the] defendant had no need for a transcript, especially in light of the fact that the State's case rested entirely on the victim's identification of [the] defendant as the perpetrator. . . . Accordingly, [the] defendant is entitled to a new trial.

Id. at 519-20, 725 S.E.2d at 99 (citation omitted); *see also Wells*, 73 N.C. App. at 330-31, 326 S.E.2d at 131 (citation omitted) (holding "the [trial court's] ruling denying [the] defendant a continuance without the findings required by our Supreme Court in *Rankin* was a violation of [the] defendant's equal protection rights under the Fourteenth Amendment to the [United States] Constitution").[3]

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3. The Majority does not engage with the key issue in this appeal–the lack of findings, required by *Rankin*, in the trial court's denial of Defendant's motions for a transcript

¶ 35 Here, like the defendant in *Tyson*, Defendant requested the transcript of the mistrial to effectively impeach and cross-examine the State's witnesses. Further, like the victim's identification of the defendant in *Tyson*, much of the State's case rested on whether Porcello and Daniel witnessed Defendant driving. The trial court's pretrial denial of Defendant's motion for production of the mistrial transcript and motion to continue to have sufficient time to receive the mistrial transcript did not contain a finding regarding whether the transcript was necessary to prepare an effective defense, or whether there was an alternative device available to Defendant that was substantially equivalent to a transcript. Specifically, the oral order denying Defendant's pretrial motions did not contain any of the required findings.

¶ 36 Similar to the trial court's denial of the defendant's renewed request in *Tyson*, at trial, Defendant's renewed motions for a continuance and production of the mistrial transcript were denied after a finding Defendant had "three prior attorneys" appointed to him. Regarding the denial of Defendant's renewed motions at retrial, the Record on appeal shows no findings were made regarding whether the transcript was necessary for Defendant's preparation of an effective defense, or whether an alternative device substantially equivalent to the transcript was available to Defendant. Accordingly, the denial of Defendant's motion to continue and for production of the mistrial transcript was made without sufficient *findings* that Defendant had no need for a transcript or that a substantially equivalent alternative was available to him. *See Reid*, 312 N.C. at 323, 321 S.E.2d at 881 (emphasis added) (granting a new trial where "the [trial] court denied [the] defendant's motion without *evidence* or *findings* that [the] defendant had no need for a transcript or that there was available to [the] defendant a substantially equivalent alternative").

¶ 37 Although our courts have not conducted an explicit prejudice analysis in these instances, we have treated the lack of findings as prejudicial error. *See Tyson*, 220 N.C. App. at 518, 725 S.E.2d at 98 (remanding for a new trial where insufficient findings were made); *Rankin*, 306 N.C. at 715-16, 295 S.E.2d at 418-19.

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and to continue. Further, the Majority's contention that the trial court's denial of Defendant's motions for a transcript and to continue was not a potential constitutional violation is not consistent with *Wells*, *Tyson*, or *Rankin*. *Supra* at ¶¶ 13-14. The denial without the findings required by *Rankin* violated Defendant's equal protection rights. *See Wells*, 73 N.C. App. at 330-31, 326 S.E.2d at 131.

B. Evidence of a Substantially Equivalent Alternative

¶ 38 We also must evaluate whether the denial of Defendant's motions was made without *evidence* that Defendant had no need for a transcript or that a substantially equivalent alternative was available to him. *See Reid*, 312 N.C. at 323, 321 S.E.2d at 881. Relevant to this issue, the State argues the trial court did not err, despite the lack of findings required in *Rankin* at the time of the motions' denials, because at trial it allowed testimony from Defendant's former attorney, Ezeh, which provided an alternative device that was substantially equivalent to a transcript. Assuming, *arguendo*, that we should consider later evidence during trial in our review of the pretrial motions, I still disagree.

¶ 39 "[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt*, 404 U.S. at 227, 30 L. Ed. 2d at 403. In *Britt*, the Supreme Court of the United States held the trial court appropriately denied the provision of a requested transcript when an informal, substantially equivalent alternative was available to the indigent defendant. *Id.* at 230, 30 L. Ed. 2d at 405. In *Britt*,

> [t]he second trial was before the same judge, with the same counsel and the same court reporter, and the two trials were only a month apart. . . . [The] petitioner could have called the court reporter *to read to the jury the testimony given at the mistrial*, in the event that inconsistent testimony was offered at the second trial.
>
> . . . . The trials of this case took place in a small town where, according to [the] petitioner's counsel, the court reporter was a good friend of all the local lawyers[,] was reporting the second trial[, and] . . . would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request.

Id. at 228-29, 30 L. Ed. 2d at 404-05 (emphasis added).[4]

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4. The Majority cites *State v. McKeithan*, 140 N.C. App. 422, 437, 537 S.E.2d 526, 536 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 392, 547 S.E.2d 35 (2001), for two purported reasons, neither of which negate the findings required under *Rankin*: (A) "a trial court does not have to provide a transcript of a prior proceeding when counsel and the defendant were present at both proceedings and the testimony was substantially the same at both proceedings"; and (B) "[a]ny purported error may

¶ 40 Here, long after his renewed motions were denied and the State presented evidence, Defendant chose to call his former attorney, Ezeh, to testify; the State objected to Ezeh's testimony, in part because the testimony would be "confusing [to] the jury[,]" unlike "a transcript which would have been a much more clear understanding." While testifying, Ezeh provided his recollection of Porcello's testimony at the prior trial and detailed how it differed from his current testimony. However, on cross-examination, the State repeatedly impeached Ezeh's testimony as an incomplete recollection of events, including that he could not recall "word for word what a witness said in that previous trial[.]" The State continually noted Ezeh was relying simply on his trial notes and memory of Porcello's testimony, not on a verbatim trial transcript. Ezeh's impeached testimony was not a substantially equivalent alternative to a trial transcript.

¶ 41 Upon this Record, the facts here are similar to *Rankin*, where "there was no alternative available to [Defendant] which was substantially equivalent to a transcript, [and Defendant] was entitled to a free transcript." *Rankin*, 306 N.C. at 717, 295 S.E.2d at 420. Defendant is entitled to a new trial.

CONCLUSION

¶ 42 The denial of Defendant's motions to continue and to produce the mistrial transcript was error due to the lack of findings regarding whether the transcript was necessary for Defendant's defense and whether

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be invited error if [Defendant's] motion was asserted a week prior to trial as a strategy and excuse to continue and delay the retrial." *Supra* at ¶¶ 15-16. Of note, our opinion in *McKeithan* did not analyze the required findings in *Rankin* or our opinion in *Wells*.

The first reason does not include all of the circumstances we found were important in *McKeithan*. In *McKeithan*, we held the trial court's refusal to issue the defendant a transcript of a motion to suppress hearing was not prejudicial error where "the hearing on the motion to suppress took place approximately one week before trial[, the defendant] had the *same counsel* for the hearing and trial and the *same judge* presided[, and] both counsel and the defendant were present for both proceedings." *McKeithan*, 140 N.C. App. at 438, 537 S.E.2d at 536 (emphases added). As previously noted, here, Defendant had different counsel for the retrial, and different judges presided over the mistrial and the retrial. Further, the time between Defendant's mistrial and trial was more than six weeks longer than the time between the motion to suppress and trial in *McKeithan*. *Id.*

The second reason, potential invited error, was not discussed in our opinion in *McKeithan* and assumes improper delay by Defendant. Importantly, requesting a continuance to enable the effective cross-examination of witnesses with the transcript from a prior trial is not an improper delay, as the Majority claims, and does not support the Majority's improper delay theory. Further, the second reason does not seem to take into account Defense Counsel's claim in the *Motion to Continue* that he did not receive *Brady* disclosure material until 19 August 2019, one week before making the *Motion for Transcript* on 26 August 2019 (a full week before trial).

there was an alternative device available to Defendant that was substantially equivalent to the transcript of the prior proceeding. Even if proper for our consideration, Ezeh's testimony was not a substantially equivalent alternative to a verbatim transcript. Defendant is entitled to a new trial. For these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
GERALD LAMONT HEMINGWAY, DEFENDANT

No. COA20-24

Filed 20 July 2021

1. Probation and Parole—revocation—positive drug test—Justice Reinvestment Act

The trial court erred by revoking defendant's probation on the basis that he had tested positive for cocaine. Under the Justice Reinvestment Act, defendant's positive drug test could not serve as the sole basis for revocation of his probation.

2. Probation and Parole—revocation—sufficiency of evidence—new criminal offense—hearsay evidence

The trial court did not err by revoking defendant's probation for his commission of a new criminal offense (sale, delivery, and/or possession of illegal narcotics) where a police officer's testimony regarding a paid informant's purchase of cocaine from defendant—although consisting of hearsay—provided sufficient evidence linking defendant to the substances purchased by the paid informant and identifying the substances as illegal narcotics ("crack").

3. Probation and Parole—statutory right to confrontation—good cause for denial—trial court's discretion

Although defendant's argument regarding a Sixth Amendment right to confrontation in his probation revocation hearing was meritless, defendant did have a statutory right to confrontation pursuant to N.C.G.S. § 15A-1345(e), and the trial court erred by failing to exercise its discretion in determining whether good cause existed for denying defendant the right to confront a paid informant who purchased drugs from defendant where a police officer testified as to what the paid informant said about the purchase.

Judge TYSON concurring in part and concurring in the result in part with separate opinion.

Appeal by Defendant from judgment entered 14 August 2019 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

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

MURPHY, Judge.

¶ 1 The trial court could not revoke Defendant's probation solely for a positive drug test. However, the trial court did not abuse its discretion when it revoked his probation for a violation of N.C.G.S. § 15A-1343(b)(1). There is sufficient evidence in the Record to support the trial court's finding that Defendant committed new criminal offenses in violation of N.C.G.S. § 15A-1343(b)(1).

¶ 2 Before denying Defendant the opportunity to confront and cross examine an adverse witness, the trial court must make a finding of good cause pursuant to N.C.G.S. § 15A-1345(e). When the trial court does not exercise its discretion, we cannot determine whether it abused its discretion and the case must be remanded to the trial court for further findings. Here, based upon our review of the Record, it does not appear as though the trial court exercised its discretion in determining whether good cause exists.

BACKGROUND

¶ 3 In August 2017, Defendant Gerald Lamont Hemingway pled guilty to one count of possession with intent to sell or distribute marijuana. Defendant was sentenced to 8 to 19 months in prison and his sentence was suspended for 24 months of supervised probation. As part of the standard conditions of his probation (AOC-CR-603C), Defendant was not to commit any criminal offense in any jurisdiction and Defendant could "[n]ot use, possess, or control any illegal drug or controlled substance unless it ha[d] been prescribed for [him] by a licensed physician and [was] in the original container with the prescription number affixed on it[.]" *See* N.C.G.S. § 15A-1343(b)(15) (2019).

¶ 4 The State alleged Defendant violated the conditions of his probation in two violation reports by (1) committing new criminal offenses; and (2) testing positive for cocaine. Paragraph 3 of the *Violation Report* dated 20 March 2018 alleges:

> Of the conditions of probation imposed in that judgment, [Defendant] has willfully violated:
>
> . . .
>
> 3. General Statute 15A-1343(b)(1) "Commit no criminal offense in any jurisdiction" in that [Defendant] HAS THE FOLLOWING CHARGES THAT ARE VIOLATIONS OF [Defendant's] CURRENT PROBATION: 18CR050542 FELONY POSSESSION OF COCAINE, MAINTAIN VEH/DWELL/PLACE CS (F) OFFENSE DATE [13 March 2018];
>
> 18CR050550 (F) CONSPIRE TO TRAFFIC IN COCAINE
> OFFENSE DATE [13 March 2018]
>
> 18CR050551 (F) SELL COCAINE, MAINTAIN VEH/DWELL/PLACE CS (F)
> OFFENSE DATE [12 March 2018]
>
> 18CR050552 (F) SELL COCAINE, MAINTAIN VEH/DWELL/PLACE CS (F)
> OFFENSE DATE [12 March 2018]
>
> 18CR050557 (F) CONSPIRE TO TRAFFIC COCAINE
> (F) CONSPIRE TO TRAFFIC COCAINE
> OFFENSE DATE [13 March 2018]
>
> 18CR050558 (F) SELL OR DELIVER COUNTERFEIT CS (F) PWISD COUNTERFEIT CS OFFENSE DATE [13 March 2018]

Paragraph 1 of the *Violation Report* dated 4 April 2018 alleges:

> Of the conditions of probation imposed in that judgment, [Defendant] has willfully violated:
>
> 1. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for [Defendant] by a licensed

> physician and is in the original container with the prescription number affixed on it . . .” in that
>
> [Defendant] TESTED POSITIVE FOR COCAINE ON [4 April 2018].

¶ 5 A properly noticed probation violation hearing was held on 14 August 2019. At the probation violation hearing, Probation Officer Amy Cartrette (“Cartrette”) testified Defendant tested positive for cocaine on 4 April 2018, but Defendant had denied using cocaine. Lieutenant Barett Thompson (“Lieutenant Thompson”) also testified about two purchases he initiated with Defendant through a paid informant. The paid informant did not testify at the probation violation hearing.

¶ 6 Both purchases occurred on 12 March 2018. After meeting with Defendant at his residence, the paid informant returned to a predetermined area to meet Lieutenant Thompson. Lieutenant Thompson and other officers searched the paid informant and found a “white powder substance” from the “agreed-upon transaction between the [paid informant] and the target, [Defendant].” Later in the afternoon on 12 March 2018, the paid informant went back to Defendant’s residence to conduct a second purchase.

¶ 7 These purchases were used as the basis for obtaining a search warrant for Defendant’s house, where Lieutenant Thompson found

> a pair of pants that [Defendant] stated were his pants. They contained $625[.00] in cash in the pocket. Located in the bathroom were three small off-white rocks and a small bag of green leafy substance. . . . All the evidence was placed in the Evidence of Columbus County Sheriff’s Office, and $500[.00] of the $625[.00] in the pants pocket matched the source buy money used from the day before.

Defendant was subsequently charged with possession of cocaine, possession of marijuana, maintaining a dwelling place, and sale and delivery of cocaine.

¶ 8 The trial court revoked Defendant’s probation, finding:

> 3. The condition(s) violated and the facts of each violation are as set forth . . .
>
> a. In Paragraph(s) 3 of the Violation Report or Notice dated [20 March 2018].

> b. In Paragraph(s) 1 of the Violation Report or Notice dated [4 April 2018].
>
> . . .
>
> 4. Each of the conditions violated as set forth above is valid; [Defendant] violated each condition willfully and without valid excuse; and each violation occurred at a time prior to the expiration or termination of the period of [Defendant]'s probation.
>
> Each violation is, in and of itself, a sufficient basis upon which this [c]ourt should revoke probation and activate the suspended sentence.

¶ 9 According to the trial court's written findings, Defendant's probation was revoked for (1) committing new criminal offenses and (2) testing positive for cocaine. However, at the probation revocation hearing, the judge orally stated "[t]he basis of the revocation is that [Defendant] has committed a new criminal offense." Defendant timely appealed and requests the judgment be vacated and his case be remanded for a new probation revocation hearing.

ANALYSIS

¶ 10 Defendant argues the trial court erred in revoking his probation and he is entitled to a new probation violation hearing. Specifically, Defendant argues pursuant to the Justice Reinvestment Act ("JRA"), 2011 N.C. Sess. Laws 192, his probation cannot be revoked solely for a positive drug test; there was insufficient evidence for the trial court to conclude Defendant had committed new crimes, namely the sale, delivery and/or possession of illegal narcotics; and he was deprived of his constitutional right to confrontation pursuant to the Due Process Clause, as well as his statutory right to confrontation in a probation revocation hearing pursuant to N.C.G.S. § 15A-1345(e).

A. Positive Drug Test

¶ 11 **[1]** We agree with Defendant in that the trial court "erred in revoking [his] probation after finding that [Defendant] 'tested positive for cocaine on [4 April 2018].' "

> To revoke a defendant's probation, the trial court need only find that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. Additionally,

> once the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms. If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation.

State v. Stephenson, 213 N.C. App. 621, 624, 713 S.E.2d 170, 173 (2011) (internal citations and marks omitted). Further, pursuant to the JRA,

> for violations occurring on or after 1 December 2011, the trial court may only revoke a defendant's probation where the defendant (1) commits a new criminal offense in violation of [N.C.G.S.] § 15A-1343(b)(1); (2) absconds by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, in violation of [N.C.G.S.] § 15A-1343(b)(3a); or (3) violates any condition after previously serving two periods of confinement in response to violations ("CRV") pursuant to [N.C.G.S.] § 15A-1344(d2).

State v. Krider, 258 N.C. App. 111, 113-14, 810 S.E.2d 828, 830, *modified and aff'd per curiam*, 371 N.C. 466, 818 S.E.2d 102 (2018) (internal citations and marks omitted); *see* Justice Reinvestment Act, 2011 N.C. Sess. Laws 192. "For all other violations, the trial court may either modify the conditions of the defendant's probation or impose a 90-day period of CRV." *Id.* at 114, 810 S.E.2d at 830.

¶ 12 N.C.G.S. § 15A-1343(b) sets out regular conditions of probation that "apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court[,]" including:

> (b) Regular Conditions. -- As regular conditions of probation, a defendant must:
>
> (1) Commit no criminal offense in any jurisdiction.
>
> . . .
>
> (15) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the

> original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

N.C.G.S. § 15A-1343 (2019).

¶ 13 While at the probation revocation hearing, the judge orally stated "[t]he basis of the revocation is that [Defendant] has committed a new criminal offense[,]" the trial court's written findings found Defendant's probation was revoked for (1) committing new criminal offenses and (2) testing positive for cocaine. "[I]f there is some conflict between oral findings and ones that are reduced to writing, the written order controls for purposes of appeal." *State v. Johnson*, 246 N.C. App. 677, 684, 783 S.E.2d 753, 759 (2016); *see Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) ("The general rule is that the trial court's written order controls over the trial judge's comments during the hearing."). Accordingly, the written order controls and our analysis is based on the trial court revoking Defendant's probation for committing new criminal offenses in violation of N.C.G.S. § 15A-1343(b)(1) *and* testing positive for cocaine in violation of N.C.G.S. § 15A-1343(b)(15).

¶ 14 Defendant is correct that pursuant to the JRA, his probation cannot be revoked solely for his violation of N.C.G.S. § 15A-1343(b)(15).[1] However, Defendant's probation may have been properly revoked where there was sufficient evidence to show Defendant committed new crimes in violation of N.C.G.S. § 15A-1343(b)(1). *See Krider*, 253 N.C. App. at 113-14, 310 S.E.2d at 830 ("[T]he trial court may . . . revoke a defendant's probation where the defendant . . . commits a new criminal offense in violation of [N.C.G.S.] § 15A-1343(b)(1)[.]").

¶ 15 Although the trial court's order indicated "[e]ach violation is, in and of itself, a sufficient basis upon which this [c]ourt should revoke probation

---

1. In his brief, Defendant also contends "the trial court lacked jurisdiction to revoke [Defendant's] probation based on the violations alleged in paragraph one of the [4] April 2018 violation report." The trial court was certainly without statutory authority to revoke his probation merely for a positive drug test. However, the lack of authority to invoke a certain remedy does not impact the trial court's jurisdiction over the alleged probation violation. The improper use of an unauthorized remedy is an error of law, reviewable and correctable on appeal, which does not equate to the power of the trial court to act in the first place. Defendant's argument as to lack of jurisdiction is without merit.

and activate the suspended sentence[,]" Defendant's positive drug test, "in and of itself," is not a sufficient basis upon which the trial court could revoke probation. The trial court's finding this violation is adequate to revoke probation is reversed.

B. New Criminal Offenses

¶ 16 Defendant argues there was insufficient evidence for the trial court to conclude he committed new criminal offenses in violation of N.C.G.S. § 15A-1343(b)(1). Alternatively, Defendant argues if there was sufficient evidence of a violation of N.C.G.S. § 15A-1343(b)(1), he is entitled to a new probation revocation hearing because there was a violation of the right(s) to confrontation.

1. Sufficiency of Evidence

¶ 17 **[2]** First, Defendant argues it was error to revoke his probation for commission of new criminal offenses, namely sale, delivery and/or possession of illegal narcotics, because the evidence presented in this case was insufficient to both link Defendant with the substances seized from his home, and to show that any of the substances purportedly connected to him were actually cocaine. We disagree.

¶ 18 Relying on the United States Supreme Court decision in *Gagnon v. Scarpelli*, our Supreme Court has held "[a] probation revocation proceeding is not a formal criminal prosecution, and probationers thus have 'more limited due process rights.' " *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 789, 36 L. Ed. 2d 656, 666 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-223, 90 Stat. 228 (1976)). "Consistent with this reasoning, [our Supreme Court has] stated that 'a proceeding to revoke probation is not a criminal prosecution' and is 'often regarded as informal or summary.' " *Id.* (quoting *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967)). In addition, "[f]ormal rules of evidence do not apply" in probation revocation hearings. N.C.G.S. § 15A-1345(e) (2019). "Similarly, our Rules of Evidence, other than those concerning privileges, do not apply in proceedings for 'sentencing, or granting or revoking probation.' " *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358 (quoting N.C.G.S. § 8C-1, Rule 1101(b)(3) (2013)). Accordingly, the trial court has "great discretion to admit any evidence relevant to the revocation of [the] defendant's probation." *Id.* at 465, 758 S.E.2d at 359 (internal citations and marks omitted).

¶ 19 The following testimony occurred at Defendant's probation revocation hearing:

[THE STATE]: Lieutenant Thompson, on [12 March] 2018, at approximately 12:00 in the afternoon, did you and other detectives with the Narcotics Unit conduct a [purchase] with [Defendant] as the target?

[LIEUTENANT THOMPSON]: Yes, ma'am.

[DEFENSE COUNSEL]: Objection.

THE COURT: Wish to be heard?

[DEFENSE COUNSEL]: No.

THE COURT: Overruled.

[THE STATE]: Can you tell the [c]ourt about that?

[LIEUTENANT THOMPSON]: Yes, ma'am. The source of information was met; searched; the vehicle was searched; given money from source buy funds; followed; watched go to [Defendant's] target location; watched whenever they left; followed back to the predetermined staging area. At that point in time, they were searched again, along with the conveyance, and the evidence was turned over to myself by the source of information.

[THE STATE]: Were there source buy funds given to the [paid informant] in this case?

[LIEUTENANT THOMPSON]: Yes, ma'am.

. . .

[THE STATE]: And did [the paid informant] return and turn over any contraband or evidence to the detectives?

[LIEUTENANT THOMPSON]: Yes, ma'am.

[THE STATE]: And what was seized?

[LIEUTENANT THOMPSON]: A white powder substance.

[THE STATE]: Okay. And was that what was the agreed-upon transaction between the [paid informant] and the target, [Defendant]?

[LIEUTENANT THOMPSON]: Yes, ma'am.

. . .

> [THE STATE]: Okay. All right. And can you tell the [c]ourt about the second transaction.
>
> [LIEUTENANT THOMPSON]: Yes, ma'am. [The paid informant] was met, predetermined staging area outside the town of Chadbourn; again, source of information, vehicle was searched by myself; money was provided by -- from the source buy funds of $1,000[.00]. Again, the source of information was followed to the target location; watched turn in; watched when they left the target area; followed back to the predetermined location. The evidence at that time was turned over to myself. The source of information and the vehicle were searched again.
>
> [THE STATE]: Okay. And was that evidence that was turned over to you consistent with what was discussed as to the buy concerning [Defendant]?
>
> [LIEUTENANT THOMPSON]: Yes ma'am.
>
> [THE STATE]: That it was prearranged that the [paid informant] was going to buy from [Defendant]?
>
> [LIEUTENANT THOMPSON]: Yes, ma'am.
>
> . . .
>
> [LIEUTENANT THOMPSON]: . . . [Paid informant] went into the residence with [Defendant]. [Defendant] asked [the paid informant] what she needed. [The paid informant] advised two ounces of powder. [Defendant] then got the powder and told [the paid informant] that was all he had and also gave [the paid informant] some crack for $1,000[.00]. [The paid informant] also gave [Defendant] $1,000[.00] for the powder and the crack.

¶ 20 Through this testimony, the State presented sufficient evidence to link Defendant with the substances seized from his home. Lieutenant Thompson's testimony illustrates the following facts: he executed two separate purchases between Defendant and the paid informant; the paid informant told him she purchased "powder and [] *crack*" from Defendant during the purchases; he obtained and executed a search warrant the day after the purchases at Defendant's residence and seized

three small off-white rocks from Defendant's bathroom and $625.00 from Defendant's pants pocket; $500.00 of the $625.00 found in Defendant's pants pocket matched the serial numbers of the money provided for the purchases; he searched the paid informant and the vehicle she rode in to meet Defendant before and after each purchase and confirmed the paid informant had no illegal substances on her person before the purchases occurred; and he followed the paid informant to and from Defendant's residence and confirmed the paid informant made no stops.

¶ 21 While we agree with Defendant that the testimony as to "powder" and "off-white rocks" would not be sufficient, we hold the evidence as to "crack," which was not opposed to on appeal, constituted sufficient evidence of a controlled substance, namely cocaine as defined in N.C.G.S. § 90-90. N.C.G.S. § 90-90(1)(d) (2019) ("The following controlled substances are included in [Schedule II controlled substances]: . . . [c]ocaine[.]"). The hearsay evidence of the paid informant was relevant for determining whether Defendant had violated a condition of his probation by committing a criminal offense. *See* N.C.G.S. § 15A-1343(b)(1) (2019). Lieutenant Thompson's testimony was sufficient to show Defendant committed a new criminal offense, specifically the sale and/or delivery of cocaine in violation of N.C.G.S. § 90-95(a)(1). *See* N.C.G.S. § 90-95(a)(1) (2019) (making it unlawful "[t]o manufacture, sell or deliver, or possess with intent to sell or deliver, a controlled substance[.]").

2. Confrontation

a. No Sixth Amendment Right

¶ 22 **[3]** Defendant argues he has both a constitutional right to confrontation and a statutory right to confrontation. However, a Sixth Amendment right to confrontation in a probation revocation hearing does not exist. *See State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) (holding a hearing to determine whether the terms of a suspended sentence have been violated is not a criminal prosecution and therefore protections of the Sixth Amendment are inapplicable to adult probation revocation proceedings). Defendant's constitutional argument, to the extent it sounds in due process, collapses into his statutory argument below because N.C.G.S. § 15A-1345(e) codifies the due process requirements concerning confrontation in probation revocation hearings. *See State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986) ("[N.C.G.S. § 15A-1345(e)] guarantees notice, bail, a preliminary hearing and a revocation hearing with counsel present. At the revocation hearing, the trial judge must make findings to support his decision on whether to revoke or extend probation. He must also make a summary record of the

proceedings. . . . [T]he statute guarantees full due process before there can be a revocation of probation and a resulting prison sentence."); *see also* N.C.G.S. § 15A-1345(e) (2019).

b. Statutory Right

¶ 23 Defendant further argues the trial court erred in failing to find good cause before denying him an opportunity to confront and cross-examine Lieutenant Thompson's paid informant, an adverse witness, as required by N.C.G.S. § 15A-1345(e) and "asks this Court to vacate the judgments revoking probation and remand his case for a new revocation hearing." As the trial court did not exercise its discretion in determining whether good cause exists for denying Defendant the right to confront the paid informant, we remand for reconsideration of the good cause issue.

¶ 24 N.C.G.S. § 15A-1345(e) provides that at a probation revocation hearing, a defendant "may confront and cross-examine adverse witnesses unless the [trial] court finds good cause for not allowing confrontation." N.C.G.S. § 15A-1345(e) (2019). While N.C.G.S. § 15A-1345(e) confers upon a defendant a right to confrontation, it commits to the discretion of the trial court whether "good cause [exists] for not allowing confrontation." N.C.G.S. § 15A-1345(e) (2019).

¶ 25 Lieutenant Thompson testified he oversaw two purchases in March 2018 with a paid informant. Before Lieutenant Thompson provided details about the purchases, Defendant objected to Lieutenant Thompson's testimony:

> [DEFENSE COUNSEL]: Your Honor, objection. I realize the Rules of Evidence don't apply in probation violation cases, but we do have some very fundamental constitutional rights, including due process, equal protection, and confrontation.
>
> And if [the State is] soliciting hearsay about a [purchase] from an officer who wasn't present at the [purchase], it's hearsay, and it denies [Defendant] the right to confront the accuser, who would be the person that allegedly bought the narcotics from [Defendant]. And that's a fundamental problem.
>
> I recognize that -- but it's just no right of confrontation to bring an officer in and say, ["]I know there was a [purchase] and so-and-so bought such and such from somebody.["] I don't believe that due process and equal protection -- even though we do know that the

> Rules of Evidence don't apply to probation matters, it's just a - - it's a fundamental constitutional right.

The trial court overruled Defendant's objection and Lieutenant Thompson began to testify. Defendant objected again:

> [THE STATE:] And how much was given on that day at that time, the 12:00 hour?
>
> [LIEUTENANT THOMPSON:] At that time, $200[.00].
>
> [THE STATE:] $200[.00]. Okay. And that [paid informant] was whom?
>
> . . .
>
> [LIEUTENANT THOMPSON:] [Paid informant's name].
>
> [THE STATE:] And [the paid informant], she was searched before and after the [purchase]?
>
> [LIEUTENANT THOMPSON:] Yes, sir -- I mean, yes, ma'am.
>
> [THE STATE:] And the vehicle that she rode in was searched before and after?
>
> [LIEUTENANT THOMPSON:] Yes, ma'am.
>
> [THE STATE:] And did she return and turn over any contraband or evidence to the detectives?
>
> [LIEUTENANT THOMPSON:] Yes, ma'am.
>
> [THE STATE:] And what was seized?
>
> [LIEUTENANT THOMPSON:] A white powder substance.
>
> [THE STATE:] Okay. And was that what was the agreed-upon transaction between the [paid informant] and the target, [Defendant]?
>
> [LIEUTENANT THOMPON:] Yes, ma'am.
>
> [DEFENSE COUNSEL]: Objection. That's hearsay.
>
> THE COURT: Hearsay is admissible. Overruled.
>
> [DEFENSE COUNSEL]: By the confrontation, Your Honor; we don't have this lady here to confront.

> THE COURT: *State v. Murchison*. Again, understanding the nature of these proceedings, the [trial court] overrules the objection.

¶ 26 The State, in reliance on *State v. Jones*, 269 N.C. App. 440, 838 S.E.2d 686 (2020),[2] contends Defendant did not request testimony from the paid informant or subpoena the paid informant to testify at the probation revocation hearing. However, we need not extend the rationale of *Jones* where, as here, there is no evidence to suggest Defendant knew the State would be offering testimony involving a paid informant, nor is there any evidence in the Record to suggest Defendant knew the paid informant existed.[3] Further, without knowledge of the paid informant's identity, Defendant would have no way to issue a subpoena, let alone serve one, or request the trial court to issue a material witness order in accordance with N.C.G.S. § 15A-803. *See* N.C.G.S. § 15A-803(a) (2019) ("A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought."). Such an application of *Jones* would be in direct conflict with general principles of due process.

¶ 27 We believe the trial court's denial of Defendant's objection because of "the nature of these proceedings" was an indication that it did not exercise its discretion to decide whether good cause exists under the facts of this case. *See State v. Lang*, 301 N.C. 508, 510-11, 272 S.E.2d 123, 125 (1980) (holding the trial court judge did not exercise his discretion when he denied the jury's request for a transcript by stating "the transcript is not available to the jury"). Based on the Record before us, we cannot determine whether the trial court abused its discretion in determining whether good cause exists because the trial court did not exercise its discretion to begin with.

¶ 28 Lieutenant Thompson's paid informant was an adverse witness who did not testify. Pursuant to N.C.G.S. § 15A-1345(e), the trial court was required to make a finding of good cause before denying Defendant's statu-

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2. A petition for discretionary review has been filed and is currently pending before the North Carolina Supreme Court, No. 85P20.

3. The Concurrence discusses a "search warrant," which is not included in the Record on appeal.

tory right to confront and cross-examine an adverse witness. N.C.G.S. § 15A-1345(e) (2019); *see State v. Morgan*, 372 N.C. 609, 616, 831 S.E.2d 254, 259 (2019) ("[W]hen the General Assembly has inserted the phrase 'the court finds' in a statute setting out the exclusive circumstances under which a defendant's probation may be revoked, the specific finding described in the statute must actually be made by the trial court and such a finding cannot simply be inferred from the record."). The trial court's ruling contained no findings referencing the existence of good cause and it is unclear from the face of the Record whether the trial court required a showing of good cause when it denied Defendant the right to confront the paid informant. We are unable to determine if the trial court abused its discretion in determining whether good cause exists for not allowing confrontation, and we must remand to the trial court for consideration of the issue. On remand, the trial court shall exercise its discretion in determining whether good cause exists for not allowing Defendant to confront and cross-examine the paid informant, and make findings in accordance with the requirements of N.C.G.S. § 15A-1345(e).

CONCLUSION

¶ 29 We reverse that portion of the order finding Defendant's positive drug test was an adequate ground for revoking his probation. Defendant's probation could only be revoked for a violation of N.C.G.S. § 15A-1343(b)(1). There was sufficient evidence linking Defendant to the substances involved in the purchase and identifying the substances as illegal narcotics, and for the trial court to find Defendant was in violation of N.C.G.S. § 15A-1343(b)(1). The trial court did not abuse its discretion in revoking Defendant's probation on those grounds.

¶ 30 However, the trial court did not exercise its discretion when it did not make any findings related to good cause. As the trial court did not make specific findings that denying Defendant the right to confront the paid informant was because of good cause, we remand for further findings pursuant to N.C.G.S. § 15A-1345(e).

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judge DIETZ concurs.

Judge TYSON concurs in part and concurs in the result in part with separate opinion.

TYSON, Judge, concurring in part and concurring in the result in part.

¶ 31 The majority's opinion correctly concludes Defendant did not show any abuse in the trial court's discretion when it found and concluded Defendant had committed new crimes and revoked Defendant's probation in violation of N.C. Gen. Stat. § 15A-1343(b)(1)(2019). Sufficient evidence in the record supports the finding and conclusion Defendant committed new criminal offenses in violation of that statute. I concur with these conclusions of the majority's opinion. I also concur with the majority's opinion, which correctly concludes Defendant's constitutional argument is frivolous.

¶ 32 I also conclude the trial court properly denied Defendant's untimely motion to cross-examine law enforcement's confidential informant ("CI") at his probation violation hearing. The revocation of Defendant' probation based upon his commission of new criminal acts and charges is properly affirmed, even without Sheriff's Lieutenant Thompson's ("Lt. Thompson") testimony, much less the testimony of the CI. Although unnecessary, to affirm Defendant's revocation, I concur in the result to remand for the trial court to enter its "good cause" finding.

¶ 33 Defendant pled guilty to possession with the intent to sell or deliver marijuana in August 2017. He was sentenced to a term of eight to nineteen months in prison, which was suspended, and he was placed upon 24 months of supervised probation. In March 2018, April 2018, and June 2019, his probation officer filed reports citing multiple violations. The first violation alleged Defendant had failed to pay scheduled fees and had accrued new drug charges. The second violation report alleged he had tested positive for cocaine and had illegally possessed the same. The third violation alleged he failed to report for required appointments and was charged with additional criminal charges. A probation violation hearing was held in August 2019. Defendant denied the allegations in the reports.

¶ 34 At the violation hearing, Defendant's probation officer testified regarding his positive drug tests, the new criminal charges, and the other violations. Lt. Thompson testified regarding two controlled sales and buys between Defendant and a CI. Lt. Thompson did not witness either of the drug sales. Based upon the information obtained through the controlled buys, he secured a search warrant for Defendant's home. Lt. Thompson met with and searched the CI's vehicle before and following the scheduled buys. After he searched the informant's vehicle, he retrieved the leftover marked money, three white rocks, and a bag of a leafy green substance. The State did not call either the CI or the SBI

analyst to testify at the violation hearing. Neither witness was subpoenaed by Defendant.

¶ 35 Defendant objected to Lt. Thompson's testimony regarding hearsay from the CI and to the drug lab results. The trial court overruled Defendant's hearsay objection, but it sustained his objection to the lab results. Lt. Thompson testified, based on his training and experience, the leafy green substance recovered was marijuana.

¶ 36 The trial court found Defendant had willfully violated the conditions of his probation as was alleged in the March report by committing new criminal offenses of selling and possessing illegal narcotics. The court also independently found Defendant had willfully violated his probation as alleged in the April report by testing positive for illegal drugs. The court dismissed his remaining violations and orally revoked Defendant's probation on the basis Defendant had committed new criminal offenses. The written order entered recited alternative bases to revoke and activate Defendant's suspended sentences. Defendant timely appealed.

I. Issue

¶ 37 The issue in this case is whether the trial court's ruling should be affirmed based upon Defendant's waivers and failure to subpoena witnesses, and this Court's precedential opinion and conclusion in *State v. Jones*, 269 N.C. App. 440, 445, 838 S.E.2d 686, 690 (2020).

II. Analysis

¶ 38 "A proceeding to revoke probation is not a criminal prosecution." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). N.C. Gen. Stat. § 15A-1345(e) gives a probationer a right to confrontation at a revocation hearing, but it leaves the trial court with discretion to determine whether "good cause" exists for not allowing confrontation. N.C. Gen. Stat. § 15A-1345(e) (2019). The trial court properly exercised its discretion when it denied Defendant's untimely motion.

¶ 39 The State must present competent evidence tending to show a defendant's failure to comply with the terms and conditions of probation to support the trial court's conclusion the defendant has committed a violation that warrants revocation under the statute. *State v. Terry*, 149 N.C. App. 434, 437, 562 S.E.2d 537, 540 (2002). "Once the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *Id.* at 437–38, 562 S.E.2d 540.

¶ 40 "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *Id.* at 438, 562 S.E.2d 540.

¶ 41 N.C. Gen. Stat. § 15A-1345(e) is a statutory codification of the probationer's due process right. A probationer's failure to compel or subpoena a witness to attend the violation hearing and be available to testify constitutes a waiver of the statutory right to confrontation. *Terry*, 149 N.C. App. at 438, 562 S.E.2d 540 (the defendant did not at any stage in the proceedings request her professor be subpoenaed nor did defendant suggest the professor had additional information other than what the professor had already reported to the probation officer).

¶ 42 This case is controlled by this Court's precedential holding in *State v. Jones*, 269 N.C. App. at 445, 838 S.E.2d at 690. In *Jones*, the trial court revoked defendant's probation and activated his suspended sentences after finding the defendant had willfully violated probation by committing new crimes. *Id.*

¶ 43 The defendant in *Jones* pled guilty to possession of a firearm by a felon and discharging a weapon into occupied property. *Id.* at 441, 838 S.E.2d at 687. His sentence was suspended, and he was placed on thirty-six months' supervised probation. *Id.* at 441, 838 S.E.2d at 688. Less than a year later, officers investigating potential criminal activity observed defendant outside a store for about an hour and followed his car. *Id.* The officers conducted a traffic stop after defendant exceeded the speed limit. He failed to present identification after an officer asked him to exit the vehicle. *Id.*

¶ 44 The officer observed and recovered a handgun from inside the vehicle, and placed the defendant under arrest. *Id.* at 441-42, 838 S.E.2d at 688. Defendant Jones filed a motion to suppress. *Id.* at 443, 838 S.E.2d at 688. The arresting officer testified, and the trial court denied Jones' motion. *Id.* at 443, 838 S.E.2d at 689. A probation violation report was filed, alleging he had willfully violated probation by absconding and committing new crimes. *Id.* at 442, 838 S.E.2d at 688.

¶ 45 At the defendant's probation violation hearing, the trial court allowed the transcript of the law enforcement officer's testimony from the suppression hearing to be introduced and admitted. *Id.* at 443, 838 S.E.2d at 688. The defendant appealed and asserted his due process right to confrontation was violated when the officer whose testimony was used against him was not physically present at his probation violation hearing and "good cause" did not exist justifying the officer's absence. *Id.*

¶ 46 This Court affirmed the trial court's ruling to revoke the defendant's probation. *Id.* at 445, 838 S.E.2d at 690. Nothing in the record showed the defendant in *Jones* had subpoenaed the officer to compel his attendance under N.C. Gen. Stat. § 15A-1345(e) or otherwise sought to assure the officer's presence at the revocation hearing. *Id.* at 445, 838 S.E.2d at 689. The transcript of the officer's testimony offered by the State was held to be competent evidence and was properly admitted to show the defendant had committed new crimes in violation of his probation. *Id.*

¶ 47 Here, the facts are similar to those in *Jones*. Both defendants were afforded their statutory due process rights at their probation violation hearings: (1) to have evidence against them disclosed; (2) the opportunity to appear and speak on their own behalf; and (3) to present relevant evidence under N.C. Gen. Stat. § 15A-1345(e).

¶ 48 Concerning probationers' statutory confrontation rights, the trial court retains discretion to determine "good cause" for not allowing confrontation. N.C. Gen. Stat § 15A-1345(e). Both the defendants here and in *Jones* had the ability to subpoena the State's or their own witnesses but failed to do so. Neither defendant demanded nor objected to a lack of an express finding for "good cause" by the trial court, another waiver of that right.

¶ 49 The State, in both cases, presented sufficient evidence to support the trial court's conclusions the defendants had committed new crimes. This Court, in *Jones*, found the State had shown competent evidence establishing defendant's violation by proof of the new criminal charges and the transcript of the officer's testimony from the suppression hearing. *Jones*, 269 N.C. App. at 445, 838 S.E.2d at 690. The trial court properly acted within its discretion to revoke that defendant's probation. *Id.* at 444, 838 S.E.2d at 690.

¶ 50 Here, the trial court found Defendant had committed new criminal acts and charges had been filed against him. The probation officer's testimony of Defendant's new crimes was sufficient to meet the competent evidence standard under N.C. Gen. Stat. § 15A-1345(e) to revoke Defendant's probation. The majority's opinion suggests no evidence shows Defendant knew the State could potentially offer testimony involving the CI or that the CI even existed to justify the remand.

¶ 51 This notion is contradicted by the filed and served probation violation reports and Defendant's underlying knowledge of the basis of the new charges filed against him. Defendant was made aware of the nature of the charges brought against him through the warrant to search his

home based upon the controlled buys with the CI and the subsequent felony charges and indictments served upon him.

¶ 52 The majority's opinion correctly concludes Defendant's constitutional argument is frivolous. A probation violation hearing is not a criminal prosecution, and a constitutional right to confrontation in a revocation hearing does not exist. *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) (citation omitted). Although N.C. Gen. Stat. § 15A-1345(e) allows the trial court to make a finding of "good cause" to deny the opportunity for confrontation, the statute does not require the court to do so to avoid reversible error, particularly where a defendant has the burden on appeal to show prejudice, failed to subpoena the witness, or has waived his rights by failure to object. *See Jones*, 269 N.C. App. at 444, 838 S.E.2d at 690.

¶ 53 Even if Defendant had timely objected, he has failed to show any prejudice as the trial court correctly found the State had provided competent evidence based upon the violation reports, the probation officer's testimony, and the new criminal charges alone. Lt. Thompson's testimony, much less any appearance by the CI, was unnecessary to the other competent evidence admitted to uphold Defendant's revocation. *See Jones*, 269 N.C. App. at 445, 838 S.E.2d at 689. Defendant's arguments are without merit.

III. Conclusion

¶ 54 Defendant failed to subpoena witnesses, waived any objection, and has not carried his burden to show prejudice. This Court's ruling in *Jones* is binding precedent upon these facts and the order entered. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The trial court did not err by revoking his probation and activating his suspended sentence. The order is properly affirmed.

STATE v. HUCKABEE

[278 N.C. App. 558, 2021-NCCOA-353]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER HUCKABEE, DEFENDANT

No. COA20-581

Filed 20 July 2021

1. Criminal Law—jury instructions—assault with deadly weapon inflicting serious injury—evidence of lesser-included offense

Defendant's conviction for assault with a deadly weapon inflicting serious injury was vacated because evidence was presented from which a jury could find that the victim's injuries—sustained during a jailhouse fight and which included multiple facial fractures—were not that serious, particularly where the victim was treated and discharged after one and a half hours. Although the trial court included an instruction on simple assault, defendant was also entitled to his requested instruction on the lesser-included offense of assault with a deadly weapon.

2. Attorney Fees—criminal trial—judgment vacated—civil judgment for attorney fees also vacated

Where defendant's judgment for assault with a deadly weapon inflicting serious injury was vacated on the basis that a requested jury instruction on a lesser-included offense should have been given, and the matter remanded for a new trial, the civil judgment requiring defendant to pay attorney fees was also vacated.

Appeal by Defendant from judgment entered 4 December 2019 by Judge Stephan R. Futrell in Richmond County Superior Court. Heard in the Court of Appeals 27 April 2021.

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

Daniel J. Dolan for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Christopher Huckabee appeals from a judgment entered upon his convictions for assault with a deadly weapon inflicting serious injury and attaining the status of a habitual felon. Defendant argues that the trial court erred by (1) denying Defendant's motion to dismiss

the charges; (2) failing to dismiss the indictment due to a fatal variance between the indictment and the evidence presented at trial; (3) failing to instruct the jury on the lesser included offense of assault with a deadly weapon; and (4) entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. Upon review, we hold that the trial court's failure to instruct the jury on the lesser included offense of assault with a deadly weapon constitutes reversible error. We therefore vacate the judgment entered upon Defendant's convictions and remand for a new trial. We also vacate the civil judgment as to attorney's fees.

I. Factual and Procedural Background

¶ 2 The present case centers around a jailhouse fight that occurred between several inmates at the Richmond County Jail.

¶ 3 During the early morning hours on 14 April 2019, Officer Gregory Riggins was working an overnight shift at the Richmond County Jail. After hearing some noise emanating from the "C Block" of the jail, Officer Riggins walked over to the C Block and heard inmate Matthew Winfield yelling, "Let me out the cell." When Officer Riggins asked Mr. Winfield what was wrong, Mr. Winfield responded that another inmate had "thr[own] pee on him."

¶ 4 Officer Riggins then released Mr. Winfield from his cell and into the "day area" of the C Block just outside the cell. At the time, three other inmates were present in the day area of the C Block. After Mr. Winfield was released from his cell, one of the inmates in the day area "took a broom and started hitting on [Mr.] Winfield." Shortly thereafter, Officer Jonathan Nails responded to the scene to assist Officer Riggins. Officer Nails testified that he witnessed three inmates, including Defendant, "punching and stomping Mr. Winfield" and that "[Defendant] had the broom in his hand and struck Mr. Winfield." After the altercation ended, officers observed that Mr. Winfield had a bleeding nose, bruised face, and "red marks and welts" on the forehead and back.

¶ 5 Mr. Winfield was later transported to Richmond Memorial Hospital where he was evaluated by emergency physician Dr. Jonathan Brower. At trial, Dr. Brower confirmed that Mr. Winfield had "multiple fractures to the nasal area" and one fracture "underneath the eye." When asked to describe the typical level of pain caused by such fractures, Dr. Brower testified that "[i]t tends to be uncomfortable for a few days" but that "it's not quite the same as like a broken arm, because you're generally not moving that part of your body as much." Mr. Winfield was discharged from the hospital approximately one hour and thirty minutes after ad-

mission. When asked why Mr. Winfield was not kept in the hospital for a longer period, Dr. Brower testified, "We typically don't need to keep anybody longer for these types of injuries."

¶ 6 A Richmond County grand jury returned true bills of indictment charging Defendant with assault with a deadly weapon inflicting serious injury and attaining the status of a habitual felon. During the jury charge conference, the trial court agreed to instruct the jury on two lesser included offenses of assault with a deadly weapon inflicting serious injury: (1) simple assault and (2) assault inflicting serious injury. The trial court declined to instruct the jury on the lesser included offense of assault with a deadly weapon, despite Defendant's requests that the instruction be included.

¶ 7 On 4 December 2019, a jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant then pled guilty to attaining the status of a habitual felon. Defendant provided oral notice of appeal in open court.

II. Analysis

¶ 8 Defendant argues that the trial court erred by (1) denying Defendant's motion to dismiss the charges; (2) failing to dismiss the indictment due to a fatal variance between the indictment and the evidence presented at trial; (3) failing to instruct the jury on the lesser included offense of assault with a deadly weapon; and (4) entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. We agree that the trial court erred by failing to instruct the jury on the lesser included offense. For this reason, we vacate the trial court's judgment entered upon his criminal convictions, vacate the civil judgment as to attorney's fees, and need not consider the merits of his other arguments.

¶ 9 **[1]** Defendant argues that he "must receive a new trial because the trial court failed to instruct the jury on the lesser included offense of assault with a deadly weapon despite the fact that there was evidence that the injury was not serious and counsel for [Defendant] requested the instruction[.]"

¶ 10 "In North Carolina, a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial." *State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (citation omitted). "A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a

special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000) (citations omitted). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981) (citations omitted).

¶ 11 "A trial court's decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal." *State v. Matsoake*, 243 N.C. App. 651, 657, 777 S.E.2d 810, 814 (2015) (citation omitted). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Ryder*, 196 N.C. App. 56, 64, 674 S.E.2d 805, 811 (2009) (citing *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994)).

¶ 12 Unlike assault with a deadly weapon inflicting serious injury, "the lesser included offense of assault with a deadly weapon . . . does not require that the victim suffer serious injury." *State v. McCoy*, 174 N.C. App. 105, 113, 620 S.E.2d 863, 870 (2005). Accordingly, if a rational juror could conclude from the evidence presented at trial that Mr. Winfield did not suffer serious injury, then the trial court erred by failing to instruct the jury on the lesser included offense of assault with a deadly weapon, and Defendant is entitled to a new trial. *Id.* at 113-14, 620 S.E.2d at 870.

¶ 13 "[W]hether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions." *Id.* at 113, 620 S.E.2d at 870 (alteration in original) (quoting *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991)). "Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work." *Id.* at 113-114, 620 S.E.2d at 870 (citation omitted).

¶ 14 For example, in *McCoy*, "[t]he State's evidence tended to show that . . . [the] defendant had severely beaten [the victim] and restrained her against her will over the course of . . . [a] month and [a] half." *Id.* at 108, 620 S.E.2d at 867. The victim reported that "the defendant beat her in the face[] and twisted her arm until it fractured." *Id.* The State's evidence "tended to show that . . . [the] defendant used his hands to twist [the victim's] arm until it broke." *Id.* at 113, 620 S.E.2d at 869. Notwithstanding the extent of the victim's injuries, this Court held that "the jury could rationally have found [the] defendant guilty of assault with a deadly weap-

on" and that the trial "court erred by not instructing on that offense." *Id.* at 114, 620 S.E.2d at 870.

¶ 15 In another case, *State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494 (1983), the victim was shot by the defendant in the right arm and received medical treatment at a hospital. *Id.* at 109, 111, 308 S.E.2d at 496-98. The defendant argued on appeal "that the trial judge should have submitted a jury instruction on misdemeanor assault with a deadly weapon[.]" *Id.* at 110, 308 S.E.2d at 497. This Court agreed and held that "reasonable minds could differ" as to whether the victim's injuries were serious, reasoning that the victim was only "treated at a hospital for about three hours." *Id.* at 111, 308 S.E.2d at 498; *see also State v. Bagley*, 183 N.C. App. 514, 527, 644 S.E.2d 615, 623-24 (2007) (holding that "reasonable minds could differ as to whether [the victim's] injury was serious" where the victim sustained "a gunshot wound to the leg" for which the victim was hospitalized and released "after about two hours").

¶ 16 Viewed in the light most favorable to Defendant, we conclude that a rational juror could have found that no serious injury occurred. Mr. Winfield's injuries included a bleeding nose, bruised face, and "red marks and welts" on the forehead and back. Mr. Winfield also sustained "multiple fractures to the nasal area" and one fracture "underneath the eye." However, this Court held in *McCoy* that reasonable minds could disagree as to whether the victim's broken arm constituted a serious injury. *McCoy*, 174 N.C. App at 113-14, 620 S.E.2d at 870. Moreover, Dr. Brower testified at trial that the typical level of pain caused by facial fractures is "not quite the same as like a broken arm, because you're generally not moving that part of your body as much."

¶ 17 Mr. Winfield was treated and discharged from the hospital approximately one hour and thirty minutes after admission. In *Owens* and *Bagley*, both victims were similarly treated and discharged in under three hours. *Owens*, 65 N.C. App. at 111, 308 S.E.2d at 498; *Bagley*, 183 N.C. App. at 527, 644 S.E.2d at 623-24. When asked why Mr. Winfield was not kept in the hospital for a longer period, Dr. Brower testified, "We typically don't need to keep anybody longer for these types of injuries."

¶ 18 During the charge conference after the presentation of evidence concluded, the trial court agreed to instruct the jury on the lesser included offense of simple assault, stating "I think I'll put [the instruction] in. I think there is some evidence based on the questions you had of the doctor—that these [injuries] are not that serious." This statement and the jury instruction on the charge of simple assault indicate the trial court must have concluded that a rational juror could have found that

Mr. Winfield's injuries were not serious. The trial court thus erred by failing to instruct the jury on the lesser included offense of assault with a deadly weapon. Defendant is entitled to a new trial.

¶ 19 **[2]** Defendant also argues that the trial court erred by entering a civil judgment ordering Defendant to pay attorney's fees without providing Defendant notice and an opportunity to be heard. Because we vacate the judgment entered upon Defendant's convictions and remand for a new trial, Defendant is not required to pay attorney's fees associated with the vacated convictions. *See* N.C. Gen. Stat. § 7A-455(c) (2019) ("No order for partial payment under subsection (a) . . . and no judgment under subsection (b) . . . shall be entered unless the indigent person is convicted."); *State v. Rogers*, 161 N.C. App. 345, 346, 587 S.E.2d 906, 907 (2003) ("[T]he universal practice of the general courts of justice is to not reduce to judgment the money value of legal services provided an indigent person convicted at trial when an appeal is taken that results in a reversal of the conviction."). We therefore vacate the trial court's civil judgment as to attorney's fees.

III. Conclusion

¶ 20 For the reasons stated herein, we vacate the trial court's judgment entered upon Defendant's criminal convictions and remand for a new trial. We vacate the civil judgment as to attorney's fees.

NEW TRIAL; VACATE ATTORNEY'S FEES.

Judges INMAN and GORE concur.

STATE v. OGLESBY

[278 N.C. App. 564, 2021-NCCOA-354]

STATE OF NORTH CAROLINA
v.
JAAMALL DENARIS OGLESBY, DEFENDANT

No. COA20-336

Filed 20 July 2021

1. Sentencing—juvenile at time of offenses—structured resentencing—concurrent versus consecutive sentences—discretion of trial court

Upon the granting of defendant's motion for relief, which asserted a retroactive claim under *Miller v. Alabama*, 567 U.S. 460 (2012), the trial court did not abuse the discretion granted to it under N.C.G.S. § 15A-1354(a) when it resentenced defendant on his murder and kidnapping sentences to consecutive sentences (as the original sentences had been imposed) after considering all the facts and arguments presented.

2. Appeal and Error—preservation of issues—multiple sentences—only some eligible for resentencing

Defendant did not preserve for appellate review the issue of whether the trial court, in resentencing defendant on his murder and kidnapping convictions, should have also addressed defendant's two armed robbery convictions. Defendant not only did not raise the issue at his resentencing hearing, but argued multiple times that only the murder and kidnapping sentences were subject to resentencing. His oral notice of appeal therefore did not include the robbery convictions, which remained undisturbed since the original trial.

3. Sentencing—juvenile at time of multiple offenses—resentencing granted—effect of Miller—limited to murder conviction

Although defendant did not preserve for appellate review the issue of whether, at resentencing, the trial court erred by only addressing defendant's murder and kidnapping convictions and not his armed robbery convictions (all for crimes committed when defendant was a juvenile), the Court of Appeals nevertheless addressed the issue given its relevance to defendant's constitutional claim that he received ineffective assistance of counsel. After defendant was granted a new sentencing hearing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and subsequently-enacted legislation (N.C.G.S. § 15A-1340.19A et seq.), based on having been given a mandatory sentence of life without the possibility of parole, only

his murder conviction was subject to resentencing since the armed robbery convictions arose out of a different transaction.

4. Constitutional Law—effective assistance of counsel—Miller resentencing—limited to murder conviction—concession that unrelated crimes not subject to resentencing

Where defendant was entitled to be resentenced only on his murder conviction pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and N.C.G.S. § 15A-1340.19A (for which he was sentenced to mandatory life without the possibility of parole for a crime he committed as a juvenile), his counsel was not deficient for informing the trial court that defendant's sentences for two armed robbery convictions were not subject to resentencing. Further, even had counsel argued for resentencing on the unrelated robbery convictions, defendant could not demonstrate a likelihood that the trial court would have run the sentences concurrently in light of the trial court's discretionary decision, under N.C.G.S. § 15A-1354(a), to impose consecutive sentences for the murder and kidnapping convictions.

5. Appeal and Error—Eighth Amendment argument—dismissed without prejudice—impending appellate resolution

Defendant's Eighth Amendment argument that his sentence constituted a de facto life without the possibility of parole contrary to *Miller v. Alabama*, 567 U.S. 460 (2012), was dismissed without prejudice to his right to file a motion for appropriate relief after the issuance of an opinion, for a case pending before the Supreme Court of North Carolina, which was anticipated to resolve the underlying legal issue.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Defendant from an order entered on 4 September 2019 by Judge William A. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

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

JACKSON, Judge.

¶ 1 Jaamall Denaris Oglesby ("Defendant") appeals from the trial court's resentencing order, which was entered following a post-conviction motion for appropriate relief. The issues presented by this resentencing appeal are (1) whether the trial court erred in only resentencing Defendant on some (but not all) of his convictions; (2) whether Defendant received ineffective assistance of counsel at his resentencing hearing; and (3) whether the trial court violated the Eighth Amendment by resentencing Defendant to a *de facto* life without parole sentence, given that Defendant was a juvenile at the time of the offense. We conclude that the trial court committed no error.

I. Factual and Procedural Background

¶ 2 On 7 September 2002, when Defendant was 16 years old, Defendant and several accomplices robbed a convenience store at gunpoint. The group then proceeded to rob a different store at gunpoint the following evening, 8 September 2002. On 10 September 2002, the group kidnapped a custodian, Scott Jester, from a restaurant in Winston-Salem, North Carolina. They drove down the Interstate with Jester for several miles, until Defendant instructed the driver to stop at an exit, where Defendant pushed Jester out of the car, ordered him to lay flat on the ground, and shot him three times in the back of the head.

¶ 3 On 7 July 2003, Defendant was indicted by a Forsyth County Grand Jury for first-degree murder, first-degree kidnapping, and attempted armed robbery, in connection with the murder of Mr. Jester that occurred on 10 September 2002. On 3 November 2003, Defendant was also indicted for two counts of robbery with a dangerous weapon in connection with the two convenience store robberies that occurred on 7 and 8 September 2002.

¶ 4 On 24 May 2004, Defendant pleaded guilty to the two armed robbery charges, but the trial court postponed sentencing on those charges until Defendant could be tried on the remaining three charges. Also on 24 May 2004, the trial court heard and ultimately denied Defendant's motion to suppress certain incriminating statements he had made to law enforcement officers during an interrogation.

¶ 5 Defendant's trial was held in May 2004 in Forsyth County Superior Court, Judge Catherine Eagles presiding. On 28 May 2004, the jury found Defendant guilty of first-degree murder (under the felony murder rule), first-degree kidnapping, and attempted robbery. The trial court sentenced Defendant to the following consecutive terms: (1) 95 to 123 months for one armed robbery charge; (2) 95 to 123 months for the second armed robbery charge; (3) life imprisonment without parole ("LWOP") for

first-degree murder; (4) 29 to 44 months for kidnapping; and (5) 77 to 102 months for attempted armed robbery. Defendant appealed.

¶ 6 On 6 December 2005, this Court filed an opinion remanding the case in part for resentencing on the two armed robbery convictions (based on a *Blakely* error in failing to submit the aggravating factors to the jury), and arresting judgment on either the kidnapping or armed robbery conviction (based on a double jeopardy violation in convicting Defendant of both the predicate felony and felony murder). *See State v. Oglesby*, 174 N.C. App. 658, 622 S.E.2d 152 (2005), *aff'd in part*, *vacated in part*, 361 N.C. 550, 648 S.E.2d 819 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that any aggravating factor which increases the penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt).

¶ 7 On 24 August 2007, our Supreme Court vacated in part this Court's decision and remanded for a resentencing on the armed robberies, after concluding that this Court applied an erroneous standard of review to evaluate the *Blakely* claim. *See State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007). On 6 November 2007, this Court duly reconsidered Defendant's *Blakely* claims under the harmless error standard, and ultimately upheld the armed robbery sentences after determining that the failure to submit the aggravating factors to the jury was harmless error. *See State v. Oglesby*, 186 N.C. App. 681, 652 S.E.2d 71, 2007 WL 3256666 (unpublished), *disc. review denied*, 362 N.C. 478, 667 S.E.2d 234 (2008). In compliance with this Court's mandate, on remand the trial court consequently arrested judgment on Defendant's attempted robbery conviction (based on the double jeopardy violation).

¶ 8 On 9 April 2013, Defendant filed a motion for appropriate relief ("MAR") in Forsyth County Superior Court based on the newly-issued United States Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile offender may not be sentenced to mandatory LWOP. Defendant's MAR argued that, under *Miller*, his LWOP sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment because he was only 16 at the time of the offense. The State responded on 10 April 2015 to request a one-year stay, asserting that our courts had not yet determined whether *Miller* could apply retroactively in cases such as Defendant's. The trial court granted the requested one-year stay on 5 May 2015. Defendant filed an amended MAR on 31 August 2016, asserting that it had been declared in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), that *Miller* applied retroactively. The State responded on 7 November 2016, agreeing that *Mille*r applied retroactively and that Defendant was entitled to a resentencing hearing. On 17 May 2017, Judge Richard S. Gottlieb entered an order allowing

Defendant's amended MAR, and awarding him a resentencing hearing for the limited purpose of: (1) resentencing Defendant's LWOP murder sentence (in accord with *Miller)*; and (2) arresting judgment on either the kidnapping or attempted armed robbery sentence (in accord with this Court's earlier remand).

¶ 9 On 26 August 2019, a resentencing hearing—the hearing at issue in this case—was held in Forsyth County Superior Court, Judge William A. Wood presiding. The trial court was tasked with resentencing Defendant on his murder, kidnapping, and attempted armed robbery convictions, in light of *Miller* and N.C. Gen. Stat. § 15A-1340.19B (the statute which governs sentencing of juvenile offenders convicted of murder).

¶ 10 The parties agreed that, because Defendant's murder conviction was based solely on the felony murder rule, the trial court was statutorily obligated to sentence Defendant to life (with the possibility of parole after 25 years) for the murder conviction. *See* N.C. Gen. Stat. § 15A-1340.19B(a) (2019) (providing that when "the sole basis for" a juvenile defendant's murder conviction "was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole"); *id.* § 15A-1340.19A (defining "life imprisonment with parole" to mean that "the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole").

¶ 11 In contrast, the main point of contention during the resentencing hearing was whether Defendant's murder sentence should run *concurrently* with his kidnapping sentence—as opposed to keeping the two sentences consecutive. Defendant's trial counsel argued that the kidnapping sentence should run concurrently with the murder sentence "based upon the [mitigating] factors that *Miller* put forth for a judge to consider[.]"[1] Namely, defense counsel presented evidence that Defendant

1. These mitigating factors include:

   (1) Age at the time of the offense.
   (2) Immaturity.
   (3) Ability to appreciate the risks and consequences of the conduct.
   (4) Intellectual capacity.
   (5) Prior record.
   (6) Mental health.
   (7) Familial or peer pressure exerted upon the defendant.
   (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
   (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2019).

was 16 years old at the time of the crime; was interrogated by the police for 26 hours (without a parent or guardian present) before confessing; had an IQ of 81 (in the borderline-impairment range); was evaluated for intellectual capacity to proceed prior to his trial; and was diagnosed with bipolar disorder but was not receiving medication or treatment at the time of trial. Defense counsel also stated that Defendant's LWOP sentence made him ineligible to participate in prison educational programs, and that Defendant was engaging in self-improvement in prison by developing a program to assist at-risk youth.

¶ 12 The trial court then requested clarification on whether the statute permitted this type of concurrent sentencing, asking counsel whether there was "any authority under § 15A-1340.19B . . . that permits the Court to modify the order in which the sentence is run, as opposed to modifying the 25 to life?" Defense counsel responded that concurrent sentences were permitted under *Miller* because the kidnapping arose from the same series of transactions that resulted in the felony murder.

¶ 13 In response, the State argued that the kidnapping and murder sentences should remain consecutive, due to the serious nature of the crime and due to Defendant's numerous, repeated infractions while in prison. These prison infractions ran from 2008 through February 2019, and included offenses such as "weapon possession," "involvement with a gang," "assault on a staff with a weapon," "involvement with a gang," and "active rioter." The State noted that some infractions had even occurred during the pendency of Defendant's MAR, asserting that this demonstrated that Defendant had the opportunity to reform but chose not to, and that Defendant was "not someone who should get the benefit of these sentences running together."

¶ 14 With regard to the two armed robbery convictions, defense counsel described these convictions as "two other consecutive sentences from matters that are not before this Court[,]" further stating that the murder and kidnapping convictions were "the only two sentences that are at issue before the Court today." The trial court sought to clarify which sentences were before it:

> THE COURT: Just to make sure I understand. All right. First, there are two consecutive armed robbery sentences that the Defendant has already served.
>
> DEFENSE COUNSEL: It depends how DOC actually would calculate that. However, [the armed robbery sentences] are not at issue here because they are not related to this particular conduct. They were

> sentenced at the same time as this was, but it was not part of that trial.
>
> THE COURT: All right. So there are two sentences that he has served or he will have to serve.
>
> DEFENSE COUNSEL: There are. The DOC website shows that he would have been released in February of 2012 in one of them. So it does show that those would be the first sentences he would be serving. This is from the DOC website and from combined records as to how it was imposed. [S]o the two armed robbery sentences were imposed by DOC prior to the 25 to life.

¶ 15 The trial court requested further explanation on some matters and clarified the following: (1) judgment had already been arrested on Defendant's attempted armed robbery conviction; (2) the unarrested judgment on Defendant's kidnapping conviction imposed a minimum of 29 months, due to having been sentenced at a lower class; (3) the two armed robbery sentences remained undisturbed after previous appellate review; and (4) Defendant had fully served his first armed robbery sentence and had either almost served the second armed robbery sentence or had just started to serve his murder sentence.

¶ 16 After hearing all arguments and evidence, the trial court concluded that Defendant should be resentenced in accord with *Miller* on the murder charge, but chose not to modify the consecutive nature of the kidnapping charge. In a written order entered on 4 September 2019, the trial court resentenced Defendant as follows:

> (1) The Defendant is resentenced on the First Degree Murder charge . . . to a sentence of life with the possibility of parole after 25 years.
>
> (2) Based upon the information presented at the resentencing hearing, the Court in its discretion, does not modify the consecutive nature of the First Degree Kidnapping charge . . . and the 29 to 44 month sentence previously imposed for that crime will continue to run consecutively.
>
> (3) The Court specifically finds that consecutive sentences are warranted by the facts presented at the resentencing hearing and consecutive sentences

in this case are not violative of the Eight Amendment to the United States Constitution.

(4) Based upon the felony murder conviction the Court will arrest judgment in the Attempted Robbery with a Firearm [charge].

¶ 17 The trial court's order made no reference to Defendant's two armed robbery convictions. Defendant gave oral notice of appeal at the conclusion of the resentencing hearing.

II. Analysis

¶ 18 On appeal, Defendant raises three primary arguments, contending that: (1) the trial court erred by only resentencing him on the murder and kidnapping convictions (while ignoring the two armed robbery convictions); (2) his attorney provided ineffective assistance of counsel at his resentencing hearing; and (3) the trial court violated the Eighth Amendment by resentencing him to over 43 years in prison. We discern no error on issues one and two, and decline to rule on issue three. Accordingly, we affirm the trial court's ruling on issues one and two and dismiss without prejudice Defendant's Eighth Amendment claim.

A. Structured Resentencing

¶ 19 Defendant first argues that the trial court erred by only considering the murder and kidnapping convictions during his resentencing, contending that the trial court should have also considered his two armed robbery convictions. He also argues that the trial court erred by maintaining his sentences as consecutive instead of concurrent. We disagree, and conclude that that trial court committed no error during resentencing.

¶ 20 To begin with, it may be useful to provide some background regarding the applicable juvenile sentencing scheme in North Carolina. Prior to *Miller*, a juvenile defendant who committed first-degree murder in North Carolina would receive mandatory LWOP. *See* N.C. Gen. Stat. § 14-17 (2007). In 2012, the United States Supreme Court held in *Miller* that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," and that a sentencing judge "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." 567 U.S. at 479-89.

¶ 21 In order to comply with *Miller*, in late 2012 our General Assembly enacted N.C. Gen. Stat. § 15A-1340.19A,[2] which set out the new sentencing procedures applicable to a defendant "who is convicted of first degree murder, and who was under the age of 18 at the time of the offense." N.C. Gen. Stat. § 15A-1340.19A (2019). The statute provides that if "the sole basis for" the juvenile defendant's conviction "was the felony murder rule, then the court *shall* sentence the defendant to life imprisonment with parole"—meaning that "the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." *Id.* § 15A-1340.19A, .19B (emphasis added). The statute also provides a list of mitigating factors (as described above, in footnote one) that a court may consider when sentencing a juvenile offender. *See id.* § 15A-1340.19B(c).

¶ 22 However, the statute provides no guidance regarding whether or not a juvenile offender's murder sentence should be run concurrently with (or consecutive to) any other sentences that the juvenile may be subject to. Due to this omission in § 15A-1340.19A, Defendant looks elsewhere in our General Statutes for guidance on the proper ordering of his sentences. Specifically, Defendant relies on a portion of the Criminal Procedure Act which provides that

> [w]hen multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

N.C. Gen. Stat. § 15A-1354(a) (2019).

¶ 23 Based upon the language of § 15A-1354(a), Defendant contends that the trial court possessed the authority to resentence him on *all* of his convictions, and to impose concurrent terms in all sentences. Defendant argues that the trial court misapprehended the scope of its sentencing authority, asserting that the transcript demonstrates that the trial court believed it was only permitted consider his murder and kidnapping convictions. Due to this alleged misapprehension of law by the trial court, Defendant claims that the trial court abused its discretion during his resentencing and that he is entitled to a new hearing. We find this argument unavailing.

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2. Our Supreme Court has held that this statute fully complies with the mandate from *Miller*. *See State v. James*, 371 N.C. 77, 89, 813 S.E.2d 195, 204 (2018).

¶ 24 Most prominently, we believe Defendant's argument conflates two distinct issues: (1) whether the trial court possessed the authority to run his sentences concurrently as opposed to consecutively; and (2) whether the trial court possessed the authority to consider the two armed robbery convictions. We answer each question in turn.

1. Concurrent vs. Consecutive Sentences

¶ 25 **[1]** First, we agree with Defendant that the trial court possessed authority to run his murder and kidnapping sentences either concurrently or consecutively, but discern no abuse of discretion in the trial court's decision to keep his sentences consecutive. Defendant is correct that § 15A-1354(a) grants a trial court the authority to choose between consecutive or concurrent sentences when "multiple sentences of imprisonment are imposed on a person at the same time." N.C. Gen. Stat. § 15A-1354(a) (2019). Here, Defendant was sentenced to all of his sentences of imprisonment "at the same time," during his original sentencing proceeding on 28 May 2004. Thus, based on the language of § 15A-1354(a), the trial court was authorized to impose either concurrent or consecutive sentences for all of the convictions which were before the Court for resentencing.[3]

¶ 26 However, the trial court here chose to keep Defendant's sentences consecutive, and we are unable to say that this choice was an abuse of the court's discretion. As we have previously explained, "N.C. Gen. Stat. § 15A-1354 vests the trial court with the discretion to elect between concurrent or consecutive sentences for a defendant faced with multiple sentences of imprisonment," and we review a trial court's sentencing decision in this context for "abuse of discretion." *State v. Hill*, 262 N.C. App. 113, 120-21, 821 S.E.2d 631, 636-37 (2018). *See also State v. Duffie*, 241 N.C. App. 88, 96-97, 772 S.E.2d 100, 107 (2015) ("[T]he trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences . . . [under] N.C. Gen. Stat. § 15A-1354(a)."). Moreover, "[w]hen the trial court gives no reason for a ruling that must be discretionary, we presume on appeal that the court exercised its discretion." S*tate v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 365 (2011).

¶ 27 The record in this case demonstrates that the trial court knew it possessed discretion to sentence Defendant consecutively and exercised that discretion reasonably. During the resentencing hearing, defense counsel requested that the murder and kidnapping sentences run con-

3. As explained in the following section, in this case Defendant's two armed robbery sentences were not before the trial court for resentencing.

currently due to Defendant's young age, mental health issues, and desire to participate in prison educational programs, while the State argued that the sentences should run consecutively due to the nature of the crime and Defendant's numerous infractions while in prison. The trial court then requested clarification as to whether § 15A-1340.19B provided authority to "modify the order in which the sentence is run, as opposed to modifying the 25 to life?"

¶ 28 After hearing all arguments and "considering all these matters," the trial court, in its discretion, denied Defendant's request to run the sentences consecutively. The trial court also memorialized this ruling in a written order, which stated that "[b]ased upon the information presented at the resentencing hearing, the Court *in its discretion*, does not modify the consecutive nature of the First Degree Kidnapping charge . . . . The Court specifically finds that consecutive sentences are warranted by the facts presented at the resentencing hearing." (Emphasis added.)

¶ 29 This language clearly indicates that the trial court (1) knew it possessed discretion to reorder Defendant's sentences; and (2) duly exercised that discretion by considering all facts presented at the resentencing hearing in reaching its decision. The trial court was under no obligation to provide a lengthy explanation for its resentencing decision. We accordingly hold that the trial court did not abuse its discretion in resentencing Defendant without modifying the consecutive nature of the sentences.

2. Armed Robbery Sentences

¶ 30 **[2]** Next, we must consider the distinct question of whether the trial court should have also resentenced Defendant on the two armed robbery convictions. We conclude that Defendant has not preserved this argument for appellate review, and that in any event, the two armed robbery convictions were not before the trial court for resentencing.

¶ 31 First, Defendant has failed to preserve this issue for appellate review, in two distinct ways. Most notably, Defendant's oral notice of appeal at the close of his resentencing hearing did not vest this Court with jurisdiction over the undisturbed armed robbery judgments, which were originally entered during Defendant's first sentencing in 2004, and remained undisturbed throughout the subsequent appeals. In the 2017 order which granted Defendant's MAR, Judge Gottlieb ordered a limited-scope resentencing, only for purposes of (1) resentencing Defendant on his LWOP murder sentence (in accord with *Miller*); and (2) arresting judgment on either the kidnapping or attempted armed robbery sentence (in accord with this Court's earlier remand that was

ordered in our 2005 opinion). Thus, there existed no court order or other authority which would have allowed Defendant a *de novo* resentencing hearing on his armed robbery convictions.

¶ 32 Second, Defendant has failed to preserve this issue for our review by failing to raise it before the trial court. Our Appellate Rules provide that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. Rule 10(a)(1).

¶ 33 In interpreting this Rule, our courts have long held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal marks and citations omitted). Accordingly, where a defendant "impermissibly presents a different theory on appeal than argued at trial, [the] assignment of error [is] not properly preserved" and is "waived by [the] defendant." *Id.* at 124, 573 S.E.2d at 686.

¶ 34 Here, Defendant has failed to preserve his argument regarding the two armed robbery sentences because, during his resentencing hearing, he did not argue that the trial court should consider his two armed robbery convictions alongside the murder and kidnapping convictions—in fact, he argued the exact opposite. During the hearing, defense counsel stated on multiple occasions that the kidnapping and murder convictions were "the only two sentences that are at issue before the Court today." Defense counsel stated her belief that the two armed robbery sentences were "not at issue here because they are not related to this particular conduct," in that the armed robberies occurred several days prior to the kidnapping and murder. The prosecution agreed that the armed robbery sentences were not before the court.

¶ 35 Defendant cannot argue before the trial court that these convictions should not be considered, and then argue on appeal that they must be considered—this is an impermissible attempt to swap horses on appeal. Thus, this assignment of error has not been properly preserved and has been waived by Defendant.

¶ 36 **[3]** However, we nevertheless choose to examine the merits of Defendant's claim, in our discretion, because the issues surrounding the two armed robbery sentences are also relevant to Defendant's ineffective assistance of counsel claim (which is analyzed in the following section). We ultimately conclude that the trial court acted properly in not considering the two armed robbery sentences, because, as Defendant's trial counsel correctly noted, those sentences stemmed from a separate transaction that was not before the court. Our state's *Miller* jurisprudence shows that when a juvenile offender is awarded a *Miller* resentencing hearing, the juvenile is only entitled to be resentenced on his murder conviction (i.e., the conviction for which he received mandatory LWOP), and is not entitled to be resentenced for unrelated convictions which arose out of a different transaction.

¶ 37 Following the United States Supreme Court's decision in *Miller*, and our General Assembly's enactment of N.C Gen. Stat. § 15A-1340.19A, a juvenile offender who previously received a mandatory LWOP sentence "is entitled to be resentenced in the case in which he was convicted of first-degree murder pursuant to [N.C. Gen. Stat. § 15A-1340.19A]." *State v. Perry*, 369 N.C. 390, 393, 794 S.E.2d 280, 281-82 (2016). For example, in *Perry*, the defendant was convicted of armed robbery and first-degree murder for an incident that occurred when he was seventeen years old. *Id.* at 391, 794 S.E.2d at 280. He was originally sentenced to 51 to 71 months for the robbery conviction, and a consecutive term of mandatory LWOP for the murder conviction. *Id.* at 391, 794 S.E.2d at 280-81.

¶ 38 Following the decision in *Miller*, the defendant filed an MAR requesting that his LWOP sentence be vacated. *Id.* at 391, 794 S.E.2d at 281. On review, our Supreme Court agreed that the defendant was entitled to a retroactive *Miller* resentencing hearing "in the case in which he was convicted of first-degree murder." *Id.* at 393, 794 S.E.2d at 281. The Court accordingly remanded to the trial court "for further proceedings not inconsistent with this opinion, including the imposition of a new sentence in the case in which defendant was convicted of first-degree murder." *Id.* at 393, 794 S.E.2d at 282. Notably, the Court did *not* remand the robbery conviction for resentencing—despite the fact that both convictions were originally imposed at the same time.

¶ 39 Likewise, in *State v. Lovette*, the defendant was convicted of kidnapping, armed robbery, and first-degree murder for an incident that occurred when he was seventeen years old. *State v. Lovette*, 225 N.C. App. 456, 460, 737 S.E.2d 432, 436 (2013). He was originally sentenced to LWOP for the murder conviction, as well as consecutive terms of 100

to 129 months for the kidnapping conviction and 77 to 102 months for the robbery conviction. *Id.* Following the decision in *Miller*, the defendant filed an MAR requesting that his LWOP sentence be vacated. *Id.* On review, this Court held that the defendant was entitled to be resentenced under *Miller* and N.C. Gen. Stat. § 15A-1340.19. *Id.* at 470-71, 737 S.E.2d at 441-42. We accordingly vacated and remanded "Defendant's sentence of life imprisonment without parole . . . for resentencing as provided in the Act." *Id.* at 471, 737 S.E.2d at 442. Just as in *Perry*, we did not remand the defendant's robbery and kidnapping convictions for resentencing—despite the fact that all three convictions were originally imposed at the same time.

¶ 40 *Perry* and *Lovette* demonstrate that a juvenile offender in North Carolina who is awarded a resentencing hearing in accord with *Miller* and § 15A-1340.19A is only statutorily entitled to be resentenced for his murder conviction (i.e., the conviction for which he was sentenced to LWOP)—and is not automatically entitled to be resentenced for any other convictions which may have been imposed at the same time as his murder conviction. Accordingly, in the present case Defendant was only statutorily entitled to be resentenced for his murder conviction, and the trial court committed no error by failing to consider his two armed robbery convictions (which arose out of an entirely different transaction).

¶ 41 In sum, we hold that: (1) the trial court did not abuse its discretion by resentencing Defendant without modifying the consecutive nature of the kidnapping and murder sentences; and (2) the trial court was under no obligation to resentence Defendant on his two unrelated armed robbery convictions.

B. Ineffective Assistance of Counsel

¶ 42 **[4]** Next, Defendant argues that he received ineffective assistance of counsel at his resentencing hearing. Defendant contends that his counsel erred by informing the trial court that the armed robbery convictions were "unrelated" and "not before the court," and maintains that he was prejudiced by this error because the trial court might otherwise have considered running his murder sentence concurrently with his armed robbery sentences. We are unpersuaded by this argument, and hold that Defendant's counsel did not perform deficiently.

¶ 43 Under the United States and North Carolina Constitutions, a defendant has a right to the effective assistance of counsel during both trial and sentencing proceedings. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985). In order to succeed on a claim for ineffective assistance of counsel, a defendant must do the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*

Id. at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

¶ 44 The United States Supreme Court, further elaborating on the prejudice prong, has explained that "[t]he 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." *Strickland*, 466 U.S. at 694. "Because of the difficulties inherent in making the [prejudice] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689.

¶ 45 For the first prong of the *Strickland* test—deficient performance—Defendant argues here that his counsel acted deficiently by "[telling] the trial court repeatedly that the robbery convictions were unrelated and not before the court." Instead, Defendant maintains that counsel should have relied on § 15A-1354(a) to persuade the trial court that it was authorized to resentence Defendant on *all* of his convictions, given that all of his convictions were originally "imposed. . . at the same time" within the meaning of the statute. We disagree.

¶ 46 When evaluating counsel's performance, we seek to analyze whether their conduct "falls within the wide range of reasonable professional assistance." *State v. McNeill*, 371 N.C. 198, 219, 813 S.E.2d 797, 813 (2018). "[C]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for the defendant to bear." *Id.* at 218-19, 813 S.E.2d at 812.

¶ 47 It is well-established that counsel's failure to raise a particular argument or theory does not amount to deficient performance where that argument was either meritless or rested on uncertain, undecided law. *See Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) ("The law does not require counsel to raise every available nonfrivolous defense."); *United*

States v. Parrott, 906 F.3d 717, 719 (8th Cir. 2018) ("[F]ailing to raise an argument that requires the resolution of an unsettled legal question rarely constitutes ineffective assistance.") (internal marks and citation omitted); *State v. Garcell*, 363 N.C. 10, 54, 678 S.E.2d 618, 646 (2009) (finding no deficient performance in defense counsel's failure to raise a particular legal doctrine, "as . . . [the doctrine] has no application to this case . . . defendant's counsel did not deficiently perform by failing to object on the basis of [the doctrine]."); *State v. Fair*, 354 N.C. 131, 168, 557 S.E.2d 500, 526 (2001) ("As detailed in our previous analysis[,] . . . [t]here was no basis for an objection by trial counsel, and thus there was no ineffective assistance of counsel.").

¶ 48 Here, the resentencing argument that Defendant contends his counsel should have raised was, at best, resting on unsettled law, and at worst, meritless. As explained above, we believe that Defendant's request for a *de novo* resentencing on all of his convictions was meritless for several reasons, including the fact that: (1) the MAR order granting Defendant a limited resentencing hearing did not grant the trial court jurisdiction over the armed robbery sentences; and (2) our state's *Miller* jurisprudence allows a juvenile offender to be resentenced only for his murder conviction (i.e., the conviction for which he received mandatory LWOP), and does not automatically entitle him to be resentenced for other unrelated convictions.

¶ 49 At best, defense counsel might have been able to raise a colorable argument that § 15A-1354(a) somehow overrides the above-mentioned laws and grants the trial court authority to consider convictions that were not otherwise before it. But we can find no precedent supporting such an argument. Therefore, we conclude that Defendant's trial counsel did not act deficiently by failing to raise this speculative and untested argument.

¶ 50 As for the second prong of the *Strickland* test—prejudice—Defendant likewise cannot show that he was prejudiced by defense counsel's failure to request that the trial court consider the armed robbery convictions for resentencing. Proving prejudice requires a showing of "a reasonable probability" that "the result of the proceeding would have been different" if counsel had not erred. *State v. Lane*, 271 N.C. App. 307, 312, 844 S.E.2d 32, 38 (2020) (internal marks and citation omitted). Here, *even if* defense counsel had requested that the trial court consider the armed robbery sentences under § 15A-1354(a), and *even if* the court was persuaded by this argument, we think it a highly remote possibility that the trial court would have actually chosen to run these sentences concurrently as Defendant now requests.

¶ 51 During the resentencing hearing, the trial court heard thorough arguments from both parties regarding a range of mitigating and aggravating circumstances surrounding the serious nature of Defendant's offenses (including the fact that he was the one who shot and killed Jester), his personal background and abilities, and his misconduct while in prison. The State recited Defendant's long list of prison infractions, including weapon possession; involvement with a gang, assault on staff with a weapon; and active rioting. The State persuasively argued that there was no evidence of Defendant making any efforts to reform, and that Defendant was "not someone who should get the benefit of these sentences running together."

¶ 52 Based on the evidence presented, the trial court chose not to consolidate the two sentences that were before it (murder and kidnapping), instead exercising its discretion to keep these sentences consecutive. Given that the trial court was apparently unwilling to reduce Defendant's sentence by approximately 29 months via consolidation of the murder and kidnapping sentences, it seems quite unlikely that the trial court would have chosen to reduce his sentence by approximately 190 months via consolidation of the two armed robbery sentences. We can discern no reasonable probability that the results of the resentencing would have been different even if counsel had made the arguments requested by Defendant. Thus, because Defendant cannot show either deficient performance by his counsel or resulting prejudice, this assertion of error is overruled.

C. Eighth Amendment

¶ 53 **[5]** In Defendant's third and final assertion of error, he contends that the trial court violated the Eighth Amendment by sentencing him to *de facto* LWOP. He points out that the sentences imposed by the trial court carry an aggregate minimum of 43 years in prison before the possibility of parole—meaning he will be 61 years old before he becomes eligible for parole. Defendant contends that, under the United States Supreme Court's decision in *Miller*, this sentence violates the Eighth Amendment prohibition against cruel and unusual punishment.

¶ 54 However, as Defendant acknowledges in his brief, neither the United States Supreme Court nor the North Carolina Supreme Court have yet ruled on the novel issue of *de facto* life sentences under *Miller*. This Court recently issued an opinion on this issue in *State v. Kelliher*, wherein we held that "*de facto* LWOP sentences for redeemable juveniles are unconstitutional," and wherein we struck down the defendant's sentence which would have made him "eligibl[e] for parole at 50 years

and earliest possible release at age 67." *State v. Kelliher*, 849 S.E.2d 333, 344-49 (N.C. Ct. App. 2020), *review allowed*, *writ allowed*, *appeal dismissed*, 854 S.E.2d 584 (N.C. 2021), *review allowed*, 854 S.E.2d 586 (N.C. 2021).[4] Our Supreme Court subsequently issued a stay of this Court's mandate in *Kelliher*, pending its discretionary review of that case. *State v. Kelliher*, 854 S.E.2d 586 (N.C. 2021). The case is currently docketed in the Supreme Court, awaiting argument.

¶ 55 Given the pending Supreme Court cases, which will definitively decide the constitutionality of *de facto* juvenile LWOP sentences under *Miller*, we decline to rule on Defendant's Eighth Amendment argument at this time. We therefore dismiss this claim without prejudice, such that it may be asserted in a subsequent MAR, in anticipation of our Supreme Court's forthcoming decision in *Kelliher*.

III. Conclusion

¶ 56 The trial court did not abuse its discretion by maintaining Defendant's murder and kidnapping sentences as consecutive, rather than concurrent. The trial court did not err in failing to resentence Defendant's two armed robbery convictions, as the court possessed no authority to consider these convictions. Defendant did not receive ineffective assistance of counsel at his resentencing proceeding. Finally, though Defendant raises a colorable Eighth Amendment claim regarding *de facto* juvenile LWOP sentences, we decline to rule on this issue at this time and dismiss this claim without prejudice, in anticipation of our Supreme Court's pending decision in *Kelliher*.

NO ERROR.

Chief Judge STROUD concurs.

Judge ARROWOOD concurs in part and dissents in part by separate opinion.

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4. This Court also issued a recent opinion in *State v. Anderson* which held the opposite—that "a 50-year sentence [for a juvenile offender] does not equate to a *de facto* life sentence," and that such a sentence does not violate *Miller*. *State v. Anderson*, 853 S.E.2d 797, 798 (N.C. Ct. App. 2020), *writ allowed*, 376 N.C. 885, 853 S.E.2d 445 (2021). Due to the existence of these two conflicting cases from this Court, we are confident that the Supreme Court will resolve this issue in the pending *Kelliher* appeal.

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

¶ 57 I concur in the portions of the majority opinion which address defendant's structured resentencing and Eighth Amendment claims. I respectfully dissent from the majority's holding that defendant received effective assistance of counsel.

¶ 58 The majority correctly identifies the two-prong test set out in *Strickland v. Washington*, which requires a defendant to show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

I. Deficient Performance

¶ 59 Our Supreme Court has held that for counsel's performance to be deficient, it must fall "below an objective standard of reasonableness[.]" *State v. Garcell*, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2009) (citations omitted). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91, 80 L. Ed. 2d at 695. Our courts indulge "the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Campbell*, 359 N.C. 644, 690, 617

S.E.2d 1, 30 (2005) (citing *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986)).

¶ 60 Under N.C. Gen. Stat. § 15A-1354(a),

> [w]hen multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court.

N.C. Gen. Stat. § 15A-1354(a) (2019). Although a trial court is prohibited from imposing a more severe sentence upon remand than originally imposed, "nothing prohibits the trial court from changing the way in which it consolidate[s] convictions during a sentencing hearing prior to remand." *State v. Moffitt*, 185 N.C. App. 308, 312, 648 S.E.2d 272, 274 (2007) (quoting *State v. Ransom*, 80 N.C. App. 711, 713, 343 S.E.2d 232, 234, *cert. denied*, 317 N.C. 712, 347 S.E.2d 450 (1986)). The trial court has discretion to determine whether to impose concurrent or consecutive sentences. *State v. Parker*, 350 N.C. 411, 441, 516 S.E.2d 106, 126 (1999).

¶ 61 At the resentencing hearing, defendant's trial counsel repeatedly described defendant's robbery sentences, one of which defendant had served and the other which was either already or nearly complete, as unrelated and not before the trial court. Defendant's trial counsel maintained this position when the trial court specifically requested clarification that there were "two consecutive armed robbery sentences that the defendant has already served[,]" and defendant's trial counsel failed to raise any argument regarding those convictions when the trial court discussed its authority under Section 15A-1340.19B.

¶ 62 Although I acknowledge the deference afforded to counsel's judgments, I disagree with the majority's holding that the resentencing argument defendant contends his trial counsel should have raised was either resting on unsettled law or totally meritless. Defendant was originally sentenced to multiple terms of imprisonment at the same time, and thus the trial court could either run the sentences concurrently or consecutively under Section 15A-1354(a). Nothing prohibited the trial court from changing the way in which all of defendant's convictions were consolidated, including the two convictions for robbery with a firearm. I disagree with the majority's position that Section 15A-1354(a) must "override" the MAR order and our state's *Miller* jurisprudence. The plain meaning of the statute includes defendant, as a person with "multiple

sentences of imprisonment" imposed "at the same time," and as such I would hold that Section 15A-1354(a) is applicable to defendant's sentences and that the trial court had jurisdiction and discretion to consider running all sentences either concurrently or consecutively. Defendant's trial counsel's insistence that the armed robbery convictions were not before the court, when in fact it was in the trial court's discretion to consider them, was unreasonable and constitutes deficient performance.

II. Prejudice

¶ 63 Prejudice under the ineffective assistance of counsel test requires a showing of "reasonable probability" that, "but for *counsel's* unprofessional errors, the result of the proceeding would have been different." *State v. Lane*, 271 N.C. App. 307, 313, 844 S.E.2d 32, 39, *review dismissed*, 376 N.C. 540, 851 S.E.2d 367, *review denied*, 376 N.C. 540, 851 S.E.2d 624 (2020) (emphasis in original) (citing *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). Under the reasonable probability standard, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693, 80 L. Ed. 2d at 697. "While under the reasonable probability standard '[t]he likelihood of a different result must be substantial, not just conceivable[,]', it is something less than that required under plain error." *Lane*, 271 N.C. App. at 314, 844 S.E.2d at 39 (quoting *Harrington v. Richter*, 562 U.S. 86, 112, 178 L. Ed. 2d 624, 647 (2011)).

¶ 64 Here, I would hold that there was a reasonable probability that but for defendant's trial counsel's arguments, the result of the hearing would have been different. The trial court asked defendant's trial counsel multiple times for clarification of the sentences and convictions before it, and at no point did defendant's trial counsel attempt to seek resentencing for all of defendant's convictions. It is substantially likely, not just conceivable, that the trial court would have exercised its discretion to consider all of defendant's convictions in resentencing had defendant's trial counsel presented the argument. Accordingly, I would hold that defendant was prejudiced by his trial counsel's errors and would remand for resentencing to consider all of defendant's convictions, rather than only the murder and kidnapping convictions.

STATE v. SCOTT

[278 N.C. App. 585, 2021-NCCOA-355]

STATE OF NORTH CAROLINA
v.
LAWRENCE SCOTT, DEFENDANT

No. COA20-688

Filed 20 July 2021

1. Indictment and Information—amendment of indictment—additional language—not substantial alteration

In a prosecution for sexual activity by a substitute parent, the trial court properly allowed the State to amend the indictment to add the words "[a]t the time of the offense, the defendant was residing in the home with" the victim, since the unamended version of the indictment was facially valid where it alleged all of the essential elements of the offense pursuant to N.C.G.S. § 14-27.7(a). Where the additional language did not add a previously omitted element, it did not constitute a substantial alteration.

2. Sentencing—consecutive sentences—multiple counts of sexual activity by substitute parent—separate and distinct offenses—unanimous verdicts

Defendant's constitutional rights were not violated and no abuse of discretion occurred by his being sentenced to two consecutive sentences of sexual activity by a substitute parent, where the acts underlying each of the two convictions constituted separate and distinct offenses despite occurring during the same incident. Further, the jury instructions and verdict sheets, which clearly distinguished between the basis for each count, indicated that the verdicts were unanimous.

Appeal by Defendant from judgments entered on 25 October 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 25 May 2021.

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

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

JACKSON, Judge.

¶ 1 Lawrence Scott ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of two counts of sexual activity by a substitute parent, a violation of N.C. Gen. Stat. § 14-27.7(a). On appeal, Defendant argues that the trial court erred in allowing amendment of the indictment charging him with these offenses. Defendant also argues that the trial court erred by sentencing him to consecutive sentences for his convictions. We hold that Defendant has failed to demonstrate any error.

I. Background

¶ 2 On Tuesday, 31 May 2016, Katherine[1] stayed home from school after returning from an out-of-town trip over the Memorial Day weekend. The holiday fell on Monday, 30 May 2016 that year, and Katherine had returned home late at night. She was 16 years old at the time. There was an exam period at her school that week and she did not need to be at school on Tuesday because she had no exam that day.

¶ 3 That morning, Katherine's mother had a job interview. Before leaving for the interview, Katherine's mother woke her and invited her to come with her, but Katherine declined. After Katherine's mother left for the interview, Katherine went back to sleep.

¶ 4 Defendant is the father of Katherine's younger sister and had been living with Katherine's family since losing his job in 2015. After Katherine's mother left for the interview, Defendant entered the room where Katherine had been sleeping. Katherine was still in bed, but she was awake. Defendant began flashing money at Katherine, whereupon she asked if she could have a dollar. Defendant replied that she would have to work for it, and repeated this several times.

¶ 5 Defendant then performed cunnilingus on Katherine and then stood up and had her perform fellatio on him. He also attempted to penetrate her vaginally.

¶ 6 Katherine's mother then returned home. She had gone grocery shopping after her job interview. Defendant brought some of the grocery bags inside and then left the home. After he left, Katherine told her mother what had happened.

¶ 7 On 29 July 2016, a warrant was issued for Defendant's arrest. He was taken into custody the same day. A Wake County grand jury indicted him with three counts of sexual activity by a substitute parent on 22 August 2016.

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1. A pseudonym is used for ease of reading and to protect the privacy of the victim, who was a juvenile at the time of the commission of the offenses. *See* N.C. R. App. P. 42(b).

¶ 8 The matter came on for trial before the Honorable A. Graham Shirley in Wake County Superior Court on 17 July 2018. At the conclusion of a three-day trial, the jury acquitted Defendant of one of the counts. It was hopelessly deadlocked on the remaining two. Judge Shirley accepted the jury's not guilty verdict on the first count and declared a mistrial as to the remaining counts.

¶ 9 Defendant was re-tried in October 2019 before the Honorable Rebecca W. Holt. Judge Holt presided over a four-day trial. At the conclusion of the trial, the jury returned verdicts of guilty on the remaining counts. The court entered two judgments on the jury's verdicts, sentencing Defendant to 20 to 84 months in prison in each judgment, and ordering that the sentences run consecutively. The court also ordered that Defendant register as a sex offender and entered a permanent no contact order with Katherine.

¶ 10 Defendant entered timely written notice of appeal on 1 November 2019.

II. Analysis

¶ 11 Defendant makes essentially two arguments on appeal, which we address in turn.

A. Amendment of the Indictment

¶ 12 **[1]** Defendant first argues that the trial court erred by granting the State's motion to amend the indictment. Specifically, Defendant contends that allowing the State to amend the indictment by adding the words "[a]t the time of the offense, the defendant was residing in the home with [Katherine]" substantially altered the charges in the indictment, adding an essential element to the offense charged—an element the unamended version of the indictment did not include. We disagree.

¶ 13 "A valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019) (internal marks and citation omitted). It "serves to identify the offense being charged with certainty, to enable the accused to prepare for trial, and to enable the court, upon conviction, to pronounce the sentence." *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (internal marks and citation omitted). An indictment must therefore contain

> [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 . . . of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2019) (emphasis added).

¶ 14 "[A]n indictment is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *White*, 372 N.C. at 250, 827 S.E.2d at 82 (internal marks and citation omitted). An invalid indictment "fails to confer subject-matter jurisdiction on the trial court." *State v. Lyons*, 268 N.C. App. 603, 607, 836 S.E.2d 917, 921 (2019) (citation omitted). Accordingly, the validity of an indictment may be raised for the first time on appeal "even though no corresponding objection, exception or motion was made in the trial division." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981).

¶ 15 "Although G.S. 15A-923(e) prohibits the amendment of a bill of indictment, the term 'amendment' has been restrictively defined as 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986) (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)). Thus, "while amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration, an amendment that simply corrects an error unconnected and extraneous to the allegations of the essential elements [does] not." *State v. Stith*, 246 N.C. App. 714, 716, 787 S.E.2d 40, 43 (2016) (internal marks and citation omitted), *aff'd*, 369 N.C. 516, 796 S.E.2d 784 (2017).

¶ 16 Both the facial validity of indictments and trial rulings allowing amendment of indictments are reviewed de novo by our Court. *See*, *e.g.*, *State v. Edgerton*, 266 N.C. App. 521, 525, 832 S.E.2d 249, 253 (2019) (standard of review for facial validity challenges is de novo); *State v. Frazier*, 251 N.C. App. 840, 795 S.E.2d 654, 655 (2017) (standard of review for rulings on amendments to indictments is de novo). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

¶ 17 The crime of sexual activity by a substitute parent is defined by N.C. Gen. Stat. § 14-27.31, which provides:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a

> minor residing in the home, the defendant is guilty of a Class E felony.

N.C. Gen. Stat. § 14-27.31(a) (2019). "[T]he elements of sexual activity by a substitute parent are (1) vaginal intercourse or a sexual act, (2) with a minor victim residing in a home, (3) by a person who has assumed the position of a parent in the minor victim's home." *State v. Johnson*, 253 N.C. App. 337, 346, 801 S.E.2d 123, 128 (2017). "Proof of a 'sexual act' under [the statute] does not require . . . penetration." *State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926 (1988).

¶ 18 The indictment charging Defendant with sexual activity by a substitute parent charged that

> on or about May 31, 2016, in Wake County, the defendant . . . unlawfully, willfully, and feloniously did, having assumed the position of a parent in the home of [Katherine] . . . , a person less than eighteen years old, and engaged in a sexual act with that person. This act was done in violation of NCGS § 14-27.7(a).

As noted previously, the indictment charged Defendant with three counts of the offense.

¶ 19 The unamended version of the indictment thus charged that Defendant, (1) "having assumed the position of a parent in the home of [Katherine]"; (2) "a person less than eighteen years old"; (3) "engaged in a sexual act with that person." These allegations allege the essential elements of sexual activity by a substitute parent. *See Johnson*, 253 N.C. App. at 346, 801 S.E.2d at 128. We therefore hold that the unamended version of the indictment was facially valid. Accordingly, even this unamended version of the indictment served the dual purposes of a valid indictment—providing Defendant with notice and preventing double jeopardy. *See Rankin*, 371 N.C. at 886, 821 S.E.2d at 790.

¶ 20 The State's motion to amend the indictment was heard on 12 July 2018 before the Honorable R. Allen Baddour, Jr., in Wake County Superior Court. Defendant argued at the hearing that the State's proposed amendment was impermissible because liability for the offense required proof both (1) that the defendant resided in the home and (2) that he had acted in a parental role, and that these two facts were separate essential elements of the crime. The State disputed this argument and explained that it was "asking to amend out of an abundance of caution, to – just to be clear[.]" Judge Baddour consulted the pattern jury instructions and noted that the third element of the offense in the pattern instruction

was that "that the defendant had assumed the position of a parent in the home where the alleged victim resided[,]" and ruled as follows:

> THE COURT: . . . I think that the existing language is sufficient to indict and provide jurisdiction to the court for a trial on sexual activity by a substitute parent, but I do also think that the amendment provides more clear language without adding an element, so to speak.
>
> So I will allow the motion.
>
> I also, on the Court's own motion, will amend the statute in each count of the indictment from 14-27.7(a) to 14-27.31(a).[2]

Judge Baddour memorialized these rulings in a written order dated 13 July 2018.

¶ 21 Defendant's argument on appeal is somewhat different than the one made by his trial counsel at the 12 July 2018 hearing before Judge Baddour. Whereas there, Defendant argued that the State was required to prove both that *he* resided in the home where the offense occurred and had acted in a parental role in the home, here, he argues that the unamended version of the indictment did not adequately allege that the *minor victim* resided in the home at the time of the offense. Defendant's appellate counsel thus appears to recognize that trial counsel's argument was unsuccessful because it is the victim, not the defendant, that the State must prove lived in the home at the time of the offense in order to convict. *See* N.C. Gen. Stat. § 14-27.31(a) (2019) (defining offense as where "a defendant who has assumed the position of a parent in the home of a minor victim engages in . . . a sexual act with a *victim who is a minor residing in the home*") (emphasis added); N.C.P.I.—Crim 207.70A (requiring proof that offense occurred "in the home where the alleged victim resided"). Yet, appellate counsel's argument is just as unavailing. The allegations in the unamended indictment allege that the minor victim was Katherine, "a person less than eighteen years old," and that Defendant "ha[d] assumed the position of a parent in the home of [Katherine.]" These allegations make plain that Katherine, the minor victim, was alleged to reside in the home where Defendant stood accused of engaging in various sexual acts with her after assuming the position of a parent. Accordingly, we hold that the unamended ver-

2. N.C. Gen. Stat. § 14-27.7(a) was recodified at N.C. Gen. Stat. § 14-27.31 in 2015. 2015 S.L. 181 § 13(a).

sion of the indictment adequately alleged that the minor victim resided in the home where the offenses occurred.

¶ 22 Adding the words "[a]t the time of the offense, the defendant was residing in the home with [Katherine]" to what otherwise was a facially valid indictment did not constitute a substantial alteration of the offenses charged in the indictment because these additional words did not add any previously omitted essential element of the crime of sexual activity by a substitute parent. As noted above, it is not an essential element of sexual activity by a substitute parent that the person who has assumed the position of a parent reside in the home where the minor victim resides, although this will no doubt often be the case when a person assumes the position of a parent with respect to a minor child. Instead, it is the minor victim who must reside in the home at the time of the commission of the offense. *See* N.C. Gen. Stat. § 14-27.31(a) (2019) (requiring that the victim "is a minor residing in the home"); N.C.P.I.—Crim 207.70A (defining the third element of the offense as "the defendant had assumed the position of a parent in the home where the alleged victim resided"). Accordingly, the words, "[a]t the time of the offense, the defendant was residing in the home with [Katherine,]" were "extraneous to the allegations of the essential elements" in the indictment. *Stith*, 246 N.C. App. at 716, 787 S.E.2d at 43. Adding them thus did not qualify as an amendment prohibited by N.C. Gen. Stat. § 15A-923(e).

B. Consecutive Sentences

¶ 23 **[2]** Defendant also argues that the trial court erred by sentencing him to two consecutive sentences. Specifically, Defendant contends that sentencing him to consecutive sentences was improper where the predicate sexual acts for each conviction were perpetrated during the same incident, recasting a double jeopardy argument that has not been preserved for appellate review as a hybrid challenge to the unanimity of the verdict and sufficiency of the indictment. We hold that (1) the jury instructions and verdict sheets demonstrate that the jury's verdicts were unanimous; (2) indicting Defendant with multiple counts of the same crime based on distinct sexual acts was proper; and (3) the trial court did not abuse its discretion by sentencing Defendant to consecutive sentences.

¶ 24 In general, constitutional issues not raised in the trial court will not be considered for the first time on appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). However, alleged "[v]iolations of . . . the right to a unanimous verdict . . . are not waived by the failure to object at trial and may be raised for the first time on appeal." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003) (citation

omitted). Similarly, challenges to "the sufficiency of an indictment . . . may be made for the first time in the appellate division." *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729.

¶ 25 Article I, § 24 of the North Carolina Constitution and the Sixth Amendment to the United States Constitution both guarantee the right to a unanimous verdict. *See* N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]"); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) ("[T]he Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."). So do our General Statutes. *See* N.C. Gen. Stat. § 15A-1237(b) (2019) ("The verdict must be unanimous, and must be returned by the jury in open court."). Verdict unanimity issues can arise "[i]f the trial court instructs a jury that it may find the defendant guilty of the crime charged on either of two alternative grounds, [and] some jurors [] find the defendant guilty of the crime charged on one ground, while other jurors [] find the defendant guilty on another ground." *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (1999). "Where each alternative ground constitutes a separate and distinct offense, the risk of a nonunanimous verdict arises." *Id.* (citation omitted).

¶ 26 For example, if a jury is instructed to return a guilty verdict if it finds that the "defendant knowingly possessed or knowingly transported marijuana" and the verdict sheet states that the jury finds the defendant guilty of trafficking marijuana without specifying whether the conviction is for trafficking in marijuana by transportation or possession—two different modes of liability for the offense of trafficking in marijuana—it is impossible from the verdict and instructions "to determine whether all of the jurors found possession, all found transportation, or some found one and some the other." *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990). Critically, "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis in original). On the other hand, "if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied." *Id.* at 303, 412 S.E.2d at 312.

¶ 27 This case does not present a verdict unanimity issue. The jury instructions and the verdict sheets consistently distinguished between the sexual act upon which each of the counts of sexual activity by a substi-

tute parent were predicated. The trial court instructed the jury on the count predicated on cunnilingus as follows:

> The defendant has been charged with feloniously engaging in a sexual act, cunnilingus, with a minor over whom the defendant had assumed the position of a parent residing in the home. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another.
>
> Second, that the alleged victim was a minor. A minor is someone who has not attained the age of 18 years or has not otherwise been emancipated.
>
> And, third, that the defendant . . . had assumed the position of a parent in the home where the alleged victim resided.
>
> Consent is no defense to this charge.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in a sexual act, cunnilingus, with the alleged victim and that at the time the alleged victim was less than 18 years of age and had not been emancipated and was thereby a minor and that the defendant had assumed the position of a parent in the home where the alleged victim resided, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

¶ 28 Then the court instructed the jury on the count predicated on fellatio:

> The defendant has been charged with feloniously engaging in a sexual act, fellatio, with a minor over whom the defendant had assumed the position of a parent residing in the home. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

> First, that the defendant engaged in a sexual act with the alleged victim. A sexual act also means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another.
>
> Second, that the alleged victim was a minor. A minor is someone who has not attained the age of 18 years or has not otherwise been emancipated.
>
> And, third, that the defendant had assumed the position of a parent in the home where the alleged victim resided.
>
> Consent is no defense to this charge.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in a sexual act, fellatio, with the alleged victim and that at that time the alleged victim was less than 18 years of age and had not been emancipated and was thereby a minor and that the defendant had assumed the position of a parent in the home where the alleged victim resided, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt about one or more of these things, it would be your duty to return a verdict of not guilty.

¶ 29 Although not required, we note that the verdict sheet for the count predicated on cunnilingus stated as follows:

> We the jury by unanimous verdict find the defendant, Lawrence Scott, to be:
>
> COUNT 2
>
> √ Guilty of Sexual Activity by a Substitute Parent (Cunnilingus)

The verdict sheet for the count predicated on fellatio read in the same fashion:

> We the jury by unanimous verdict find the defendant, Lawrence Scott, to be:
>
> COUNT 3
>
> √ Guilty of Sexual Activity by a Substitute Parent (Fellatio)

¶ 30 Accordingly, we hold that the consistent distinction between the sexual acts upon which the convictions were predicated demonstrates that the jury's verdicts were unanimous.

¶ 31 Defendant argues that he is being punished twice for a single offense because the sexual acts upon which his convictions were based were perpetrated during the same incident and that the indictment was thus "multiplicious." *See Petty*, 132 N.C. App. at 463 n. 2, 512 S.E.2d at 435 n. 2 ("An indictment is multiplicious if it charges a single offense in several counts."). However, the indictment in this case is not "multiplicious": it charges Defendant with multiple counts of the same crime. While the crime is the same in each count, each count represents a different charge—a separate instance of commission of the crime based on a distinct predicate act. The first count, which he was acquitted of, was based on vaginal intercourse. The two counts of which he was found guilty were based on cunnilingus and fellatio, respectively. "Even when multiple sex acts occur in a 'single transaction' or a short span of time, each act is a distinct and separate offense." *State v. Gobal*, 186 N.C. App. 308, 322 n. 7, 651 S.E.2d 279, 288 n. 7 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008). Distinct sexual acts perpetrated during the same incident can thus support multiple indictments and convictions for a sexual offense. *See*, *e.g.*, *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987) (upholding two rape convictions where the instances of forcible intercourse occurred during the same incident but were interrupted by an attempted rape of another victim); *State v. Pierce*, 238 N.C. App. 537, 539, 767 S.E.2d 860, 862 (2014) ("[M]ultiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties."); *State v. Williams*, 201 N.C. App. 161, 185, 689 S.E.2d 412, 426 (2009) ("[T]he occurrence of the acts in a 'single transaction' is irrelevant."); *State v. Coleman*, 200 N.C. App. 696, 706, 684 S.E.2d 513, 520 (2009) (upholding two convictions for indecent liberties for distinct acts committed during the same evening); *State v. James*, 182 N.C. App. 698, 705, 643 S.E.2d 34, 38 (2007) ("The distinctive character of the acts is not altered because all three occurred within a short time span."). Accordingly, we hold that the indictment charging Defendant with separate counts of sexual activity by a substitute parent based on distinct sexual acts did not suffer from any infirmity.

¶ 32 "It is well established that the decision to impose consecutive or concurrent sentences is within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion." *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 497, 692 S.E.2d 145, 154 (2010) (citation omitted). "Abuse of discretion results where the court's

ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted).

¶ 33 It was well within the trial court's discretion to impose the sentence Defendant received. Nothing in the record suggests that sentencing Defendant to consecutive sentences for his convictions was "manifestly unsupported by reason or . . . arbitrary[.]" *Id.* We therefore hold the decision to sentence Defendant to consecutive sentences was not an abuse of discretion.

III. Conclusion

¶ 34 For the reasons stated above, we hold that Defendant has failed to demonstrate any error in the proceedings in the trial court.

NO ERROR.

Judges TYSON and MURPHY concur.

PAUL STEVEN WYNN, Plaintiff
v.
REX FREDERICK, in his official capacity, and GREAT AMERICAN INSURANCE COMPANY, Defendants

No. COA20-472

Filed 20 July 2021

1. Appeal and Error—interlocutory appeal—substantial right—motions to dismiss—sovereign and judicial immunity

In a suit for damages against a county magistrate, the denial of the magistrate's Rule 12(b)(6) motion to dismiss (for failure to state a claim upon which relief could be granted) based on sovereign and judicial immunity affected a substantial right, but the denial of his Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction—also based on sovereign immunity—did not. Thus, only the Rule 12(b)(6) motion was immediately appealable.

2. Immunity—sovereign—magistrate—statutory waiver—applicability

In a suit for damages against a county magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order, where the nephew subsequently shot plaintiff with a

crossbow during an acute psychotic episode, the magistrate's sovereign immunity was waived under N.C.G.S. § 58-76-5, which waives immunity for "any register, surveyor, sheriff, coroner, county treasurer, or other officer" covered by bonds. Under the statute's plain language, "other officers" is not limited to county officers but also includes magistrates. Further, section 58-76-5 was not intended to be the sole remedy for negligence of officials covered by bonds, and therefore the existence of the North Carolina Tort Claims Act as an alternative remedy for negligence by magistrates did not preclude section 58-76-5's applicability in this case.

3. Immunity—judicial—magistrate—sued in official capacity—applicability

In a suit for damages against a county magistrate who failed to timely serve plaintiff's nephew with an involuntary commitment order, where the nephew subsequently shot plaintiff with a crossbow during an acute psychotic episode, the magistrate could not assert judicial immunity as a defense because plaintiff sued him solely in his official capacity, and judicial immunity only shields judicial officers sued as individuals.

Judge MURPHY concurring in result only.

Appeal by Defendants from the order entered 15 January 2020 by Judge John O. Craig, III in Orange County Superior Court. Heard in the Court of Appeals 23 March 2021.

Carlos E. Mahoney and Barry D. Nakell, for Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn H. Shields, for Defendant-Appellant Frederick.

David O. Lewis and F. Joseph Nealon, for Defendant-Appellant Great American Insurance Company.

GORE, Judge.

¶ 1 Rex Frederick ("Defendant") appeals from orders entered 15 January 2020 denying his motions to dismiss Paul Wynn's ("Plaintiff") claims against him.[1] We affirm the trial court's order.

1. The trial court also denied Defendant Great American Insurance Company's motion to dismiss under Rule 12(b)(6). Defendant Great American Insurance Company filed a notice of appeal, but the appeal was dismissed at Great American's request on 28 August 2020.

I. Background

¶ 2 In December 2016, Plaintiff owned two properties in Mebane, North Carolina, one in which he lived and another which he rented out to his sister, Judy Wynn ("Ms. Wynn"), and her twenty-four-year-old son, Robert Norman Morris ("Mr. Morris). Since Mr. Morris was a teenager, he experienced severe mental health issues and was diagnosed with schizoaffective disorder, schizophrenia, and bipolar disorder. In addition, Mr. Morris engaged in significant alcohol and drug use and was diagnosed with substance abuse disorders. When he was not taking his medications, Mr. Morris, at times, would become violent and threatening to others. On several occasions Mr. Morris was hospitalized at UNC Hospitals, often on an involuntary commitment basis, for inpatient treatment of acute psychiatric symptoms. This resulted in Mr. Morris being under the care of the UNC Center for Excellence in Community Mental Health's Assertive Community Treatment (ACT) team.[2] The ACT team regularly visited Mr. Morris at his home to monitor his conditions and medication compliance. Additionally, Mr. Morris received psychiatric care and treatment from Dr. Austin Hall, the ACT team Medical Director. Prior to the events of this case, Mr. Morris was involuntarily committed three times in 2016.

¶ 3 During the week of 12 December 2016, Mr. Morris was not taking his medication and his mental health had deteriorated. On 14 December 2016, Ms. Wynn called 911 after Mr. Morris drained her car battery and hid the keys to Plaintiff's spare vehicle, in order to prevent Ms. Wynn from leaving the home. The Orange County Sheriff's Office responded and confiscated a knife from Mr. Morris. Ms. Wynn informed the ACT team that Mr. Morris was not taking his medication, and she claimed Mr. Morris had not slept for three days, spent the night guarding the house with a crossbow, and had developed an unreasonable fear for Ms. Wynn's safety.

¶ 4 On the morning of 16 December 2016, Dr. Hall met with Ms. Wynn and Mr. Morris at their home. After speaking with them and observing Mr. Morris, Dr. Hall determined that Mr. Morris needed to be involuntarily committed because he was mentally ill and dangerous to himself and others. Dr. Hall prepared an Affidavit and Petition for Involuntary Commitment of Mr. Morris, signed it in front of a notary public, and faxed it to the Orange County Magistrate's Office, where it was received by Defendant, who is an Orange County Magistrate. The Affidavit and

2. The ACT team provides support for individuals with severe mental illness who live at home in Orange County.

Petition provided Mr. Morris's home address as well as the contact information for Dr. Hall. At 2:17 p.m. that day, Defendant issued a Findings and Custody Order for Involuntary Commitment ("Custody Order"). Defendant faxed the Custody Order to UNC Hospitals and not the Orange County Sheriff's Department. As a result, Mr. Morris was not served with the Custody Order on 16 December 2016.

¶ 5 On the morning of 17 December 2016, Dr. Hall called Ms. Wynn to ask if the Sheriff's Office had picked up Mr. Morris, Ms. Wynn informed him they had not. At approximately 5:30 a.m. Dr. Hall called Defendant at the Orange County Magistrate's Office to inquire about the status of the Custody Order. Defendant told Dr. Hall he sent the Custody Order to UNC Hospitals because he believed Mr. Morris was at the hospital. When Dr. Hall informed Defendant Mr. Morris was not at the hospital, but at home, Defendant asked Dr. Hall to fax the involuntary commitment documents back to him so that he could reissue the order, because he no longer had the Affidavit and Petition or the Custody Order. Dr. Hall did not have the documents immediately accessible, nor did he have immediate access to his fax machine and was not able to fax the documents to the Magistrate's Office until 9:27 a.m. At 11:02 a.m., Tony Oakley, another Orange County Magistrate, contacted the Orange County Sheriff's Office for the delivery of the Custody Order. At approximately 11:20 a.m. Deputy Hester received the faxed Custody Order and began driving to Mr. Morris's home to serve the Order.

¶ 6 Around 11:00 a.m. on 17 December 2016, Plaintiff went to Ms. Wynn's house to jump start her car. After jump starting the car, Ms. Wynn invited Plaintiff inside for some refreshments. At this time, Plaintiff did not know that Mr. Morris was off his medication and experiencing an acute psychotic episode. When Plaintiff entered the house, he saw Mr. Morris in the family room, but did not see that Mr. Morris had a crossbow. While Plaintiff was in the kitchen, Mr. Morris used the crossbow to shoot Plaintiff in the left side of the neck with an arrow. The arrow punctured Plaintiff's cervical spine, spinal cord, and left vertebral artery, instantly paralyzing Plaintiff. Ms. Wynn called 911 at 11:18 a.m., and Deputy Hester arrived at the home at approximately 11:36 a.m. Orange County EMS arrived shortly thereafter. At that time, Mr. Morris was taken into custody by the Orange County Sheriff's Office.

¶ 7 On 17 September 2019, Plaintiff filed a complaint against Defendant, in his official capacity as a Magistrate, and Great American Insurance Company seeking damages in the amount of $100,000 under Defendant's official bond issued by Great American Insurance Company. Defendant filed a motion to dismiss claiming sovereign immunity, absolute judicial

immunity, and that Plaintiff has otherwise failed to state a claim upon which relief can be granted.[3] Great American Insurance Company filed a motion to dismiss joining in and adopting Defendant's motion to dismiss as Defendant's insurer. On 8 January 2020, the trial court found that Defendant Frederick is not entitled to sovereign immunity or judicial immunity and denied Defendant Frederick and Defendant Great American Insurance Company's motions to dismiss. Defendant gave notice of appeal on 11 February 2020.

II. Scope of Appellate Review

¶ 8 **[1]** As an initial matter, we must address the scope of this Court' jurisdiction over Defendant's interlocutory appeal. The trial court's denial of Defendant's motion to dismiss is an interlocutory order. Generally, "a party has no right to immediate appellate review of an interlocutory order." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). However, a party may immediately appeal from an interlocutory order that affects a substantial right. N.C. Gen. Stat. § 1-277(a) (2020); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2020).

¶ 9 The denial of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity does not affect a substantial right, therefore, we cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1). *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (citations omitted); *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 535, 836 S.E.2d 330, 335 (2019). However, the denial of a Rule 12(b)(6) motion to dismiss based on sovereign immunity affects a substantial right and is immediately appealable. *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). Similarly, claims of judicial immunity affect a substantial right and are reviewable on interlocutory appeal. *See Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty.*, 233 N.C. App. 145, 149, 756 S.E.2d 833, 836 (2014).

III. Standard of Review

¶ 10 At the outset we note that the failure of the trial court to identify which civil procedure rule or rules supported the dismissal of particular claims obfuscates appellate review. Defendant moved to dismiss Plaintiff's claims based on both North Carolina Civil Procedure Rules 12(b)(1) and 12(b)(6). However, the trial court did not state on which Rule it based its denial of Defendant's Motion to Dismiss. This hinders

3. Defendant also initially claimed public official immunity, however, at the hearing on the motions to dismiss he waived the motion to dismiss on the basis of public official immunity.

appellate review because, while we apply a *de novo* standard when reviewing either a Rule 12(b)(1) or 12(b)(6) dismissal, the scope of review varies. *See Holton v. Holton*, 258 N.C. App. 408, 414, 813 S.E.2d 649, 654 (2018). Review of a Rule 12(b)(6) dismissal is confined to the face of the pleadings while review of a Rule 12(b)(1) dismissal may take into consideration any outside evidence or hold an evidentiary hearing. *Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009). Here, the trial court's order determined "the factual allegations in the Complaint . . . state a claim upon which relief can be granted . . . ." Therefore, we conclude that the trial court must have denied Defendant's motion based on Rule 12(b)(6), and treats it as such upon review.

¶ 11 We review an appeal from a Rule 12(b)(6) motion to dismiss *de novo*, 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*, 203 N.C. App. at 266–67, 690 S.E.2d at 761. "We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* We consider well-pleaded factual allegations of the complaint as true for purposes of a 12(b)(6) motion, conclusions of law or deductions of fact are not admitted. *Dalenko v. Wake Cnty. Dep't of Hum. Servs.*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003). "A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970).

IV. Sovereign Immunity

¶ 12 **[2]** "Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits." *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted).

¶ 13 North Carolina General Statutes § 58-76-5 provides "[e]very person injured by the neglect, misconduct, or misbehavior in office of any register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit . . . upon their respective bonds. . . ." N.C. Gen. Stat. § 58-76-5. This statute works to waive sovereign immunity for officials covered by statutory bonds. This court has stated "[t]he statutory mandate that the sheriff furnish a bond works to remove the sheriff from the protective embrace of governmental immunity, but only where the surety is joined as a party to the action." *Messick v. Catawba Cnty*, 110 N.C. App. 707, 715, 431 S.E.2d 489, 494 (1993). Immunity is only waived in tort cases and to the extent of the amount of the bond. *Hill v. Medford*,

158 N.C. App. 618, 623, 582 S.E.2d 325, 329 (2003) (Martin, J. dissenting), *per curiam rev'd based on the dissenting opinion*, 357 N.C. 650, 588 S.E.2d 467 (2003).

¶ 14 Defendant argues that sovereign immunity was not waived in this case because "other officers," as used in § 58-76-5, does not include magistrates. Defendant argues that if the General Assembly intended to include magistrates within the reach of § 58-76-5 they would have explicitly included magistrates in the list of applicable officers. Further, Defendant argues that the legislature did not intend for magistrates to be included within the reach of § 58-76-5 because the listed officers are all county officers, therefore, "other officers" only applies to other county officers. As a result, Defendant asserts that there is no plain and unmistakable waiver here because § 58-76-5 does not specifically identify magistrates. *See Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001) (holding that for sovereign immunity to be waived it must be by a "plain, unmistakable mandate of the lawmaking body."). However, this argument is not persuasive because § 58-76-5 gives a plain and unmistakable waiver of sovereign immunity, and as long as magistrates are found to be "other officers" they are included within the mandate of the statute.

¶ 15 Defendant argues § 58-76-5's "other officers" does not include magistrates because the North Carolina Torts Claims Act provides a remedy for negligence of magistrates. N.C. Gen. Stat. § 143-291, *et seq*. We do not find this persuasive. Section 58-76-5 clearly covers sheriffs, as they are enumerated in the list of applicable state officers in the statute, however, there are other statutes that provide for remedies of the negligence of sheriffs. *See Myers v. Bryant*, 188 N.C. App. 585, 588, 655 S.E.2d 882, 885 (2008). Therefore, § 58-76-5 clearly was not intended to be the sole remedy for negligence of officials who are covered by bonds. The existence of an alternative remedy does not preclude § 58-76-5 from being applicable here.

¶ 16 There are several cannons of statutory interpretation, including plain language of the statute. "An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Here, the plain language of the statute states "other officers." Further, the underlying reason and purpose of § 58-76-5 is to provide a remedy for those harmed by the "neglect, misconduct, or misbehavior" of officers who are statutorily required to be protected by a bond. If the General Assembly truly intended to only include county

officers, as Defendant argues, the plain language of the statute would have read "other county officers."

¶ 17 Therefore, we find that magistrates are included within the meaning of "other officers" under § 58-76-5 and sovereign immunity was waived.

V. Judicial Immunity

¶ 18 **[3]** Defendant argues if we find the General Assembly waived sovereign immunity in this case, that Plaintiff's claims are nonetheless barred by judicial immunity. Judicial immunity, like sovereign immunity, presents an absolute bar to recovery. *Fuquay Springs v. Rowland*, 239 N.C. 299, 301, 79 S.E.2d 774, 776 (1954). Judicial immunity is "available for individuals in actions taken while exercising their judicial function." *Price v. Calder*, 240 N.C. App. 190, 193, 770 S.E.2d 752, 754 (2015). Magistrates are judicial officials entitled to judicial immunity. *See Foust v. Hughes*, 21 N.C. App. 268, 270, 204 S.E.2d 230, 231 (1974).

¶ 19 However, the definition of judicial immunity demonstrates the difference in application of judicial immunity from sovereign immunity. Judicial immunity applies to *individuals*, *Price*, 240 N.C. App. at 193, 770 S.E.2d at 754, while sovereign immunity applies to "the state, its counties, and its public officials, *in their official capacity*." *Paquette*, 155 N.C. App. at 418, 573 S.E.2d at 717 (emphasis added). These differences show that the doctrines of sovereign immunity and judicial immunity are not intended to be parallels applicable under the same circumstances. Therefore, we conclude sovereign immunity applies when the government or a public official are sued in their official capacity while judicial immunity is an available defense for judicial officers sued as individuals. Here, Plaintiff only sued Defendant in his official capacity. Therefore, judicial immunity is not applicable in this cause of action.

VI. Conclusion

¶ 20 For the foregoing reasons we find that magistrates are included in "other officers" under N.C. Gen. Stat. § 58-76-5, and therefore, sovereign immunity was waived. Further, we find that because Defendant was sued exclusively in his official capacity the defense of judicial immunity is not applicable in this case. As a result, we conclude that the trial court did not err by denying Defendant's motion to dismiss and affirm the trial court's order.

AFFIRMED.

Judge DIETZ concurs.

Judge MURPHY concurs in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JULY 2021)

BATTS v. IDEAL IMAGE CLINICS, PLLC 2021-NCCOA-357 No. 20-480	Durham (19CVS2277)	Affirmed
BIRD v. E. BAND OF CHEROKEE NATION ALCOHOLIC BEVERAGE CONTROL 2021-NCCOA-358 No. 20-612	Jackson (19CVS176)	Affirmed
DESAI v. DESAI 2021-NCCOA-359 No. 20-435	Mecklenburg (16CVD1733)	Reversed and Remanded
DLL FIN. LLC v. WARNER 2021-NCCOA-360 No. 20-624	Ashe (16CVS283)	Affirmed
ELLIS v. HARPER 2021-NCCOA-361 No. 20-746	Buncombe (18SP758)	Affirmed.
ELLIS v. HARPER 2021-NCCOA-362 No. 20-730	Buncombe (18SP758)	Affirmed.
HEDGEPETH v. SMCC CLUBHOUSE, LLC 2021-NCCOA-363 No. 20-743	Swain (20CVS73)	No Error
IN RE C.G.F. 2021-NCCOA-364 No. 20-574	Durham (20SPC275)	Affirmed
IN RE E.M.D.Y. 2021-NCCOA-365 No. 20-685	Durham (20SPC746)	REMANDED FOR ADDITIONAL FINDINGS
IN RE J.R. 2021-NCCOA-366 No. 20-457	Durham (19SPC2379)	Affirmed
IN RE L.R.M. 2021-NCCOA-367 No. 20-913	Chatham (19JA115)	Affirmed

IN RE M.F. 2021-NCCOA-368 No. 20-736	Cumberland (15JA324)	Affirmed in Part, Reversed in Part and Remanded
IN RE R.S.H. 2021-NCCOA-369 No. 20-777	Durham (20SPC802)	Affirmed
JACOBS v. MANN 2021-NCCOA-370 No. 20-378	Edgecombe (17CVS491)	Affirmed in part; Vacated in part and Remanded.
PEAY v. S. & D. COFFEE, INC. 2021-NCCOA-371 No. 20-717	Anson (18CVS200)	No Error
POWELL v. CARTRET 2021-NCCOA-372 No. 20-638	New Hanover (18CVS2952)	Affirmed
RISSMANN v. RISSMANN 2021-NCCOA-373 No. 20-503	Mecklenburg (17CVD17119)	AFFIRMED IN PART, VACATED AND REMANDED IN PART.
RODGERS v. L. OFF. OF KENNETH T. DAVIES, P.C. 2021-NCCOA-374 No. 20-465	Mecklenburg (18CVD23362)	Affirmed
STATE v. ALVAREZ 2021-NCCOA-375 No. 20-611	Rowan (18CRS52368-69)	Affirmed
STATE v. BEARD 2021-NCCOA-376 No. 20-773	McDowell (19CRS50990)	No Error
STATE v. BLAKLEY 2021-NCCOA-377 No. 20-239	Forsyth (17CRS61704) (18CRS361)	No Plain Error in Part; No Error in Part
STATE v. BLUEFORD 2021-NCCOA-378 No. 20-388	Durham (17CRS57995)	No Error
STATE v. BOONE 2021-NCCOA-379 No. 20-310	Mecklenburg (17CRS200245)	No Error.

STATE v. CARTER 2021-NCCOA-380 No. 20-755	Rockingham (11CRS50264-65)	NO ERROR IN PART; VACATED IN PART
STATE v. CHRISTMAN 2021-NCCOA-381 No. 20-316	Brunswick (16CRS55123-27) (16CRS55129-33)	NO ERROR IN PART; VACATED INPART, REMANDED.
STATE v. FORTNEY 2021-NCCOA-382 No. 20-524	Columbus (17CRS52734-35)	No Error
STATE v. GRADY 2021-NCCOA-383 No. 20-355	New Hanover (18CRS51345)	No Error
STATE v. HELMS 2021-NCCOA-384 No. 20-553	Forsyth (18CRS1284) (18CRS1287-88) (18CRS54103) (18CRS54122-23) (18CRS55337-39) (19CRS2048) (19CRS890)	DENIED AND DISMISSED
STATE v. JOHNSON 2021-NCCOA-385 No. 20-410	Cabarrus (17CRS1999) (17CRS51404-06)	NO ERROR IN PART; VACATED AND REMANDED IN PART
STATE v. JOHNSON 2021-NCCOA-386 No. 20-732	Rowan (16CRS52465) (16CRS52467) (16CRS52469)	No Error
STATE v. LEDBETTER 2021-NCCOA-387 No. 19-1155	Randolph (19CRS17)	Affirmed
STATE v. MORROW 2021-NCCOA-388 No. 20-401	Alamance (15CRS2738)	No Error
STATE v. PARKER 2021-NCCOA-389 No. 20-498	Cabarrus (17CRS53642-43)	No Error
STATE v. POWELL 2021-NCCOA-390 No. 20-135	Buncombe (17CRS86500-01) (17CRS86503)	Vacated and Remanded
STATE v. SMITH 2021-NCCOA-391 No. 20-626	Guilford (18CRS74175)	Remanded For Rehearing.

STATE v. TULL 2021-NCCOA-392 No. 20-787	Carteret (18CRS53002)	Affirmed
STATE v. VANN 2021-NCCOA-393 No. 20-182	Cumberland (17CRS63024)	No Error
STATE v. WILLIAMS 2021-NCCOA-394 No. 20-713	Wake (19CRS204897)	New Trial
WARNER v. SULLIVAN 2021-NCCOA-395 No. 20-625	Ashe (16CVS233)	Affirmed
WILSON v. QUEEN CITY JUMP, LLC 2021-NCCOA-396 No. 20-479	Mecklenburg (17CVS4268)	Dismissed

IN RE E.A.C.

[278 N.C. App. 608, 2021-NCCOA-298]

IN THE MATTER OF E.A.C., P.A.C., J.M.C., AND J.C.-B.

No. COA20-835

Filed 3 August 2021

1. Child Abuse, Dependency, and Neglect—permanency planning hearing—notice—waiver

In a neglect and dependency case where the trial court entered a permanency planning order after a hearing that was designated as a ninety-day review hearing, respondent-mother waived her right to notice of a permanency planning hearing under N.C.G.S. § 7B-907(a) by attending the hearing, participating in it, and failing to object to the lack of notice.

2. Child Abuse, Dependency, and Neglect—permanency planning—primary plan of reunification—eliminated—sufficiency of findings

The trial court's review order and permanency planning orders in a neglect and dependency case were vacated and remanded where the court had established reunification as the primary permanent plan at the initial disposition hearing but then eliminated reunification as a permanent plan at a subsequent hearing. Contrary to respondent-mother's argument, it was legally permissible for the court to eliminate reunification after it had already been part of the initial permanent plan. However, the court erred in eliminating reunification where it failed to enter sufficient findings of fact indicating whether reunification efforts would have been successful, and instead only entered findings showing that respondent-mother was unable to make progress toward reunification because of her status as an undocumented immigrant and her inability to obtain a U Visa.

3. Child Abuse, Dependency, and Neglect—permanent plan of reunification—eliminated—trial court's refusal to list steps for regaining custody

The trial court in a neglect and dependency case neither abused its discretion nor acted under a misapprehension of the law when, after removing reunification as a primary permanent plan, it told respondent-mother's counsel that it was not obligated to list what respondent-mother had to do to regain custody of her children. Under N.C.G.S. § 7B-904, courts have the discretion to direct parents to certain orders and enter dispositions that clearly spell out

what parents must do to regain custody. Moreover, a family services agreement had been in place for some time that respondent-mother was aware of and that delineated the specific steps she needed to take to regain custody, and therefore any injury caused by the court's refusal to list those steps was harmless.

Appeal by respondent-mother from orders entered 25 March 2020 and 18 September 2020 by Judge Warren McSweeney and Judge Regina M. Joe respectively in Hoke County District Court. Heard in the Court of Appeals 9 June 2021.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for appellant-respondent-mother.

The Charleston Group, by Jose A. Coker, R. Jonathan Charleston, and Charles R. Smith, for petitioner-appellee Hoke County Department of Social Services.

Matthew D. Wunsche for petitioner-appellee Guardian ad Litem.

ARROWOOD, Judge.

¶ 1 Respondent-mother appeals from a ninety-day review order and two permanency planning orders. Respondent-mother contends the trial court erred in setting a permanent plan that did not include reunification, that the Hoke County Department of Social Services ("DSS") failed to provide reasonable reunification efforts, and that the trial court could not grant guardianship of the children to foster parents without a finding that respondent-mother was unfit or had acted inconsistently with her constitutionally protected status. For the following reasons, we vacate the trial court's orders and remand for a new hearing.

I. Background

¶ 2 In July 2015, respondent-mother was shot in the head by her ex-boyfriend. The shooting caused respondent-mother to suffer a traumatic brain injury. On 8 October 2017, respondent-mother began acting erratically. Respondent-mother's brother called law enforcement officers and respondent-mother was hospitalized overnight due to suicidal ideations.

¶ 3 On 9 October 2017, DSS received a report alleging improper supervision, improper discipline, and an injurious environment involving J.M.C.

("Julieta"), P.A.C. ("Patricio"), and E.A.C. ("Emmanuel").[1] DSS observed injuries to Julieta's face. Although respondent-mother denied causing the injuries, Julieta, Patricio, and Emmanuel attributed the injuries to respondent-mother striking Julieta in the nose with a knife. DSS and respondent-mother entered into a Safety Agreement dated 9 October 2017. As part of the Safety Agreement, respondent-mother agreed to seek domestic violence services and engage in mental health services. DSS sought to place Julieta, Patricio, and Emmanuel with their maternal uncle. On 19 December 2017, the Cumberland County Department of Social Services notified DSS of pending criminal charges against the maternal uncle for sexual abuse.

¶ 4 On 20 December 2017, DSS filed petitions alleging Julieta, Patricio, and Emmanuel as dependent and neglected under N.C. Gen. Stat. §§ 7B-101(9) and 7B-101(15). DSS placed Julieta, Patricio, and Emmanuel in the care of Shanley and Theresa Morgan ("Morgans"). On 10 July 2018, by consent of all parties, the trial court appointed respondent-mother a Guardian *ad litem* ("GAL") under N.C. R. Civ. P. 17 due to her traumatic brain injury. On 29 October 2018, the trial court adjudicated Julieta, Patricio, and Emmanuel as dependent and neglected. The trial court filed a continuance order on 3 December 2018 keeping Julieta, Patricio, and Emmanuel in DSS custody.

¶ 5 On 3 December 2018, the UNC Medical Center in Chapel Hill notified DSS of J.C.-B.'s ("Juliana") birth. At the time of Juliana's birth, respondent-mother did not have stable housing or gainful employment. DSS also received information that respondent-mother had attempted to coordinate an illegal adoption of Juliana. On 5 December 2018, DSS filed a petition alleging Juliana as dependent and neglected. DSS obtained nonsecure custody of Juliana and placed her with the Morgans along with her older siblings. On 1 February 2019, the trial court adjudicated Juliana as dependent and neglected.

¶ 6 The trial court conducted four hearings during the dispositional phase: 15 March 2019, 27 September 2019, 6 March 2020, and 19 June 2020.

¶ 7 At the 15 March 2019 hearing, respondent-mother entered into an Out of Home Family Services Agreement ("OHFSA") in which she agreed to: (1) maintain stable employment or income to care for the needs of the juveniles; (2) participate in parenting classes; (3) maintain stable hous-

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading. The parties have stipulated to the aforementioned pseudonyms. All four children are at times referenced collectively as "juveniles."

ing; (4) participate in mental health therapy; and (5) visit the juveniles to maintain a bond. DSS recommended a primary plan of reunification with a concurrent plan of guardianship to a court-approved caretaker, which the trial court adopted in the disposition order. Disposition for all four children was entered on 25 March 2019.

¶ 8 DSS encountered several barriers in respondent-mother's achieving the primary plan of reunification. While conducting a home study of respondent-mother's residence, DSS observed several issues, including wiring hanging from the ceiling, holes in the floor, scattered debris throughout the house, lack of proper heating, and an insufficient number of beds for the juveniles. Additionally, respondent-mother's status as an undocumented immigrant created difficulty in obtaining employment and participating in parenting classes. DSS referred respondent-mother to Catholic Charities of Raleigh's office in Fayetteville to assist respondent-mother in applying for U Nonimmigrant Status as a victim of a violent crime ("U Visa"). Respondent-mother did not file an application or provide the necessary documentation to secure a U Visa.

¶ 9 In July 2019, respondent-mother contacted DSS to execute Relinquishments of Minor for Adoption ("Relinquishments") for the juveniles. Respondent-mother did not have counsel present, and upon receiving the unsolicited request, DSS advised respondent-mother to confer with her counsel. After respondent-mother conferred with her attorney, respondent-mother requested to independently proceed with the Relinquishments. DSS provided respondent-mother with Relinquishments in Spanish and explained their ramifications. Respondent-mother signed the Relinquishments of her own volition and free will.

¶ 10 The next hearing was conducted on 27 September 2019. The trial court set aside the Relinquishments upon respondent-mother's motion to have them rescinded. The trial court set aside the Relinquishments because respondent-mother's GAL was not present at the time of the signatures. In the order setting aside the Relinquishments, the trial court found that DSS had not forced, coerced, or threatened respondent-mother to sign the Relinquishments.

¶ 11 After addressing the Relinquishments, the trial court proceeded with the review hearing. At the time of the hearing, Julieta, Patricio, and Emmanuel had been in DSS custody for 646 days, and Juliana for 296 days. At the hearing, DSS recommended changing the primary plan for Julieta, Patricio, and Juliana from reunification to guardian-

ship and changing the concurrent plan from guardianship to custody.[2] Respondent-mother's trial counsel objected to the proposed change in primary and concurrent plans. Over respondent-mother's objection, the trial court changed the primary plans for Julieta, Patricio, and Juliana to guardianship with a court-approved caretaker with a concurrent plan of custody to a court-approved caretaker. The Ninety Day Review Order was entered 4 November 2019.

¶ 12 Based on respondent-mother's failure to complete the requirements of her OHFSA, DSS requested to be relieved of further reunification efforts. DSS contacted multiple providers to assist respondent-mother with employment and housing services but failed to obtain assistance due to respondent-mother's undocumented status. DSS contacted TT&T Services ("TT&T") in Raeford, North Carolina regarding parenting classes. TT&T did not have a Spanish-speaking service provider, and Julieta, Patricio, and Emmanuel did not meet TT&T's age criteria. DSS also contacted the Cooperative Extension Parents as Teachers program. Respondent-mother did not meet the program's criteria for services because the juveniles did not reside with respondent-mother and some were over the age of five.

¶ 13 DSS also contacted several service providers to assist respondent-mother in obtaining mental health services with a Spanish-speaking therapist, including TT&T, Greater Visions Behavioral Health, Renew Counseling Center of Raeford, and Daymark Recovery Center ("Daymark"). Daymark refused to provide services to respondent-mother due to her undocumented status. DSS also attempted to schedule therapy for respondent-mother at the Hoke County Health Department, but services were unavailable due to respondent-mother's undocumented status.

¶ 14 After these unsuccessful attempts to obtain assistance, DSS transported respondent-mother to the Catholic Charities of Raleigh's office in Fayetteville to seek assistance in applying for a U Visa. DSS provided an interpreter to assist at the appointment. At the appointment, respondent-mother was informed that the U Visa application required her to obtain birth certificates for all of her children, including those born in Mexico, and to provide financial or employment statements so that service fees could be waived. Respondent-mother did not provide the required documentation and her U Visa application was never processed.

¶ 15 DSS also attempted to assist respondent-mother in obtaining neurological services. DSS scheduled an appointment for respondent-mother

2. Emmanuel's primary plan was not changed because DSS was awaiting the results of a paternity test.

at the Duke University School of Medicine Department of Neurology ("Duke Neurology") in Durham, North Carolina. DSS intended to use reunification funds to financially assist respondent-mother with the services at Duke Neurology. DSS was informed that Duke Neurology would not provide services due to respondent-mother's undocumented status.

¶ 16 The trial court found that respondent-mother had not achieved stable housing, employment, participated in parenting classes, or mental health services as required by the OHFSA. The trial court relieved DSS of further reunification efforts to respondent-mother in the 4 November 2019 review order.

¶ 17 The next permanency planning hearing was conducted on 6 March 2020. At the time of the hearing, Julieta, Patricio, and Emmanuel had been in DSS custody for over 808 days, and Juliana for 450 days. On 25 March 2020, the trial court entered a permanency planning order granting guardianship of Patricio, Julieta, and Juliana to the Morgans.[3] In the permanency planning order, the trial court found that respondent-mother had waived her constitutionally protected status because she never provided DSS with the documentation required to obtain a U Visa and because she had not acquired stable housing throughout the pendency of the cases. Apart from respondent-mother's inability to complete her OHFSA, the Morgans provided permanence for the juveniles. The Morgans provided for the juveniles' medical and educational needs, and the juveniles established a strong bond with the Morgans, enjoying their own bedrooms and vacations together.

¶ 18 The last permanency planning hearing regarding Emmanuel was conducted on 19 June 2020. Although an assessment was completed on the home of a paternal uncle in Indiana, the trial court received evidence that Emmanuel feared being removed from the Morgans and separated from his siblings. The trial court determined that it was in Emmanuel's best interest to remain with the Morgans. The trial court found that respondent-mother had waived her constitutionally protected status because she never provided DSS with the documentation required to obtain a U Visa and because she had not acquired stable housing throughout the pendency of the case. The permanency planning order granting guardianship of Emmanuel to the Morgans was entered 18 September 2020.

¶ 19 Respondent-mother filed written notices of appeal on 30 June 2020 and 23 September 2020. On 28 July 2020, respondent-mother filed a

3. Emmanuel's case was bifurcated from his siblings due to the aforementioned paternity test.

petition for *writ of certiorari* to review the 4 November 2019 Ninety Day Review Order.[4] This Court allowed respondent-mother's petition on 17 August 2020.

II. Discussion

¶ 20 Respondent-mother raises several arguments on appeal. First, respondent-mother contends the trial court should not have acted as if it was holding a permanency planning hearing because the hearing was noticed as a review hearing and respondent-mother's trial counsel objected. Second, respondent-mother argues the trial court operated under a misapprehension of law by "eliminat[ing] reunification efforts at a first review hearing," by setting "a permanent plan which did not include reunification," and by telling trial counsel that the trial court was not obligated to "list what the [respondent-m]other had to do to regain custody of her children." Third, respondent-mother argues that DSS failed to provide reasonable reunification efforts and the trial court's findings are not supported by competent evidence. Finally, respondent-mother contends the trial court's finding that respondent-mother acted inconsistently with her constitutionally protected status was contrary to the evidence presented.

A. Notice of Hearing

¶ 21 **[1]** There is a sequential process for abuse, neglect, or dependency cases, wherein each required action or event must occur within a prescribed amount of time after the preceding stage in the case. *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 791-92 (2006). An adjudicatory hearing must be held no later than 60 days after the filing of a petition, and an initial dispositional hearing follows the adjudication. N.C. Gen. Stat. §§ 7B-801(c), 7B-901 (2019). A review hearing must be "held within 90 days from the date of the initial dispositional hearing . . . [and] at least every six months thereafter." N.C. Gen. Stat. § 7B-906.1(a) (2019). "Within 12 months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." N.C. Gen. Stat. § 7B-906.1(a). Hearings after an initial permanency planning hearing are automatically designated as permanency planning hearings. N.C. Gen. Stat. § 7B-906.1(a). Prior to a review hearing, the clerk "shall give 15 days' notice of the hearing and its purpose" to parents and other parties. N.C. Gen. Stat. § 7B-906.1(b). Although the Juvenile Code has established a sequential hearing process, courts may combine and conduct

4. Respondent-mother's petition for *writ of certiorari* was filed prior to the pendency of this appeal and is docketed under No. P20-417.

the adjudicatory, dispositional, and permanency planning hearings on the same day. *In re C.P.*, 258 N.C. App. 241, 244, 812 S.E.2d 188, 191 (2018).

¶ 22 While dispositional hearings can be combined, a court cannot enter a permanency planning order at a hearing for which proper notice was not given, unless proper notice is waived. *In re S.C.R.*, 217 N.C. App. 166, 171, 718 S.E.2d 709, 713 (2011). "[A] party waives its right to notice under section 7B-907(a)[5] by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice." *In re J.P.*, 230 N.C. App. 523, 526, 750 S.E.2d 543, 545 (2013) (footnote omitted) (citing *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004)).

¶ 23 Respondent-mother argues the trial court erred in conducting a permanency planning hearing without providing adequate notice of the proceedings. We disagree. Respondent-mother attended and participated in the hearings on 15 March 2019 and 27 September 2019 and at the latter hearing objected to the proposed change in permanent plan but made no objection to holding a permanency planning hearing. Because respondent-mother attended and participated in the hearings and failed to object to the lack of notice, we hold that respondent-mother waived her right to notice under N.C. Gen. Stat. § 7B-906.1(b).

B. Elimination of Reunification Efforts & Misapprehension of Law

¶ 24 Respondent-mother raises three issues with respect to the trial court's permanency planning order: (1) the trial court erred in eliminating reunification efforts in an initial review hearing; (2) the trial court erred in setting a permanent plan that did not include reunification; and (3) the trial court misapprehended the law and its judicial role in stating that it was not obligated to "list what the [respondent-m]other had to do to regain custody of her children." Because the first two issues are intertwined, we discuss them together.

1. Eliminating Reunification at Initial Hearing

¶ 25 **[2]** At the permanency planning stage involving a neglected juvenile, the trial court must adopt concurrent permanent plans consisting of a primary and secondary plan. N.C. Gen. Stat. § 7B-906.2(a), (b) (2019). If determined to be in the juvenile's best interest, the trial court can adopt two of the six statutory plans, including adoption, guardianship, reinstatement of parental rights, and reunification. N.C. Gen. Stat.

5. N.C. Gen. Stat. § 7B-907(a) was repealed effective 1 October 2013 and recodified as N.C. Gen. Stat. § 7B-906.1(b).

§ 7B-906.2(a). When deciding which plans to impose, Chapter 7B instructs the trial court as follows concerning reunification:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. 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), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing. Unless permanence has been achieved, the court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b).

¶ 26 The trial court must also make findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (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). Our Supreme Court has stated in the context of orders ceasing reunification efforts that "[t]he trial court's written findings must address the statute's concerns, but need not

quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013).

> "The essential requirement at the review hearing is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child." In light of this objective, neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings, and the trial court's findings of fact need only be supported by sufficient competent evidence.

Id. at 180, 752 S.E.2d at 462 (citations omitted) (cleaned up).

¶ 27 In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

¶ 28 Under N.C. Gen. Stat. § 7B-906.2(b), reunification must be either a primary or secondary plan unless: (1) the trial court makes findings under §§ 7B-901(c) or 7B-906.1(d)(3); (2) the permanent plan is or has been achieved in accordance with § 7B-906.2(a1), or (3) the trial 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).

¶ 29 In this case, the 15 March 2019 hearing was designated as an initial dispositional hearing but became a combined dispositional and permanency planning hearing. In the 25 March 2019 disposition order, the trial court adopted "the primary plan of reunification and the concurrent plan of guardianship to a court-approved caretaker, as these plans of care for establishing permanency for the Juveniles at this time[.]" Accordingly, because reunification was part of the initial permanent plan, respondent-mother's argument that the trial court could not as a matter of law eliminate reunification at the subsequent 27 September 2019 hearing is without merit.

¶ 30 Under *In re C.P.*, "a trial court can cease reunification efforts at the first permanency planning hearing if necessary findings of fact were made that showed reunification would be unsuccessful" or would be inconsistent with the juvenile's health or safety. *In re C.P.*, 258 N.C. App. at 245, 812 S.E.2d at 191. Here, the trial court made the following relevant findings of fact:

> 54. The primary plan for [Patricio, Julieta, and Juliana] shall be changed from reunification concurrent with guardianship to a court-approved caretaker to guardianship with a court-approved caretaker concurrent with custody to a court-approved caretaker, *as this is the best plan to achieve a safe and permanent home for [Patricio, Julieta, and Juliana] within a reasonable time.*
>
> . . . .
>
> 58. [Respondent-m]other has remained available to [DSS], the Court, and the Juveniles' GAL.
>
> 59. [Respondent-m]other's efforts to obtain the U Visa by obtaining information about her children was not completed by [respondent-m]other.
>
> 60. The placement of the Juveniles with [respondent-m]other within the next six (6) months is *unlikely* due to the inability of [DSS] to establish services for [respondent-m]other due to her immigration status and the unavailability of services for [respondent-m]other in the Spanish language.
>
> 61. Return to the Juveniles' home would be contrary to their health and safety.

(emphasis added). The trial court also concluded as a matter of law that it would "be in the best interests of the Juveniles" that DSS be authorized to make decisions on behalf of the juveniles, for their care and placement to remain the responsibility of DSS, and for DSS to arrange or provide for foster care or other suitable placement for the juveniles, and that "[i]t would be contrary to the welfare and best interest of the Juveniles to return to the home of any of the Respondents."

¶ 31 In order to cease reunification efforts and remove reunification as a primary or secondary plan, the trial court was required to make necessary findings of fact that showed reunification would be unsuccessful or inconsistent with the juveniles' health or safety. Although the trial court's findings of fact do provide that changing the primary plan was "the best plan to achieve a safe and permanent home for [the juveniles] within a reasonable time[,]" and that returning "to the Juvenile's home would be contrary to their health and safety[,]" the findings do not pro-

vide that reunification would be "clearly unsuccessful" as required by N.C. Gen. Stat. § 7B-906.2(b). Instead, the findings provide that placing the juveniles with respondent-mother within the next six months would be "unlikely."

¶ 32 With respect to the findings required by N.C. Gen. Stat. § 7B-906.2(d), the trial court found that respondent-mother had remained available to the Court, DSS, and GAL, but did not specifically address the other three required findings. Rather than addressing whether respondent-mother was making adequate progress within a reasonable period of time, whether respondent-mother was actively participating in or cooperating with the plan, or whether respondent-mother was acting in a manner inconsistent with the health or safety of the juveniles, the trial court simply stated that DSS was "unable to assist [respondent-m]other in accomplishing the issues addressed in her [OHFSA] due to the unavailability of services that can or will work with [respondent-m]other[,]" and that respondent-mother had not completed her efforts to obtain a U Visa.

¶ 33 These findings are insufficient to demonstrate the degree of success or failure towards reunification. The findings only demonstrate that DSS was unable to locate any services that could help respondent-mother progress towards reunification and that respondent-mother was unable to make progress towards reunification because she was unable to obtain a U Visa. We hold the trial court erred in removing reunification as a primary or secondary plan and in ceasing reunification efforts without making sufficient findings of fact. We vacate the trial court's orders and remand for further proceedings.

2. Misapprehension of Law

¶ 34 **[3]** "Reversal is warranted where a trial court acts under a misapprehension of the law." *In re M.K.*, 241 N.C. App. 467, 475, 773 S.E.2d 535, 541 (2015). "[W]here it appears that the judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light." *In re S.G.V.S.*, 258 N.C. App. 21, 24, 811 S.E.2d 718, 721 (2018) (citation omitted).

¶ 35 We review an order ceasing reunification to determine "whether the trial court abused its discretion with respect to disposition." *In re J.H.*, 373 N.C. 264, 267, 837 S.E.2d 847, 850 (2020) (citations 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) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd*, 362 N.C. 229, 657 S.E.2d 355 (2008).

¶ 36 Respondent-mother contends that the trial court erred in stating "I don't think it's my position and authority to lay out the specific acts that your client has to do or should do" because under N.C. Gen. Stat. § 7B-904, "the trial court is authorized to enter dispositions that clearly spell out what a parent needs to do to regain custody." DSS cites N.C. Gen. Stat. § 7B-904 in asserting that "the court is authorized to direct certain orders to parents, but the court's authority is limited by the Juvenile Code." DSS further notes that an OHFSA had been in place since 2018 delineating the steps required for respondent-mother to regain custody of the juveniles.

¶ 37 We hold that the trial court exercised its discretion in choosing to decline enumerating specific requirements, and further hold that the trial court did not abuse its discretion in doing so. Respondent-mother was aware of and attempting to participate in the OHFSA at the time of the hearing, and any injury caused by the trial court's decision to not lay out the specific acts required of respondent-mother was harmless.

C. Remaining Arguments

¶ 38 Respondent-mother further contends the trial court's findings are not supported by any competent evidence because DSS failed to provide reasonable reunification efforts, and that the trial court could not grant guardianship of the children to the Morgans without a finding of unfitness or that respondent-mother acted inconsistently with her constitutionally protected parental status. Because we vacate the trial court's orders on other grounds, it is unnecessary to address respondent-mother's remaining arguments.

III. Conclusion

¶ 39 For the forgoing reasons, we hold that respondent-mother waived any objection to notice of the permanency planning hearings and that the trial court did not err in establishing reunification as a permanent plan at the initial hearing. We further hold that the trial court erred in ceasing reunification efforts and removing reunification as a permanent plan because the permanency planning order did not contain sufficient findings of fact. We vacate the trial court's orders and remand for a new permanency planning hearing.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

ANGARITA v. EDWARDS

[278 N.C. App. 621, 2021-NCCOA-397]

WILLIAM J. PARRA ANGARITA, PLAINTIFF
v.
MARGUERITE EDWARDS, DEFENDANT

No. COA20-846

Filed 3 August 2021

1. Appeal and Error—preservation of issues—pro se appellant —arguments waived—Appellate Rule 2 review

In a pro se defendant's appeal from a civil no-contact order entered against her, the Court of Appeals exercised its discretion under Appellate Rule 2 to consider two arguments that defendant failed to preserve for appellate review where, at any rate, the arguments lacked merit.

2. Trials—hearing—civil no-contact order—findings of fact paraphrasing testimony—reasonable inference drawn

In a matter between next-door neighbors, where the trial court entered a civil no-contact order against defendant, which included a finding of fact stating that defendant said, "plaintiff smells," defendant's argument that the trial court had misquoted her lacked merit. Rather, the trial court had accurately paraphrased testimony from the hearing and drew a reasonable inference from the many statements defendant made about plaintiff (for example, she testified that she "smelled a bad smell" when she passed by plaintiff's garage door, and plaintiff testified that she texted him statements like "my house stinks like skunks from you and your people, you stinky criminal").

3. Judges—duty of impartiality—hearing on civil no-contact order —interactions with defendant

During a hearing on plaintiff's request for a civil no-contact order against defendant, his next-door neighbor, the trial court neither acted with undue hostility toward defendant (who appeared pro se) nor otherwise abused its discretion when interacting with her where the judge only interrupted her in the interests of expediency and of ensuring that she complied with the rules of evidence. Further, there was no evidence that the judge's tone or attitude toward defendant stemmed from any sort of personal bias; instead, the record merely reflected the judge's disapproval of defendant's disorganized arguments and mode of presenting evidence.

4. Stalking—civil no-contact order—amended to include stalking—finding of stalking supported

In a matter between next-door neighbors, the trial court did not abuse its discretion in amending the no-contact order it entered against defendant by checking an additional box ordering her to "cease stalking the plaintiff." Although the court never explicitly ruled on stalking, the evidence and the court's findings of fact supported a finding that defendant stalked plaintiff by constantly accusing him of breaking into her home, threatening to have him arrested, yelling racist remarks at his family from her yard, posting a letter on her door calling him a "dangerous criminal," and texting him death threats. Therefore, the court most likely made a clerical mistake by not checking the additional box in the first order and properly corrected it via amendment, pursuant to Civil Procedure Rule 60(a).

5. Stalking—civil no-contact order—remedies under Chapter 50C—mental health evaluation

In a matter between next-door neighbors, the trial court did not abuse its discretion in ordering defendant to obtain a mental health evaluation as part of a no-contact order it entered on plaintiff's behalf. The court acted within its broad authority under Chapter 50C-5 to order the evaluation as "other relief deemed necessary and appropriate by the court" (N.C.G.S. § 50C-5(b)(7)), and the court reasonably based the remedy on defendant's testimony, which showed that she exhibited a number of concerning, delusional beliefs about plaintiff that led her to text him death threats and verbally harass him and his family on a regular basis.

6. Process and Service—failure to serve—written motion to dismiss—civil no-contact order

During a hearing on plaintiff's request for a civil no-contact order against defendant, his next-door neighbor, the trial court did not abuse its discretion by declining to consider defendant's pretrial motion to dismiss plaintiff's complaint. Defendant (who appeared pro se) failed to serve the written motion upon plaintiff, as required under Civil Procedure Rule 5, and never made an oral motion to dismiss during the hearing despite having the option to do so.

Judge GRIFFIN concurring in result.

Appeal by Defendant from an order entered on 5 August 2020 by Judge Paulina Havelka in Mecklenburg County District Court. Heard in the Court of Appeals 12 May 2021.

William J. Parra Angarita, pro se.

Marguerite Edwards, pro se.

JACKSON, Judge.

¶ 1 The issue in this case is whether the trial court erred or abused its discretion in granting a civil no-contact order against a *pro se* litigant. We conclude that the trial court committed no error or abuse of discretion and affirm the order.

I. Factual and Procedural Background

¶ 2 William Parra Angarita ("Plaintiff") and Marguerite Edwards ("Defendant") are next-door neighbors on Dominion Village Drive in Charlotte, North Carolina. Beginning sometime in February or March of 2020, Defendant began to suspect that someone was breaking into her house. On 7 March 2020, she reported the suspected break-ins to the police. She began to suspect Plaintiff was the perpetrator and reported his name to the police. According to Plaintiff, he has never been contacted by the police. Defendant has a security system and multiple cameras installed but has no video evidence of Plaintiff breaking into her house. Defendant claims to be suffering lasting health consequences due to the alleged break-ins.

¶ 3 From time to time, Plaintiff's children would accidentally throw soccer balls into Defendant's fenced, locked yard. On 23 March 2020, Plaintiff received a phone call from Defendant requesting that his children stop throwing balls into her yard. During this call, Defendant used "harsh language" towards Plaintiff's children. Defendant called Plaintiff again on 6 April 2020, this time threatening to call the police and making offensive, racist statements about Plaintiff and his family.

¶ 4 A series of escalating interactions ensued. Following a verbal altercation about the balls, Defendant threatened to have Plaintiff arrested, and Defendant alleges that at some point Plaintiff "came to her front door and rang her door bell several times in a rage." Defendant responded by posting a sign on her door that accused Plaintiff of breaking into her house and notifying the homeowners' association of the alleged break-ins.

¶ 5 Throughout these events, Defendant sent Plaintiff at least eight text messages with "derogatory, defamatory, and incendiary language," including some express or implied threats. Defendant also yelled accusations and racist remarks at Plaintiff's family from her property. Plaintiff's wife

and sister-in-law testified that Defendant shouted accusations and racist remarks directly at them on multiple occasions. Plaintiff states that the behavior of Defendant has caused significant stress for him and his family.

¶ 6 On 8 July 2020, Plaintiff filed a complaint in Mecklenburg County District Court, seeking a permanent civil no-contact order against Defendant under N.C. Gen. Stat § 50C-2, and requesting that the court bar Defendant from "verbally abusing any family members living in [Plantiff's] household and to stop yelling and shouting from her property towards ours," among other remedies. Defendant was served with the complaint on 18 July 2020. On 28 July 2020, Defendant filed (but apparently did not serve upon Plaintiff) an answer to the complaint and a written motion to dismiss.

¶ 7 A hearing was held on 4 August 2020 before the Honorable Paulina Havelka. Neither Plaintiff nor Defendant was represented by an attorney. During the hearing, testimony was heard from Plaintiff, Plantiff's wife, and Plaintiff's sister-in-law, who described the harassment they had faced from Defendant over the past year. Defendant also testified at the hearing, stating her belief that Plaintiff was continually breaking into her house, tampering with her belongings, and "doing criminal activities for unknown reasons." At several points, both Plaintiff and Defendant attempted to introduce documentary exhibits (such as a notarized statement from their neighbors, or emails from the local police department) but the court refused to admit the exhibits after ruling they were inadmissible hearsay.

¶ 8 At the conclusion of the parties' testimony, the trial court granted Plaintiff a permanent no-contact order against Defendant pursuant to § 50C-7. The trial court concluded that

> [Plaintiff] has suffered unlawful conduct by [D]efendant in that: Defendant continuously harasses Plaintiff and Plaintiff's household. Posts letters on Defendant's door with an arrow stating Plaintiff is a "dangerous criminal." In open court Defendant stated "Plaintiff smells" and does so while in her yard at Plaintiff and Plaintiff's family.

¶ 9 In its order, the trial court checked boxes indicating that Defendant: (1) shall not "visit, assault, molest, or otherwise interfere with" Plaintiff; (2) "cease harassment" of Plaintiff; (3) "not abuse or injure" Plaintiff; and (4) not contact Plaintiff "by telephone, written communication, or electronic means" for a period of one year. The trial court also added an additional handwritten order that Defendant

"shall obtain a mental health evaluation," with a review hearing scheduled for 8 December 2020.

¶ 10 On 5 August 2020, Defendant contacted the clerk of court and told her that she was having difficulty reading the court's written order due to its legibility. Later that same day, the court issued an "amended" no-contact order, that was otherwise identical with the exception of checking an additional box that "the Defendant cease stalking the Plaintiff." Defendant filed a timely written notice of appeal from the court's amended order on 14 August 2020.

II. Analysis

¶ 11 In her *pro se* appeal, Defendant raises five arguments, contending that: (1) the trial court erred by misquoting her in the findings section of the no-contact order; (2) the trial court was "exceptionally hostile" to Defendant during the hearing; (3) the trial court erred by making an improper amendment to the no-contact order; (4) the trial court erred by assigning her a mental health evaluation; and (5) the trial court erred by failing to consider her motion to dismiss. We disagree and hold that the trial court committed no error or abuse of discretion.

A. Preservation

¶ 12 **[1]** As a threshold matter, we must address whether Defendant has properly preserved her arguments for appellate review. Our Appellate Rules provide that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. Rule 10(a)(1).

¶ 13 In interpreting this Rule, we have long held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal marks and citations omitted). Accordingly, where a defendant "impermissibly presents a different theory on appeal than argued at trial, [the] assignment of error [is] not properly preserved" and is "waived by [the] defendant." *Id.* at 124, 573 S.E.2d at 686.

¶ 14 Here, Defendant has failed to preserve two issues—the trial court's failure to consider her motion to dismiss, and the trial court's alleged "undue hostility" during the hearing—because Defendant did not raise either of these issues before the trial court.[1] However, in our discretion we nevertheless choose to review all of Defendant's arguments, as none of the issues raised by Defendant show any error by the trial court.

¶ 15 We have previously addressed a similar scenario in *Seafare Corp. v. Trenor Corp.*, wherein the *pro se* defendants raised a number of issues on appeal that had not been raised before the trial court. Despite this waiver, we nevertheless reviewed the defendants' assertions of error, explaining:

> Defendants next assign error to the admission of much of plaintiff's evidence. Defendants failed, however, to object to the admission of any evidence . . . . An unrepresented party is not relieved of the duty to object to evidence in order to preserve the issue for appeal. Nevertheless, we have considered defendants' arguments set forth in their brief and conclude there was no prejudicial error.

Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 413, 363 S.E.2d 643, 650-51 (1988) (internal marks and citations omitted).

¶ 16 Likewise, despite Defendant's failure in the present case to preserve her arguments for appellate review, we exercise our discretion under Rule 2 to consider these arguments and conclude that the trial court committed no error. *See* N.C. R. App. P. 2.

B. Misquotation

¶ 17 **[2]** Defendant first argues that the trial court erred by misquoting her in the findings section of the no-contact order. We disagree and discern no error in the trial court's findings of fact. We review a trial court's findings of fact only to establish that they were supported by competent evidence:

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact

1. The remainder of Defendant's arguments were properly preserved because they involved either findings of fact or conclusions of law in the trial court's written order, or actions that the trial court took following the conclusion of the hearing (such as the amendment of the no contact order). *See* N.C. R. App. P. 10(a)(1) (noting that certain issues may be "deemed preserved" without any action taken by the appellant, such as "whether the judgment is supported by the verdict or by the findings of fact and conclusions of law").

> and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (internal marks and citations omitted).

¶ 18 Defendant's argument centers around an alleged misquotation by the trial court in the "Findings" section of the no-contact order. The trial court wrote that "In open court Defendant stated 'Plaintiff smells' and does so while in her yard at Plaintiff and Plaintiff's family." Defendant contends that this misquotation is incorrect and is grounds for reversal. We disagree.

¶ 19 While it is true that Defendant never spoke those exact words during the hearing, she did say a number of closely related phrases in her written and oral testimony. In her answer to Plaintiff's complaint and during the hearing, she stated, "I smelled a bad smell when I passed by the Plaintiff's open garage door" and "I knew who was breaking into my house . . . . I knew it was him by the smell." Plaintiff testified that Defendant texted her statements like "[e]very time I smell the horrible odor you put in my house I want to yell at you criminal" and "[m]y house stinks like skunks from you and your people, you stinky criminal." During cross examination, Plaintiff asked Defendant "can you explain how you say that [it] is a fact that I've been breaking into your house?" Defendant replied, "[t]he smell."

¶ 20 This Court has previously upheld findings of fact by trial courts in civil cases that paraphrase testimony and draw reasonable inferences therefrom. For example, in *In re Botros*, 265 N.C. App. 422, 828 S.E.2d 696 (2019), the respondent challenged the trial court's findings of fact by arguing that the findings did not accurately quote the words he spoke during the hearing. *Id.* at 429, 828 S.E.2d at 703. Specifically, the trial court's order found that "[i]mmediately upon appearing before [the trial court, the respondent] requested five minutes to 'collect' himself. [Respondent] appeared somewhat distressed and disoriented." *Id.* Whereas, the video recording of the proceeding revealed that he requested to "have one – one moment" before beginning, "without saying it was to 'collect' himself." *Id.* at 430, 828 S.E.2d at 703. This Court held that "[w]hile [the respondent] may not have used the precise words of the findings in his testimony, the findings reasonably paraphrase [his] testimony or *are inferences reasonably drawn from that testimony*." *Id.* (internal marks and citation omitted).

¶ 21 Here, the trial court's paraphrase that "Defendant stated 'Plaintiff smells' " was a reasonable inference from the variety of olfactory assertions made by Defendant during the hearing and in her written answer. There was thus sufficient "evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant had stated, in effect, that "Plaintiff smells." We hold that the trial court did not err by paraphrasing Defendant.

C. Exceptional Hostility

¶ 22 **[3]** Next, Defendant alleges that the trial court acted with undue hostility during the hearing, as indicated by the judge's interruptions, tone, and general treatment of her. We disagree and find no error by the trial court.

¶ 23 The North Carolina Constitution requires that "right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. Accordingly, "[t]he law imposes on the trial judge the duty of absolute impartiality." *State v. Fleming*, 350 N.C. 109, 125-26, 512 S.E.2d 720, 732 (1999) (internal marks and citation omitted). However, "[t]he trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties." *Id.* at 126, 512 S.E.2d at 732. "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *Id.* (internal marks and citation omitted).

¶ 24 Applying these principles to the remarks of the trial court here, and after conducting a thorough review of each alleged instance of improper conduct or hostility on the part of the trial judge, we detect no prejudicial error and reject Defendant's claim of "exceptional hostility."

¶ 25 Turning first to the interruptions, it is apparent that the trial judge interrupted only in the interests of expediency and to bring a *pro se* Defendant into compliance with the rules of evidence.[2] In this regard, the trial court's actions were helpful to Defendant, if anything. For example, the trial court avoided wasting time by interrupting Defendant in this exchange:

> MS. EDWARDS: When you put in the complaint, why didn't you complain about the break-ins and all that?

---

2. *See*, *e.g.*, N.C. Gen. Stat. § 8C-1, Rule 611(a) (2019) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

> Why did you not put that in your complaint when you filed it on – [interruption]
>
> THE COURT: I'm going to object to that and sustain it, ma'am. He's already testified that the only reason he thought you had problems was over balls.

¶ 26 Likewise, Defendant's remaining arguments concerning the trial court's tone and treatment of Defendant were comfortably within the discretion of the trial judge. "A presiding judge is given large discretionary power as to the conduct of a trial. Absent controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial are within his discretion." *State v. Higginbottom*, 312 N.C. 760, 769-70, 324 S.E.2d 834, 841 (1985) (internal citation omitted).

¶ 27 Moreover, even assuming *arguendo* that the trial judge had displayed bias, "[i]n a *non-jury* case where the trial judge develops a bias or prejudice toward one party and where there is no evidence this bias or prejudice arose from any source outside the evidence and arguments presented in the case, the judgment entered by the trial court will be affirmed if it is otherwise properly entered." *Sowers v. Toliver*, 150 N.C. App. 114, 120, 562 S.E.2d 593, 597 (2002) (emphasis added) (Greene, J., concurring). Here, there is likewise no evidence that the trial court's attitude towards Defendant arose from any sort of personal bias, but rather from a disapproval of Defendant's disorganized arguments and mode of presenting evidence. Accordingly, the trial court did not abuse its discretion in its interactions with Defendant during the hearing.

D. Improper Amendment

¶ 28 **[4]** We next address Defendant's argument that the trial court erred by improperly amending the no-contact order. We disagree and hold that the trial court did not abuse its discretion by amending the order.

¶ 29 Here, the trial court issued an amended no-contact order following Defendant's request for a more legible copy of the order. The amended order contained identical content to the original order, with the exception of an additional box checked in the "Order" section: "The defendant cease stalking the plaintiff."

¶ 30 Rule 60(a) of the North Carolina Rules of Civil Procedure permits a judge to *sua sponte* correct clerical mistakes in judgments resulting from an oversight or omission:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight

> or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2019).

¶ 31 "Relief under Rule 60(a) is limited to the correction of clerical errors, and it does not permit the correction of serious or substantial errors." *In re Estate of Meetze*, 272 N.C. App. 475, 479, 847 S.E.2d 220, 224 (2020) (internal marks and citations omitted). A change in an order is considered substantive and outside the boundaries of Rule 60(a) "when it alters the effect of the original order." *Id.* "A trial court's order correcting a clerical error under Rule 60(a) is subject to the abuse of discretion standard." *Id.*

¶ 32 " 'Clerical mistakes' are typographical errors, mistakes in writing or copying something into the record, or other, similar mistakes that are not changes in the court's reasoning or determination." *In re J.K.P.*, 238 N.C. App. 334, 343, 767 S.E.2d 119, 124 (2014). For example, in *In re J.K.P.*, this Court concluded that "that the term 'clerical mistakes' includes the inadvertent checking of boxes on forms." *Id.* at 343, 767 S.E.2d at 125 (internal marks and citation omitted). In that case, the trial court spoke with the respondent about the risks associated with proceeding *pro se* and asked the respondent to read and sign a waiver-of-counsel form. *Id.* at 343-44, 767 S.E.2d at 124-25. After the respondent signed the form, the court accidentally checked the box labeled "Parent's waiver is not knowing and voluntary." *Id.* The trial court later amended the order *sua sponte* to indicate that the respondent's waiver was indeed knowing and voluntary. *Id.* On appeal, we concluded that the checked box was an inadvertent clerical mistake in light of the trial court's "findings on the form, and its additional, contemporaneous statements at that hearing." *Id.* at 344, 767 S.E.2d at 125.

¶ 33 Here, the issue before us likewise becomes whether the trial court's inclusion of an additional checked box on the amended no-contact order qualified as the amendment of a clerical mistake/omission, or instead was a substantive alteration of the order. We conclude the former characterization is more accurate—that the trial court's amendment qualified as the correction of a simple clerical mistake in failing to check the appropriate box in its first order.

¶ 34 As explained above, Rule 60(a) expressly contemplates the correction of omissions, and a "clerical mistake" can include "the inadvertent checking of boxes on forms." *In re J.K.P.*, 238 N.C. App. at 343, 767 S.E.2d at 125. Based on the trial court's findings and the evidence presented at the hearing, we conclude that the trial court most likely intended to originally check the box ordering that "[t]he defendant cease stalking the plaintiff," and that the omission of the check on this box in the first order was a clerical mistake.

¶ 35 Though the trial court did not make an explicit ruling on stalking, there was evidence before the court that Defendant had engaged in a sustained pattern of harassing and verbally abusing Plaintiff and his family members. During the hearing, the trial court stated to Plaintiff that "I'm certainly not convinced you're breaking into her house" and "I'm going to enter the order." In the written order, the trial court's findings stated:

> The plaintiff has suffered unlawful conduct by the defendant in that: Defendant continuously harasses Plaintiff and Plaintiff's household. Posts letters on Defendant's door with an arrow stating Plaintiff is a "dangerous criminal." In open court Defendant stated "Plaintiff smells" and does so while in her yard at Plaintiff and Plaintiff's family.

¶ 36 These findings align with the definition of "stalking" as provided in the statute governing civil no-contact orders:

> Stalking. - On more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose with the intent to do any of the following:
>
> a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat § 50C-1(6) (2019).

¶ 37 In addition, on multiple occasions Defendant used language that could have placed "the [Plaintiff] in reasonable fear either for [his] safety or the safety of [his] immediate family or close personal associates."

Plaintiff's uncontested testimony showed that Defendant sent threatening texts to Plaintiff on multiple occasions that implicated the safety of Plaintiff and his family:

- I hope the next person's house you break into blows your brains out, you stinky criminal.
- I hope someones [sic] blow your brains out. I bet your brains stink.
- I'm hoping someone will kill you, stinky criminal.
- I wish someone would wipe you and your whole family out.
- People like you deserve to die and get off the earth.

¶ 38 Plaintiff's sister-in-law testified that she "[doesn't] feel safe because I don't know if she might have a gun or whatever." Plaintiff's wife testified that "everybody was afraid" at a family gathering due to the actions of Defendant. A finding that Defendant was stalking Plaintiff was thus consistent with the definition found in N.C. Gen. Stat. § 50C-1(6) is supported by the uncontested testimony offered at the hearing.

¶ 39 In Defendant's brief, she cites to *State v. Briggs*, 249 N.C. App. 95, 790 S.E.2d 671 (2016), and *State v. Leaks*, 240 N.C. App. 573, 771 S.E.2d 795 (2015), for the proposition that "decisions should not be changed when the defendant is not present." These criminal cases are inapposite. Those holdings trace back to a longstanding common law right that requires that the accused criminal defendant "be personally present before the court at the time of pronouncing the sentence." *Ball v. United States*, 140 U.S. 118, 131 (1891). This common law right is not applicable in the present civil case.

¶ 40 In sum, we hold that the trial court's findings on the no-contact order and the uncontested testimony reasonably supported a finding of stalking, thus showing that the trial court made an inadvertent "clerical mistake" by *not* checking the box on the first version of the no-contact order. Accordingly, the trial court did not abuse its discretion in correcting this omission in the amended order.

E. Mental Health Evaluation

¶ 41 **[5]** Defendant next argues that the trial court erred by requiring her to obtain a mental health evaluation as part of the no-contact order. In the written order, the trial court checked box seven, entitled "Other: (specify)" and made a handwritten notation ordering that: "Defendant shall

obtain a mental health evaluation. Review hearing on 12/8/20 in 4110 at 9:00am." We disagree with Defendant's argument and hold that the trial court did not abuse its discretion by ordering this evaluation.

¶ 42 To begin with, N.C. Gen. Stat. § 50C-5 grants a trial court considerable discretion in awarding remedies when a no-contact order is issued:

> (a) Upon a finding that the victim has suffered unlawful conduct committed by the respondent, the court may issue temporary or permanent civil no-contact orders as authorized in this Chapter. In determining whether or not to issue a civil no-contact order, the court shall not require physical injury to the victim.
>
> (b) The court may grant one or more of the following forms of relief in its orders under this Chapter:
>
> . . .
>
> (7) Order other relief deemed necessary and appropriate by the court, including assessing attorneys' fees to either party.

N.C. Gen. Stat. § 50C-5(a)-(b) (2019).

¶ 43 Moreover, Chapter 50C is explicit about the non-exclusivity of the remedies laid out in Section 5—"[t]he remedies provided by this Chapter are not exclusive but are additional to other remedies provided under law." *Id.* § 50C-11 (2019).

¶ 44 This Court recently interpreted the limits of the remedies under § 50C-5 in *Russell v. Wofford*, 260 N.C. App. 88, 816 S.E.2d 909 (2018). In that case, the trial court issued a Chapter 50C no-contact order against a defendant who committed acts of nonconsensual sexual conduct against the plaintiff. *Id.* at 89, 816 S.E.2d at 910. Among the listed remedies, the trial court included in its order an "other" remedy requiring the defendant to surrender all firearms to the sheriff's department, revoking his concealed carry permit, and barring all firearm purchases for the duration of the order. *Id.* at 89-90, 816 S.E.2d at 910.

¶ 45 We ultimately reversed that portion of the order, holding that "District Courts do not have . . . unfettered discretion under Chapter 50C to order any relief the judge believes necessary to protect a victim." *Id.* at 94, 816 S.E.2d at 913. Despite the broad language of the statute, we nevertheless determined that ordering a defendant to surrender all firearms was too broad a remedy and was too tenuously connected to the issues raised by the no-contact order. *Id.* Instead, we concluded that

"the catch-all provision [in § 50C-5] limits the court to ordering a party to act or refrain from acting . . . in relationship to [the plaintiff.]" *Id.* at 93-94, 816 S.E.2d at 912-13 (citing *State v. Elder*, 368 N.C. 70, 72-73, 773 S.E.2d 51, 53 (2015)). We also emphasized that a Chapter 50C remedy must not abridge any fundamental rights guaranteed by the federal and state constitutions. *Id.*

¶ 46 We therefore held that requiring the defendant to surrender his firearms, revoking his concealed carry permit, and forbidding the purchase of firearms without statutory notice of those possibilities went beyond "ordering a party to act or refrain from acting in relationship to . . . [the] plaintiff." *Russell*, 260 N.C. App. at 94, 816 S.E.2d at 913 (internal marks and citation omitted).

¶ 47 In contrast, in the present case we do not believe that the single mental health evaluation ordered by the trial court went beyond the limits of § 50C-5 or abridged any of Defendant's fundamental constitutional rights. The remedy ordered by the trial court here was narrowly tailored; was directly related to the issues raised by the no-contact order; did not abridge any constitutional right; and was analogous to other remedies commonly awarded by trial courts in similar civil cases.

¶ 48 For example, the statute governing domestic violence protective orders states that a trial court may "[o]rder any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission." N.C. Gen. Stat. § 50B-3(a)(12) (2019). Abuser treatment programs, also known as "batterer intervention programs," contain elements analogous to a basic "mental health evaluation."[3] This type of mental health program is one among a list of non-exhaustive remedies, comparable to the list in § 50C-5, containing no extra due process requirements. Rather, § 50C-5(b)(7) requires only that the trial court find the measure "necessary and appropriate."

¶ 49 In this regard, the trial court reasonably found the testimony offered at trial alarming enough to order the Defendant to "act in relationship to the Plaintiff" by completing a mental health evaluation, in order to aid Defendant in restoring peaceful relations with her neighbor and in examining her concerning beliefs that Plaintiff was breaking into her home.

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3. *See, e.g.*, *North Carolina Batterer Intervention Programs: A Guide to Achieving Recommended Practices*, N.C. Council for Women (March 2013), https://files.nc.gov/ncdoa/BattererInterventionHandbook.pdf.

¶ 50 Defendant's testimony and written submissions showed that she exhibited a number of concerning, delusional beliefs and behaviors in regards to Plaintiff, such as: (1) Defendant's baseless conviction that Plaintiff was continually breaking into her house, even though her home security system never indicated a break-in; (2) Defendant's belief that Plaintiff was "damaging her [heating] system by putting some type of substance in the pipes in the furnace lines"; (3) Defendant's belief that Plaintiff had "put some type of white powder all over everything in [her] house"; (4) Defendant's belief that Plaintiff was tampering with the food in her fridge; (5) Defendant's continued verbal harassment of Plaintiff and his family; and (6) Defendant's repeated texts containing death threats sent to Plaintiff and his family. Based on this evidence of Defendant's troubling beliefs and behaviors towards Plaintiff, we cannot conclude that the trial court overstepped the bounds of § 50C-5 in ordering Defendant to receive a mental health evaluation as part of the no-contact order. The trial court did not abuse its discretion in ordering the mental health evaluation.

F. Failure to Consider Motion to Dismiss

¶ 51 **[6]** Defendant finally argues that the trial court abused its discretion by not considering the motion to dismiss which she filed prior to the hearing. We disagree and conclude that the trial court did not abuse its discretion by failing to consider Defendant's defective motion.

¶ 52 On 28 July 2020, shortly before the date of the hearing, Defendant filed a motion to dismiss—but did not serve the motion upon Plaintiff. At the hearing, the court stated that the court had not considered the documents in the file:

> MS. EDWARDS: Your Honor, I would like to -- I have a question. Did the documents that I submitted, are they in my file today?
>
> THE COURT: Whether they would be or not, ma'am, you still have to follow the court rules and evidence rules in the courtroom. *I don't look at anything in the file*. I listen to the testimony and that's it. So if you have something you want me to look at, you would have to have them with you today.
>
> MS. EDWARDS: I do.
>
> THE COURT: Okay. Well, then you're going to be able to enter it into evidence later.

MS. EDWARDS: Okay.

THE COURT: When it's your turn.

¶ 53 From the record, it appears that Defendant's "motion to dismiss" was a document appended to her written answer. The answer was filed with Mecklenburg County District Court on 28 July 2020. However, the record contains no indication, nor does Defendant claim, that the motion to dismiss was ever served upon Plaintiff.

¶ 54 Rule 5(a) of the North Carolina Rules of Civil Procedure requires service of process for written motions: "every pleading subsequent to the original complaint . . . [and] every written motion . . . shall be served upon each of the parties." N.C. Gen. Stat. § 1A-1, Rule 5(a) (2019). Written motions must also be filed and served under Rule 5(d): "[t]he following papers shall be filed with the court, either before service or within five days after service: . . . (2) Written motions and all notices of hearing." *Id.*, Rule 5(d). A motion which is not served upon all parties is "procedurally flawed" and need not be considered by the court. *See Cap. Res.*, *LLC v. Chelda*, *Inc.*, 223 N.C. App. 227, 242, 735 S.E.2d 203, 214, n.6 (2012).

¶ 55 Here, because Defendant's motion to dismiss was not properly served, the trial court acted properly in refusing to consider it. Moreover, Defendant was free to make an oral motion to dismiss at the hearing, but failed to do so. *See* N.C. Gen. Stat. § 1A-1, Rule 7(b). The trial court invited Defendant to present her evidence and submissions during the hearing, but Defendant did not bring the matter back up. We accordingly hold that the trial court did not err in refusing to consider Defendant's procedurally defective motion.

III. Conclusion

¶ 56 Because there was no error or abuse of discretion in any of the trial court's rulings, we affirm the no-contact order in all respects.

AFFIRMED.

Judge DILLON concurs.

Judge GRIFFIN concurs in result.

IN RE A.D.

[278 N.C. App. 637, 2021-NCCOA-398]

IN RE A.D. & A.D.

No. COA21-6

Filed 3 August 2021

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

The trial court did not err in a neglect case where its finding of fact that the department of social services (DSS) had substantiated neglect by respondent was supported by clear and convincing evidence. Although DSS's initial investigation report said, "services needed" for neglect rather than "services substantiated," the evidence—revealing that respondent admittedly used improper physical discipline with the children, refused to attend parenting classes or therapy to address the problem, and failed to seek necessary therapy for the children to address their own mental health issues—showed that the children faced a substantial risk of physical, emotional, and mental harm under respondent's care.

2. Child Abuse, Dependency, and Neglect—neglect—sufficiency of findings—determination of "services needed" rather than "substantiated"

The trial court's findings of fact supported its neglect adjudication, including its finding that the department of social services (DSS) "substantiated" neglect by respondent even though DSS's initial investigation report said, "services needed" rather than "services substantiated." The official policies governing in-home services treat the phrases "services needed" and "services substantiated" similarly, and DSS was not even required to substantiate neglect in order to proceed with the juvenile petition. In fact, N.C.G.S. § 7B-302(c) required DSS to file the petition where DSS properly determined that family services were necessary but where respondent refused to participate in those services, and the evidence of respondent's refusal to engage with her case plan at the time DSS filed the petition supported the court's neglect adjudication.

Appeal by Respondent from order entered 31 August 2020 by Judge Shamieka L. Rhinehart in Durham County District Court. Heard in the Court of Appeals 8 June 2021.

Durham County Government, by Senior Assistant County Attorney Bettyna Belly Abney, for Durham County Department of Social Services, Petitioner-Appellee.

Erica M. Hicks, for the Guardian ad Litem.

Edward Eldred, for Respondent.

WOOD, Judge.

¶ 1 Respondent appeals an order adjudicating the minor children, Alta[1] and Ardith, neglected. On appeal, Respondent alleges the trial court erred because its finding of fact that the Durham County Department of Social Services ("DSS") substantiated neglect was not supported by clear and convincing evidence. Respondent further contends the trial court erred in concluding Alta and Ardith were neglected because this conclusion of law was not supported by its findings of fact. After careful review of the record and applicable law, we affirm the decision of the trial court.

I. Background

¶ 2 In 2012, Respondent was granted custody of Alta, Ardith, and their brother.[2] The children came into Respondent's care because their biological mother, Respondent's sister, struggled with substance abuse. On September 8, 2018, DSS received a report regarding the family, alleging neglect due to improper discipline. Specifically, the report alleged Respondent smacked Alta in the face, resulting in a nosebleed. Respondent admitted she swung at Alta, but claimed she only intended to hit her on the shoulder. Ardith also reported that she was "whooped with a belt" on the back of her legs, resulting in bruising.

¶ 3 In December 2018, DSS closed its investigation, marking the case as "Services Needed" rather than "Substantiated" on its case decision summary. On December 7, 2018, DSS determined services were needed for the family and transferred the case to an in-home services case worker for ongoing case management. At that time, DSS recommended counseling services for Respondent, Alta, and Ardith, and recommended that Respondent participate in parenting classes.

¶ 4 On January 17, 2019, DSS attempted to provide an In-Home Services Agreement (the "Agreement") to Respondent and explain the process for completing the requirements, but Respondent refused to sign

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1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

2. Alta and Ardith's brother is not subject to this appeal.

the Agreement. The social worker made multiple subsequent visits to Respondent's home, and Respondent continued to refuse to sign the Agreement. The social worker testified that Respondent was angry with the results of DSS's investigation and felt it was unfair.

¶ 5 That same month, Respondent, Alta, and Ardith each completed a comprehensive clinical assessment through Yelverton Enrichment Services ("Yelverton"). According to Ardith's comprehensive clinical assessment, she was distressed over the separation from her biological mother. Ardith was sad, angry, desired to be left alone, and suffered from nightmares. She also displayed troublesome behavior, such as hitting and calling children names at school and hitting and screaming at others two to three times a week at school and once a week at home. According to Alta's comprehensive clinical assessment, Alta expressed that she felt abandoned by her biological mom, experienced sadness, desired to be alone, and had flashbacks of living with her mother. She felt helpless and hopeless because she constantly thought about the past, causing her to be distracted by worry and memories. Alta reported that sometimes she forced herself to eat when she did not feel like eating.

¶ 6 During Respondent's comprehensive clinical assessment, Respondent reported feeling stressed and overwhelmed due to the attention Alta and Ardith required and because she internalized the grief over the passing of her grandmother. The social worker reported Respondent had various emotional outbursts while working with DSS. According to the social worker, Respondent experienced crying spells during their meetings, was verbally aggressive, and yelled at the social worker and her supervisor.

¶ 7 The results of the comprehensive clinical assessments led to Alta and Ardith being diagnosed with adjustment disorder with mixed anxiety and depressed mood. Respondent was diagnosed with major depressive disorder, moderate, single episode, with anxious disorder. Yelverton recommended Respondent, Alta, and Ardith participate in outpatient therapy to address their issues and develop skills to manage their symptoms.

¶ 8 Despite the recommendations she received from Yelverton and DSS, Respondent refused to schedule therapy appointments for herself, Alta, or Ardith. On January 18, 2019, Alta began receiving therapy in her charter school from a Yelverton therapist. Alta met with the Yelverton therapist once a week through the end of the school year in June 2019 but did not receive any further mental health treatment thereafter.

¶ 9 Yelverton was not able to provide services to Ardith because she attended a public school. Respondent was uncomfortable having the therapist meet Ardith in her home and did not allow the therapist to provide

services to Ardith in the residence. Yelverton was unable to schedule appointments on the weekend when Respondent reported she had availability, so Ardith was not able to participate in services.

¶ 10 Respondent attended one therapy session in June 2019 but failed to attend the second scheduled appointment and did not reschedule. The therapist attempted to set up in-home sessions, but Respondent refused to allow the therapist into her home. DSS offered to assist Respondent with transportation to therapy sessions, but Respondent refused. Respondent refused to participate in parenting classes, intensive in-home services, peer support, home and school visits, case management services, and attempted social worker counseling and guidance as recommended by DSS. Respondent prevented the social worker from seeing the children, only allowing access three times during the first four months of in-home services, and once allowing the social worker to see the children through the door.

¶ 11 On July 5, 2019, DSS filed a petition alleging Alta, Ardith, and their younger brother were dependent and neglected juveniles. DSS filed the petition "[d]ue to [Respondent]'s resistance to engage herself or the children in any services." At the time of the filing of the petition, Alta was no longer receiving therapy and neither Respondent nor Ardith received treatment throughout the case.

¶ 12 By the end of 2019, Respondent, Alta, and Ardith were attending individual counseling sessions. This mental health treatment continued until the disposition hearing. However, DSS was unable to follow up on their engagement in therapy because Respondent refused to provide DSS access to their therapy records.

¶ 13 The adjudication hearing was held over four days between February and May 2020. On May 28, 2020, the trial court adjudicated Alta and Ardith neglected due to improper care, supervision, or discipline and living in an environment injurious to their welfare. The trial court proceeded to disposition that same day, but there was insufficient court time for the hearing. Thus, the disposition hearing was rescheduled by the trial court for June 18, 2020. Respondent was ordered to allow DSS to have at least two face-to-face visits with the children before June 17, 2020. Respondent complied with the limited order. However, Respondent continued to be resistant in allowing DSS access to the children twice a month pursuant to North Carolina Department of Health and Human Services ("NC DHHS") In-Home Policies, Protocol, and Guidance for moderate-risk cases.

¶ 14 On August 31, 2020, the trial court entered its written adjudication and disposition order, concluding Alta and Ardith were neglected juveniles because they did not receive proper care, supervision, or discipline from Respondent, and they lived in an environment injurious to their welfare. Respondent retained legal custody of the children subject to a court-ordered protection plan and her compliance with in-home services. On September 17, 2020, Respondent timely filed notice of appeal.

II. Standards of Review

¶ 15 During the adjudication hearing, the trial court must determine whether the conditions alleged in the petition exist. *See In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006) (citing *Powers v. Powers*, 130 N.C. App. 37, 46, 502 S.E.2d 398, 403-04 (1998)). Evidence of events after the petition is filed is irrelevant to the determination of whether the child is neglected. *See id.* at 605, 635 S.E.2d at 14-15. The trial court resolves any conflicts in the evidence, acting as "both judge and jury." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citation omitted). Accordingly, "appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citation omitted).

¶ 16 Our review of the trial court's adjudication and disposition order "entails a determination of (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) (internal quotation marks and citations omitted). "Clear and convincing evidence is evidence which should fully convince." *In re S.R.J.T.*, 276 N.C. App. 327, 2021-NCCOA-94, ¶ 5 (citation omitted). "[W]hether a trial court's findings of fact support its conclusions of law is reviewed *de novo*." *In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020) (citation omitted).

III. Analysis

¶ 17 Respondent raises two arguments on appeal. Each will be addressed in turn.

A. Finding of Fact No. 24

¶ 18 **[1]** Respondent first contends finding of fact 24 is not supported by competent evidence because DSS failed to substantiate neglect for inappropriate discipline. Respondent argues this finding is not supported

because the initial case decision summary from December 2018 indicated "Services Needed" rather than "Substantiated." Finding of fact 24 states,

> As a result of the CPS investigation . . . [DSS] *substantiated neglect* for inappropriate discipline. [DSS] had concerns regarding the mental health needs of [Alta, Ardith,] and [Respondent]. Later, this matter was transferred to [DSS's] In-Home Services Unit on or about January 17, 2019. (emphasis added).

¶ 19 A neglected juvenile is one "whose parent . . . does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2021). To support an adjudication of neglect, there must be evidence of some type of emotional, physical or mental harm, or a substantial risk of such harm, from the neglect; however, there is no requirement that the court make a specific finding where the facts support a finding of harm or substantial risk of harm. *See In re Safriet*, 112 N.C. App. 747, 753, 436 S.E.2d 898, 902 (1993). The trial court is granted "some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (internal quotation marks and citation omitted).

¶ 20 In this case, the evidence tended to show that Alta and Ardith were at a substantial risk of harm. *See In re T.R.T.*, 225 N.C. App. 567, 571, 737 S.E.2d 823, 827 (2013). During DSS's investigation into the September 18, 2018 report, Alta told the social worker that Respondent hit her in the face, causing her nose to bleed. The social worker also testified about that same investigation, "I confirmed the allegations and [Ardith] was saying that she had got in trouble and that she had got a spanking during that time and she was hit. And [Ardith] showed me a couple of marks on her." Moreover, Respondent admitted to using physical discipline with the children, further substantiating the allegations of neglect for improper discipline, but failed to attend parenting classes or therapy that could help her address the use of improper discipline.

¶ 21 The evidence also showed the girls were at risk of continued emotional and mental harm. The results of Alta and Ardith's comprehensive clinical assessments and their documented behavioral issues demonstrated they needed mental health treatment for their health and well-being. Specifically, Alta reported feeling hopeless and having difficulty eating, while Ardith stated she was frequently anxious. The

social worker testified to Respondent's "resistance to engage herself or the children in any services" such that at the filing of the petition, Alta was no longer receiving therapy and neither Respondent nor Ardith received treatment throughout the case. Thus, the evidence tends to show Respondent denied the girls necessary treatment for their mental and emotional well-being and refused to attend therapy to address her own mental health issues that contributed to her stress and feelings of frustration regarding the children. This Court has previously upheld a finding of neglect in cases where parents specifically failed to follow through with required therapy for themselves and treatment for their children. *See In re A.J.M.*, 177 N.C. App. 745, 751, 630 S.E.2d 33, 36 (2006); *see also In re Thompson*, 64 N.C. App. 95, 100-01, 306 S.E.2d 792, 795-96 (1983).

¶ 22 Here, Respondent's failure to attend parenting classes and seek mental health treatment for herself and the children demonstrates that she did not address the conditions that led to the filing of the petition and the ultimate adjudication of neglect. *See A.J.M.*, 177 N.C. App. at 751, 630 S.E.2d at 36. "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re C.M.P.*, 254 N.C. App. 647, 655, 803 S.E.2d 853, 859 (2017) (citation omitted). Respondent's use of improper discipline on Alta and Ardith, and her failure to satisfy DSS's recommendations to address the root cause, resulted in concerns for Alta and Ardith's safety. *See id.* DSS case plans are designed to address the conditions that DSS has identified as endangering the well-being of the children. *See In re Brim*, 139 N.C. App. 733, 742-43, 535 S.E.2d 367, 372 (2000).

¶ 23 This Court has upheld a trial court's finding that a mother's failure to cooperate with DSS put the child at risk of substantial harm where the mother refused to participate in services, including parenting classes and mental health therapy. *In re T.R.T.*, 225 N.C. App. at 572, 737 S.E.2d at 827. Such evidence in light of a prior adjudication of neglect supported the trial court's finding of neglect. *Id.* (citing *In re C.M.*, 183 N.C. App. at 212, 644 S.E.2d at 593). Respondent admitted to hitting Alta and to using physical discipline, including hitting Ardith with a belt and leaving bruises and marks. Thus, Respondent's use of improper discipline and refusal to complete the requirements intended to address this issue supports the trial court's finding of fact.

¶ 24 Respondent further contends finding of fact 24 was not supported by competent evidence because it also states this case was transferred to in-home services "on or about January 17, 2019," instead of on December 7, 2018.

¶ 25 While the North Carolina Child Protective Services ("CPS") Assessment Documentation Tool provided in the record on appeal reveals that DSS transferred this case to in-home services on December 7, 2018, rather than on January 17, 2019, as is stated in finding of fact 24, we do not find that this typographical error undercuts the clear and convincing evidence of the minor children's neglect in this case. Accordingly, we affirm the trial court on this issue.

B. Neglected Conclusion of Law

¶ 26 **[2]** Next, Respondent contends the trial court's conclusion of law that Alta and Ardith were neglected is not supported by the evidence because DSS did not *substantiate* neglect in December 2018; Respondent and the girls received some services for seven months; and there were no new reports of maltreatment between the time of the first allegation and the time of the adjudication hearing.

¶ 27 DSS has the duty to screen reports of suspected child abuse, neglect, or dependency to determine whether the facts reported, if true, meet the statutory definitions of abuse, neglect, or dependency. N.C. Gen. Stat. § 7B-302 (2021); N.C. Gen. Stat. § 7B-403 (2021). If they do, DSS must determine what type of assessment response is appropriate. N.C. Gen. Stat. § 7B-302(a). A "family assessment" response is used for reports meeting the statutory definitions of neglect and dependency and applies a family-centered approach that focuses on the strengths and needs of the family as well as the child's alleged condition. N.C. Gen Stat. § 7B-101(11b) (2021). At the end of an assessment, DSS determines or substantiates whether abuse, neglect, serious neglect, or dependency occurred. If DSS substantiates a report or determines that the family needs services, DSS must provide protective services and *may* file a petition with or without requesting a nonsecure custody order removing the child from the home immediately. N.C. Gen. Stat. § 7B-302(c)-(d); N.C. Gen. Stat. § 108A-14(a)(11) (2021).

¶ 28 After substantiation or a finding that a family requires services, DSS is responsible for determining what services would help the family to meet the child's basic needs, keep the child safe, and prevent future harm. DSS must determine and arrange for the most appropriate services, focusing on the child's safety. If a parent, guardian, custodian, or caretaker refuses to accept the protective services arranged or provided by DSS, then DSS is *required* to file a petition to protect the juvenile(s). N.C. Gen. Stat. § 7B-302(c).

¶ 29 In this case, Respondent improperly assumes that DSS can only proceed with filing a juvenile petition if there is a case decision of

substantiation, not merely services needed. A determination of substantiated and services needed are treated similarly under DSS policy. We note the policies and protocols that guide and govern in-home services, "In-Home Services Policy, Protocol and Guidance," (IHS Policy), are found in North Carolina's Child Welfare Manual published by the North Carolina Department of Health and Human Services. CPS In-Home Services are legally mandated for a substantiation of neglect *or determination of services needed. See* N.C. Dep't of Health & Hum. Servs., *In-Home Services Policy*, *Protocol*, *and Guidance*, 1, 3 (May 2020), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/in-home_manual.pdf. Further, throughout the IHS Policy, the two terms are used in this manner, and various measures are required following a substantiation and a determination that services are needed. *Id*. at 1, 3-4. Thus, "Services Needed" is not the same as "unsubstantiated."

¶ 30 Here, DSS made a case decision of "Services Needed" based on Respondent's use of improper discipline and the mental health needs of the family. DSS's determination was supported by Alta's descriptions of Respondent leaving marks on her legs from being whipped with a belt several times and Respondent yelling when the children did something wrong. Further, Ardith reported to the social worker that Respondent sometimes smacked the children on the back of their heads, on their legs, and on the sides of their faces with her hand. Such allegations were confirmed by Respondent who admitted she used such physical discipline with the children at the time.

¶ 31 Although Respondent was willing to engage the children and herself in mental health treatment while DSS was investigating the report, there is sufficient evidence in this case to support the girls were neglected at the time of the filing of DSS's petition. Respondent's refusal to follow the recommendations from Yelverton's comprehensive clinical assessments, refusal to complete any parenting programs, and failure to comply with in-home services is sufficient evidence to support a finding of neglect. Respondent testified she failed to seek outpatient therapy for herself and the girls before the petition was filed or the adjudication hearing. Where parents or caretakers did not cooperate with DSS or ensure their children received proper treatment, this Court has upheld the trial court's finding of neglect. *See In re T.R.T.*, 225 N.C. App. at 571, 737 S.E.2d at 827 (upholding a trial court's finding that a mother's failure to cooperate with DSS put her child at risk of substantial harm where the mother refused to participate in parenting classes and mental health therapy); *In re C.M.*, 183 N.C. App. at 212, 644 S.E.2d at 593 (holding that the findings relating to the prior adjudication of neglect, subsequent

termination of parental rights as to another child, and the parents' failure to attend mental health treatment and vocational rehabilitation supported the finding that their child was neglected); *In re Thompson*, 64 N.C. App. at 101, 306 S.E.2d at 795-96 (holding that the mother's failure to seek treatment for her daughter to determine if she was developing normally supported the conclusion of neglect by failure to provide necessary medical care); *In re Huber*, 57 N.C. App. 453, 458, 291 S.E.2d 916, 919 (1982) (affirmed the finding of neglect where the mother failed to ensure her child received the necessary medical and remedial care she needed, reasoning that "[to] deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child"). Thus, based on the evidence and consistent with our precedent, we hold the trial court's conclusion that Alta and Ardith were neglected juveniles is supported by its findings of fact.

¶ 32 We note that "erroneous findings unnecessary to the determination [of neglect] do not constitute reversible error where an adjudication is supported by sufficient additional findings grounded in clear and convincing evidence." *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208-09 (2016) (internal quotation marks omitted) (quoting *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006)). Here, the trial court's typographical error in using the phrase "substantiated neglect" instead of "services needed" in finding of fact 24 has no practical effect on the determination that Alta and Ardith were neglected juveniles. Our review revealed the two phrases are treated similarly under DSS policy and that DSS was required under N.C. Gen. Stat. § 7B-302(c) to file a petition after determining the family needed services and Respondent refused to accept or participate in those services. N.C. Gen. Stat. § 7B-302(c).

IV. Conclusion

¶ 33 Therefore, we hold there was sufficient and clear and convincing evidence the children were neglected at the time of the filing of the petition. Accordingly, we affirm the trial court's adjudication and disposition order.

AFFIRMED.

Chief Judge STROUD and Judge COLLINS concur.

MUNOZ v. MUNOZ

[278 N.C. App. 647, 2021-NCCOA-399]

ISSAC MUNOZ, Plaintiff
v.
CASSANDRA MUNOZ, Defendant

No. COA20-193

Filed 3 August 2021

1. Child Custody and Support—primary physical custody—relocation out-of-state—best interest factors

The trial court did not abuse its discretion either by determining that a child's relocation to another state with her father was in her best interests or in setting the physical custody schedule, where the court's findings reflected its consideration of multiple factors affecting the child's welfare and best interests—including the relative strength of each parent's support system in their respective states of residence—and were supported by competent evidence.

2. Child Custody and Support—primary physical custody—mother's military service—not sole basis for best interest determination

There was no abuse of discretion by the trial court in granting primary physical custody of a child to her father where the court's consideration of the mother's military service, rather than violating N.C.G.S. § 50-13.2(f) (a provision that provides protection for military members in custody matters), was only one of several bases for determining the child's best interests, and was outweighed by the court's evaluation of the relative strength of each party's support system.

Appeal by defendant from order entered 20 August 2019 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 10 June 2021.

Ward and Smith, P.A., by Christopher S. Edwards and Alex C. Dale, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant-Mother Cassandra Munoz appeals from a permanent custody order awarding Plaintiff-Father Issac Munoz primary physical custody of their daughter, M.M.[1] After careful review, we affirm.

Background

¶ 2 Mother and Father grew up in California and were "high[-]school sweethearts," with Father graduating in 2010 and Mother graduating in 2012. They also married in 2012, and M.M. was born to the young couple in 2015. Mother was, and remains, a member of the United States Army. In 2016, the Army stationed Mother at Fort Bragg near Fayetteville, North Carolina, where she worked as a test measurement and diagnostic equipment maintenance support specialist.

¶ 3 When M.M. was born, both parents worked, but they preferred not to leave M.M. in daycare, so they relied on extended family to provide care for M.M. Father's grandmother lived with them and cared for M.M. before and after the family moved to Fayetteville following Mother's assignment to Fort Bragg. Mother's father has also lived with the family and taken care of M.M. For most of M.M.'s life, Mother and Father have had live-in family support to care for her.

¶ 4 While living in Fayetteville in 2018, Mother and Father separated. At that time, Mother was anticipating deployment to Iraq for nine months.

¶ 5 On 16 April 2018, Father filed a complaint in Cumberland County District Court seeking divorce from bed and board, child custody, child support, and equitable distribution. On 19 April 2018, Father obtained an *ex parte* order restraining Mother from contacting him and awarding Father temporary custody of M.M., as well as exclusive use and possession of the marital residence. On 25 April 2018, Mother filed an emergency motion to set aside the *ex parte* order. The trial court heard the matter that day, and on 3 May 2018, the court entered an order allowing both parties to occupy the marital residence pending further proceedings.

¶ 6 On 30 April 2018, Mother filed her answer and counterclaims for child custody, child support, and equitable distribution. On 10 May 2018, the parties executed a Memorandum of Judgment regarding temporary child custody, which the trial court entered on 27 June 2018 ("the temporary custody order"). Pursuant to the temporary custody order, the parties agreed that it was in M.M.'s best interest for them to share joint legal custody, with Father having primary physical custody and Mother having secondary physical custody. The parties also agreed to permit Father to relocate to California with M.M.

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1. Initials are used to protect the identity of the minor child.

¶ 7 On 15 May 2018, Mother filed a motion to amend the temporary custody order, which came on for hearing on 14 June 2018. That same day, Mother filed a motion to review the temporary custody order, in that her deployment had been delayed until July. On 29 June 2018, the trial court entered an order requiring the parties to keep M.M. in North Carolina until Mother deployed, but no later than 1 July 2018.

¶ 8 On 12 July 2018, Mother filed a motion to set aside the temporary custody order, alleging that, *inter alia*, she had been "informed that she [would] no longer [be] deployed." Father and M.M. had already relocated to Victorville, California, where Father was employed as a supervisor for UPS.

¶ 9 Mother's motion to set aside the temporary custody order came on for hearing on 8 October 2018, and on 15 November 2018, the trial court entered its order establishing a holiday visitation schedule and once again awarding primary physical custody to Father and secondary physical custody to Mother. On 29 November 2018, the parties executed a second Memorandum of Judgment, which the trial court entered on 30 November 2018, modifying the holiday visitation schedule set forth in the trial court's order; a formal typed order was entered on 7 January 2019.

¶ 10 On 19 August 2019, the permanent custody matter came on for hearing in Cumberland County District Court before the Honorable Edward A. Pone. The next day, the trial court entered a permanent custody order awarding primary physical custody to Father and secondary physical custody to Mother. On 11 September 2019, Mother timely filed her notice of appeal.

Discussion

¶ 11 On appeal, Mother argues that the trial court abused its discretion by (1) allowing Father to relocate to California with M.M. without considering the factors set forth in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); and (2) improperly considering her military-service obligations as the basis for determining that it was in M.M.'s best interest for Father to be awarded primary physical custody, in violation of N.C. Gen. Stat. § 50-13.2(f) (2019).

I. Standard of Review

¶ 12 When this Court reviews a child custody order,

> the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if

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

Jonna v. Yaramada, 273 N.C. App. 93, 116, 848 S.E.2d 33, 51 (2020) (citation omitted). "Questions of statutory interpretation are questions of law," which this Court reviews de novo. *In re J.K.*, 253 N.C. App. 57, 60, 799 S.E.2d 439, 441 (2017) (citation omitted).

II. Ramirez-Barker *Factors*

¶ 13 **[1]** Mother first argues that the trial court abused its discretion by failing to give appropriate consideration to the *Ramirez-Barker* factors in determining whether relocation to California was in M.M.'s best interest. We disagree.

¶ 14 In *Ramirez-Barker*, this Court discussed the factors relevant to a trial court's evaluation of a child's best interest in a case involving the child's potential relocation.

> In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

107 N.C. App. at 79–80, 418 S.E.2d at 680.

¶ 15 However, the *Ramirez-Barker* factors are not a mandatory checklist for trial courts; as always, the primary objective is the determination of the best interest of the child. Trial courts considering this issue

are not required "to make explicit findings addressing each and every *Ramirez-Barker* factor." *Tuel v. Tuel*, 270 N.C. App. 629, 632, 840 S.E.2d 917, 920 (2020). "[A]lthough the trial court may appropriately consider these factors, the court's primary concern is the furtherance of the welfare and best interests of the child and [her] placement in the home environment that will be most conducive to the full development of [her] physical, mental and moral faculties." *Id.* at 632–33, 840 S.E.2d at 920 (citation omitted). "All other factors," including the visitation rights of the non-relocating parent, "will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the [s]tate, the court should not hesitate to do so." *Id.* at 633, 840 S.E.2d at 920 (citation omitted).

¶ 16 Mother compares this case to *Evans v. Evans*, in which "the trial court found . . . that the proposed relocation would adversely affect the relationship between the father and his child[,]" but "made no other findings about the effect of the proposed relocation on the child." 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000). We vacated and remanded the child custody order in that case because the trial court "fail[ed] to find facts so that this Court [could] determine that the order [wa]s adequately supported by competent evidence and the welfare of the child [wa]s subserved[.]" *Id.*

¶ 17 Mother argues that, like the trial court in *Evans*, the court here "failed to make required findings showing that it had given appropriate consideration to the relevant factors in determining whether [M.M.]'s relocation . . . was in her best interests." Particularly, Mother maintains that the trial court did not consider "the advantages and disadvantages of the proposed relocation" for M.M., nor did it consider or make findings of fact regarding Mother's relationship with M.M. However, careful review of the permanent custody order in this case reflects that the trial court made the requisite findings, and did not abuse its discretion.

¶ 18 First, we note that Mother only challenges two of the trial court's findings of fact:

> 39. [Mother] does not have a support system in close proximity to her and [M.M.] She is here alone.
>
> . . . .
>
> 46. [Mother] remains in the military. She is here in the Fayetteville area all alone. While she has relatives in North Carolina, the closest ones are three to four

> hours away. They are not available at a moment's notice as it would take them several hours to get here.

¶ 19 Mother maintains that, "[w]hile it is true that [her] family members do not live in Fayetteville, it is inaccurate to say that she does not have a support system and that she is alone." Mother misstates the trial court's findings of fact with respect to her support system. Rather than finding that "she does not have a support system" *at all*, the trial court merely found that she does not have a support system "in close proximity to her and [M.M.]" Indeed, the trial court found that M.M. "is fortunate to have such a great supportive family system on both her mother's and father's side of the family."

¶ 20 Neither does Mother challenge the trial court's finding of fact that she "remains here in Fayetteville/Ft. Bragg. Her closest relatives are three to four hours away in Ash[e]ville, North Carolina. She currently lives alone in the marital residence with the family dog." In this, the trial court accurately summarized Mother's testimony from the permanent custody hearing. The trial court's unchallenged findings of fact are supported by competent evidence and binding on appeal, *Jonna*, 273 N.C. App. at 116, 848 S.E.2d at 51, and support those findings that Mother challenges. Mother's challenge to these findings of fact misinterprets the trial court's order and is overruled.

¶ 21 Throughout its findings of fact, the trial court focused a great deal on each parent's support systems in their respective home states. As the trial court explained, after M.M. was born both parents "soon realized they needed help with the minor child and did not want to put her in daycare. They were both young parents and had never had children before." The trial court found that Father's grandmother "has been an integral part of [M.M.]'s life since shortly after her birth" and was a "live-in care provider" for much of the first two years of her life. The trial court also found that Mother's father came to assist the parents for approximately one year. After reciting this history, the trial court summarized its view of the parents' need for a support system in raising M.M.: "The truth is, they have never parented [M.M.] completely on their own, either together or alone. They have always had family support. And, [M.M.] is fortunate to have such a great supportive family system on both her mother's and father's side of the family."

¶ 22 The trial court then surveyed each of the parents' current support systems in their respective states of residence. The court noted that Father lives in California with his grandmother and uncle; that his grandmother is once again a live-in care provider; and that M.M.'s bedroom

has an extra bed so that Father's grandmother can sleep in M.M.'s room "if she needs to." By comparison, the trial court found that Mother lives alone in a home where M.M. has her own bedroom, but that her "closest relatives are three to four hours away[.]"

¶ 23 This case resembles *Tuel* in that the support system of each parent was similarly a significant factor for the trial court in that case. 270 N.C. App. at 633–34, 840 S.E.2d at 921. Unlike *Tuel*, however, in which the trial court failed to "engage in any comparison" between each parent's home state, "or provide any explanation as to why Indiana would otherwise provide the children with a more enriching environment" than North Carolina, *id.* at 633, 840 S.E.2d at 921, the trial court in the instant case did provide such an explanation.

¶ 24 The trial court found as fact that Father's grandmother "once again is the live-in care provider[,] allowing [F]ather to work and keeping [M.M.] out of daycare and at home with a very familiar relative." The court further found that Father's grandmother "is healthy and able to care for" M.M., who is attending pre-kindergarten, swimming, and taekwondo classes in California. Father also located an elementary school for M.M. within walking distance of their home. Additionally, the trial court found that M.M. "has medical and dental providers there and is doing well in [F]ather's care."

¶ 25 In contrast, the trial court found that although Mother "is a good mother and loves her daughter very much[,]" because Mother does not have a similar familial support system nearby, M.M. "would be in daycare at least eleven hours a day during the week while in [M]other's care[.]" The trial court concluded by contrasting Mother's support system—with her closest relatives "three to four hours away" and "not available at a moment's notice"—against Father's support system, including his grandmother who "is one of the constants in [M.M.]'s life" and "is available for any and all emergencies" that may arise. These findings all reflect the trial court's comparison of each parent's home state and explanation that living with Father in California would provide M.M. "with a more enriching environment." *Id.*

¶ 26 The trial court clearly considered each parent to be a loving and appropriate custodial parent for M.M. It appears that the trial court determined that Father's more immediately proximate support system was a significant factor in deciding that M.M.'s "welfare and best interests w[ould] be better promoted" by permitting her to relocate from the state. *Id.* at 633, 840 S.E.2d at 920 (citation omitted). Given *Tuel*'s reminder that the *Ramirez-Barker* factors are not a mandatory checklist

for a trial court, but rather guideposts for determining a minor child's best interest—which is the true priority in any child custody proceeding—we cannot say that the trial court abused its discretion here. *See Jonna*, 273 N.C. App. at 116, 848 S.E.2d at 51.

¶ 27 Mother also argues that the "trial court's findings of fact do not support its decision regarding the physical custody schedule" established in the permanent custody order. However, Mother does not cite any case law or statutory authority in support of her contention that the trial court abused its discretion in setting that schedule.

¶ 28 Rather, Mother asserts that at the permanent custody hearing, the trial court "refused to grant" her more than a week with M.M. before school started, despite her "begg[ing] for more time because she had not seen her daughter in six months." Mother testified at the hearing that she had 40 days of leave saved. However, Mother's argument on appeal fails to acknowledge that, at the hearing, she initially requested "at least" one week with M.M., which the trial court awarded her, before she asked for more. After the trial court explained that a week was "what [she] asked for," Mother agreed.

¶ 29 Upon careful review of the record, and the arguments presented on appeal, we cannot say that Mother has shown that the trial court abused its discretion on this issue.

III. N.C. Gen. Stat. § 50-13.2(f)

¶ 30 **[2]** Mother also asserts that the trial court abused its discretion by considering her military service as the basis for determining that Father should be granted primary physical custody of M.M., in violation of N.C. Gen. Stat. § 50-13.2(f). This argument lacks merit.

¶ 31 Section 50-13.2(f) provides special protection for members of the armed services in custody matters:

> In a proceeding for custody of a minor child of a service member, a court may not consider a parent's past deployment or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment.

N.C. Gen. Stat. § 50-13.2(f).

¶ 32 "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest

extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Rosero v. Blake*, 357 N.C. 193, 206–07, 581 S.E.2d 41, 49 (2003).

¶ 33 Although Mother claims that § 50-13.2(f) prohibits the use of her possible future deployment "as a basis" for determining whether the proposed relocation was in M.M.'s best interest, the plain text of the statute belies her argument: "a court may not consider a parent's . . . possible future deployment as the *only* basis in determining the best interest of the child." N.C. Gen. Stat. § 50-13.2(f) (emphasis added). Section 50-13.2(f) thus clearly contemplates a trial court's consideration of a parent's "possible future deployment" as one basis among others in determining a child's best interest—so long as it is not the *only* basis. *Id.*

¶ 34 In the present case, it is evident that Mother's possible future deployment played a role in the procedural posture leading up to the permanent custody order from which Mother appeals. Mother's possible future deployment was certainly a factor in the parties' decision-making, until Mother was informed that she would not be deployed.

¶ 35 It is less clear, however, that Mother's possible future deployment played a significant role in the trial court's determination that relocation was in M.M.'s best interest. Mother calls our attention to several references in the trial court's order to her military service, but most of these merely provide context for the parties' relationship and the procedural history of the case. The trial court's unchallenged findings of fact state that Mother "was and remains a member of the United States Army"; that Mother enlisted when she was 17 years old; that Mother "was scheduled to deploy at the time of the filing of the action"; that although "she ultimately did not deploy, she remains in the Army and is subject to deployment or reassignment at any time"; and that "Mother is in good standing with the military and plans to remain in at this time."

¶ 36 Only one of these findings references Mother's possible future deployment, and the extent to which that possibility affected the trial court's determination—if at all—is unclear. Considering the trial court's predominant focus on the parents' respective support systems, as previously discussed, we are satisfied that Mother's possible future deployment was not "the only basis in determining the best interest" of M.M. *Id.* Mother's argument is overruled.

Conclusion

¶ 37 For the foregoing reasons, the trial court did not abuse its discretion in determining that relocation to California was in M.M.'s best interest, nor did it violate N.C. Gen. Stat. § 50-13.2(f) in its order. The permanent custody order is affirmed.

AFFIRMED.

Judges DIETZ and WOOD concur.

LAURI A. NIELSON (FKA SCHMOKE), PLAINTIFF
v.
RAYMOND SCHMOKE, DEFENDANT

No. COA20-701

Filed 3 August 2021

1. Appeal and Error—interlocutory order—order allowing enforcement of foreign judgment

In an action to enforce a foreign divorce judgment, the trial court's order denying defendant's motion to abate post-judgment proceedings—upon the court's determination that the judgments entered in another state remained enforceable in North Carolina—was immediately reviewable where the order essentially resolved all issues before it. Even if the order was in the nature of a discovery order and therefore interlocutory, it affected a substantial right—by potentially subjecting defendant to execution on his property or sanctions—which would be lost absent immediate appeal permitting review.

2. Enforcement of Judgments—foreign judgments—enforcement period—ten-year period accrued on date of filing in North Carolina

Where plaintiff filed her Michigan divorce judgments in North Carolina in accordance with this state's version of the Uniform Enforcement of Foreign Judgments Act, the filing in effect created a new North Carolina judgment subject to the applicable statutes of limitation in this state. Since the ten-year period of enforcement (for money judgments, N.C.G.S. § 1-234), which accrued upon the filing of the judgments in North Carolina, had not yet expired, the trial

court correctly determined that the Michigan judgments remained enforceable in North Carolina. Therefore, there was no error in the denial of defendant's motion to abate post-judgment proceedings or in the order directing defendant to respond to discovery requests.

Appeal by Defendant from Order entered 18 March 2020 by Judge George F. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 12 May 2021.

Butler & Butler, L.L.P., by Hunter E. Fritz, for plaintiff-appellee.

Kerner Law Firm, PLLC, by Thomas W. Kerner, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Raymond Schmoke (Defendant) appeals from an Order entered 18 March 2020 concluding judgments originally entered in a Michigan Court on 29 December 2003 and 12 October 2009, and filed as foreign judgments in North Carolina on 28 June 2013, remained enforceable in North Carolina under North Carolina's 10-year statutory enforcement period for judgments. Specifically, the trial court's Order denied Defendant's Motion to Abate Post-Judgment Proceedings and required Defendant and his current spouse to respond to discovery in supplemental proceedings, including production of documents and other information requested under N.C. Gen. Stat. § 1-352.2. The Record tends to reflect the following:

¶ 2 On 29 December 2003, the Circuit Court for Manistee County, Michigan (Michigan Court) entered a judgment (Michigan Divorce Judgment) in favor of Lauri Nielson (Plaintiff) against Defendant, her ex-husband. On 12 October 2009, the Michigan Court entered an additional judgment in favor of Plaintiff (Supplemental Judgment).

¶ 3 On 28 June 2013, pursuant to North Carolina's version of the Uniform Enforcement of Foreign Judgments Act (UEFJA) contained in N.C. Gen. Stat. § 1C-1701 *et seq.* (2019), Plaintiff enrolled the Michigan Divorce Judgment and Supplemental Judgment (collectively, the Foreign Judgments), and commenced the current action through a Notice of Filing and by filing the Foreign Judgments in North Carolina with the New Hanover County Clerk of Superior Court. Consistent with N.C. Gen. Stat. § 1C-1703, Plaintiff filed the Foreign Judgments with a

supporting affidavit averring the Foreign Judgments were final judgments and were, at the time, unsatisfied in the amount of $1,323,096.31. Consistent with N.C. Gen. Stat. § 1C-1704, Plaintiff served a Notice of Filing on Defendant along with copies of the Foreign Judgments and supporting affidavit.

¶ 4 On 29 July 2013, Defendant filed a Motion to Strike Affidavit and Notice of Defenses to Enforcement of Foreign Judgments pursuant to N.C. Gen. Stat. § 1C-1705. Defendant subsequently filed a Notice of Additional Defenses on 11 March 2014, along with a Motion to Strike Plaintiff's Amended Affidavit.

¶ 5 On 12 August 2015, the trial court entered a Judgment (North Carolina Judgment) concluding Plaintiff had met all the requirements under the UEFJA and the Foreign Judgments were entitled to Full Faith and Credit in North Carolina. The trial court entered the Judgment in favor of Plaintiff in the amount of $1,323,096.31 plus interest from and after 23 August 2013.

¶ 6 After an unsuccessful attempt to enforce the Judgment by way of Writ of Execution, Plaintiff began supplemental proceedings by conducting an oral examination of Defendant under N.C. Gen. Stat. § 1-352. Following this oral examination, on 2 October 2019, Plaintiff filed and served two separate Motions seeking Defendant and his current spouse to "Produce Documents and Information" pursuant to N.C. Gen. Stat. § 1-352.2. Both Motions were heard ex parte by the Clerk of Court, and on 3 and 9 October 2019 respectively, the Clerk of Court entered orders granting these Motions (collectively, Discovery Orders).

¶ 7 On 29 October 2019, Defendant filed a Motion to Set Aside the Order of the Clerk of Court ordering him to provide discovery in supplemental proceedings. Subsequently, on 19 December 2019, Defendant filed a Motion to Abate Post-Judgment Proceedings on the basis the Foreign Judgments were no longer enforceable in North Carolina. During a 9 January 2020 hearing before the trial court on these Motions, Defendant argued all post-judgment enforcement efforts, including supplemental proceedings, should abate because the statutory 10-year period for enforcing a judgment in North Carolina had expired. Specifically, Defendant contended because the Supplemental Judgment had been entered by the Michigan Court in October 2009, at the latest, the enforcement period of the Foreign Judgments had expired in October 2019, and, thus, the North Carolina Judgment was also now unenforceable.

¶ 8 In its Order entered 18 March 2020, the trial court "[wa]s persuaded by the logic of *Wells Fargo Equip. Fin., Inc. v. Asterbadi*, 841 F.3d

237 (4th Cir. 2016) (applying 28 U.S.C. § 1963) and h[e]ld[] that the Enforcement Period started to run on the date the Foreign Judgments were filed with the Clerk of Court: June 28, 2013." The trial court also determined the Foreign Judgments "were entitled to Full Faith and Credit in the State of North Carolina." The trial court subsequently concluded: "[t]he Enforcement Period to enforce the North Carolina Judgment ha[d] not expired" and "[t]he Enforcement Period to enforce the Foreign Judgments ha[d] not expired." Accordingly, the trial court ordered: "Defendant's Motion to Abate Post-Judgment Proceedings is respectfully DENIED[.]" The trial court also denied Defendant's Motion to Set Aside the Clerk's Order requiring discovery responses and ordered Defendant and his current spouse to "provide to counsel for the Plaintiff the documents and information set forth" in the Discovery Orders entered by the Clerk of Court "within ten (10) days following the entry of this Order." Defendant filed written Notice of Appeal on 17 April 2020.

Appellate Jurisdiction

¶ 9 **[1]** As an initial matter, Plaintiff characterizes the trial court's 18 March 2020 Order denying Defendant's Motion to Abate Post-Judgment Proceedings and requiring Defendant and his spouse to respond to discovery in post-judgment supplemental proceedings as a "Discovery Order[,]" which is interlocutory and not immediately appealable. For his part, Defendant contends the trial court's 18 March 2020 Order constitutes an appealable final order, or, in the alternative—if it does constitute an interlocutory order—it is one that, in effect, determines the action and prevents a judgment from which an appeal might be taken or otherwise affects a substantial right under N.C. Gen. Stat. § 7A-27(b).

¶ 10 "Interlocutory orders and judgments are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quotation marks and citations omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Id.* (citations omitted). "The purpose of this rule is to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Id.* at 161, S.E.2d at 578-79 (quotation marks and citations omitted).

¶ 11 Here, fundamentally, the trial court's 18 March 2020 Order resolves all issues before it on the basis the statutory 10-year period to enforce the Foreign Judgments in North Carolina had not expired, resulting in

a Judgment enforceable through execution and supplemental proceedings. Thus, the trial court's Order is certainly in the nature of a final Order or Judgment from which appeal may be taken. *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citations omitted)).

¶ 12 Moreover, presuming the trial court's Order is interlocutory—to the extent it may be interpreted as compelling discovery in supplemental proceedings without imposing a sanction for failure to comply—we agree with Defendant the trial court's Order is one affecting a substantial right which would be lost absent immediate appeal permitting review under N.C. Gen. Stat. § 7A-27(b)(2)(a); that is, absent an immediate appeal, Defendant may be subject to enforcement proceedings, including execution on his property or the imposition of sanctions on a Judgment that may not otherwise be enforceable. This is exactly what application of the 10-year enforcement period is designed to prevent. Indeed, it is unclear how, absent this immediate appeal, Defendant would ever be able to seek direct appellate review of the trial court's decision.[1] Consequently, for purposes of this appeal, we conclude Defendant has established his right to appeal the trial court's Order and, in turn, his appeal is timely and properly before us.

Issue

¶ 13 The dispositive issue on appeal is whether the trial court properly concluded the 10-year period for enforcement of Plaintiff's Foreign Judgments in North Carolina accrued on the date the Foreign Judgments were filed in North Carolina on 28 June 2013 and, thus, had not expired as of 18 March 2020.

Analysis

¶ 14 **[2]** The trial court determined as a matter of law, the 10-year period to enforce the Foreign Judgments in North Carolina began to accrue upon the filing of the Foreign Judgments in North Carolina, consistent with the UEFJA. We apply a de novo review to issues of law. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999); *see also Goetz v. N.C. Dep't of Health & Hum. Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010) ("Where there is no dispute over the relevant facts, a lower court's interpretation of a statute of

1. Acknowledging Defendant might also have sought a form of discretionary review through a Petition for Writ of Certiorari filed under N.C. R. App. P. 21.

limitations is a conclusion of law that is reviewed *de novo* on appeal." (citation omitted)).

¶ 15 As a general proposition, by application of statute, a money judgment remains enforceable in North Carolina for a period of 10 years from the entry of the judgment. *See* N.C. Gen. Stat. § 1-234 (2019) (governing docketing of judgments and providing: "[t]he judgment is a lien on the real property in the county where the same is docketed . . . for 10 years from the date of entry of the judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered."); N.C. Gen. Stat. § 1-306 (2019) (governing enforcement "as of course" of judgments and providing in part: "[h]owever, no execution upon any judgment which requires the payment of money may be issued at any time after ten years from the date of the entry thereof . . . ."); *see also* N.C. Gen. Stat. § 1-47(1) (10-year statute of limitations to bring an action "[u]pon a judgment or decree of any court of the United States or of any state or territory thereof . . . .").

¶ 16 Here, Defendant contends the Foreign Judgments—and, thus, the subsequent North Carolina Judgment entered acknowledging the validity of those Foreign Judgments and rejecting Defendant's alleged defenses—can no longer be enforced in North Carolina because the 10-year enforcement period lapsed, at the latest, on 13 October 2019, 10 years after the entry of the Supplemental Judgment in Michigan. On the other hand, Plaintiff contends the filing of the Foreign Judgments in North Carolina consistent with the UEFJA effectively results, for enforcement purposes, in a new judgment in North Carolina that is enforceable for 10 years from its enrollment in North Carolina, which occurred in this case on 28 June 2013. The trial court agreed with Plaintiff and was persuaded by the logic of the U.S. Court of Appeals for the Fourth Circuit's (Fourth Circuit) decision in *Asterbadi*. In turn, we agree with the trial court that *Asterbadi* is persuasive and instructive to the analysis.

¶ 17 In *Asterbadi*, the Fourth Circuit "address[ed] the enforceability of a judgment originally entered in the Eastern District of Virginia but registered for enforcement in the District of Maryland under 28 U.S.C. § 1963[,]" which governs registration of judgments from other federal districts. *Asterbadi*, 841 F.3d at 239. "Particularly," the Fourth Circuit "consider[ed] the time period during which the judgment remain[ed] enforceable in Maryland." *Id.* The Fourth Circuit explained the factual background of the case:

> Collecting on a financing debt incurred by Dr. Nabil J. Asterbadi, CIT/Equipment Financing, Inc. ("CIT") obtained a $2.63 million judgment against

> Asterbadi in 1993, in the Eastern District of Virginia. Under Virginia law, that judgment remained viable for 20 years. Roughly 10 years after the judgment had been entered, on August 27, 2003, CIT registered the judgment in the District of Maryland pursuant to § 1963. Under Maryland law, made relevant by Federal Rule of Civil Procedure 69(a), judgments expire 12 years after entry.
>
> CIT sold the judgment to Wells Fargo Equipment Finance, Inc., and Wells Fargo thereafter, in April 2015, began collection efforts in Maryland. Asterbadi filed a motion for a protective order, contending that the judgment was unenforceable because the efforts began more than 12 years after the judgment had originally been entered in Virginia. Wells Fargo responded that the registration of the Virginia judgment in Maryland before it had expired under Virginia law became, in effect, a new judgment that was subject to Maryland law for enforcement. Thus, it argued, Maryland's 12-year limitations period began on the date that the judgment was registered in Maryland, not on the date that the original judgment was entered in Virginia, and therefore the judgment was still enforceable.
>
> The district court agreed with Wells Fargo, concluding that the time limitation for enforcement of the judgment began with the date of its registration in Maryland, on August 27, 2003, and that therefore it was still enforceable against Asterbadi.

Id. at 239-40.

¶ 18 Under 28 U.S.C. § 1963:

> A judgment in an action for the recovery of money . . . entered in any . . . district court . . . may be registered by filing a certified copy of the judgment in any other district . . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

28 U.S.C. § 1963 (2019). The Fourth Circuit observed 28 U.S.C. § 1963 "was enacted . . . as a device to streamline the more awkward prior

practice of bringing suit on a foreign judgment and thereby obtaining new judgment on the foreign judgment." *Asterbadi*, 841 F.3d at 244. The Fourth Circuit reasoned:

> Thus, instead of requiring the holder of a Virginia judgment to file a complaint in the Maryland district court on the basis of the Virginia judgment, thereby engaging the federal process to obtain a new judgment enforceable in the District of Maryland, § 1963 allows the judgment holder simply to register the Virginia judgment in Maryland but to retain the benefits of obtaining a judgment under the former practice of suing on a judgment to obtain a new judgment.

Id. The Fourth Circuit found support for this reasoning in the statutory language itself: "[i]ndeed, § 1963 explicitly so provides, stating that a district court judgment registered in another district court 'shall have *the same effect as a judgment* of the district court . . . and *may be enforced in like manne*r.' " *Id.* (second alteration in original) (quoting 28 U.S.C. § 1963). The Court in *Asterbadi* "thus construe[d] § 1963 to provide for a *new* judgment in the district court where the judgment is registered, as if the new judgment had been *entered* in the district" and "[a]ccordingly, just as a new judgment obtained in an action on a previous judgment from another district would be enforceable as any judgment entered in the district court, so too is a registered judgment." *Id.*

¶ 19 The Fourth Circuit further noted:

> [i]f registration were merely a ministerial act to enforce the Virginia judgment in Maryland, there would be no need for the statute to have added the language that the registered judgment functions the same as a judgment entered in the registration court. With that language, § 1963 elevates the registered Virginia judgment to the status of a new Maryland judgment, and it is accordingly enforced as a new judgment entered in the first instance in Maryland.

Id. at 245.

¶ 20 "With this understanding of § 1963," the Fourth Circuit "appl[ied] the principles applicable to any money judgment entered in a district court." *Id.* "Under [Fed. R. Civ. P.] 69(a), the judgment [wa]s enforceable in accordance with state law, and in this case Maryland law provide[d]

that 'a money judgment expires 12 years from the date of entry or most recent renewal.' " *Id.* "Accordingly, the registered judgment in this case would have expired 12 years from August 27, 2003, or on August 27, 2015. And because Wells Fargo renewed the judgment for another 12 years on August 26, 2015, the registered judgment remain[ed] enforceable in Maryland to August 26, 2027." *Id.*

¶ 21 Similar to 28 U.S.C. § 1963, the UEFJA governs the filing and enforcement of foreign judgments in North Carolina. *See* N.C. Gen. Stat. §§ 1C-1701 to -1708 (2019). "The UEFJA enacted in North Carolina sets out the procedure for filing a foreign judgment." *DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 378, 758 S.E.2d 390, 395 (2014) (citations omitted). Similar to 28 U.S.C. § 1963, the UEFJA also serves the purpose of providing a more streamlined option for registering a foreign judgment, rather than requiring a judgment creditor to have to bring a suit on the foreign judgment in North Carolina. Indeed, as our Supreme Court noted in DOCRX, the Prefatory Note to the 1964 Revised Uniform Enforcement of Foreign Judgments Act, states the revised UEFJA:

> adopts the practice which, in substance, is used in Federal courts. It provides the enacting state with a speedy and economical method of doing that which it is required to do by the Constitution of the United States. It also relieves creditors and debtors of the additional cost and harassment of further litigation which would otherwise be incident to the enforcement of the foreign judgment.

Id. at 380, 758 S.E.2d at 396 (quoting Rev. Unif. Enforcement of Foreign Judgments Act prefatory note (1964), 13 U.L.A. 156-57 (2002)); *see also* N.C. Gen. Stat. § 1C-1707 (2019) ("This Article may not be construed to impair a judgment creditor's right to bring a civil action in this State to enforce such creditor's judgment."). Moreover, like 28 U.S.C. § 1963, N.C. Gen. Stat. § 1C-1703 expressly provides a judgment filed in accordance with the UEFJA "has the same effect . . . as a judgment of this State and shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(a).

¶ 22 Given the similarities between 28 U.S.C. § 1963 and North Carolina's UEFJA, the analysis employed by the Fourth Circuit in *Asterbadi* is highly persuasive and equally employable to this case. *Asterbadi*'s persuasiveness here is further underscored by decisions of other state courts interpreting their own foreign judgment registration statutes. *See, e.g., Stevenson v. Edgefield Holdings, LLC*, 244 Md. App. 604, 225 A.3d 85,

99 (2020) ("Ultimately, we determine that *Asterbadi* should guide our interpretation of the effective date of foreign judgments. In other words, registration of a judgment within a jurisdiction gives rise to enforcement within that jurisdiction."); *Singh v. Sidana*, 387 N.J. Super. 380, 385, 904 A.2d 721, 724 (App. Div. 2006) ("The focus of this provision is manifestly on the commencement of the action to enforce the foreign judgment, not on the foreign judgment's continuing validity whenever such questions as may be raised are addressed. As long as a judgment is viable and enforceable in the rendering state when domestication proceedings are commenced, that judgment becomes enforceable, by the terms of New Jersey law, at that moment."); *Canizaro Trigiani Architects v. Crowe*, 815 So.2d 386, 392 (La. App. 2 Cir. 2002) ("Therefore, the procedure for enforcement of a foreign judgment under the EFJA results in a new Louisiana judgment just as it would if the procedure under La. C.C.P. art. 2541 were followed."); *Pan Energy v. Martin*, 813 P.2d 1142, 1144 (Utah 1991) ("[A]t least for purposes of enforcement, the filing of a foreign judgment . . . creates a new Utah judgment which is governed by the Utah statute of limitations . . . . [F]oreign judgments filed in Utah must also be governed by the eight-year statute of limitations, which runs from the date of filing."); *see also Home Port Rentals, Inc. v. Int'l Yachting Grp., Inc.*, 252 F.3d 399, 407 (5th Cir. 2001) (under 28 U.S.C. § 1963 "when a money judgment (1) is rendered in a federal district court located in one state, and (2) is duly registered in a district court located in another state, (3) at a time when enforcement of that judgment is not time-barred in either state, the applicable limitation law for purposes of enforcement of the registered judgment in the registration district is that of the registration state—here, Louisiana's 10-year liberative prescription—and it starts to run on the date of registration." (emphasis omitted)); *Stanford v. Utley*, 341 F.2d 265, 268 (8th Cir. 1965) ("[Section] 1963 is more than 'ministerial' and is more than a mere procedural device for the collection of the foreign judgment. We feel that registration provides, so far as enforcement is concerned, the equivalent of a new judgment of the registration court.").

¶ 23 For his part, Defendant contends we need not look to other jurisdictions for guidance and, instead, points to North Carolina authorities which stand for the proposition that in order for a foreign judgment to be enforceable in North Carolina, it must be filed under the UEFJA or a separate civil action filed to enforce it within 10 years from its entry in the foreign jurisdiction under the statute of limitations found in N.C. Gen. Stat. § 1-47. *See, e.g.*, *Arrington v. Arrington*, 127 N.C. 190, 37 S.E.2d 212 (1900); *Palm Coast Recovery Corp. v. Moore*, 184 N.C. App. 550, 646 S.E.2d 438 (2007); *Elliot v. Estate of Elliot*, 163 N.C. App. 577,

596 S.E.2d 819 (2004); *Wener v. Perrone & Cramer Realty, Inc.*, 137 N.C. App. 362, 528 S.E.2d 65 (2000). However, our decision here is unrelated to efforts to register foreign judgments in North Carolina more than 10 years after their entry and has no bearing on the impact of the general rule applied in those cases. This is because, here, the initial Michigan Divorce Judgment was entered on 29 December 2003 and the Foreign Judgments were filed on 28 June 2013, and were, thus, filed within the 10-year Statute of Limitations mandated by N.C. Gen. Stat. § 1-47. As such, these cases are inapplicable to the particular issue at bar.

¶ 24 Applying the reasoning of *Asterbadi*—and the related cases—to North Carolina's UEFJA, when a foreign money judgment is filed in North Carolina in compliance with N.C. Gen. Stat. §§ 1C-1703 and 1C-1704, such filing has the effect of creating a new North Carolina judgment, which "shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(c) (2019). This includes the 10-year enforcement period contemplated in N.C. Gen. Stat. §§ 1-234 and 1-306, as well as the running of any statute of limitations to enforce the "new" North Carolina judgment under N.C. Gen. Stat. § 1-47, which each begin to run upon the filing of the foreign judgment in North Carolina.

¶ 25 Thus, here, the trial court properly concluded the enforcement period in North Carolina began to run on 28 June 2013, the day the Foreign Judgments were properly filed in North Carolina. As the Foreign Judgments remained enforceable in North Carolina, the trial court also did not err by requiring Defendant and his current spouse to respond to the discovery requests in supplemental proceedings under N.C. Gen. Stat. § 1-352 *et seq.* Consequently, the trial court correctly denied Defendant's Motion to Abate Post-Judgment Proceedings and did not err in ordering Defendant and his current spouse to "provide to counsel for the Plaintiff the documents and information set forth" in the Discovery Orders entered by the Clerk of Court.

Conclusion

¶ 26 Accordingly for the foregoing reasons, the trial court's 18 March 2020 Order is affirmed.

AFFIRMED.

Judges TYSON and WOOD concur.

PUTNAM v. PUTNAM

[278 N.C. App. 667, 2021-NCCOA-401]

MICHAEL PUTNAM, PLAINTIFF
v.
REBECCA PUTNAM, DEFENDANT

No. COA20-594

Filed 3 August 2021

1. Divorce—alimony—reasonable monthly expenses—consideration of relevant factors

The trial court properly considered the parties' standard of living during their marriage when it calculated the wife's reasonable monthly expenses in its order awarding her alimony (reducing the monthly expenses from the $18,275 estimated in the wife's financial affidavit down to $13,677), as shown by the trial court's detailed findings of facts concerning all relevant factors.

2. Divorce—alimony—amount—statutory factors

The trial court did not abuse its discretion in awarding a wife the amount of $2,100 per month in alimony where the trial court considered all relevant and required statutory factors under N.C.G.S. § 50-16.3A(b), including marital misconduct, relative earnings and earning capacities, ages and conditions of the spouses, duration of the marriage, standard of living established during the marriage, relative education, relative assets and liabilities, contribution as homemaker, relative needs, and the equitable distribution of the property.

Appeal by Defendant from order entered 11 February 2020 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 25 May 2021.

Marshall & Taylor, PLLC, by Travis R. Taylor for plaintiff-appellee.

Gailor Hunt Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton and Carrie B. Tortora for defendant-appellant.

MURPHY, Judge.

¶ 1 Decisions regarding the determination and amount of alimony are left to the sound discretion of the trial court. A trial court does not abuse its discretion when it considers all relevant factors under N.C.G.S. § 50-16.3A(b) for which evidence is offered. Here, the Record reflects the trial court considered all relevant factors under N.C.G.S. § 50-16.3A(b),

including the parties' standard of living during the marriage, and did not abuse its discretion in determining the dependent spouse is entitled to $2,100.00 per month in alimony.

BACKGROUND

¶ 2 Plaintiff Michael Putnam ("Michael") and Defendant Rebecca Putnam ("Rebecca") were married on 16 June 2001. On 2 March 2017, Michael and Rebecca separated, and on 27 July 2018, they divorced. Michael and Rebecca are the parents of three minor children.

¶ 3 After the parties separated, they resolved equitable distribution by entering into a consent order, filed 21 May 2018, regarding the distribution of their property. As a result of the consent order, Michael was awarded Sequence, Inc. ("Sequence"), a validation specialist company Michael and Rebecca formed in 2002, in which Rebecca had been a 51% shareholder and Michael had been a 49% shareholder. According to the terms of the consent order, Michael became the 100% shareholder in Sequence. Rebecca received a distributive award of approximately $3,000,000.00 in exchange for Michael retaining Sequence, as well as a payout of $225,000.00 in exchange for Michael retaining the parties' beach house purchased during the marriage. The consent order did not resolve the issue of alimony.

¶ 4 On 11 February 2020, after an alimony trial, the trial court entered its *Order on Alimony, Temporary Child Support and Attorney's Fees* ("Alimony Order"). The Alimony Order designated Michael as the supporting spouse and Rebecca as the dependent spouse, and ordered Michael to pay Rebecca $2,100.00 per month in alimony, $1,900.00 per month in temporary child support, and $72,617.00 in support arrears at the rate of $1,500.00 per month. Rebecca timely appeals, arguing the trial court erred in its computation and award of alimony.[1]

ANALYSIS

¶ 5 Rebecca argues the Alimony Order should be vacated "as to the amount of [her] reasonable monthly needs and remand[ed] for entry of

1. In accordance with N.C.G.S. § 50-16.3A(a), "[t]he [trial] court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those" listed in N.C.G.S. § 50-16.3A(b). N.C.G.S. § 50-16.3A(a) (2019). Rebecca does not argue the trial court erred in finding Michael to be a supporting spouse and finding her to be a dependent spouse. Rather, Rebecca argues the trial court's procedure in computing her alimony award was error and challenges the amount of her alimony award.

a new order." Rebecca also argues "the trial court abused its discretion in the amount of alimony awarded to [her]."

¶ 6 "Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001). Our review of the trial court's findings of fact is limited to "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

A. Reasonable Monthly Expenses

¶ 7 **[1]** In her most updated amended financial affidavit, dated 10 June 2019, Rebecca listed her total monthly expenses, including the children's expenses, as $18,275.71. The trial court concluded that some of these expenses were unreasonable, and without making any further findings of fact, reduced this number by approximately $4,600.00, finding "[Rebecca's] reasonable monthly expenses, *given the standard of living during the marriage of the parties*, are $13,677.56. This includes the children's monthly expenses." (Emphasis added).

¶ 8 N.C.G.S. § 50-16.3A(b) permits the trial court to exercise its discretion in determining the amount of alimony and directs the trial court to "consider all relevant factors" when making the determination of alimony, including "[t]he standard of living of the spouses established during the marriage[.]" N.C.G.S. § 50-16.3A(b)(8) (2019). Our Supreme Court has defined the phrase "standard of living" as used in N.C.G.S. § 50-16.3A(b)(8) as follows:

> The . . . phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

¶ 9 Rebecca argues "the trial court failed to consider the parties' standard of living established during the marriage in determining [her]

reasonable monthly expenses" as required by N.C.G.S. § 50-16.3A(b)(8). Specifically, Rebecca challenges a portion of Finding of Fact 57 that states the trial court relied on "the standard of living during the marriage of the parties" in calculating her reasonable monthly expenses.

¶ 10 There are numerous findings of fact in the Record that show the trial court considered the parties' standard of living during their marriage, including the following:

> 17. *During the marriage of the parties*, [Rebecca] was the primary caretaker for the minor children. Except as a substitute teacher on occasion at her children's school, Envision Science Academy, [Rebecca] did not work outside the home after the birth of the first child.
>
> 18. After the parties' separation, in October 2017 [Rebecca] began working as a preschool teacher at Good Shephard Lutheran Church. [Rebecca] typically works Tuesday through Friday from 9:30 a.m. until 1:30 p.m. This allows her to be home with the children after school.
>
> 19. [Rebecca] is currently only working part-time. If [Rebecca] were to work a full-time job, she would require childcare assistance before and after school.
>
> . . . .
>
> 23. After the parties separated, they reached an agreement regarding the distribution of their property in May 2018. As a result of this Consent Order, [Michael] was awarded the Sequence business, and [Rebecca] received approximately $3,000,000[.00] which she was able to invest. She also received a payout of $225,000[.00] for the Beach House, which house was kept by [Michael].
>
> 24. The parties sold their marital residence and [Rebecca] received approximately $300,000[.00] from the proceeds.
>
> 25. [Rebecca] prepared and submitted a Financial Affidavit. The affidavit was completed in June 2019.
>
> . . . .

49. On her Financial Affidavit, [Rebecca] reported regular recurring monthly expenses of $16,164.09 at the time the parties separated. She reported current (as of June 2019) regular recurring monthly expenses of $10,036.66 but [Rebecca] testified that her current expenses are $10,222.73 as of the date of this hearing.

50. [Rebecca] also listed on her Financial Affidavit additional individual monthly expenses of $10,005.38 at the date of separation. She listed her current (as of June 2019) individual expenses as $9,198.31. [Rebecca] testified at this hearing that her individual monthly expenses had been reduced to $8,052.98.

. . . .

52. In July 2018, [Rebecca] bought a 2[,]500 square foot townhome on Fawn Lake Drive. She used $395,000[.00] to purchase this townhome and did so without a mortgage. This home was in the same district as her children's schools.

53. Just prior to this trial, in July 2019, [Rebecca] bought a new 4[,]200 square foot home for approximately $720,000[.00]. This home is in a gated community near the former marital residence and is in the same school district as the parties' minor children's schools. [Rebecca] put no money down and secured an equity line to finance the home, using her investment account as collateral. Her monthly payment is $3,131[.00] per month. This mortgage payment amount does not include monthly homeowner's association dues ($83.00), utilities, yard maintenance ($225[.00]) property taxes ($524.66), and insurance costs ($243.00) associated with the property.

. . . .

55. [Rebecca] purchased a 2019 GMC Yukon in October 2018 and [Rebecca's] automobile loan payment is $1,184[.00] per month. [Rebecca] listed $376[.00] per month for auto repairs and maintenance relating to her new vehicle.

. . . .

58. [Rebecca] will have an average monthly shortfall of $2,930.00 per month without any consideration for taxes. This is based on income in the amount of $10,746.58 per month and expenses of $13,677.56 per month.

. . . .

62. *During their marriage*, the parties owned a business, Sequence, [] a validation specialist company which assists pharmaceutical companies in testing equipment. [Michael] began the company in 2002. [Rebecca] was a 51% owner of the company. She assisted with bookkeeping and performed other tasks for the business until 2016.

63. *During their marriage*, the parties used income from Sequence[] to pay personal expenses, such as automobile loan payments and insurance. *The parties were able to live an extravagant lifestyle during their marriage*. They vacationed frequently and owned a nice home.

. . . .

66. Some of [Michael's] personal expenses, such as his Ford Expedition, his car insurance and his cell phone are paid by Sequence[].

. . . .

71. After the parties' separation, [Michael] lived briefly with his sister, and then rented an apartment. In April 2018, [Michael] purchased a home on Rosalee [sic] Street in Raleigh, North Carolina where he currently resides.

72. [Michael] completed and served a Financial Affidavit in June 2019 and said Affidavit was admitted at trial.

73. Sequence[] currently pays for [Michael's] health and dental insurance. [Michael] pays for the children's medical, dental, and vision insurance at a cost of $398[.00] per month.

74. On his Financial Affidavit, [Michael] listed regular recurring monthly expenses as of the date of

> separation in the amount of $16,353[.00]. In addition to his loan repayment and his court-ordered support payment, he listed his current (as of June 2019) regular monthly expenses in the amount of $13,219[.00].
>
> 75. [Michael] reported $12,842[.00] per month in individual monthly expenses at the time of separation and [Michael] reported current (as of June 2019) individual expenses in the amount of $14,197[.00] per month (note: the totals were lower on [Michael's] Financial Affidavit, but these are accurate calculations).

(Emphases added).

¶ 11 Finding of Fact 63 states "[t]he parties were able to live an extravagant lifestyle during their marriage." This finding of fact is unchallenged by Rebecca.[2] The remainder of the findings of fact listed above discuss how Rebecca was able to stay home with the children during the marriage, the types of cars the parties purchased during the marriage, and the size of the houses the parties lived in during the marriage. The trial court also made findings of fact about how Rebecca will continue to stay at home with the children, maintain the same kinds of cars, and live in houses of a similar size, as during the marriage. The trial court properly considered the parties' standard of living during their marriage when it calculated Rebecca's reasonable monthly expenses. *See Barrett v. Barrett*, 140 N.C. App. 369, 372, 536 S.E.2d 642, 645 (2000) (holding the trial court considered the parties' marital standard of living when it "made explicit findings as to the parties' respective incomes during the marriage, the type of home in which they lived, and the types of family vacations they enjoyed"); *see also Adams v. Adams*, 92 N.C. App. 274, 279-80, 374 S.E.2d 450, 453 (1988) ("The [trial] judge's findings as to [the defendant's] monthly gross income and his reasonable living expenses, coupled with the findings as to [the plaintiff's] monthly income and her expenses during the last year of the marriage, satisfied the requirement . . . for findings regarding the [parties'] accustomed standard of living [during the marriage]."), *superseded on other grounds by statute as stated in Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

¶ 12 Rebecca also notes that Michael was continuing to save and invest for retirement and contends the parties had a pattern of saving during the

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2. As Rebecca does not challenge this finding of fact, it is binding on appeal. *See Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 313 (2015) ("[W]here a 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.").

marriage. Michael's financial affidavit shows he was investing $1,590.00 per month during the marriage and he was investing $1,661.00 per month at the time of trial. Rebecca was unemployed after the children were born, so her accumulation of retirement assets during the marriage was based solely on Michael's contributions. Rebecca argues "although the trial court made an evidentiary finding regarding [Michael's] saving for retirement, the [trial] court made no ultimate finding regarding [a] pattern of savings as part of the accustomed standard of living for purposes of alimony." We disagree.

¶ 13 "Where the parties have established a pattern of saving for retirement as part of their accustomed standard of living during the marriage, this expense can be part of the standard of living and should be considered for purposes of alimony." *Myers v. Myers*, 269 N.C. App. 237, 262, 837 S.E.2d 443, 460 (2020). "[A]lthough the parties' pattern of savings may not be determinative of a claim for alimony, the trial court must at least consider this pattern in determining the parties' accustomed standard of living." *Vadala v. Vadala*, 145 N.C. App. 478, 481, 550 S.E.2d 536, 539 (2001).

¶ 14 The trial court properly considered the parties' pattern of saving as part of their accustomed standard of living during the marriage, as illustrated in unchallenged Findings of Fact 23, 28, 29, 30, and 42. Those findings of fact state:

> 23. After the parties separated, they reached an agreement regarding the distribution of their property in May 2018. As a result of this Consent Order, [Michael] was awarded the Sequence business, and [Rebecca] received approximately $3,000,000[.00] which she was able to invest. She also received a payout of $225,000[.00] for the Beach House, which house was kept by [Michael].
>
> . . . .
>
> 28. Johnathan Henry is a wealth advisor with the Trust Company of the South. He has been assisting [Rebecca] with her investments since June 2018 when she initially deposited the funds from her distributive award.
>
> 29. Mr. Henry helped [Rebecca] invest her portfolio with a "balanced growth" approach. [Rebecca] currently has an investment portfolio consisting of

> approximately seventy percent (70%) stocks and thirty percent (30%) bonds. . . .
>
> 30. In June 2019, [Rebecca's] investment account held $2,506,847.63. [Rebecca] earned $26,914.81 in dividends and interest between January and June 2019. Her capital appreciation was $175,595.20. [Rebecca] paid $9,772.32 in fees and took $188,420[.00] in distributions. She also deposited $202,532.60 during the same period.
>
> . . . .
>
> 42. The [trial] [c]ourt finds that [Rebecca] can safely withdraw $10,000[.00] per month from the proceeds of her investment account without depleting her estate.

The trial court determined Rebecca has the ability to save for retirement to the same standard that the parties planned for during the marriage by using her investment account. Rebecca does not contest these findings of fact. The trial court properly considered the parties' pattern of savings and retirement contributions as it pertains to the parties' accustomed standard of living.

¶ 15 In further arguing the trial court did not properly consider her reasonable monthly expenses, Rebecca challenges Finding of Fact 56, arguing it is insufficient because it is "vague and does not enable this Court to determine which expenses the trial court reduced."

¶ 16 Finding of Fact 56 states:

> 56. [Rebecca] included some expenses on her affidavit which she testified she is no longer paying, such as storage unit fees, social memberships, and a life coach. She also listed expenses that she did not include in her total such as charitable giving. [Rebecca] listed other expenses that were not reasonable given the standard of living during the marriage, such as the eating out expenses which increased after separation, or were non-recurring.

¶ 17 The amount the trial court found as Rebecca's reasonable monthly expenses, $13,677.56, differed from the amount Rebecca listed as current monthly expenses as of the date of trial in her amended financial affidavit, $18,275.71. However, "[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is

within the discretion of the trial [court], and [it] is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Bookholt*, 136 N.C. App. at 250, 523 S.E.2d at 731. "Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Cunningham v. Cunningham*, 171 N.C. App. 550, 564, 615 S.E.2d 675, 685 (2005). "The [trial] court is not required to make findings about the weight and credibility which it gives to the evidence before it." *Robinson v. Robinson*, 210 N.C. App. 319, 327, 707 S.E.2d 785, 791 (2011).

¶ 18 Rebecca suggests the trial court must produce a redline itemization for all reasonable or unreasonable expenses listed on a financial affidavit. This is not what is required of the trial court. In *Bookholt*, we reviewed a defendant's claim that the trial court erred in calculating the monthly needs and expenses of each party:

> In his financial affidavit submitted to the trial court, [the] defendant listed $2[,]100[.00] in projected monthly housing costs to enable him to attain better housing. The trial court, however, considered these projections speculative and reduced this figure to $960.50 in finding [the] defendant's total monthly needs and expenses to be $2[,]823.35. [The] [d]efendant maintains that this amounted to an abuse of the trial judge's discretion. We disagree. . . . Here, the trial court apparently felt the $2[,]100[.00] in projected housing costs was unreasonable and then reduced that figure to an amount it felt was more reasonable. By doing so, we find no abuse in the exercise of its discretion.
>
> [The] [d]efendant also claims error in the trial court's calculations as to [the] plaintiff's needs and expenses. In her financial affidavit, [the] plaintiff listed her expenses as $1[,]941.71 per month. The trial judge concluded that five of these expenses were unreasonable and, *without making any further findings*, reduced [the] plaintiff's figure by $625.49. [The] [d]efendant argues that, even though the trial court's reduction ultimately benefitted him, the trial court's calculations are "patently defective" absent appropriate findings to explain them. Again we disagree. As previously stated, the trial judge is

> not bound by the financial assertions of the parties and may resort to common sense and every-day experiences. By reducing some of [the] plaintiff's expenses here, the trial court did not abuse its discretion.

Bookholt, 136 N.C. App. at 250-51, 523 S.E.2d at 731-32 (emphasis added).

¶ 19 Here, as in *Bookholt*, the trial court provided sufficient detail for us to determine it had considered all relevant factors when calculating Rebecca's reasonable monthly needs and expenses. The trial court did not abuse its discretion in reducing Rebecca's monthly expenses and provided sufficient findings of fact for us to review on appeal.

B. Amount of Alimony Award

¶ 20 **[2]** Rebecca's second argument pertains to the amount of alimony she was awarded. Rebecca does not take issue with the trial court's finding she is entitled to alimony, but rather takes issue with the *amount* the trial court awarded her in alimony, arguing "the trial court abused its discretion in the amount of alimony awarded to [her]."

¶ 21 "Decisions concerning the amount . . . of alimony are entrusted to the trial court's discretion and will not be disturbed absent a showing that the trial court has abused such discretion." *Robinson*, 210 N.C. App. at 326, 707 S.E.2d at 791; *see also Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008); *Walker v. Walker*, 143 N.C. App. 414, 422, 546 S.E.2d 625, 630 (2001). "The [trial] court is not required to make findings about the weight and credibility which it gives to the evidence before it." *Robinson*, 210 N.C. App. at 327, 707 S.E.2d at 791.

¶ 22 The trial court concluded "[Michael] is a supporting spouse and [Rebecca] is a dependent spouse within the meaning of [N.C.G.S.] § 50-16A." After making that determination, the trial court was required to "consider all relevant factors" in determining the amount and duration of alimony. N.C.G.S. § 50-16.3A(b) (2019). N.C.G.S. § 50-16.3A(b) enumerates sixteen relevant, but non-exclusive factors, including:

> (1) The marital misconduct of either of the spouses. . . .;
>
> (2) The relative earnings and earning capacities of the spouses;
>
> (3) The ages and the physical, mental, and emotional conditions of the spouses;
>
> (4) The amount and sources of earned and unearned income of both spouses, including, but not limited

> to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> (5) The duration of the marriage;
>
> (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
>
> (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C.G.S. § 50-16.3A(b) (2019). "[T]he [trial] court shall make a specific finding of fact on each of the factors [listed above] if evidence is offered on that factor." N.C.G.S. § 50-16.3A(c) (2019).

¶ 23 Here, the trial court made findings of fact reflecting that when the trial court determined the amount of alimony awarded to Rebecca, it considered all the factors for which evidence was offered.

¶ 24 Pursuant to N.C.G.S. § 50-16.3A(b)(1), the trial court considered "marital misconduct of either of the spouses," as illustrated in Findings of Fact 89, 90, 91, 92, and 93:

> 89. The parties had difficulties during their marriage. [Michael] confessed to watching too much pornography. In 2015, [Michael] attended a conference in Minnesota to treat his addiction. He also joined a support group.
>
> 90. Approximately eight months before separation, [Rebecca] moved into the basement and began asking [Michael] to leave the home.
>
> 91. [Michael] then began restricting [Rebecca's] access to company data and he withheld funds from [Rebecca].
>
> 92. [Rebecca] set up a video camera in the home without [Michael's] knowledge and changed the lock on the safety deposit box.
>
> 93. The [trial] [c]ourt does not find that these things rise to the level of marital fault. There was no credible evidence of illicit sexual conduct during the marriage.

See N.C.G.S. § 50-16.3A(b)(1) (2019).

¶ 25 Pursuant to N.C.G.S. § 50-16.3A(b)(2), the trial court considered "[t]he relative earnings and earning capacities of the spouses," as illustrated in Findings of Fact 18, 19, 20, 43, and 44:

> 18. After the parties' separation, in October 2017 [] [Rebecca] began working as a preschool teacher at Good Shephard Lutheran Church. [Rebecca] typically works Tuesday through Friday from 9:30 a.m. until 1:30 p.m. This allows her to be home with the children after school.
>
> 19. [Rebecca] is currently only working part-time. If [Rebecca] were to work a full-time job, she would require childcare assistance before and after school.

> 20. In 2018 [Rebecca] earned $8,959.39. She is currently working part-time as a preschool teacher.
>
> . . . .
>
> 43. [Rebecca] is currently earning $8,959[.00] per year from her employment. The [trial] [c]ourt cannot find that [Rebecca] is acting in bad faith and will not impute income.
>
> 44. [Rebecca's] monthly income, for purposes of calculating child support and alimony, is $128,959[.00] annually (or $10,748.58 per month).

See N.C.G.S. § 50-16.3A(b)(2) (2019).

¶ 26 Pursuant to N.C.G.S. § 50-16.3A(b)(3), the trial court considered "[t]he ages and the physical, mental, and emotional conditions of the spouses," as illustrated in Findings of Fact 84, 95, and 96:

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties[']marriage, the relative ages and health of the parties, [Rebecca's] role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.
>
> . . . .
>
> 95. During the marriage, [Rebecca] had several health conditions, including ADHD, hearing loss, and "XLH." She regularly took medications.
>
> 96. The parties are close in age. [Rebecca] is 45 years old and [Michael] is 43.

See N.C.G.S. § 50-16.3A(b)(3) (2019).

¶ 27 Pursuant to N.C.G.S. § 50-16.3A(b)(5), the trial court considered "[t]he duration of the marriage," as illustrated in Findings of Fact 84 and 97:

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties[']marriage, the relative ages and health of the parties, [Rebecca's]

> role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.
>
> . . . .
>
> 97. Based on the length of the marriage, the relative age and health of the parties, the age of the children (16, 15, and 12), and the time [Rebecca] needs to re-enter the work force, the [trial] [c]ourt finds that an alimony payment should be made for a period of 6 years.

See N.C.G.S. § 50-16.3A(b)(5) (2019).

¶ 28 Pursuant to N.C.G.S. § 50-16.3A(b)(8), the trial court considered "[t]he standard of living of the spouses established during the marriage," as illustrated in Finding of Fact 63:

> 63. During their marriage, the parties used income from Sequence[] to pay personal expenses, such as automobile loan payments and insurance. The parties were able to live an extravagant lifestyle during their marriage. They vacationed frequently and owned a nice home.

See N.C.G.S. § 50-16.3A(b)(8) (2019).

¶ 29 Pursuant to N.C.G.S. § 50-16.3A(b)(9), the trial court considered "[t]he relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs," as illustrated in Finding of Fact 84:

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties['] marriage, the relative ages and health of the parties, [Rebecca's] role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.

See N.C.G.S. § 50-16.3A(b)(9) (2019).

¶ 30 Pursuant to N.C.G.S. § 50-16.3A(b)(10), the trial court considered "[t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses," as illustrated in Findings of Fact 65 and 74:

> 65. In order to buyout [Rebecca's] portion of the business, [Michael] borrowed three million dollars ($3,000,000[.00]) in funds from Sequence[]. Each month, [Michael] is receiving $80,000[.00] in distributions from the company. Of that amount, [Michael] uses $53,906[.00] per month to repay the loan to Sequence, [] leaving him with a net distribution of $26,094[.00] per month. The loan to Sequence will be paid off in June 2023.
>
> . . . .
>
> 74. On his Financial Affidavit, [Michael] listed regular recurring monthly expenses as of the date of separation in the amount of $16,353[.00]. In addition to his loan repayment and his court-ordered support payment, he listed his current (as of June 2019) regular monthly expenses in the amount of $13,219[.00].

See N.C.G.S. § 50-16.3A(b)(10) (2019).

¶ 31 Pursuant to N.C.G.S. § 50-16.3A(b)(12), the trial court considered "[t]he contribution of a spouse as homemaker," as illustrated in Finding of Fact 17:

> 17. During the marriage of the parties, [Rebecca] was the primary caretaker for the minor children. Except as a substitute teacher on occasion at her children's school, Envision Science Academy, [Rebecca] did not work outside the home after the birth of the first child.

See N.C.G.S. § 50-16.3A(b)(12) (2019).

¶ 32 Pursuant to N.C.G.S. § 50-16.3A(b)(13), the trial court considered "[t]he relative needs of the spouses," as illustrated in Findings of Fact 61 and 84:

> 61. The [trial] [c]ourt finds that [Rebecca's] total monthly need is $4,000[.00] per month.
>
> . . . .

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties[']' marriage, the relative ages and health of the parties, [Rebecca's] role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.

See N.C.G.S. § 50-16.3A(b)(13) (2019).

¶ 33 Finally, pursuant to N.C.G.S. § 50-16.3A(b)(16), the trial court considered "[t]he fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property," as illustrated in Findings of Fact 23 and 65:

> 23. After the parties separated, they reached an agreement regarding the distribution of their property in May 2018. As a result of this Consent Order, [Michael] was awarded the Sequence business, and [Rebecca] received approximately $3,000,000[.00] which she was able to invest. She also received a payout of $225,000[.00] for the Beach House, which house was kept by [Michael].
>
> . . . .
>
> 65. In order to buyout [Rebecca's] portion of the business, [Michael] borrowed three million dollars ($3,000,000[.00]) in funds from Sequence[]. Each month, [Michael] is receiving $80,000[.00] in distributions from the company. Of that amount, [Michael] uses $53,906[.00] per month to repay the loan to Sequence, [] leaving him with a net distribution of $26,094[.00] per month. The loan to Sequence will be paid off in June 2023.

See N.C.G.S. § 50-16.3A(b)(16) (2019).

¶ 34 The findings of fact listed above are unchallenged and binding on appeal. *Juhnn*, 242 N.C. App. at 63, 775 S.E.2d at 313. No evidence was offered for the remaining factors under N.C.G.S. § 50-16.3A(b)(4), (6), (7), (11), (14), and (15) and the trial court was not required to make findings as to these factors. N.C.G.S. § 50-16.3A(c) (2019). The trial court

considered all relevant and required statutory factors in determining the alimony payment to Rebecca and did not abuse its discretion in awarding alimony in the amount of $2,100.00 per month to Rebecca.

CONCLUSION

¶ 35 The trial court did not abuse its discretion in calculating Rebecca's reasonable monthly expenses. Additionally, the trial court did not abuse its discretion in ordering Michael to pay Rebecca $2,100.00 per month in alimony. The *Order on Alimony, Temporary Child Support and Attorney's Fees* is affirmed.

AFFIRMED.

Judges TYSON and JACKSON concur.

GERALD STEVEN SPRINKLE, JR., PLAINTIFF
v.
MATTHEW JOHNSON, DEFENDANT

No. COA20-32

Filed 3 August 2021

1. Appeal and Error—preservation of issues—lack of notice for trial—due process implications—Rule 2

The Court of Appeals invoked Appellate Rule 2 to review defendant's claim that he did not receive notice for trial (involving claims for alienation of affection and criminal conversation) where, even though defendant did not preserve any issues for appellate review because he was not present at trial and subsequently filed but withdrew his Civil Procedure Rule 59/60 motion before obtaining a ruling, the implication of important due process rights merited review of the issue.

2. Notice—lack of notice for trial—no evidence of receipt—due process violation

Defendant's due process rights were violated in a case involving claims of alienation of affection and criminal conversation where there was no evidence he received notice of trial and where, as a result, he did not appear in court and only learned of the nearly $2.3 million judgment against him some time later. Although the parties disputed which address was proper for defendant, there also

was no evidence that defendant had been served at any address with an order allowing his attorney to withdraw (prior to trial), a pre-trial order that was entered without a hearing, or calendar notice of the trial. Judgment was vacated and the matter remanded for a new trial.

Appeal by defendant from order and judgment entered 17 June 2019 and 1 July 2019 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 11 May 2021.

Lisa Costner for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

GORE, Judge.

¶ 1 Gerald Steven Sprinkle, Jr., ("plaintiff") filed suit against Dr. Matthew Johnson ("defendant") for alienation of affection and criminal conversation, alleging that defendant engaged in a romantic relationship and sexual acts with his wife Jana Sprinkle ("Mrs. Sprinkle"). Following a jury trial, at which defendant was neither present nor represented by counsel, judgment was entered awarding plaintiff a total of $2,294,000.00 in compensatory and punitive damages from defendant. Upon review, we conclude that defendant did not have notice of trial and vacate and remand the judgment against him.

I. Factual and Procedural Background

¶ 2 Mrs. Sprinkle worked at defendant's oral surgery practice in Mooresville, North Carolina, for seventeen years as a surgical assistant. Over a period of four years during her employment, defendant and Mrs. Sprinkle engaged in a romantic and sexual relationship.

¶ 3 In 2014, defendant initiated sexually explicit conversation with Mrs. Sprinkle and touched her bottom at work. As the affair progressed, defendant provided Mrs. Sprinkle with Adderall, a cell phone for communicating with him, and the two met at hotel rooms and his house on Lake Norman to have sexual intercourse. The affair came to a halt when another employee discovered a photograph on defendant's phone of Mrs. Sprinkle participating in a sexual act with him. That photograph was eventually seen by Mrs. Sprinkle's cousin. Mrs. Sprinkle then told her husband, plaintiff, about the affair. While plaintiff and Mrs. Sprinkle decided to reconcile, the affair resulted in Mrs. Sprinkle's loss of employment, and plaintiff sought mental health treatment and incurred related expenses.

¶ 4 On 23 March 2018, plaintiff filed suit against defendant for alienation of affection and criminal conversation. Plaintiff properly served defendant with the complaint at his business address on Medical Park Road in Mooresville. Plaintiff alleged that defendant and Mrs. Sprinkle engaged in sexual intercourse on multiple occasions in North Carolina during the marriage, and defendant's actions interfered with a genuine love and affection that existed in the marital relationship between them.

¶ 5 Upon receiving service of the complaint on 3 May 2018, defendant hired an attorney and was granted a thirty-day extension to file an answer. Defendant filed an answer on 5 July 2018 and also filed motions to dismiss and bifurcate. Those filings were later amended and refiled on 24 July 2018.

¶ 6 The parties and their respective counsel participated in court-ordered mediation on 11 January 2019. The filed Report of Mediator in Superior Court Civil Action represented that the parties settled the dispute and arrived to an "agreement on all issues." The report stipulated that plaintiff's attorney would file a notice of dismissal no later than 30 June 2019. The mediator notified the trial court that the matter had been settled in mediation, but it could not be dismissed before the end of June as to allow defendant requisite time to pay the agreed upon amount. The mediator's report did not specify the agreement's substantive terms. The only indication of the agreement reached in mediation is evidenced in a nearly illegible handwritten note authored by plaintiff's attorney. The note's only decipherable writing is its apparent title of "Agreement 1/11/19." There is no further indication as to what the parties agreed to, nor the extent to which those terms were mutually abided by.

¶ 7 Defendant's counsel moved to withdraw from representation in the matter on 22 March 2019, citing defendant's lack of communication, contempt towards his legal advice, and failure to procure payment for legal fees. The motion to withdraw as counsel was granted by a court order on 15 April 2019. In a certificate of service attached to that motion, counsel certified that he had served defendant with both the motion and the notice of hearing regarding the same by mail sent to an address on Beaten Path Road in Mooresville. Defendant's attorney believed this to be the correct mailing address.

¶ 8 On 17 June 2019, the trial court entered a Pre-Trial Order without holding a pre-trial conference. The Pre-Trial Order contained stipulations and agreements but was not signed by defendant or an attorney representing him. The Order was signed by only plaintiff's attorney and the trial court. The Order states that plaintiff's attorney, after due diligence, was unable to arrange a time with defendant for a pre-trial conference.

¶ 9 The trial was conducted from 24 June to 25 June 2019 before a jury in Rowan County Superior Court. Defendant was neither present at trial nor represented by counsel. On 25 June 2019, the jury rendered a verdict for plaintiff in the amount of $794,000.00 in compensatory damages and $1,500,000.00 in punitive damages, for a total award of $2,294,000.00. The trial court entered judgment reflecting the jury verdict on 1 July 2019.

¶ 10 Later, defendant was contacted by a reporter who inquired about the verdict against him. Defendant claims that, until that moment, he was unaware the trial had been held or that a judgment had been entered. He then hired new counsel who obtained the court file, where he first learned that his previous attorney had withdrawn. Defendant claims he also learned of the Pre-Trial Order, the trial date, and the $2,294,000.00 judgment from the court file.

¶ 11 On 11 July 2019, Defendant's attorney filed a motion pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure (hereinafter, "Rule 59/60 motion"), requesting a new trial. In the alternative, Defendant requested relief from the Pre-Trial Order, the judgment entered, or a new pre-trial conference. Plaintiff filed a response to that motion, and a motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

¶ 12 In an affidavit, defendant stated that although he formerly resided at the Beaten Path Road address, he moved from that property around or before November 2018. He further stated that in December 2018 and January 2019, he informed his attorney that he had moved and was living in temporary housing. Additionally, he claims he never received mail at the Beaten Path Road address, but instead has used his Medical Park Road business address for receiving mail, and the property tax card for the Beaten Path Road address lists his business address as the appropriate mailing address. Defendant also stated that his former attorney always communicated with him by phone or text message, and he never received notice of his counsel's motion to withdraw, the Pre-Trial Order, or notice of trial by those means. Additionally, defendant's ex-wife, Ms. Regina Johnson, corroborated by affidavit defendant's timeline regarding his place of residence.

¶ 13 On 31 July 2019, Defendant withdrew his Rule 59/60 motion. In response, plaintiff dismissed his Rule 11 motion, which indicated mail service on defendant at three addresses: (1) Beaten Path Road; (2) Fern Hill Road; and (3) the Medical Park Road business address. On the same day, defendant's counsel filed a Motion to Withdraw, which was granted. Defendant filed a *pro se* Notice of Appeal and listed his address as the Medical Park Road business address.

II. Discussion

¶ 14 On appeal, defendant argues that the trial court abused its discretion in entering a Pre-Trial Order without holding a pre-trial conference. Specifically, he contends that the trial court exceeded its authority by entering stipulations and agreements of the parties when both parties did not actually stipulate or agree, and that Order effectively dispensed with our Rules of Evidence. Additionally, he argues that he was deprived his right to due process when he was not provided with notice of the date, time, or place of the trial.

¶ 15 **[1]** As a preliminary matter, defendant failed to preserve his issues on appeal, and any issue presented regarding lack of notice for trial, or the Pre-Trial Order, are not properly before this Court. Rule 10 of the North Carolina Rules of Appellate Procedure provides in pertinent part:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). "[I]t is well-established that the North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." *Stann v. Levine*, 180 N.C. App. 1, 3, 636 S.E.2d 214, 215 (2006) (*purgandum*). Given that defendant was absent from trial and not represented by counsel, he did not have an opportunity to present a timely request or objection in open court. Furthermore, defendant voluntarily withdrew his Rule 59/60 motion and supporting affidavits, without a hearing on the merits, before the trial court could render a decision upon his motion. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (quotation marks and citation omitted).

¶ 16 However, notice is a fundamental requirement of due process. In accordance with Rule 2 of the Appellate Rules of Procedure, this Court may "suspend or vary the requirements or provisions of any of these rules[,]" *sua sponte* or upon the motion of a party, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest" except where the rules otherwise expressly prohibit. N.C. R. App. P. 2. "[T]his

residual power . . . may be drawn upon where the justice of doing so or the injustice of failing to do so appears manifest to the Court." *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986) (citation omitted). "Rule 2 must be applied cautiously, and it may only be invoked in exceptional circumstances. A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *Bursell*, 372 N.C. at 200, 827 S.E.2d at 305-06 (quotation marks and citations omitted).

¶ 17 "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160-61 (2005) (quotation marks and citation omitted). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950).

> It is a principle, never to be lost sight of, that no person should be deprived of his property or rights, without notice and an opportunity of defending them. This right is guaranteed by the constitution. Hence it is, that no Court will give judgment against any person, unless such person have an opportunity of sh[o]wing cause against it. A judgment entered up otherwise would be a mere nullity.

Den ex dem. Hamilton v. Adams, 6 N.C. 161, 162 (1812). Considering the circumstances of this case, and the manifest necessity of due process, this Court invokes Rule 2 as to permit appellate review. "Whether a party has adequate notice is a question of law, which we review *de novo*." *Id.* at 805, 622 S.E.2d at 160 (citation omitted).

¶ 18 **[2]** In *Laroque v. Laroqu*e, this Court examined notice requirements as governed by Rules of Civil Procedure and the General Rules of Practice. 46 N.C. App. 578, 580, 265 S.E.2d 444, 445 (1980). This Court held that the defendant did not receive the requisite notice of trial when nothing on the record indicated that a trial calendar request or certificate of readiness was mailed to him. *Id.* at 581-82, 265 S.E.2d at 446-47. In reaching its decision, this Court reasoned that:

> Rule 2 of the Rules of Practice, by requiring notice of the calendaring of a case, secures to a party the opportunity to prepare his case for trial and to be present for trial or to seek a continuance. Although the rule specifies that the calendar be sent to each attorney of record and that the copy of the certificate or readiness be sent to opposing counsel, it is implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. We note that it has long been the practice in this State that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk.

Id. at 581, 265 S.E.2d at 446 (1980) (citation omitted). "[R]ule [2] contemplates that systematic notice of the calendaring of a case be given to a party at each stage of the calendaring process." *Id.* at 580, 265 S.E.2d at 446.

¶ 19 In *Brown v. Ellis*, this Court also addressed notice requirements in an action involving alienation of affection and criminal conversation claims. 206 N.C. App. 93, 94, 696 S.E.2d 813, 816 (2010). In *Brown*, the "defendant's attorney's motion to withdraw, the order allowing the motion to withdraw, the order setting the trial date, and the trial calendar mailed from the trial court were all mailed to the incorrect address." *Id.* at 102-03, 696 S.E.2d at 820. Further, the record was silent as to whether "defendant received any notices or documents regarding the case after the trial court denied his motion to dismiss[.]" *Id.* at 103, 696 S.E.2d at 820. The defendant neither appeared at trial, nor was he represented at trial, and judgment was entered against him in the amount of $600,000.00. *Id.* at 94, 696 S.E.2d at 815.

¶ 20 This Court held that the defendant was entitled to a new trial because lack of adequate notice did not comport with the requirements of due process. *Id.* at 109, 696 S.E.2d at 824. This Court contrasted its decision in *Laroque* with that in *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 606 S.E.2d 164 (2004), where the defendant received notice that his case was calendared for trial but failed to appear because he was "neglectful and inattentive to his case." 167 N.C. App. 412, 418, 606 S.E.2d 164, 168 (2004). In *Brown*, this Court concluded that:

> neither the scheduling order nor the court calendar was mailed to the service address, through no fault of

> defendant. Defendant had no way of knowing and no reason to know that both his original counsel and the trial court were sending documents to him at an incorrect address until after he was notified of the trial three days before it was to begin and he was able to contact an attorney in North Carolina.

Brown, 206 N.C. App. at 108, 696 S.E.2d at 823.

¶ 21 In the case *sub judice*, counsel for defendant listed the address on Beaten Path Road in Mooresville as the address he served defendant with notice of the motion to withdraw and hearing on that motion. However, nothing in the record indicates that defendant received that notice. Plaintiff argues that it was reasonable to rely on the address listed on the pleadings filed by defendant's attorneys, and that defendant was under a continuing duty to keep opposing counsel informed of his correct address. However, assuming *arguendo*, that service at the Beaten Path Road address was proper, the record simply does not reflect that defendant was served with the order allowing defense counsel to withdraw, the Pre-Trial Order, calendar notice, or notice of trial at any address.

¶ 22 The facts before us do not indicate that defendant was negligent or inattentive to his case. This is a case where defendant never received proper notice of trial. This court concludes that a failure to provide proper notice violated defendant's due process rights and entitles him to a new trial. Accordingly, we need not address his remaining arguments.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

STATE v. ABBITT

[278 N.C. App. 692, 2021-NCCOA-403]

STATE OF NORTH CAROLINA
v.
SINDY LINA ABBITT

STATE OF NORTH CAROLINA
v.
DANIEL ALBARRAN

No. COA20-309

Filed 3 August 2021

1. Evidence—murder trial—potentially exculpatory evidence—other possible perpetrators—not inconsistent with defendant's guilt

In a joint murder trial, there was no prejudicial error in the trial court's decision to exclude defendants' proffered evidence—including a handgun and latex gloves that belonged to another person—that they contended showed two other people committed the crimes for which they were charged. The evidence was not inconsistent with direct and eyewitness evidence of either defendant's guilt and merely tended to suggest that another person may have been involved in the crimes.

2. Identification of Defendants—pretrial photographic lineup—constitutional challenge—in-court identification also made—plain error analysis

In a murder trial, there was no prejudice in the introduction of the results of a pretrial photographic lineup in which the victim's mother identified defendant as being involved in the events that led to her daughter's shooting, where the mother also made an independent in-court identification of defendant based on her personal experience from being present at the scene of the crime.

3. Criminal Law—prosecutor's closing argument—lack of evidence from defendant—objection overruled

In a murder trial, the trial court did not abuse its discretion by overruling defendant's objection to the prosecutor's statement during closing argument regarding defendant's failure to produce evidence of an alibi defense.

4. Criminal Law—defense counsel's closing argument—appearance of defendant at time of crime—presence of tattoos—no mention by eyewitness

In a trial for murder, the trial court properly sustained the prosecutor's objection to defense counsel's closing argument noting an eyewitness's failure to mention that defendant had tattoos, in comparison with defendant's in-court appearance. A reference to defendant's appearance from the crime two years prior had no bearing on the witness's identification of defendant where she testified that defendant was wearing long sleeves at the time, which would have covered up any tattoos he had on his arms, and where there were no tattoos visible in the pretrial photo lineup, from which the witness identified defendant.

5. Evidence—hearsay—out-of-court statements—by defendant to officer

In a joint murder trial, there was no error in the admission of one defendant's out-of-court statements, made to a law enforcement officer, in which she denied knowing her co-defendant and declared she had not seen the victim in years. The statements were admissible, relevant, and did not give rise to a reasonable possibility that, absent their admission, the jury would have reached a different verdict.

6. Indictment and Information—first-degree murder—short-form indictment

A short-form indictment was sufficient to charge defendant with first-degree murder and confer jurisdiction on the trial court.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendants from judgments entered 13 March 2019 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Anne Bleyman for defendant-appellant Sindy Lina Abbitt.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant Daniel Albarran.

TYSON, Judge.

¶ 1 Sindy Abbitt ("Abbitt") and Daniel Albarran ("Albarran") (together: "Defendants") were indicted for the murder of Lacynda Feimster and other crimes related thereto. The jury returned guilty verdicts against Abbitt for first-degree murder on the bases of malice, premeditation, deliberation, and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. Albarran was convicted by the jury of first-degree felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. We find no error.

I. Background

¶ 2 Mary Gregory ("Gregory") lived on Crown Point Drive in May 2016 with her daughter, Lacynda Feimster, ("Feimster") and Feimster's two children: three-year-old Meaco; and, nineteen-year-old NaKyia. Gregory was at home and caring for Meaco when Feimster arrived home from work on 24 May 2016. Feimster had worked at an O'Charley's restaurant, and she had bought juice and diaper wipes at a Food Lion supermarket before returning home between 10:00 p.m. and 11:00 p.m.

¶ 3 Gregory and Meaco were located in the living room and heard Feimster's car arrive in the parking lot. Feimster took longer than usual to come inside the apartment. When Feimster walked into the apartment, a Black female and Hispanic male walked into the apartment behind her.

¶ 4 The male was described as tall, with slicked-back, black hair. He wore a long-sleeved white shirt, jacket, white low top sneakers, and dirty latex gloves. Gregory described the female as stocky and dark-skinned with shoulder-length hair. She was wearing red tennis shoes and a shirt with a design on the front. Regarding the female's stature, Gregory described her as, "medium, short. She was just average. Not quite average height." Gregory testified she had never seen either the woman or the man with Feimster previously.

¶ 5 After Feimster and the perpetrators entered the apartment, the male locked the front door behind them. Gregory asked Feimster if everything was okay, Feimster replied: "Yes, mama, I got this." Feimster and the female walked directly into Feimster's bedroom and closed the door. Gregory and Meaco remained on the living room sofa with the Hispanic male present.

¶ 6 Meaco eventually went into the bedroom and sat on his mother's lap. Gregory asked the man for his name and where he lived, but he declined to answer. Gregory attempted to call her granddaughter to come and take Meaco away from the apartment, but the man took her cellular flip phone. He told Gregory she could call "when everything was over."

¶ 7 Gregory testified the man was within arms-length away from her, the apartment was "well-lit" and nothing obstructed her view of the man. Gregory testified that while she waited on the sofa, the man paced back and forth. For the duration of the intrusion, the male opened the front door several times to peer outside, and he and the female perpetrator talked about "a phone call."

¶ 8 The man made two or three cell phone calls. During one of the calls, Gregory testified he said, "She wants to know how far you are. Where are you? How far away are you?" After that phone call, the man went to Feimster's bedroom and talked to the female perpetrator. Gregory was ordered to join them in the bedroom.

¶ 9 Gregory testified the female left the bedroom momentarily. Gregory saw she had a gun when she returned to the "well-lit" bedroom. The female hit Gregory in her face with the gun, and she fell to the floor. Gregory testified, "She told me to stay down. She said she didn't want to hurt me because I didn't have nothing (sic) to do with it and it didn't have anything to do with me." Gregory described the gun as small, black, with a brown handle.

¶ 10 Gregory testified when she arose from the floor, Feimster, Meaco and the female were located by the bedroom door. At some point during the incident, Feimster told the female perpetrator, "If I had it I would give it to you. I don't have any money." Gregory testified, "The next thing I know [Feimster] and Meaco are down on the floor . . . [Feimster] has got Meaco. They're in a fetal position and you can't see Meaco." Gregory explained the female perpetrator had her knee and hand on Feimster, holding her down on the floor.

¶ 11 The female said to Feimster, "Bitch, you should have gave (sic) me the mother f***ing money." The female perpetrator then shot Feimster in the head and ran out of the apartment. Gregory called 911 in hysterics; she was yelling for help and portions of the call are inaudible. The 911 operator asked, "Did he have a weapon?" Gregory said, "Yes. (inaudible) had a gun and she shot my daughter." The 911 operator recording of a computer-aided dispatch asserted, "Male had a gun and shot the female." The police and EMS arrived. Gregory was transported to the hospital and treated with eight stiches for her broken nose. Meaco was not physically injured.

¶ 12 At trial, forensic pathologist, Nabila Haikal M.D., testified that she performed an autopsy on Feimster on 25 May 2016. Dr. Haikal testified Feimster's life was taken by a gunshot wound to the head, it took minutes for Feimster to die, and she had suffered other injuries suggesting blunt force trauma on the scalp.

¶ 13 Salisbury Police investigators developed a suspect named Ashley Phillips ("Phillips"). Phillips was the first person identified by Feimster's family. A confidential informant identified a car connected to Phillips as being present at the murder scene on 24 May. Phillips came to the police station after the crimes driving this car.

¶ 14 Police officers found a .25 caliber Lorcin pistol and white latex gloves inside the glove compartment of her car. DNA swabs were taken from these items, but they were not submitted for testing. There were also three spent shell casings matching the .25 caliber of the pistol inside the car.

¶ 15 Gregory was shown a photograph of Phillips and said, "she does look like her," referring to the female who had shot Feimster, but the police did not do a photographic lineup including Phillips' picture.

¶ 16 Inside Feimster's bedroom, a .25 caliber shell casing was found on the floor under Feimster's body. Police also discovered a black drawstring bag in the bedroom with a Taurus revolver inside.

¶ 17 Defense counsel explained to the court that Bureau of Alcohol, Tobacco, Firearms, and Explosives Agent Kevin Kelly ("Agent Kelly") took the .25 shell casing found at the scene and sent it to Jamie Minn ("Minn") along with two shell casings he had test fired himself from the pistol recovered in Phillips' car. Minn received all three shell casings.

¶ 18 Minn was not tendered as a firearms expert at the time of testing, but she examined the shell casings and reported "she could not say it was not the gun used, she also told them there was a likelihood it could be the gun that was used and explained to them how to get further testing that they did not do." The Lorcin pistol and shell casings found in Phillips' car and under Feimster's body produced inconclusive results. The Lorcin pistol was eventually returned to Phillips.

¶ 19 Three days after Feimster was killed, police conducted two photographic lineups with Gregory on 27 May 2016. One lineup involved a photo array of six pictures of males, including a photo of Albarran. Gregory became emotional and visibly upset upon being shown Albarran's photo. She was certain he was the Hispanic male inside of her home and involved in the crimes. The photo lineup was recorded and played for the jury. The second photographic lineup involved a photo array of six Black females, including Abbitt. Gregory selected Abbitt's picture with certainty as the Black woman who had shot and killed her daughter.

¶ 20 Police officers interviewed Abbitt. She admitted she knew Feimster through her sister but asserted she had not seen her in several years.

Abbitt denied being at Crown Point Drive or inside the victim's home on 24 May.

¶ 21 Abbitt claimed, as an alibi, she was home all night at 340 Adolphus Road at a cookout the night Feimster was killed, and other individuals were with her. Abbitt's counsel filed pretrial notice of an alibi defense. None of those asserted individuals were called or testified during trial.

¶ 22 Federal Bureau of Investigation Special Agent Michael Sutton ("Agent Sutton") of the cellular analysis survey division, testified about each of Defendants' cellular phone usage from 23-26 May 2016. Agent Sutton analyzed cell numbers: (704) 645-1373, and (704) 223-7882. The parties stipulated that on or about 24 May 2016, Sindy Abbitt's telephone number was (704) 223-7882.

¶ 23 Salisbury Police Sergeant Travis Schulenburger ("Sergeant Schulenburger") testified Albarran's cellular number at that time was (704) 645-1373. Sergeant Schulenburger testified he had observed a "323" tattoo on Albarran's body. Albarran told him during an interview he had grown up in Los Angeles. The area around Los Angeles is assigned a "323" area code. Albarran stated some people call him "L.A."

¶ 24 The calls Defendants made on 24 May 2016 were relayed by the cell phone towers located at or near the O'Charley's restaurant, the Food Lion supermarket, and Adolphus Road, all of which are located in south Salisbury and in the vicinity of Feimster's apartment.

¶ 25 Agent Sutton testified that on 24 May 2016, from at least 6:09 p.m. to 7:12 p.m., both of Defendants' phones used sectors of towers that provided service to an area that included the 340 Adolphus Road address. No later than 7:32 p.m., Albarran's phone had moved from the south Salisbury location to an area near the O'Charley's restaurant where Feimster had worked. By 10:41 p.m., Abbitt's phone had moved from the area south of Salisbury and used the sector of the cell tower which provided service to an area that included the Food Lion supermarket where Feimster had purchased juice and baby wipes.

¶ 26 Albarran's phone used sectors of towers that provided service to the area that included the Food Lion supermarket and Gregory's apartment at 11:02 p.m., 11:04 p.m. and 11:07 p.m. The sectors used at 11:02 p.m., and 11:07 p.m., had also provided service to the O'Charley's restaurant. On 24 May 2016, by no later than 11:58 p.m., both phones had moved south back to a tower which served an area that included Adolphus Road. There were approximately twelve contacts between the Defendants' two phones from 23 May 2016 through 26 May 2016.

¶ 27 Albarran and Abbitt both denied knowing each another. Abbitt was arrested on 23 June 2016. Albarran was arrested on 17 August 2016. Gregory identified both Albarran as the male perpetrator and Abbitt as the female perpetrator in open court. The defense requested forensic analysis of a pink cell phone recovered from the coffee table in the victim's apartment. Defense did not request analysis from the Salisbury Police Department for any other items.

¶ 28 Defendants were joined for noncapital trials on 4 March 2019. The jury's verdicts convicted Abbitt of first-degree murder on the bases of both premeditation and deliberation and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. The jury's verdicts convicted Albarran of first-degree murder on the bases of felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon.

¶ 29 Abbitt was sentenced to life without possibility of parole for murder and to concurrent sentences of 73 to 100 months and 150 days for the additional crimes. Albarran was sentenced to life without possibility of parole for the first-degree murder, and to concurrent sentences of 84 months to 113 months and 150 days for the additional crimes. Defendants timely appealed.

II. Jurisdiction

¶ 30 These appeals arise from final judgments in a criminal case pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 31 Six issues are asserted before this Court on appeal. Both parties appeal the trial court's refusal to allow them to introduce evidence to implicate third parties. Albarran also asserts the photographic lineup was suggestive, the trial court erred overruling his objections to the State's assertion he had failed to present evidence, and his counsel's closing argument was flawed.

¶ 32 Abbitt individually challenges the admission of her out-of-court denials of seeing the victim the day of the murder and the sufficiency of the indictment to support the State proceeding on each element of first-degree murder.

IV. Refusal to Allow Evidence Implicating Others

¶ 33 **[1]** Defendants argue the trial court erred by failing to admit relevant evidence tending to show two other people had committed the crimes for which they were charged.

¶ 34 " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019).

A. Standard of Review

¶ 35 "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

> Evidence casting doubt on the guilt of the accused and insinuating the guilt of another must be relevant in order to be considered by the jury. Because the relevancy standard in criminal cases is relatively lax, [a]ny evidence calculated to throw light upon the crime charged should be admitted by the trial court. However, the general rule remains that the trial court has great discretion on the admission of evidence. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. Rather, it must point directly to the guilt of the other party. *The evidence must simultaneously implicate another and exculpate the defendant.*

State v. Miles, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012) (emphasis supplied) (citations and internal quotation marks omitted) *aff'd*, 366 N.C. 503, 750 S.E.2d 833 (2013).

B. Trial Court's Findings

¶ 36 The trial court found:

> [S]ome items, specifically, a .25 caliber handgun and latex gloves were found somewhere relevant to Ashley Phillips.
>
> That also Ashley Phillips and others were seen arriving at the police department in a vehicle that has been forecasted to the Court to be similar to an automobile that was identified by a confidential informant as being in or around the scene of the murder of Ms. Feimster on March 24, 2016 (sic.)

> Also evidence has been presented at trial to indicate that the two -- the black female and the Hispanic male that were in the apartment on the night of May 24, 2016, were in communication via telephone. One or both of those individuals were in communication via cell phone with other individuals asking questions such as, "Where are you? When are you going to be here," which would -- could create and could be seen as evidence of the involvement of other parties, which to this Court does not -- which to this Court means that there may have been other people involved --could very well have been other people involved at -- and one of those people could very, very well have been Ashley Phillips.
>
> . . . .
>
> [T]he evidence that the defense intends to proffer need to both point directly to the guilt of another person and be inconsistent with the defendant's guilt.
>
> I'm going to find that the proffered -- or the forecasted evidence and the arguments of counsel for the defense failed to meet that second prong. That is, that the evidence would be inconsistent with the guilt of the defendants, and, therefore, I'm going to grant the State's motion in limine to exclude questions or testimony regarding the guilt of another individual.

¶ 37 Neither Defendant proffered evidence tending to *both* implicate another person(s) *and* exculpate either Defendant. *Miles*, 222 N.C. App. at 607, 730 S.E.2d at 827 (emphasis supplied). The proffered evidence merely inferred another person may have been involved in, or assisted in committing the crimes.

¶ 38 Such inferences, if true, were not inconsistent with direct and eyewitness evidence of either Albarran or Abbitt's guilt. *Id.* Albarran failed to show the trial court's exclusion of the proffered evidence, as not relevant and not admissible, was prejudicial or reversible error. This argument is overruled.

V. Photographic Lineup

¶ 39 **[2]** Albarran alleges the photographic array lineup was unconstitutionally suggestive.

A. Standard of Review

¶ 40 The standard of review to challenge the denial of a motion to suppress a suggestive pretrial identification is whether the trial court's findings of fact are supported by competent evidence, and if the findings of fact support the conclusions of law, which are reviewed *de novo*. *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 799, 786 (2019). This Court examines the totality of the circumstances to determine whether an identification procedure was unduly suggestive. *State v. Alvarez*, 168 N.C. App. 487, 495, 608 S.E.2d 371, 376 (2005).

¶ 41 "[A] trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (emphasis original) (citations omitted). Where this issue is not properly preserved at trial, we review for plain error. *State v. Williams*, 248 N.C. App. 112, 118, 786 S.E.2d 419, 424 (2016).

¶ 42 Under plain error review, a defendant must show a fundamental error occurred at trial and that, after reviewing the entire record, the claimed error must be so prejudicial justice cannot have been done. *State v. Young*, 248 N.C. App. 815, 823, 790 S.E.2d 182, 188 (2016) (citation omitted). Albarran must show "the error had a probable impact on the jury's finding" and verdict that the defendant was guilty. *Id.* (citations, quotation marks, and brackets omitted).

B. Analysis

¶ 43 Albarran filed a pretrial motion to suppress the photographic lineup, which the trial court denied. During trial, Albarran objected to testimony about the pretrial identification process, but he failed to object to Gregory's testimony when she identified him as the Hispanic male perpetrator in the courtroom. The issue was not properly preserved for appellant review and is subject to plain error review. *State v. Houser*, 239 N.C. App. 410, 419, 768 S.E.2d 626, 633, *cert. denied*, 368 N.C. 281, 775 S.E.2d 869 (2015).

¶ 44 Albarran argues the photograph of him was substantially different from the other six photographs in the lineup. He asserts the photo was closer to his face than the others and drew attention to him.

¶ 45 "[T]he jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification." N.C. Gen. Stat. § 15A-284.52(d)(3) (2019). This

instruction was provided to the jury by the trial court pursuant to N.C.P.I. - - Crim. 101.15 (2019).

¶ 46 Gregory's courtroom identification of Albarran was of independent origin, based upon what she had experienced and saw up to and at the time of the shooting and during trial. Albarran failed to object, and his statutory and due process rights were not violated. *State v. Malone*, 373 N.C. 134, 135, 833 S.E.2d 779, 781 (2019) (holding eyewitness testimony identifying the defendant in trial after a prejudicial photo lineup was ultimately not a constitutional violation of his rights because the identification "was of independent origin").

¶ 47 Any uncertainty regarding the accuracy, abilities, or credibility of a witness' in-court identification testimony was subject to cross-examination. Any challenge goes to the weight and credibility the trier of fact should consider, rather than to its admissibility. *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981).

¶ 48 Under plain error review, Albarran has failed to show that the alleged error had a probable impact on the jury. He has failed to establish the error is one that seriously affects the fairness, integrity, or public reputation of judicial proceedings or that a different outcome would have occurred, if excluded. With the unobjected to and in-court identification, the photo identification testimony is not shown to have impacted the jury's verdict. Albarran has failed to establish any prejudice. His argument is overruled.

VI. Failure to Present an Evidence Objection

¶ 49 **[3]** Where the trial court fails to sustain a defendant's objection to the prosecutor's improper closing argument, this Court reviews that ruling for abuse of discretion. *State v. Martin*, 248 N.C. App. 84, 88-89, 786 S.E.2d 426, 429 (2016) (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002).

A. Standard of Review

¶ 50 "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Martin*, 248 N.C. App. at 89, 786 S.E.2d at 429 (internal citations omitted). "When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper. . . . [I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. This Court also

"determine[s] if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.*

B. Analysis

¶ 51 Albarran argues the trial court erred by overruling his objection during the State's closing argument to the prosecutor's improperly commenting on his failure to present evidence. The State's closing argument asserted:

> [Prosecutor]: All right . . . . "Where is it?"
>
> [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> [Prosecutor]: The defense has suggested that value can be found in the evidence . . . in the Salisbury PD evidence locker that has not undergone forensic analysis. They can have the evidence analyzed. Why didn't they have the evidence analyzed? Where is their forensic analysis -- analyst? Again, where is it? Defendant Abbitt gave Sergeant Shulenburger a list of people who would corroborate that she was home all night on May 24 -- 25, 2016. Her attorney predicted in her opening statement that you would hear alibi evidence. Where are these alibi witnesses? And why haven't you heard from them?

¶ 52 Defense counsel objected, stating "we're getting dangerously close to potentially presenting antagonistic defenses." The trial court overruled the defenses' objections, but then stated, "Mr. Albarran did not represent to the jury that he had an alibi defense."

¶ 53 "The State is free to point out the failure of the defendants to produce available witnesses." *State v. Tilley*, 292 N.C. 132, 144, 232 S.E.2d 433, 441 (1977) (prosecutor's remarks directed at the failure of defendants to produce exculpatory evidence or to contradict the State's case did not constitute an impermissible comment on the failure of defendants to take the stand). Abbitt's counsel filed a pretrial notice to assert an alibi defense.

¶ 54 Under these facts relating to Abbitt, the prosecutor's remarks pointing out her failure to produce exculpatory evidence are not impermissible. *State v. Mason*, 315 N.C. 724, 732-33, 340 S.E.2d 430, 435-36 (1986). Here, the prosecutor's statements do not rise to the level of an

improper remark according to *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Defendant's argument is without merit and overruled. *Id.*

VII. Defendant's Closing Argument

¶ 55 **[4]** When the trial court fails to sustain a defendant's objection to the prosecutor's improper closing argument, this Court reviews that ruling for an abuse of discretion. *Martin*, 248 N.C. App. at 88-89, 786 S.E.2d at 429. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 89, 786 S.E.2d at 429 (internal citation omitted).

¶ 56 As noted in the standard of review for section VI, "A lawyer may, however, urge the jury to observe and consider a defendant's demeanor during trial." *State v. Salmon*, 140 N.C. App. 567, 575, 537 S.E.2d 829, 835 (2000) (referencing the defendant in his closing, the prosecutor stated, "[h]ave you seen the slightest bit of emotion? . . . . I haven't seen any. He is a cold fish. He's the kind of individual, when you think about it, you see, who would do exactly what the evidence shows he did.").

¶ 57 Here, the defense's closing argument was as follows:

> [Defense counsel]: [Gregory] was asked about whether or not she noticed any tattoos on the person -- on the individual that she saw in the apartment -- the Hispanic male -- that night. And she said she didn't notice any tattoos. You've had a – a chance to see Daniel Albarran in the courtroom this week - -
>
> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: You have been in this courtroom the entire week. You've had a chance to observe the demeanor of Daniel Albarran, his appearance because you - -
>
> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: -- you obviously have had the opportunity sitting in this courtroom to see Daniel Albarran and to compare his appearance with the description that you've [heard] sic.

> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: All right. You heard Detective Shulenburger - - Sergeant Shulenburger testify that the date Daniel Albarran was arrested, he came out of the bedroom putting his shirt on and that had numerous tattoos. He even had tattoos on his neck, and yet Ms. Gregory didn't mention tattoos in her description.

¶ 58 Defense counsel's closing argument asked the jury to discern what Albarran's appearance may have been two years earlier, and to contrast it with what his appearance was at trial, and in his lineup photo.

¶ 59 The prosecutor stated:

> [Prosecutor]: And I'll just state for the record, I don't have any problem with his demeanor or whatever. And I didn't have any problem with her asking about tattoos the defendant had at the time. The problem is the tattoos that he may have now, two and half years later.
>
> There's no evidence of what tattoos he had then and what tattoos he has now. It's certainly appropriate for her to comment on tattoos that were observed by Sergeant Shulenburger at the time, and that's the reason I objected, Your Honor.

¶ 60 Gregory testified Albarran wore a long-sleeve white shirt and jacket on the night of Feimster's murder, and if he had tattoos on his arms, she would not have been able to see them. The evidence tends to show the photographic lineup of both Albarran and Abbitt was held on 27 May 2016, three days after Feimster was murdered.

¶ 61 Defendants' trial began 4 March 2019, more than two years after the murder. Albarran's photograph used in the array and in the record does not show visible tattoos on Albarran's face and neck.

¶ 62 A change in Albarran's appearance over two years, or even three months, has no bearing on Gregory's identification and description of Albarran on the night of the murder. Based upon the lack of any visible tattoos in Albarran's photograph, shown to Gregory three days after the murder, the trial court did not abuse its discretion sustaining the prosecution's objections. Albarran's argument is overruled.

VIII. Abbitt's Out of Court Denials

¶ 63 **[5]** Abbitt argues her out-of-court statements denying she had seen Feimster recently were improperly placed into evidence as admissions. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). "However, out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d. 496, 513 (1998). "This Court has held that statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as non-hearsay evidence." *Id.*

¶ 64 Sergeant Travis testified about a conversation he had with Abbitt, wherein she stated that she had not been to the Crown Point Drive area in over a year, had not seen Feimster in years, she had only known Feimster through Abbitt's sister, she did not know a Hispanic male who goes by the street name of "L.A.," and denied knowing Daniel Albarran at all.

¶ 65 Sergeant Travis testified Abbitt was not in custody or under arrest at the time of this conversation. He had advised Abbitt she did not have to talk to him and was free to leave at any time. After being advised that she could leave at any time, Abbitt willingly spoke to him.

¶ 66 The statements would be relevant and admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 401 (2019). These statements did not give rise to a reasonable possibility that without the asserted error, the jury would have reached a different result. Defendant's arguments are without merit and overruled.

IX. Elements of First-Degree Murder against Abbitt

¶ 67 **[6]** Abbitt argues her indictment is fatally defective because it does not sufficiently allege the essential elements of the offense. We disagree.

¶ 68 Our Supreme Court stated:

> [T]his Court has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions.
>
> This Court has also held that the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories, including premeditation

> and deliberation, set forth in N.C.G.S. § 14-17, which is referenced on the short-form indictment.
>
> The crime of first-degree murder and the accompanying maximum penalty of death, as set forth in N.C.G.S. § 14-17 and North Carolina's capital sentencing statute, are encompassed within the language of the short-form indictment. We, therefore, conclude that premeditation and deliberation need not be separately alleged in the short-form indictment.

State v. Braxton, 352 N.C. 158, 174-175, 531 S.E.2d 428, 437-38 (2000) (alterations, citations and internal quotation marks omitted). The short form indictment is sufficient to confer jurisdiction upon the courts. *Id.* Abbitt's argument is overruled.

X. Conclusion

¶ 69 Defendants were properly prohibited from presenting evidence implicating a third party upon mere speculation, and which evidence did not exculpate their guilt. Albarran did not properly preserve his pretrial objection to the photo lineup on appeal by Gregory's unobjected to in-court identification of him. Defendants' objections during the prosecutor's closing arguments were neither meritorious nor prejudicial. The trial court did not err in sustaining the prosecutor's objections to Albarran's closing argument on his visible tattoos the time of trial.

¶ 70 Abbitt's out-of-court statements were not hearsay. They were relevant and properly admitted. Abbitt's challenge to her indictment is without merit. Both Defendants received fair trials, free from prejudicial errors they together or individually preserved and argued. We find no error. *It is so ordered.*

NO ERROR.

Judge JACKSON concurs.

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

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

¶ 71 Evidence implicating others is relevant and admissible when it simultaneously implicates another and exculpates a defendant. Defendants sought to provide such evidence that implicated another person and

exculpated themselves. The proffered evidence "constitute[d] a possible alternative explanation for the victim's unfortunate demise and thereby cast[ed] crucial doubt upon the State's theory of the case." *State v. McElrath*, 322 N.C. 1, 13-14, 366 S.E.2d 442, 449 (1988). The trial court erred in precluding Defendants from introducing evidence implicating other suspects.

¶ 72 Further, a "reasonable possibility [exists] that, had the error in question not been committed, a different result would have been reached." *State v. Miles*, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012), *aff'd per curiam*, 366 N.C. 503, 750 S.E.2d 833 (2013). Defendants are entitled to a new trial, which would render the issues discussed in Parts V through VIII of the Majority moot. As to the validity of the short form indictment discussed in Part IX, I concur.

BACKGROUND

¶ 73 During the investigation, two suspects other than Defendants were identified—Ashley Phillips and Tim Tim McCain. Phillips is a black woman.[1] Feimster's family initially identified Phillips as a possible suspect, and a confidential informant "stated that he did know that [Feimster's] family was trying to pin the murder on . . . this girl because [she and Feimster were] already beefing." When shown a photograph of Phillips, which was not in a photographic lineup, Gregory stated, "she does look like [the woman who shot Feimster]." Law enforcement investigated Phillips as a suspect, and a confidential informant identified a car, consistent with Phillips' car, at the apartment complex on the day of the murder. When the police searched Phillips' car, they found a .25 caliber Lorcin pistol, and latex gloves inside her car. This combination of items was consistent with Gregory's testimony that the man who participated in Feimster's murder was wearing latex gloves, as well as with her testimony regarding the small size of the gun used to murder Feimster.

¶ 74 Additionally, according to a Salisbury Police Department *Case Supplemental Report*, a confidential informant told law enforcement they saw McCain "at the apartment complex minutes before the murder." The confidential informant stated McCain "was wearing two big coats, was carrying a large looking pistol, and was trying to conceal his face with a white tshirt." This information was consistent with Gregory's tes-

1. McCain's race was not identified by the confidential informant in the police report regarding McCain's involvement in the murder. The trial court referenced the report and stated that the informant "says . . . [h]e saw a black male identified as Tim Tim McCain at the apartment complex minutes before the murder." However, the report only mentions "a black female" and does not mention McCain's race.

timony that the man who participated in Feimster's murder was wearing a work jacket and a white t-shirt, and her prior statement to an officer at the hospital that the Hispanic man had a gun.[2] Furthermore, according to the report, McCain saw the informant looking at him but McCain kept walking. The informant implied McCain was with a black woman in a car, which was consistent with Phillips' car. The informant also stated McCain "didn't kill the victim[,] but the [woman] did"; "[McCain] had to call the [woman] to do it because he had been seen." This information was also consistent with Gregory's testimony that a black woman shot Feimster, and was accompanied by a Hispanic man.

¶ 75 Based on this information, Defendants intended to present evidence that Phillips and McCain committed the crime. However, on 7 March 2019, the State filed a *Motion in Limine to Preclude Mention of Possible Guilt of Another*. Over Defendants' objections, the trial court granted the State's motion in limine to exclude questions or testimony regarding the guilt of another. In granting the State's motion in limine to exclude questions or testimony regarding the guilt of other individuals, the trial court found:

> [S]ome items, specifically, a .25 caliber handgun and latex gloves were found somewhere relevant to Ashley Phillips.
>
> That also Ashley Phillips and others were seen arriving at the police department in a vehicle that has been forecasted to the Court to be similar to an automobile that was identified by a confidential informant as being in or around the scene of the murder of Ms. Feimster on [24 May 2016].
>
> Also evidence has been presented at trial to indicate that the two -- the black female and the Hispanic male that were in the apartment on the night of [24 May 2016], were in communication via telephone. One or both of those individuals were in communication via cell phone with other individuals asking questions such as, "Where are you? When are you going to be here," which would -- could create and could be seen as evidence of the involvement of other parties, which to this Court does not -- which to this Court means

2. At trial, contrary to her statement to the officer at the hospital that the Hispanic man had a gun in the apartment the night of Feimster's murder, Gregory testified that she could not remember whether the Hispanic man had a gun.

> that there may have been other people involved --could very well have been other people involved at -- and one of those people could very, very well have been Ashley Phillips.

¶ 76 Throughout the trial, over Defendants' objections, the trial court precluded the presentation of evidence of other suspects implicated in the murder of Feimster. Without hearing such potentially exculpatory evidence, the jury found Abbitt guilty of first-degree murder on the basis of both premeditation and deliberation and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon, and the jury found Albarran guilty of first-degree murder on the basis of felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon.

¶ 77 Defendants argue the trial court erred in prohibiting them from offering evidence of the guilt of Phillips and McCain, as evidence regarding whether they were even at Feimster's apartment on the night of the murder was exculpatory.

ANALYSIS

¶ 78 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Holmes*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *disc. rev. denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). "Trial court rulings on relevancy technically are not discretionary." *Id.* "Whether evidence is relevant is a question of law, [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Even though we review relevancy rulings de novo, we give the trial court rulings regarding whether evidence is relevant "great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489-90, 828 S.E.2d 562, 570, *disc. rev. denied*, *appeal dismissed*, 373 N.C. 175, 833 S.E.2d 806 (2019).

¶ 79 The Majority correctly sets out the rule regarding relevant evidence implicating others:

> Evidence casting doubt on the guilt of the accused and *insinuating* the guilt of another must be relevant in order to be considered by the jury. Because

> the relevancy standard in criminal cases is "relatively lax," *any evidence* calculated to throw light upon the crime charged should be admitted by the trial court. However, the general rule remains that the trial court has great discretion on the admission of evidence. Evidence that another committed the crime for which the defendant is charged *generally is relevant and admissible* as long as it does more than create an inference or conjecture in this regard. Rather, it must point directly to the guilt of the other party. The evidence must simultaneously implicate another and exculpate the defendant.

Miles, 222 N.C. App. at 607, 730 S.E.2d at 827 (emphases added) (citations and marks omitted); *supra* at ¶ 35. In *Miles*, we differentiated prior cases, "where alternate perpetrators were positively identified and both direct and circumstantial evidence demonstrated the third parties' opportunity and means to murder," from the defendant's speculative hypothetical that a third party only needed to "step outside her home to murder her husband." *Id.* at 608, 730 S.E.2d at 827. Such a speculative hypothetical did not amount to sufficient evidence to insinuate the guilt of another. *Id.* at 608-09, 730 S.E.2d at 827-28.

¶ 80 While the Majority correctly identifies the rule regarding relevant evidence implicating others, I disagree with its analysis and conclusion that the evidence proffered by Defendants should not have been admitted. The Majority cites the trial court's findings and concludes "[n]either Defendant proffered evidence tending to *both* implicate another person(s) *and* exculpate either Defendant." *Supra* at ¶ 37. According to the Majority, the inferences from the evidence regarding Phillips and McCain were not inconsistent with evidence of either Albarran or Abbitt's guilt. *Supra* at ¶¶ 37-38 ("The proffered evidence merely inferred another person may have been involved in, or assisted in committing the crimes. Such inferences, if true, were not inconsistent with direct and eyewitness evidence of either Albarran or Abbitt's guilt."). I could not disagree more.

¶ 81 The evidence Defendants offered regarding the guilt of others was highly relevant regarding the possibility of mistaken identification of who was actually in the apartment on the night of Feimster's murder. Specifically, Gregory's statement that Phillips looked like the woman in the apartment and the similarity between the informant's description of McCain and Gregory's description of the man in the apartment, in conjunction with the evidence placing McCain and Phillips at the scene of

the crime and evidence implicating McCain and Phillips that was consistent with Gregory's description of the murder, had the potential to cast doubt regarding whether Abbitt or Albarran were the male and female intruders in Feimster's apartment on the night of the murder.

¶ 82 There was strong evidence to inculpate Phillips. In addition to Feimster's family identifying Phillips as a suspect first, Gregory's statement that "[Phillips' picture] does look like [the woman who shot Feimster]," which was not included in a photographic lineup, is highly relevant. The confidential informant implied McCain was with the woman who shot Feimster. When asked specifically whether Phillips, among two others, had anything to do with the murder, the informant responded negatively regarding the two other people, but told the police he "couldn't advise about [whether Phillips was the woman he saw]." If Phillips was the black woman in the apartment on the night of Feimster's murder, and there was only one female intruder, such evidence would directly exculpate Abbitt. Additionally, other evidence implicated Phillips in Feimster's murder and aligned with Gregory's testimony regarding the small size of the gun and use of gloves. A confidential informant identified a vehicle consistent with Phillips' vehicle at the scene of the crime on the day of the murder, and a .25 caliber Lorcin pistol and latex gloves were discovered inside Phillips' vehicle. Further, Gregory testified the Hispanic man "had on latex gloves[.]"

¶ 83 Gregory's statement regarding Phillips looking like the woman who killed her daughter, and Feimster's family's suspicion of Phillips, taken with the other evidence found in Phillips' vehicle and the informant's statements in the police report, raises more than a mere inference that Phillips may have been involved in Feimster's murder. Rather, it "constitute[s] a possible alternative explanation for the victim's unfortunate demise and thereby casts crucial doubt upon the State's theory of the case." *McElrath*, 322 N.C. at 13-14, 366 S.E.2d at 449. This evidence was not only relevant, but pointed directly to the guilt of Phillips while exculpating Abbitt. *See Miles*, 222 N.C. App. at 607, 730 S.E.2d at 827.

¶ 84 The case of *State v. Israel* further undermines the Majority's reasoning. *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (2000). In *Israel*, "the jury was not permitted to hear" evidence from the defendant regarding the victim's fear of her ex-boyfriend, as well as evidence the ex-boyfriend had been seen at the victim's apartment complex "twice during the *week* of the murder." *Id.* at 215, 539 S.E.2d at 636 (emphasis added). Our Supreme Court reasoned:

> [The ex-boyfriend] had both the opportunity to kill her—pictured as he was on the surveillance videotape

> entering and leaving the victim's apartment [within a day of the estimated time of death]—and, given his history with the victim, a possible motive. . . . [A]mple evidence supported [the defendant's] recent interaction with the victim. Equally ample was excluded evidence of [the victim's ex-boyfriend's] own recent interaction with [the victim], and the history of his dealings with her point to more sinister motives than any left behind in [the] defendant's fingerprints or personal effects.

Id. at 219, 539 S.E.2d at 638.

¶ 85 The offered evidence similarly placed Phillips at the scene of the crime as the confidential informant indicated Phillips' vehicle was at the apartment complex "minutes before the murder" and that a black woman was with McCain.[3] While the offered evidence regarding Phillips does not provide a specific motive, the victim's family's suspicion of Phillips as a suspect, as well as the informant's statement that the female with McCain was "already beefing" with Feimster, could have provided a potential motive for Phillips to harm Feimster, similar to the ex-boyfriend in *Israel*. The informant's statements in the report potentially places Phillips at the scene of the crime at a time more proximate to the crime than the ex-boyfriend in *Israel* and casts doubt on the accuracy of Gregory's testimony.

¶ 86 Further, Gregory claimed she was not shown a picture of Phillips, in the photographic lineup or otherwise. However, Defendants intended to offer evidence that Gregory initially identified Phillips as looking like the woman in the apartment on the night of the murder to impeach Gregory's recollection of the individuals in the apartment on the night of the murder. The trial court prevented Defendants from presenting evidence that would have fit the exact definition of impeachment regarding Gregory's testimony. "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959) (quoting *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930)). "Impeachment evidence has been defined as evidence used to undermine a witness's credibility, with any circumstance tending to show a defect in the witness's perception, memory, narration or veracity relevant to this

3. Although the informant's statement explicitly referenced McCain, it clearly contemplated the woman McCain was with at the apartment at the same time as McCain.

purpose." *State v. Gettys*, 243 N.C. App. 590, 595, 777 S.E.2d 351, 356 (2015) (quoting *State v. Allen*, 222 N.C. App. 707, 721, 731 S.E.2d 510, 520, *disc. rev. denied*, *appeal dismissed*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, 569 U.S. 952, 185 L. Ed. 2d 876 (2013)), *disc. rev. denied*, *appeal dismissed*, 368 N.C. 685, 781 S.E.2d 798 (2016). As Defendants argued at trial, the proffered evidence, "in the jury's eye[,] [had the potential to] call into question the reliability of the description[s] that [at] different times were given by Ms. Gregory." Consequently, the evidence implicating Phillips was also relevant to impeach Gregory's testimony or cause the jury to question her testimony at trial.

¶ 87 The trial court's exclusion of this evidence significantly curtailed both Defendants' cases. The State built its case on the fact that if one Defendant was guilty, the other was guilty.[4] For example, the State introduced evidence of Defendants' cell phone records, showing they had been in contact the day of the crime. However, if Defendants were able to introduce evidence that Phillips was the black woman in the apartment on the night of the murder, thus exculpating Abbitt, this would have also weakened the State's case that Albarran was the Hispanic man in the apartment on the night of Feimster's murder.[5]

> '[T]he twofold aim of criminal justice is that guilt shall not escape or innocence suffer.' We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 1064 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321

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4. In response to the State's motion in limine seeking to exclude evidence regarding the possible guilt of another, Albarran acknowledged the State's tactic in arguing that the State's case was "if one is guilty[,] the other is guilty."

5. For instance, if Phillips was the black woman in the apartment on the night of the murder, and not Abbitt, Albarran was not the Hispanic man in the apartment. Additionally, if McCain was in the apartment that night, and not Albarran, then Abbitt was not the black woman in the apartment that night.

(1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212, 4 L. Ed. 2d 252 (1960)). Defendants' proffered evidence was of great consequence to the pursuit of the truth as to who killed Feimster.

¶ 88 Albarran also desired to introduce evidence that someone else, namely McCain, may have committed the crimes. The confidential informant implied that McCain was at the apartment complex with a black woman minutes before the murder. Consistent with Gregory's testimony, the informant said McCain did not kill Feimster, but the black woman with McCain did. The informant also stated McCain was wearing "two big coats," "was trying to conceal his face with a white tshirt," and was carrying a gun. Similar to the informant's statement, Gregory described the man as wearing a white t-shirt, latex gloves, and a work jacket, and as carrying a gun.

¶ 89 In granting the State's motion in limine, the trial court stated "I don't see that this confidential informant [who identified McCain and a black woman at the apartment] provides any information that would make me reconsider my ruling." The trial court, and now the Majority, have not properly considered the relevancy of the evidence that implicated others, exculpated Albarran and Abbitt, and further impeached Gregory. In *Israel*, the victim's ex-boyfriend was seen at the victim's apartment complex "twice during the *week* of the murder." *Israel*, 353 N.C. at 215, 539 S.E.2d at 636 (emphasis added). Here, McCain was seen at the apartment complex with a gun *minutes* before the murder.[6]

¶ 90 Additionally, Gregory's initial identification of Phillips as looking like the woman in the apartment on the night of Feimster's murder, and the other evidence implicating Phillips, similarly undermines Gregory's

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6. I note our Supreme Court's opinion in *State v. Williams*, where the defendant sought to introduce evidence that three others may have committed the murders he was accused of. *State v. Williams*, 355 N.C. 501, 532, 565 S.E.2d 609, 627 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). In rejecting the defendant's arguments, our Supreme Court held "there was no evidence to indicate that [the first suspect] had committed this crime except for his proximity to the crime scene." *Id.* at 533, 565 S.E.2d at 628. Here, McCain was not only in close proximity to the crime scene, within minutes of the murder, but additional evidence indicated he committed the crime. The informant stated McCain was seen with a gun, two coats, a white t-shirt (trying to conceal his face from identification), and implied he was with a black woman in a car that matched Phillips' car. Similarly, Gregory described the man in the apartment on the night of the murder to be wearing a work jacket and a white t-shirt, and to be carrying a gun. Consistent with Gregory's testimony, the informant stated McCain did not kill the victim; rather, the woman did at McCain's request. Accordingly, McCain was not only in close proximity to the crime, like the suspect in *Williams*, but Defendants were also prepared to offer additional evidence indicating McCain committed the crime.

identification of Albarran, as Gregory may have also been mistaken about Albarran, rather than McCain, being in the apartment that night. Defendants had the right to impeach by offering evidence of Gregory's prior inconsistent statements or dishonesty. *See State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988) (marks and citation omitted) ("[I]mpeachment is an attack upon the credibility of a witness, and is accomplished by such methods as showing the existence of bias; a prior inconsistent statement; untruthful or dishonest character; or defective ability to observe, remember, or recount the matter about which the witness testifies.").

¶ 91 The trial court concluded that Defendants' evidence merely implicated the involvement of other parties, making any evidence regarding McCain and Phillips not exculpatory, because one or both of the Defendants was talking on the phone asking questions, including, "Where are you? When are you going to be here[?]" The Record lacks evidence linking the four–Phillips and McCain with Abbitt and Albarran–by phone or otherwise. The trial court's grant of the State's motion in limine excluded the evidence underlying Defendants' key exculpatory theory of mistaken identification, and instead assumed a connection between Defendants and any other potential perpetrators, without sufficient evidentiary support. The evidence of other suspects had the potential to negate Defendants' involvement in the crime if the intrusion into Feimster's apartment and her murder were committed by Phillips and/or McCain.

¶ 92 The following evidence was potentially exculpatory to Abbitt: Gregory's statement that Phillips looked like the person who shot Feimster; the discovery of a potential murder weapon and latex gloves consistent with the crime in Phillips' car; a car consistent with Phillips' car being at the scene of the crime; and the report that a woman with McCain committed the murder. This evidence points to one black female intruder, Phillips, in Feimster's apartment that night, which would exculpate Abbitt from Feimster's murder. The following evidence was potentially exculpatory to Albarran: an informant placing McCain at the apartment complex minutes before the murder; the consistent identification of a male in a white t-shirt and coat with latex gloves; and the connection of McCain with Phillips in conjunction with the evidence inculpating Phillips. This evidence also points to one male intruder, McCain, in Feimster's apartment that night, which would exculpate Albarran from Feimster's murder. Consequently, the trial court erred in precluding Defendants from introducing such evidence.

¶ 93 "When the trial court excludes evidence based on its relevancy, a defendant is entitled to a new trial only where the erroneous exclusion was prejudicial." *Miles*, 222 N.C. App. at 607, 730 S.E.2d at 827. "A defendant is prejudiced by the trial court's evidentiary error where there is a 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* (quoting N.C.G.S. § 15A-1443(a) (2011)). "[The] [d]efendant bears the burden of showing prejudice." *Id.* Here, Defendants have shown a reasonable possibility that the jury would have reached a different result if the trial court had admitted the evidence implicating Phillips and McCain, as this evidence would have exculpated Defendants and the only evidence directly connecting Defendants to the crime was Gregory's identification of them, which would have been undermined by her impeachment.

CONCLUSION

¶ 94 Defendants sought to introduce exculpatory evidence regarding the involvement of two different suspects in the murder of Feimster. This relevant evidence simultaneously implicated others and exculpated Defendants. Further, it impeached the State's key witness. The trial court should not have granted the State's motion in limine to exclude questions or testimony regarding the guilt of another, and, had the trial court's evidentiary error not occurred, a different result was reasonably possible. Defendants are entitled to a new trial, and, other than the validity of the short form indictment, the remaining issues on appeal are moot. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
GABRIEL LYNN BURNS

No. COA20-491

Filed 3 August 2021

Sexual Offenses—with a child—penetration—touching urethral opening

There was sufficient evidence of penetration to support defendant's convictions for statutory sex offense with a child under thirteen by an adult where the victim testified that defendant touched her urethral opening with his fingers.

Appeal by Defendant from judgment entered 25 January 2019 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Amber I. Davis, for the State.

Michael E. Casterline, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On January 25, 2019, a Forsyth County jury convicted Gabriel Burns ("Defendant") of four charges of statutory sex offense with a child under thirteen by an adult and sixteen charges of indecent liberties with a minor. On appeal, Defendant contends there is insufficient evidence to support his convictions for statutory sex offense because there was no evidence of penetration. After careful review, we find no error.

I. Background

¶ 2 Ms. B is the mother of two daughters. Ms. B began dating Defendant in the summer of 2016, when Hannah,[1] Ms. B's youngest child, was eight years old. By October 2016, Ms. B and Hannah were living with Defendant in his house. At the time, Defendant worked as a mechanic and Ms. B was unemployed.

1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

¶ 3 Prior to moving into Defendant's home with Ms. B and Defendant, Hannah lived with Ms. L, her maternal grandmother, and attended Kimmel Farms Elementary School in Winston-Salem. After moving into Defendant's home, Hannah was no longer in the school zone for Kimmel Farms Elementary School. In order to keep Hannah in the same school, Ms. B arranged for Defendant to drive Hannah from his home to Ms. L's house each morning on his way to work so Hannah could ride the school bus to Kimmel Farms Elementary School. Defendant also picked Hannah up from Ms. L's house about three evenings per week to take her back to his house.

¶ 4 At first, Defendant dropped Hannah off at Ms. L's house each morning and she went inside to wait for the bus. After approximately a month, Defendant began parking his car outside Ms. L's home and keeping Hannah in the car with him until the bus arrived. Defendant parked in front of Ms. L's house, in a spot where his car could be seen from inside Ms. L's house. After some time of doing this, Defendant started parking in a spot where it was more difficult to see his car from inside Ms. L's home.

¶ 5 Following Hannah's move to Defendant's home, her behavior began to change. Hannah started having difficulty going to sleep, and Ms. B had to call Ms. L to calm Hannah down. On March 9, 2017, Hannah told Ms. L that Defendant had been touching her "down there" in the car on the way to and from Ms. L's house. Hannah told Ms. L she could "take it no more." She alleged Defendant was also touching her at his house when Ms. B was not in the room.

¶ 6 Ms. L took Hannah to the Department of Social Services, where they spoke to a social worker. Later that evening, at the request of the social worker, Ms. L took Hannah to a local hospital where she received a sexual assault examination. That same night, Defendant agreed to allow hospital personnel to collect evidence for a sexual assault kit from him. He also allowed police to examine his minivan.

¶ 7 On April 12, 2017, Hannah received a child medical examination. A recorded forensic interview was also conducted with her that day. Defendant agreed to be interviewed by police on May 25, 2017. On June 2, 2017, another recorded interview with Hannah was conducted by a police detective to ensure the detective "understood everything in order, and the dates, and times, and locations" of the alleged assaults because "how [Hannah] was touched . . . had already been covered." Defendant was arrested on June 15, 2017. On September 25, 2017, Defendant was indicted on four charges of statutory sex offense with a child under thirteen by an adult and sixteen charges of indecent liberties with a minor.

His trial in the Forsyth County Superior Court lasted from January 14, 2019, until January 25, 2019.

¶ 8 During the State's evidence, an eleven-year-old Hannah testified that, for months, beginning when she was eight years old, Defendant rubbed his fingers "in circles" on her vagina and was "messing" with her by touching her vagina both in his car and at his home. When asked at trial about where Defendant was placing his fingers, Hannah testified it was on her vagina "where I wipe at" and Defendant rubbed his fingers on the "place where I pee." Hannah also clarified that nothing had ever gone "inside" her vagina.

¶ 9 After the State rested, Defendant's attorney moved to dismiss the charges. The trial court denied the motion. Defendant testified and denied that the allegations Hannah made against him were true, specifically denying that he touched Hannah inappropriately.

¶ 10 The jury convicted Defendant of all charges on January 25, 2019. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 11 In his sole argument on appeal, Defendant contends there was insufficient evidence to support his convictions for statutory sex offense because the State failed to present sufficient evidence of penetration. We disagree.

¶ 12 We review whether the State presented evidence sufficient to survive a motion to dismiss *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted). "When determining the sufficiency of the evidence to support a charged offense, [this Court] must view the evidence 'in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998) (quoting *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). Furthermore, "[a] defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator." *State v. Campbell*, 359 N.C. 644, 681, 617 S.E.2d 1, 56 (2005) (quoting *Trull*, 349 N.C. at 447, 509 S.E.2d at 191).

¶ 13 "On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether

there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925, (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

¶ 14 Under N.C. Gen. Stat. § 14-27.28(a), "[a] person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a) (2021). In North Carolina, a sexual act is defined, *inter alia*, by "the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2021).

¶ 15 In the present appeal, Defendant concedes he is an adult over the age of eighteen, and Hannah was between eight and nine years old when the alleged sexual contact occurred. Therefore, the only element in dispute is the element of penetration. *See* N.C. Gen. Stat. § 14-27.28(a); *see also* N.C. Gen. Stat. § 14-27.20(4).

¶ 16 This Court addressed the penetration element of our first-degree sexual offense charge in *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81 (2005). In *Bellamy*, while committing an armed robbery of a fast-food restaurant, the defendant held a woman at gunpoint and forced her to remove her pants and underwear. *Bellamy*, 172 N.C. App. at 654, 617 S.E.2d at 86. The defendant then ordered his victim to spread her labia apart so that he could touch and separate it further with the barrel of his gun. *Id.* Though the defendant had no further sexual contact with the victim, this Court affirmed the defendant's conviction, reasoning that there was no rationale for deviating from its precedent that penetrating a victim's labia constitutes a sexual act sufficient to establish the penetration element of the first-degree sexual offense charge. *Id.* at 658, 617 S.E.2d at 88.

¶ 17 Here, while there is no evidence Defendant inserted his fingers into Hannah's vagina, there is sufficient evidence he penetrated her labia by rubbing his fingers in circles on her vulva. Specifically, Hannah confirmed that though Defendant's fingers did not go "inside" her vagina, his fingers did touch "on my vagina where I wipe at" and "on the place where I pee." The small opening where a female urinates is her urethral opening, which is located within the labia minora, below the clitoris and above the vaginal opening.[2] Accordingly, in order to touch the urethral

2. The urethral opening is the "external opening of the transport tube that leads from the bladder to discharge urine outside the body in a female." The opening "of the female

opening from which a female urinates, the labia majora and labia minora almost certainly have to be entered like that of the victim's in *Bellamy*. Thus, in order for Defendant's fingers to have touched Hannah's urethral opening, his fingers had to have been within Hannah's labia.

¶ 18 This Court has concluded that a victim's testimony of being touched in between the labia is sufficient evidence to survive a motion to dismiss by the defendant. For example, in *State v. Corbett*, the defendant contended on appeal the State provided no evidence of penetration constituting a sexual act as defined by N.C. Gen. Stat. § 14-27.20(4), despite the victim's testimony that she was touched "in between the labia" by the defendant. 264 N.C. App. 93, 96, 824 S.E.2d 875, 879 (2019). In that case, this Court held the victim's testimony, when viewed in the light most favorable to the State, was sufficient so that reasonable jurors could have determined that it constituted substantial evidence to establish the element of penetration in the offense charged. *Id.* at 99, 824 S.E.2d at 879. In doing so, we reasoned that since evidence of penetrating the labia is sufficient to establish the element of penetration in a sexual act, the victim's testimony she was touched "in between the labia" was sufficient to establish the element in the defendant's rape charge. *Id.* at 98-99, 824 S.E.2d at 878-79 (citing *Bellamy*, 172 N.C. App. at 658, 617 S.E.2d at 88).

¶ 19 Here, the State's evidence consisted of testimony from Hannah, Ms. L, Hannah's uncle, and Hannah's therapist. The State's witnesses all testified Defendant touched Hannah "in [her] vagina," "down there," and "in her private areas," and had his hands "inside [Hannah's] panties, rubbing up and down." The State, in the present appeal, presented sufficient evidence by offering the victim's testimony that she was touched by Defendant and corroborating testimony from Ms. L, Hannah's uncle, and Hannah's therapist who she confided in regarding the abuse. *See Corbett*, 264 N.C. App. at 99, 824 S.E.2d at 879 (finding that victim testimony, alone, is sufficient evidence of the element of penetration). Thus, we hold the State presented substantial evidence supporting the element of penetration from which reasonable jurors could have concluded Defendant committed first-degree sex offense. Accordingly, we find no error.

NO ERROR.

Chief Judge STROUD and Judge COLLINS concur.

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urethra is below the clitoris and just above the opening of the vagina." https://www.medicinenet.com/female_urethral_opening/definition.htm.

STATE v. DOVER

[278 N.C. App.723, 2021-NCCOA-405]

STATE OF NORTH CAROLINA
v.
DAVID MYRON DOVER, DEFENDANT

No. COA20-362

Filed 3 August 2021

Homicide—sufficiency of evidence—opportunity to commit crime —surmise and conjecture

There was insufficient evidence to convict defendant of robbery with a dangerous weapon, felony murder based on the underlying felony of robbery with a dangerous weapon, and first-degree murder based on malice, premeditation, and deliberation where defendant was a crack cocaine addict who had frequently borrowed cash from the victim, the victim had been known to carry large sums of cash, defendant had approximately $3,000 of cash in a concealed location after the murder, cell phone tower records showed that defendant was in the vicinity of the victim's residence on the night of the murder (a sector that also included defendant's place of work), defendant made contradictory statements to the police, and defendant had deleted all of the call and text message history from his phone up until the morning that the victim's body was found. While the circumstantial evidence showed that defendant had an opportunity to commit the crimes charged, it did not remove the case from the realm of surmise and conjecture.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgments entered 19 September 2019 by Judge Richard S. Gottlieb in Rowan County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General K. D. Sturgis, for the State.

Marilyn G. Ozer for defendant-appellant.

MURPHY, Judge.

¶ 1 When the State presents evidence that raises a strong suspicion of a defendant's guilt, but does not remove the case from the realm of

surmise and conjecture, the trial court errs in denying the defendant's motion to dismiss for insufficiency of the evidence. Here, the circumstantial evidence presented at trial showed Defendant had an opportunity to commit the crime charged, but there was not evidence, even when viewed in the light most favorable to the State, that a reasonable mind could accept to support the conclusion that Defendant robbed and murdered the victim.

BACKGROUND

¶ 2 On 16 May 2016, Defendant David Myron Dover was indicted on one count of robbery with a dangerous weapon, one count of first-degree murder, and having attained the status of habitual felon. A jury was impaneled for Defendant's trial on 9 September 2019. The evidence at trial tended to show the following:

¶ 3 On the morning of 10 May 2016, Arthur "Buddy" Davis ("Mr. Davis") was scheduled to meet one of his daughters, April Anderson, at 7:00 a.m. to give her an unknown sum of money. When he did not show up, Anderson called Mr. Davis's place of employment, Terry's Auto Sales, and asked to "speak to Buddy[.]" Anderson was told Mr. Davis was not at work.

¶ 4 Anderson then called her sister, Charlotte Davis ("Davis"), who directed her husband, Waylon Barber, to go to Mr. Davis's mobile home in Kannapolis to check on him. Contemporaneously, the owner of Terry's Auto Sales, Terry Bunn, was concerned about Mr. Davis not showing up at work and decided to go to Mr. Davis's mobile home to check on him. Bunn arrived at the mobile home before Barber and, after knocking on the door and receiving no answer, "slid [a screwdriver] in behind the door . . . [and] jimmied the door open." Bunn entered the home, called Mr. Davis's name, and observed "something [that] had a real brown look to it" in the kitchen, which he realized was blood. Bunn then walked to the bedroom, where he found Mr. Davis lying unconscious on the floor and called 911. Barber arrived shortly thereafter and also called 911. Paramedics arrived at the mobile home and declared Mr. Davis dead. According to expert testimony, the cause of Mr. Davis's death was multiple stab wounds. No evidence of forced entry into the mobile home was found. The time of Mr. Davis's death could not be determined with accuracy and a murder weapon was never identified.

¶ 5 Officers who responded to the 911 calls identified a list of possible suspects, including Defendant. Defendant lived in Rowan County and worked at Terry's Auto Sales with Mr. Davis. Due to a crack cocaine substance abuse problem, Defendant frequently borrowed small amounts

of cash from various people in the community, including Mr. Davis, and failed to pay them back.

¶ 6 After the investigation at Mr. Davis's mobile home concluded, some officers went to locate the other possible suspects. Contemporaneously, other officers went by Defendant's house, located in China Grove, "to kind of get a feel of where [he] lived at." As the officers were leaving the area, they saw Defendant "pull in, driving." The officers knew Defendant previously had his driver's license revoked and contacted the Rowan County Sheriff's Office to advise them Defendant was driving without a license. The Rowan County Sherriff's Office took out a warrant for Defendant for driving while license revoked, but service of the warrant was held off.

¶ 7 That same day, officers returned to Defendant's house. Defendant and his girlfriend, Carol Carlson, who Defendant lived with, came outside the house to speak with the officers. Defendant and Carlson agreed to let the officers search their house. As a result of the search, an officer seized two shirts and a pair of blue jeans located in the back bedroom of Defendant's house. According to the officer, these items were seized "[b]ecause they had blood stains or what appeared to be blood stains on the shirts and on the back of the blue jeans." Blood DNA tests were done comparing the blood stains on the clothing seized from Defendant's house and the blood at the scene of the crime with Defendant's blood and Mr. Davis's blood. Forensic biologists testified there was no connection between Defendant's DNA profile and the scene of the crime, and no connection between the blood stains on Defendant's clothes and Mr. Davis's DNA profile.

¶ 8 After the officers finished searching the house, Defendant agreed to go to the Kannapolis police department to talk about Mr. Davis's death. As they were leaving, Carlson asked Defendant for money because she was hungry, and Defendant gave her $20.00 from cash that he had in his pocket at the time.

¶ 9 Defendant's interview at the police department was video recorded and played for the jury. When asked about his whereabouts on the evening of 9 May 2016, Defendant stated he returned home at about 8:00 or 9:00 p.m. and did not leave his house for the remainder of the evening. Later during the interview, Defendant changed his story and stated that on 9 May 2016, he purchased "a dime" of crack cocaine, brought it back to Terry's Auto Sales, and smoked it before he did more work and later went home. He also stated he tried to call Mr. Davis two or three times to borrow $20.00 at about 10:00 p.m., but Mr. Davis never picked up the

phone. Defendant told the officers that occasionally, Mr. Davis tells him he isn't going to loan him any more money, but Mr. Davis recently loaned him $20.00 on the previous Sunday.

¶ 10 Defendant gave the interviewing officers permission to inspect his cell phone in an attempt to corroborate his story. Officers attempted to retrieve data from Defendant's cell phone using a Cellebrite forensic device, but due to the age of the phone, the data could not be retrieved. Instead, the officers manually searched the cell phone's contents. The manual search revealed the only calls in the cell phone's call history were those made after Defendant had been in the presence of the officers, and the only text message history was one text message received from Carlson on 10 May 2016.

¶ 11 The State also presented location records of Defendant's cell phone on the night of 9 May 2016. According to expert testimony from Special Agent Michael Sutton, Defendant's cell phone records were assessed to determine which cell towers and sectors were utilized by his phone in order to map its location. Because "[m]ost towers are sectorized to increase the number of customers it can serve[,]" cell phone carriers put "three towers on one pole, pointing in different directions." Special Agent Sutton looked at "the topography of the area, the layout of the area, as well as associating the other towers to come up with an estimated service area of [a] particular tower," and determined the general area and sector of where Defendant's phone was when it was being used.

¶ 12 The cell tower records showed Defendant made calls at 9:46 p.m., 10:21 p.m., 10:22 p.m., and 10:23 p.m. on 9 May 2016 from a sector that included his residence in China Grove. The cell tower records also showed Defendant made calls at 11:22 p.m., 11:30 p.m., 11:31 p.m., and 11:32 p.m. on 9 May 2016 from a sector that included both Mr. Davis's mobile home and Terry's Auto Sales. On 10 May 2016, the cell tower records showed Defendant made calls at 12:00 a.m., 12:11 a.m., and 12:12 a.m. from a sector that included the home of Defendant's drug dealer. Also, on 10 May 2016, Defendant again made calls between 12:49 a.m. and 1:29 a.m. from the sector that included his residence in China Grove.

¶ 13 Officers asked Defendant where he obtained the money he gave to Carlson prior to the interview. He stated he had $300.00 or $400.00 from a customer whose car he put a transmission in, but it was Bunn's money since Bunn gave him an advance on the money Defendant was to receive for the transmission work.

¶ 14 After the interview concluded, Defendant went outside the Kannapolis Police Department and waited to be transported back to his

house. While waiting, Defendant was arrested on the outstanding warrant for driving while license revoked. Defendant was transported to jail where he declined to be interviewed a second time.

¶ 15 While in jail, Defendant made a telephone call to Carlson on a monitored phone line. The audio recording of this phone call was played for the jury. While on the phone, Defendant instructed Carlson to look in a trash can for a stack of approximately $3,000.00 in cash, inside a work glove, which was in turn inside a McDonald's bag, and instructed her to use the cash to pay his bail. Carlson located the money and used $1,000.00 of it for Defendant's bail money. Officers recovered the remainder of the money, $1,724.00, from a wallet in Carlson's purse. The majority of the cash was in one-hundred-dollar bills. Officers were later able to recover the McDonald's bag and the empty work glove inside of it from a garbage can across the street from Defendant's house, at Carlson's mother's house.

¶ 16 At the close of the State's evidence, Defendant made a motion to dismiss all charges "for failure to provide evidence as to each element of each crime[.]" The trial court denied the motion to dismiss. At the close of all evidence, Defendant renewed the motion to dismiss all charges, citing "insufficiency of the evidence" as the basis for the motion. The trial court denied the renewed motion.

¶ 17 During closing arguments, the State argued to the jury:

> Admittedly, we don't have DNA in this case. We don't. There's always going to be something you can look at in a crime scene investigation and say it wasn't done. Short of us literally picking up the entire trailer and moving [it to] a warehouse and going through it with microscopes, there's always going to be something you can point out that wasn't done. We do the reasonable things, the things that lead to evidence that we believe might produce evidence. One way or the other, we're going to run down your alibi, just like we run down allegations against you, and that was done in this case, time and time again. The problem is, every time they went to check on something that [Defendant] had told them, it was a lie. And everybody else was telling the truth. Everything checked out. But nothing he had to say checked out, and he's telling you ridiculous things. Ridiculous.

> You need a reasonable explanation for that money. If you don't have a reasonable explanation for where that money came from --

Defendant then objected and the trial court sustained the objection; however, the trial court did not give a curative instruction. After the conclusion of the State's closing argument, Defendant moved for a mistrial based on the lack of a curative instruction. The trial court denied the motion.

¶ 18 The jury found Defendant guilty of felony murder, based on the underlying felony of robbery with a dangerous weapon, and first-degree murder on the basis of malice, premeditation, and deliberation. The jury also found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to life without parole on the first-degree murder conviction and arrested judgment on the robbery with a dangerous weapon conviction. Defendant timely appealed.

ANALYSIS

¶ 19 On appeal, Defendant argues the trial court erred by (A) denying his motion to dismiss all the charges for insufficiency of the evidence, and (B) denying his motion for a mistrial when the trial court failed to give a curative instruction during the prosecutor's improper closing statement. We agree with Defendant that the trial court erred by denying his motion to dismiss all the charges and vacate his convictions.

A. Motion to Dismiss

¶ 20 "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). "When reviewing a defendant's motion to dismiss for insufficient evidence, [we] must inquire whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Campbell*, 373 N.C. 216, 220, 835 S.E.2d 844, 848 (2019) (marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

¶ 21 However, "[i]f 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 [to dismiss] should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). This is true even if "the suspicion so aroused by the evidence is strong." *Id.* "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favor-

able 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).

¶ 22 We begin by noting the evidence we rely on to analyze the murder charges is the same evidence we rely on to analyze the robbery with a dangerous weapon charge. As such, we discuss the sufficiency of the evidence presented for the first-degree murder charge, the felony murder charge, and the robbery with a dangerous weapon charge together. We hold the evidence, even when viewed in the light most favorable to the State, was insufficient to go to the jury.

¶ 23 Defendant argues "[t]he State failed to present any evidence that [Defendant] entered the trailer of [Mr. Davis] and committed murder" and "[t]he State failed to present any evidence connecting [the $3,000.00 in cash] with [the victim]."

¶ 24 The State contends there was evidence presented that "a reasonable mind might accept as adequate to support [the] conclusion" that Defendant murdered and robbed Mr. Davis. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. The evidence favorable to the State included: Defendant lied to the police and changed his story as to his whereabouts on the night of the murder; cell tower records placed Defendant in the same vicinity as Mr. Davis's mobile home on the night of the murder;[1] Defendant deleted his cellphone call and text messaging history; there was no forced entry in Mr. Davis's mobile home, suggesting he knew the perpetrator; the fact that Defendant was in possession of $3,000.00 in cash with no explanation of where it came from; Mr. Davis's wallet and any cash he may have had were missing from his mobile home; Bunn's testimony that Mr. Davis usually "carried a lot of cash on him" and kept cash in his wallet; Mr. Davis planned to meet his daughter the morning after the murder to bring her money; Defendant's continued asking to borrow money from Mr. Davis; and Mr. Davis told Defendant a few days before his death he refused to loan Defendant any more money. The State's evidence in this case establishes Mr. Davis was murdered, and "[i]t shows that [Defendant] had the opportunity to commit it and begets suspicion in imaginative minds. All the evidence engenders the question, if [D]efendant didn't kill [the victim], who did? To raise such a question,

1. We note that while the State's evidence shows that Defendant may have been in the general vicinity of the victim's mobile home, this general vicinity also overlaps with Terry's Auto Sales, Defendant's employer, and a location where Defendant is often present.

however, will not suffice to sustain a conviction." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971) (marks and citations omitted).

¶ 25 The State urges we can infer Defendant's motive for murdering Mr. Davis was because Mr. Davis "has been known to carry around large amounts of cash" and Defendant was in possession of a large amount of cash immediately after the murder. In light of Mr. Davis's scheduled meeting with his daughter on 10 May 2016 where he planned to give her money, the jury could reasonably infer Mr. Davis had cash in his mobile home. However, it is too speculative to assume Mr. Davis had thousands of dollars' worth of one-hundred-dollar bills when there is nothing in the Record to support this assumption, especially considering the Record contains no indication that Mr. Davis ever loaned anyone more than $20.00 or $50.00. Assuming Mr. Davis possessed a large amount of cash at the time of his murder, the State failed to present sufficient evidence that Defendant was the one who took and carried away the cash from the victim. Rather, the evidence simply established that Defendant had an opportunity to steal the money at issue. "Under well-settled caselaw, evidence of a defendant's mere opportunity to commit a crime is not sufficient to send the charge to the jury." *Campbell*, 373 N.C. at 221, 835 S.E.2d at 848.

¶ 26 *State v. White* illustrates the principle that a conviction cannot be sustained if the most the State has shown is the defendant was in an area where he could have committed the crime. *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977). In *White*, the defendant was charged with second-degree murder after a woman was found stabbed to death in her mobile home located outside of a motel where the defendant was staying at the time. *Id.* at 96-97, 235 S.E.2d at 59. There was testimony that a motel employee heard a woman scream and then saw a man run out of the victim's mobile home and head in the direction of the defendant's motel room. *Id.* at 92, 235 S.E.2d at 56. Officers found traces of blood on the defendant's shoes and shirt, but the DNA analysis failed to match the blood to the victim. *Id.* at 96, 235 S.E.2d at 59. Our Supreme Court held that, although "the evidence raises a strong suspicion as to [the] defendant's guilt[,]" it was "not sufficient to remove the case from the realm of surmise and conjecture." *Id.* at 95, 235 S.E.2d at 58. Our Supreme Court acknowledged the State's evidence established that the defendant was in the general vicinity of the victim's residence at the time of the murder, the defendant gave contradictory statements to law enforcement officers, and it could "even reasonably be inferred that the defendant was at the home of the deceased when the deceased came to her death, or shortly thereafter." *Id.* at 97, 235 S.E.2d at 59. Nevertheless, our Supreme Court reversed the defendant's conviction. *Id.*

¶ 27 Here, the State offered evidence that the victim "has been known to carry around large amounts of cash"; the victim planned to bring money to his daughter on the morning he was found murdered, although it is unknown how much money; Defendant was a crack cocaine addict who frequently borrowed small amounts of money from various people in the community, including the victim; Defendant was in possession of approximately $3,000.00 in cash after the murder and concealed that cash outside his girlfriend's mother's house; Defendant was in the vicinity of the victim's residence for a period of time on the night of the murder; Defendant changed his story and gave contradictory statements to law enforcement officers; and Defendant deleted all call and text message history from his cellphone except for the calls and text messages from the morning the victim was discovered murdered. This evidence may be fairly characterized as raising a suspicion of Defendant's guilt, but crucial gaps existed in the State's evidence. The State failed to link Defendant to the stolen cash or prove that the $3,000.00 worth of one-hundred-dollar bills Defendant hid in the McDonald's bag in the trash can was cash stolen from the victim's mobile home. "The full summary of the incriminating facts, taken in the strongest view of them adverse to [Defendant], excite[s] suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party." *Jones*, 280 N.C. at 66, 184 S.E.2d at 866 (marks omitted).

¶ 28 "The State has shown that [] [D]efendant was in the general vicinity of the deceased's home at the time of the murder and that he made several arguably contradictory statements during the course of the police investigation." *White*, 293 N.C. at 97, 235 S.E.2d at 59. However, "the State has [only] established that [] [D]efendant had an opportunity to commit the crime charged." *Id.* To infer anything "[b]eyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *Id.* There was no evidence beyond mere speculation that Defendant was at the scene of the crime, had a motive to commit these crimes, or that Defendant actually committed the crimes. Although "[t]he circumstances raise a strong suspicion of [D]efendant's guilt, . . . we are obliged to hold that the State failed to offer substantial evidence that [D]efendant was the one who [stabbed the victim]." *Jones*, 280 N.C. at 67, 184 S.E.2d at 866. There is insufficient evidence to establish Defendant was the perpetrator of the murder and the robbery.

¶ 29 "We believe the evidence raises a strong suspicion as to [D]efendant's guilt, but that is not sufficient to remove the case from the realm of surmise and conjecture." *White*, 293 N.C. at 95, 235 S.E.2d at

58. We find the Record is insufficient to show more than a suspicion that Defendant murdered Mr. Davis and robbed him with a dangerous weapon. "Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support [D]efendant's conviction of felony murder." *State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 263 (1983). The trial court erred in denying Defendant's motion to dismiss all charges and we reverse the trial court's ruling on the motion to dismiss and vacate his convictions.

B. Motion for a Mistrial

¶ 30 Defendant also argues "the [trial] court erred by failing to promptly cure the prosecutor's improper [closing] argument which shifted the burden of proof to [] Defendant" and the trial court should have granted his motion for a mistrial. Our holding in Part A–that the trial court erred in denying Defendant's motion to dismiss all charges–renders Defendant's second argument, regarding his motion for a mistrial, moot. *See State v. Angram*, 270 N.C. App. 82, 88, 839 S.E.2d 865, 869 (2020) ("Because we must reverse the judgment, we need not address [the] defendant's other issue on appeal."). As we agree with Defendant's first argument, we must reverse the trial court's ruling on the motion to dismiss all charges, as well as vacate Defendant's judgments, and we need not address Defendant's other issue on appeal.

CONCLUSION

¶ 31 The State failed to present substantial evidence that Defendant was the perpetrator of any of the crimes he was tried upon. The trial court erred in denying Defendant's motion to dismiss all charges. We reverse its ruling and vacate Defendant's convictions.

REVERSED.

Judge DILLON concurs.

Judge ARROWOOD dissents with separate opinion.

ARROWOOD, Judge, dissenting.

¶ 32 I respectfully dissent from the majority's holding that the trial court erred in denying defendant's motion to dismiss for insufficient evidence. Although the majority's holding does not reach defendant's motion for a mistrial, I also would hold that the trial court properly denied defendant's motion. I would affirm the trial court's order and uphold defendant's convictions.

I. Motion to Dismiss for Insufficient Evidence

¶ 33 In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). Substantial evidence is defined by the North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 34 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted).

¶ 35 In considering circumstantial evidence, a jury may properly make inferences on inferences in determining the facts constituting the elements of the crime. *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987). Making inferences which naturally arise from a fact proven by circumstantial evidence "is the way people often reason in everyday life." *Id.*

¶ 36 When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)). If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citing *State v. Poole*, 285 N.C. 108, 203 S.E.2d 786 (1974)).

¶ 37 The majority accurately summarizes the evidence presented in this case, but I disagree with the majority's resulting analysis. In summarizing the evidence, the majority appears to engage in a determination of whether the facts, taken singly or in combination, were satisfactory beyond a reasonable doubt that defendant is actually guilty. With respect to defendant's motion to dismiss for insufficient evidence, the only question we must answer is whether there was evidence that gives rise to a reasonable inference of guilt.

¶ 38 The State presented evidence that the victim carried large amounts of cash on his person, he was due to bring money to his daughter on the morning he was found dead, and that a police search of his residence immediately after his murder revealed no cash or billfold. The State also presented evidence that defendant was a long-term crack cocaine user that frequently borrowed small amounts of cash from friends, his employer, and others, including the victim, and was in possession of nearly $3,000 in cash immediately after the victim's murder. Regarding this money, the State presented evidence that the cash was hidden in a glove, inside a McDonald's bag, inside his girlfriend's mother's outdoor trashcan, across the street from where defendant was staying, and that defendant had not been in possession of that money on several occasions prior to the victim's murder. Finally, the State presented evidence from defendant's cell phone records that defendant was in the vicinity of the victim's residence and another acquaintance's residence on the night he told police he had stayed at home, and that defendant had deleted all call and text histories apart from very recent calls and a text message from the morning the victim's body was discovered.

¶ 39 In this case, I would hold that the evidence of defendant's location, his possession of a large amount of cash, his history with the victim, and defendant's apparent concealment of evidence was sufficient to raise a reasonable inference that defendant was guilty of armed robbery and first-degree murder. Accordingly, I believe the case was properly submitted to the jury.

II. Motion for a Mistrial

¶ 40 "We review the trial court's denial of [d]efendant's motion for a mistrial for abuse of discretion." *State v. Sistler*, 218 N.C. App. 60, 70, 720 S.E.2d 809, 816 (2012). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "In our review, we consider not whether we might disagree with the trial court, but whether the trial

court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007).

¶ 41 "Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982). However, if a defendant fails to object to a prosecutor's closing argument at trial, this Court "must consider whether the argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu*." *State v. Rogers*, 355 N.C. 420, 452, 562 S.E.2d 859, 879 (2002). The defendant's failure to meet the State's evidence is properly the subject of a prosecutor's closing argument. *Id.*

¶ 42 In this case, the State's closing argument addressed facts supported by competent evidence and suggested inferences based on those facts. The State argued, without objection, that "every time they went to check on something that the defendant had told them, it was a lie," and that none of defendant's accounts to police were verified. The State continued as follows:

> You need a reasonable explanation for that money. If you don't have a reasonable explanation for where that money came from –
>
> MR. HOFFMAN: Your Honor, I'm going to object.
>
> THE COURT: Hold on one second. Approach.
>
> (Counsel approached the bench.)
>
> THE COURT: Sustained.
>
> [STATE]: If you can't in your own mind, reasonably resolve where that money came from, he's guilty, period. In his world, there was no other place it could have come from.

Although defendant objected to the State's original phrasing, defendant failed to object to the following statement and now argues that the trial court should have issued a curative instruction, rather than simply sustaining the objection. Defendant additionally cites several cases to support the proposition that a jury charge cannot cure an error in closing argument and that a curative instruction must be prompt or immediate. I find this case distinguishable from those cited by defendant, as defendant did not object to the rephrased argument. Defendant has failed to show that the State's closing argument was so grossly improper

that the trial court had a duty to intervene *ex mero motu*. Accordingly, I would hold that the trial court properly denied defendant's motion for a mistrial.

STATE OF NORTH CAROLINA
v.
RAMON DAVAUL MALONE-BULLOCK

No. COA20-334

Filed 3 August 2021

1. Evidence—lay witness testimony—defendant's intent—prejudice analysis

The trial court erred in defendant's trial for first-degree murder by admitting impermissible lay witness opinion testimony, over defendant's objections, that defendant drove to his cousin's house in order to obtain a gun and that defendant later attempted to set up the cousin to be killed (because the cousin was cooperating with police in their investigation of defendant for the murder), where the jury was as well qualified as the witnesses to draw those inferences from the evidence. However, the errors in admitting these two statements were not prejudicial in light of the overwhelming evidence of defendant's guilt.

2. Constitutional Law—right against self-incrimination—statements made upon arrest—testimony about extent of statements

Where defendant chose not to remain silent when he was arrested for murder, the trial court did not err by allowing the prosecutor to ask a law enforcement officer about the difference between defendant's statement upon his arrest (that he did not shoot the victim and did not know who did) and defendant's theory of defense at trial (that defendant's cousin shot the victim).

Appeal by defendant from judgment entered 16 August 2019 by Judge Leonard L. Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

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

ZACHARY, Judge.

¶ 1 Defendant Ramon Davaul Malone-Bullock appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree murder. On appeal, Defendant argues that the trial court erred by overruling Defendant's objections to lay-witness opinion testimony. Defendant also argues that the trial court committed plain error by permitting the State to elicit testimony from a detective regarding Defendant's post-arrest silence. While we agree that the trial court erred by overruling Defendant's objections to impermissible lay-witness opinion testimony, we conclude that the error did not prejudice Defendant. We further conclude that the trial court did not err by allowing the prosecutor to question the detective regarding Defendant's statements to law enforcement officers following his arrest. Therefore, after careful review, we conclude that Defendant received a trial free from prejudicial error.

I. Background

¶ 2 The State's witnesses at Defendant's trial testified to the following: On the afternoon of 1 April 2017, Defendant attended a child's birthday party on Lincoln Street in Wilson, North Carolina, with his girlfriend, Jatoria Grice, and his friend, Devanta Battle. After the birthday party was over, some of the attendees went down the street to the home of Veronika Locus and began to play cards. A dispute over the card game arose between Defendant and Harry Beecher, and they got into a fist-fight. Defendant told Mr. Beecher, "I'm going to kill you" and "you better not be here when I get back," and additionally threatened that "he was going to f*** him up[.]" Defendant then left with Ms. Grice in her car. Ms. Locus and Mr. Battle told Mr. Beecher to leave as well, but he did not.

¶ 3 When they left Ms. Locus's house, Defendant drove Ms. Grice's car; she testified that "[h]e drove really fast, like . . . 120" miles per hour, despite her request that he slow down. After Defendant ran a red light, Ms. Grice told him to stop the car. Defendant pulled over at a gas station, and Ms. Grice exited the car. Defendant drove off in the direction of his grandfather's house, where he was residing at the time.

¶ 4 Shortly thereafter, Defendant returned to Ms. Locus's house. When Mr. Beecher saw Defendant, Mr. Beecher repeatedly said, "I'm going to get him now." As Mr. Beecher started to walk toward Defendant, Defendant shot him and then left. Mr. Battle, Alex Umstead, and Elliot Santiago witnessed the shooting. Mr. Beecher died at the scene.

¶ 5 Defendant's cousin, William Saxton, testified for the State at Defendant's trial. He testified that on the morning of 1 April 2017, he

and Defendant used Mr. Saxton's gun to practice target shooting in the yard. Defendant asked if he could buy the gun from Mr. Saxton; Mr. Saxton refused, but allowed Defendant to borrow it. The gun had six bullets in the cartridge when Defendant took it. When Defendant returned the gun to Mr. Saxton the next day, 2 April 2017, the cartridge was empty.

¶ 6 Defendant's account at trial differed from that of the State's witnesses. In his opening statement, Defendant's counsel asserted that he "expect[ed] the evidence to be clear that William Saxton . . . pull[ed] the trigger on that gun that killed" Mr. Beecher. Defendant testified that, after letting Ms. Grice out of the car at the gas station, he drove to Mr. Saxton's home, which was near Defendant's residence. He told Mr. Saxton about the fight with Mr. Beecher, and Mr. Saxton "got real mad [that Mr. Beecher] put his hands on" Defendant. Mr. Saxton said, "I'm going to show you how to handle stuff." Defendant testified that Mr. Saxton dropped off Defendant at the home of someone named "Old School" with whom Defendant gambled until Mr. Saxton returned. Defendant then asked Mr. Saxton what happened, and Mr. Saxton responded that "he handled that and don't ask him all these crazy questions." Defendant testified that he did not shoot Mr. Beecher, and that his "gut" told him that Mr. Saxton did.

¶ 7 Defendant was arrested on 15 December 2017 on the charge of first-degree murder for the death of Mr. Beecher. When detectives spoke with Defendant upon his arrest, Defendant told them that he did not shoot Mr. Beecher and he did not know who did.

¶ 8 Mr. Battle testified at trial to circumstances after the shooting. In February of 2018, defense counsel received discovery from the State. The discovery included the videotape of a December 2017 interview of Mr. Saxton, in which he told law enforcement officers that he had lent Defendant his gun from 1 to 2 April 2017. Mr. Battle testified that Defendant phoned him in May 2018, after Defendant became aware of the Saxton videotape:

> Basically [Defendant] mad like. . . . [S]o I asked him like, Elliot [Santiago] told me about Saxton. He like, yeah, blah, blah, blah, Saxton ain't right. . . . He was like how you going to tell on me; you the one that gave him the gun. . . . I ain't got nothing to prove but I know it's him; like I know it's him, got to be him. That's what he kept saying; got to be him, bro, I need you.

Mr. Battle then testified that Defendant told him, "You need to get rid of Saxton[,]" which Mr. Battle understood to mean, "Kill him." Defendant and Mr. Battle then planned the killing of Mr. Saxton.

¶ 9 On 20 May 2018, Mr. Battle called Mr. Saxton and arranged a meeting. Mr. Battle picked up Mr. Saxton, with Mr. Battle's friend, Sabrina Presley, driving the car. Mr. Battle instructed her to turn onto a dead-end road and stop at a stop sign. When she did, Mr. Battle shot Mr. Saxton in the face. Mr. Saxton quickly exited the car and ran toward the woods; Mr. Battle jumped out after him and shot him again in the back. Mr. Saxton hid in the woods, and ultimately survived his injuries.

¶ 10 Afterward, Mr. Battle spoke to Defendant by phone again and told him, "boy got away, bro." Mr. Battle testified that Defendant sounded "disappointed" to hear this news.

¶ 11 On 16 July 2018, a Wilson County grand jury returned an indictment charging Defendant with first-degree murder in the death of Mr. Beecher. Following a trial, on 16 August 2019, the jury returned a verdict finding Defendant guilty of first-degree murder. The trial court entered judgment upon the verdict and sentenced Defendant to life imprisonment without the possibility of parole.

¶ 12 Defendant gave notice of appeal in open court.

II. Discussion

¶ 13 Defendant raises two arguments on appeal. First, Defendant argues that the trial court erred in denying his objections to two instances of improper lay-witness opinion testimony. Second, he argues that the trial court committed plain error by permitting the State to elicit testimony from Detective Justin Godwin regarding Defendant's post-arrest silence. We address each argument in turn. After careful review, we conclude that the trial court did not commit prejudicial error by allowing the lay-witness opinion testimony, and that the trial court did not err by permitting the State to question Det. Godwin regarding Defendant's statement upon his arrest.

A. Admission of Lay-Witness Opinion Testimony

¶ 14 **[1]** At trial, Mr. Battle testified, over Defendant's objection, that he believed that, after Defendant left Ms. Grice at the gas station, he was driving to Mr. Saxton's house because he knew that Mr. Saxton had guns. Defendant argues that the trial court erred by permitting Mr. Battle to testify to his opinion regarding where Defendant was driving or why.

¶ 15 In addition, Mr. Saxton testified, over Defendant's objection, that he believed that Defendant had set him up to be shot by Mr. Battle. Defendant argues that the trial court erred by permitting Mr. Saxton to speculate as to whether Defendant planned Mr. Saxton's shooting.

¶ 16 We agree that the trial court erred by admitting each of these lay-witness opinions; however, because the State presented ample other evidence upon which the jury could have relied in finding Defendant guilty of first-degree murder, we conclude that these errors were not prejudicial.

1. Standard of Review

¶ 17 Defendant objected to both Mr. Battle's and Mr. Saxton's testimony at trial; we therefore review the trial court's evidentiary rulings for abuse of discretion. *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). "In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *State v. Shaw*, 106 N.C. App. 433, 441, 417 S.E.2d 262, 267, *disc. review denied*, 333 N.C. 170, 424 S.E.2d 914 (1992).

2. Analysis

¶ 18 Rule 701 of the North Carolina Rules of Evidence governs opinion testimony by lay witnesses:

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

N.C. Gen. Stat. § 8C-1, Rule 701 (2019).

¶ 19 Generally, "opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. McKoy*, 2021-NCCOA-237, ¶ 14 (citation omitted). In that "the jury is charged with determining what inferences and conclusions are warranted by the evidence[,]" *id.* (citation omitted), lay-witness opinion testimony is inadmissible when the jury is "as well qualified as the witness to draw the inferences and conclusions from the facts that [the witness] expresse[s] in his opinion[,]" *Belk*, 201 N.C. App. at 415, 689 S.E.2d at 441 (citation omitted).

¶ 20 Our Supreme Court has interpreted Rule 701 to allow a lay witness to testify to an opinion which is "a shorthand statement of fact, or, in other words, the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and

things, derived from observation of a variety of facts presented to the senses at one and the same time[.]" *State v. Roache*, 358 N.C. 243, 294, 595 S.E.2d 381, 414 (2004) (citations and internal quotation marks omitted). However, "[a]lthough a lay witness may be allowed to testify as to his opinion of the emotions a person displayed on a given occasion, a lay witness may not give his opinion of another person's intention on a particular occasion." *State v. Hurst*, 127 N.C. App. 54, 63, 487 S.E.2d 846, 853, *appeal dismissed and disc. review denied*, 347 N.C. 406, 494 S.E.2d 427 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998) (citation and internal quotation marks omitted).

¶ 21 Here, Mr. Battle testified on direct examination that he was with Ms. Locus at her house on the evening of 1 April 2017 when Ms. Locus received a telephone call from Ms. Grice, who said that Defendant was "driving fast" and "on the way to the country." Mr. Battle then testified as follows:

> Q Do you know where [Defendant] lived at that time?
>
> A Yes.
>
> Q Where?
>
> A In the country.
>
> Q Where in the country?
>
> A Out Packhouse.
>
> Q Now did you know William Saxton?
>
> A Yes.
>
> Q Did you know where he lived?
>
> A Yes.
>
> Q Where did he live?
>
> A Off Packhouse [Road].
>
> Q Is that near [Defendant]?
>
> A Yes. That's where I figured he was going.
>
> Q Why is that? Why did you figure he was going there?
>
> A Just the way she say he was driving and he was already mad so I figured he was going to see [Mr. Saxton].

> Q Why would he do that?
>
> [DEFENSE COUNSEL]: Objection. There's no foundation for his answer to this. He would be guessing, speculation.
>
> THE COURT: If he knows why he can answer the question. Objection is overruled.
>
> . . . .
>
> BY [COUNSEL FOR THE STATE]:
>
> Q Okay. Could you answer the question why he would be going there?
>
> A [Mr. Saxton] got all the guns.

¶ 22 Defendant contends that Mr. Battle's testimony that he "figured" that Defendant was driving to Mr. Saxton's house because Mr. Saxton had "all the guns" amounts to an impermissible opinion. We agree.

¶ 23 Here, the jury was "as well qualified as [Mr. Battle] to draw the inferences and conclusions from the facts[.]" *Belk*, 201 N.C. App. at 415, 689 S.E.2d at 441. The State presented testimony that Defendant and Mr. Saxton lived near each other; that Defendant was driving at a high rate of speed in the direction of their respective houses; that Defendant appeared angry after the altercation with Mr. Beecher; that Mr. Saxton had a gun; and that Defendant knew that Mr. Saxton had a gun. The State presented these facts prior to eliciting the opinion statement from Mr. Battle. Therefore, the jury was well equipped to draw the same inference that Mr. Battle had drawn: that Defendant was driving to Mr. Saxton's house to acquire a gun. Accordingly, the trial court erred by admitting Mr. Battle's opinion testimony.

¶ 24 We similarly conclude that the trial court erred by overruling Defendant's objection to Mr. Saxton's opinion testimony and permitting Mr. Saxton to testify that he believed that Defendant planned for Mr. Battle to shoot him.

¶ 25 Mr. Saxton testified regarding his opinion as to Defendant's complicity in his shooting:

> Q What was your thought when you were in the ambulance going to the hospital?
>
> A I was set up.
>
> Q By whom?

[DEFENSE COUNSEL]: Objection.

THE WITNESS: [Defendant].

THE COURT: Overruled.

BY [COUNSEL FOR THE STATE]:

Q By whom?

A [Defendant].

Q Why?

A About the shooting on Lincoln Street.

¶ 26 Mr. Saxton's testimony that he was "set up" by Defendant because of the shooting on Lincoln Street is an improper opinion. This testimony was not based on Mr. Saxton's perception, as is required by Rule 701, and he was in no better position than the jurors to deduce whether Defendant was responsible for Mr. Battle shooting him. *See State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002). "The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [Mr. Saxton]. Therefore, we find the trial court erred in permitting this testimony." *Id.*

¶ 27 Nevertheless, we conclude that neither statement prejudiced Defendant. "In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *Shaw*, 106 N.C. App. at 441, 417 S.E.2d at 267. Defendant cannot show that the admission of Mr. Battle's or Mr. Saxton's opinion testimony prejudiced him. Three eyewitnesses testified that Defendant shot Mr. Beecher. The jury also heard testimony that Defendant threatened to kill Mr. Beecher, that he told Mr. Beecher that he had "better not be here" when Defendant returned, and that he borrowed Mr. Saxton's gun on the day of the shooting and returned it with an empty cartridge the following day. Additionally, Defendant himself testified—following the erroneous admission of the above testimony—that, after he left Ms. Grice at the gas station, he drove to Mr. Saxton's house. Therefore, Defendant cannot show "a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *Id.*

B. Post-Arrest Silence

¶ 28 **[2]** Defendant next argues that the trial court committed plain error by permitting the prosecutor to elicit testimony from Det. Godwin that

Defendant did not offer his version of the events—strongly implying that Mr. Saxton shot and killed Mr. Beecher—at any time between his arrest and trial. Defendant contends that the prosecutor's questioning impermissibly referenced his right not to incriminate himself under the Fifth Amendment to the United States Constitution. After careful review, we conclude that the trial court did not err in permitting this line of questioning because it did not, in fact, refer to any post-arrest silence on the part of Defendant.

1. Preservation

¶ 29 As a preliminary matter, the State, pointing to *State v. Gardner*, 68 N.C. App. 515, 316 S.E.2d 131 (1984), *aff'd*, 315 N.C. 444, 340 S.E.2d 701 (1986), argues that this issue is not appropriate for appellate review because it is an unpreserved constitutional issue. In *Gardner*, the defendant argued on appeal that cross-examination regarding his "failure to give a statement to the police after his arrest violated his constitutional right to remain silent." 68 N.C. App. at 518, 316 S.E.2d at 133. However, this Court concluded that, because the defendant neither asserted plain error on appeal nor raised a constitutional objection at trial, he waived appellate review of the alleged violation. *Id.* at 520, 316 S.E.2d at 133.

¶ 30 *Gardner* is not applicable in the instant case, in which Defendant has clearly asserted plain error; instead, our Supreme Court's decision in *State v. Moore*, 366 N.C. 100, 726 S.E.2d 168 (2012), governs where a defendant asserts that the trial court committed plain error in admitting testimony in violation of his constitutional right not to incriminate himself. In *Moore*, the defendant argued that the trial court committed plain error by admitting the testimony of a law enforcement officer that referred to the defendant's exercise of his Fifth Amendment right not to incriminate himself. 366 N.C. at 103, 726 S.E.2d at 171. The Court of Appeals concluded that the admission was error, but that it did not amount to plain error. *Id.* at 103–04, 726 S.E.2d at 171–72. The Supreme Court of North Carolina affirmed, concluding that the trial court erred in admitting the testimony that referred to the defendant's post-arrest silence, but that "the brief, passing nature" of the erroneously admitted evidence did not amount to plain error. *Id.* at 107, 726 S.E.2d at 174. In deciding that the admission of the officer's testimony was error but not plain error, the *Moore* Court noted that "[t]he prosecutor did not emphasize, capitalize on, or directly elicit [the officer's] prohibited responses; the prosecutor did not cross-examine [the] defendant about his silence; the jury heard the testimony of all witnesses, including [the] defendant; and the evidence against [the] defendant was substantial and corroborated by the witnesses." *Id.* at 109, 726 S.E.2d at 175.

¶ 31 Therefore, pursuant to our Supreme Court's analysis in *Moore*, the issue of whether the trial court committed plain error by admitting testimony regarding Defendant's post-arrest silence is properly before us.

2. Standard of Review

¶ 32 "For error to constitute plain error, a defendant must demonstrate that . . . . after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted). Regarding the burden on criminal defendants under plain-error review, our Supreme Court has explained that

> [t]he plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to [the] appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 516–17, 723 S.E.2d at 333 (emphasis, citation, and internal quotation marks omitted).

3. Analysis

¶ 33 Defendant contends on appeal that the trial court committed plain error by permitting the prosecutor to question Det. Godwin regarding Defendant's failure to mention his belief that Mr. Saxton shot Mr. Beecher, maintaining that the "prosecutor's deliberate elicitation of evidence that [Defendant] remained silent and did not tell the State's investigators about Saxton's involvement in the shooting . . . was a clear violation of [Defendant]'s state and federal constitutional rights[.]"

¶ 34 Defense counsel first articulated Defendant's theory of the case—that Mr. Saxton shot Mr. Beecher—during his opening statement. The prosecutor later questioned Det. Godwin on direct examination regard-

ing whether Defendant mentioned his account of the events of 1 April 2017 during Defendant's post-arrest interview:

> Q Okay. And did you have an opportunity to talk to [Defendant] after he was charged with first degree murder?
>
> A I did.
>
> Q After . . . Defendant was charged with first degree murder, did he tell you the story that [defense counsel] said in his opening?
>
> A No. That's the first time I've heard that was during the opening. He never said anything about that.
>
> Q So [Defendant] didn't tell you, even after he was charged, that William Saxton took the car and the gun over to Lincoln Street.
>
> A No, he did not.
>
> Q Did [Defendant], when he was charged, after he was charged, in that interview, did he tell you anything about anybody else going back over to Lincoln Street and shooting Harry Beecher?
>
> A No.
>
> Q Was he able to explain to you why he smelled like gasoline?
>
> A I believe he may have mentioned [he] may have spilled some gas. He was -- was not real -- he didn't want to talk about that when I mentioned that to him, even during the interview, the second interview.
>
> Q Even after the last interview in December of 2017, after the Defendant was charged, did he ever say anything about seeing or being in William Saxton's presence at any time after dark on April 1st, 2017 until the sun came up on April 2nd, Sunday, 2017?
>
> A No.

¶ 35 Defendant contends that this line of questioning violated his constitutional right not to incriminate himself because it impermissibly referenced his post-arrest silence for the purposes of impeaching his credibility. We disagree.

¶ 36 "A criminal defendant's right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment." *Moore*, 366 N.C. at 104, 726 S.E.2d at 172. "We have consistently held that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent." *Id.* (citation omitted). As our Supreme Court has explained, "[t]he rationale underlying this rule is that the value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id.* (citation and internal quotation marks omitted).

¶ 37 However, where a criminal defendant does not in fact remain silent but makes "spontaneous utterances" to law enforcement officers, "in-court questioning of the officers on the extent of [a] defendant's statements" does not violate the right against compelled self-incrimination. *State v. Alkano*, 119 N.C. App. 256, 260, 458 S.E.2d 258, 261, *appeal dismissed*, 341 N.C. 653, 465 S.E.2d 533 (1995). Indeed, "[s]ilence at the time of arrest is the critical element of the Fifth Amendment right . . . . The [United States] Supreme Court has described that right as the right to remain silent unless [the defendant] chooses to speak in the unfettered exercise of his own will." *Id.* at 261, 458 S.E.2d at 262 (emphasis, citation, and internal quotation marks omitted). And where a criminal defendant does not exercise the right to remain silent but instead speaks to law enforcement officers "regarding the facts of the incident at the time of his arrest[,]" the rule prohibiting a reference to a defendant's exercise of the right to remain silent "can have no application[.]" *Id.* (citation omitted).

¶ 38 For example, in *State v. Richardson*, the prosecutor improperly cross-examined the defendant regarding the exercise of his right to remain silent by declining to give a statement to police:

> Q. Now, you sat here through the entire trial and you heard all of the State's witnesses testify, right?
>
> A. Yes.
>
> Q. And you heard your own witness testify, didn't you?
>
> A. Yes.
>
> Q. Today, today is the very first time that you have given a statement in this case, isn't it?
>
> A. Yes.

226 N.C. App. 292, 303–04, 741 S.E.2d 434, 442–43 (2013).

¶ 39 Further, "the prosecutor questioned [the d]efendant extensively about the extent to which [the detective], whom the State did not call as a witness, had attempted to interview him and about [the d]efendant's failure to make a statement to her." *Id.* at 304, 741 S.E.2d at 443. This Court, applying *Moore*, concluded that the trial court erred in allowing this line of questioning, which constituted

> an attempt to impeach [the d]efendant by eliciting testimony that he had had an opportunity to make a post-arrest statement to [the detective] in the event that he was willing to waive his *Miranda* rights and that [the d]efendant failed to "tell his side of the story." As a result, this questioning, which comprised a significant part of the [p]rosecutor's cross-examination of [the d]efendant and which elicited evidence that [the d]efendant had failed to make a statement after refusing to waive his *Miranda* rights, was clearly impermissible[.]

Id. at 307, 741 S.E.2d at 444.

¶ 40 In *Alkano*, however, the defendant "was not silent regarding the facts of the incident at the time of his arrest." 119 N.C. App. at 261, 458 S.E.2d at 262. Because the defendant did not actually exercise his right to remain silent, we concluded that "[t]he prosecutor's questions to the officers concerning [the] defendant's lack of explanation did not violate [the] defendant's rights against self-incrimination under either the United States or North Carolina Constitutions." *Id.* at 262, 458 S.E.2d at 262.

¶ 41 The case at hand bears more similarity to *Alkano* than to *Richardson*. Here, Defendant did not actually remain silent; he spoke with Det. Godwin when he was arrested, telling Det. Godwin that he did not shoot Mr. Beecher and that he did not know who did. Defendant himself testified to making this statement to Det. Godwin. The prosecutor's questions to Det. Godwin regarding the differences between Defendant's voluntary statement—that he did not kill Mr. Beecher and he did not know who did—and his explanation at trial—that he suspected that Mr. Saxton killed Mr. Beecher—do not amount to an impermissible comment on Defendant's post-arrest silence because Defendant was not silent. Thus, "[t]he prosecutor's questions to [Det. Godwin] concerning [D]efendant's lack of explanation did not violate [D]efendant's rights against self-incrimination under either the United States or North Carolina Constitutions." *Id.*

III. Conclusion

¶ 42 Accordingly, we conclude that although the trial court erred by overruling Defendant's objections to certain impermissible lay-witness opinion testimony, the error did not amount to prejudicial error. We further conclude that the trial court did not err by permitting the prosecutor to question a law enforcement officer regarding the difference between Defendant's statement upon his arrest and his theory of defense at trial. Thus, Defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges DILLON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
BRANDON LAMAR SURRATT, DEFENDANT

No. COA20-455

Filed 3 August 2021

1. Constitutional Law—effective assistance of counsel—direct appeal—dismissal without prejudice

Defendant's ineffective assistance of counsel claims on direct appeal from drug-related convictions were dismissed without prejudice where the cold record was insufficient for the appellate court to determine whether counsel's performance was deficient.

2. Continuances—time to prepare for trial—uncomplicated criminal case—prejudice analysis

Even assuming that the trial court erred by denying defendant's motion to continue where defendant met with his attorney only briefly the day before his trial for drug-related charges, defendant failed to show prejudice from the assumed error. Defendant's attorney had adequate time to prepare, and the case was not complicated.

Appeal by Defendant from judgment entered 31 July 2019 by Judge Daniel A. Kuehnert in Cleveland County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for the State.

Leslie Rawls for defendant-appellant.

MURPHY, Judge.

¶ 1 When the Record is incomplete or unclear regarding a defendant's relationship with his or her attorney, we cannot determine whether a defendant is deprived of effective assistance of counsel. Here, we dismiss Defendant's ineffective assistance of counsel claim without prejudice as the claim cannot be decided on our existing appellate Record.

¶ 2 In addition, the trial court does not commit constitutional error when the Record clearly shows a defendant's attorney had adequate time to prepare for trial. Here, the trial court did not commit constitutional error as a thorough examination of the Record reveals Defendant's attorney had adequate time to prepare for trial.

BACKGROUND

¶ 3 On 12 October 2017, the City of Shelby Police Department conducted a controlled purchase between a paid informant and Defendant Brandon Lamar Surratt ("Defendant"), which was captured on a video and audio recording. The paid informant purchased $30.00 worth of cocaine from Defendant. Defendant was indicted on the following charges: one charge of possession with intent to manufacture, sell, and deliver a controlled substance, namely cocaine, a Class H felony; one charge of sale and delivery of a controlled substance, namely cocaine, a Class G felony; and attaining habitual felon status. N.C.G.S. § 90-95(b)(1) (2019); N.C.G.S. § 90-95(b)(1)(i) (2019). Defendant's habitual felon status could elevate these charges to Class D and Class C felonies, respectively. N.C.G.S. § 14-7.6 (2019).

¶ 4 Mr. Joshua Valentine ("Valentine") was appointed as Defendant's counsel in June 2019. However, under a local "rule or [] practice," Valentine was not qualified to be appointed on cases above Class F felonies. Valentine filed a *Motion to Withdraw as Counsel* on 8 July 2019. As grounds for the motion, Valentine stated:

> 1. Local jurisdiction rules do not allow [him] to represent [] Defendant in a habitual felon charge to which he has been appointed.
>
> 2. *Irreconcilable differences have arisen in this attorney-client relationship.*

(Emphasis added). On 29 July 2019, the trial court determined, based on Valentine's experience as a retained attorney dealing with matters

involving felonies above Class F, there was not an issue with Valentine representing Defendant at trial.

¶ 5 Defendant's trial began on 30 July 2019. During a discussion of pretrial matters, Valentine indicated, "I think my client has an oral motion he would like to make to the [c]ourt. He's asked if he'd be allowed to speak." The trial court allowed Defendant to be heard, and he made an oral motion to continue, arguing he did not have enough time to prepare for trial with his appointed counsel:

> [DEFENDANT]: Yes. A few months back, and I just appointed him last month.
>
> *This month I got a court date, but I was unaware of they had appointed me him. And then just yesterday went over my case briefly. So I wouldn't had any time -- ample time to go over my case at all with him. We went over it briefly yesterday.* So I'm asking to continue for one more time to go over my case. My life we dealing with. I ask give me more time to go over my case. We briefly went over it yesterday.

(Emphasis added). After inquiring with Valentine, the trial court denied Defendant's motion:

> THE COURT: [] Valentine, do you have any reservation about going forward with the case? Your client's acting like, you know, you haven't had -- he hasn't had enough time with you. I'm wondering if the time you've been appointed to going forward with this trial.
>
> [VALENTINE]: Yes, Your Honor.
>
> So I was appointed back in June to his case. So I was not involved throughout the whole, you know, administrative process.
>
> THE COURT: That's normal.
>
> [VALENTINE]: Yeah.
>
> So I have spent a good amount of time over the weekend and yesterday preparing if the case did go to trial. I will tell the [c]ourt we have not had a lot of time together to review the details and the facts of the case. And, you know, I always like more time, of course. But if the [c]ourt wants to go ahead and proceed, you

know, I am an officer of the [c]ourt and will comply with the [c]ourt's request.

I did make a couple of motions late yesterday that, you know, I'd like to briefly address with the [c]ourt before we do proceed. But like I said --

THE COURT: Let me ask you this. There was a -- I am allowing you to go forward. Yesterday we addressed your -- the habitual felon status, and, you know, I don't know if you looked at that beforehand or not, but I will -- if we get to that point in the proceedings, because it will be a bifurcated trial.

[VALENTINE]: Yes.

THE COURT: I will give you as much time as you need to make sure you do adequate investigation on that part of the trial, if you haven't had the time beforehand, to verify, you know, the prior felonies and those kind of things.

Hang on a minute, sir.

But you had a -- there's a motion in here [8 July 2019] about a motion to withdraw as counsel. Has that motion been addressed?

[VALENTINE]: I think -- I apologize if it wasn't clear yesterday. That was what the DA and I was intending to address regarding the local rules not explicitly allowing me to handle this type of case. I know some other judges have questioned me when I have handled those types of cases. So I had filed that motion in the -- in the hopes that I could get on the record the [c]ourt either allowing or disallowing me to --

THE COURT: Yeah, that's not a problem. I just wanted to make sure there wasn't something else.

. . .

[Defendant], do you have any other -- anything else you want to say?

. . .

[DEFENDANT]: And this is my life we dealing with. I really appreciate a reasonable amount of time to

speak with [Valentine] about my case. This is a serious case, and the habitual felon is serious. And I would really appreciate it if you would help me out with that request.

THE COURT: All right. The -- if at any time -- I mean, you and your lawyer, and your lawyer in particular, has had this case since June, which is plenty enough time to prepare for trial. He's gotten all the discovery; right?

[VALENTINE]: Yes, sir.

THE COURT: Okay. Hang on.

If in the -- I don't want to get into what's going on between you and your client, but if at any point in time you need to have a little extra time after -- before cross-examination or something, you need to talk to your client, just let me know.

[VALENTINE]: Okay.

THE COURT: And you can have that time.

I'm not inclined, [Defendant], to continue the case. I'm not going to do that. You have had this case -- the DA -- it's gone on for a long time. And you -- you have an obligation, as well as your lawyer, but you have an obligation to be prepared yourself. And your lawyer's been around since June, and it doesn't matter -- the case itself has been around longer than that . . . .

. . .

So the [c]ourt's not going to continue the case. I will give you -- at your lawyer's request, I will give you time to discuss any particular matter if you need to have a break, 15-minute break or something at some point during the trial that would be -- I'm going to give some deference to your lawyer and you, give you some time in the middle of the trial, but we are going to go forward with the trial.

This is not a complicated trial.

¶ 6 The jury found Defendant guilty on all charges. Defendant entered a plea of guilty with regard to habitual offender status and the

trial court imposed an active sentence of 74 to 101 months. Defendant timely appealed.

ANALYSIS

¶ 7 On appeal, Defendant argues he was "deprived of effective assistance of counsel when his appointed attorney made him argue *pro se* for a continuance and further failed to advocate on his behalf, *when [Defendant] and the attorney never met until the day before trial and then, only met briefly.*" (Emphasis added). Defendant also argues "[t]he trial court committed constitutional error in denying [Defendant's] motion to continue where he never met his attorney until the day before trial and then, met with him briefly."

A. Ineffective Assistance of Counsel

¶ 8 **[1]** First, Defendant argues he was deprived of effective assistance of counsel because his attorney met with him only once, briefly on the day before his trial.

¶ 9 "On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). The United States Supreme Court has established a defendant must satisfy a two-part test in order to show counsel was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

¶ 10 However, "claims of ineffective assistance of counsel should [generally] be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "[I]neffective assistance of counsel claims brought on direct review will be decided on the merits *when the cold record reveals that no further investigation is required*, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *State v. Thompson*,

359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (emphasis added) (marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). When the reviewing court determines an ineffective assistance of counsel claim cannot be decided on the existing appellate record, it must "dismiss those claims without prejudice, allowing [the] defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881.

¶ 11 In support of his ineffective assistance of counsel claim, Defendant argues he "never met [Valentine] until Monday, 29 July 2019, the day before trial." He claims "[t]he [R]ecord does not show when [Defendant] and his attorney met or for how long[,]" but also states the Record "does show that after arguing his motion to withdraw that morning, [Valentine] filed five motions that afternoon at and just after 3:15." Defendant repeatedly argues he was deprived of his right to adequate time to consult with his attorney and prepare for trial because he "[met] with [Valentine] only once, the day before trial" and Valentine did not "support [Defendant's] request to meet more than once to go over the case and prepare for trial."

¶ 12 We cannot properly decide whether Defendant was deprived of effective assistance of counsel on direct appeal because the cold Record reveals further investigation is required. *See id.* at 123, 604 S.E.2d at 881. For example, during his motion to continue, Defendant stated:

> [DEFENDANT]: This month I got a court date, *but I was unaware of they had appointed me him*. And then just yesterday went over my case briefly. So I wouldn't had any time -- ample time to go over my case at all with him. We went over it briefly yesterday. So I'm asking to continue for one more time to go over my case. . . . I ask give me more time to go over my case. We briefly went over it yesterday.

(Emphasis added). If true, such a claim could possibly merit relief. However, the Record reflects on 8 July 2019, Valentine filed a *Motion to Withdraw as Counsel*, citing "[i]rreconcilable differences have arisen in this attorney-client relationship" as one of the reasons for withdrawal. "Irreconcilable differences" indicates that as of 8 July 2019, Defendant and Valentine had had some sort of communication with one another and Defendant was aware Valentine had been appointed to represent him. It is not readily apparent from the Record when this communication occurred, or for how long, and more information must be developed to determine if Defendant's claim satisfies both parts of the *Strickland* test. *See State v. Adams*, 335 N.C. 401, 410, 439 S.E.2d 760, 764 (1994)

(holding incompleteness in an appellate record precludes a defendant from showing an error occurred), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998).

¶ 13 The Record here provides conflicting evidence regarding Defendant's relationship with his attorney. Further, we note neither the parties nor the trial court addressed the "[i]rreconcilable differences" justification for Valentine's 8 July 2019 *Motion to Withdraw as Counsel*. Since we do not have a sufficient Record to determine whether counsel's performance was deficient, the appropriate remedy is to remand the case to the trial court to address those claims. We dismiss Defendant's ineffective assistance of counsel claim without prejudice, "allowing [D]efendant to bring [it] pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

B. Motion to Continue

¶ 14 **[2]** Defendant also argues he is entitled to have his conviction vacated and to a new trial because "[t]he trial court committed constitutional error in denying [his] motion to continue where he never met his attorney until the day before trial and then, met with him briefly."

¶ 15 Ordinarily, "[a] motion for continuance . . . is . . . addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). However, "when a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances presented by the record on appeal of each case." *Id.*

¶ 16 "It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993). "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses*, 272 N.C. 509, 512, 158 S.E.2d 617, 619 (1968).

¶ 17 Assuming, without deciding, that the trial court committed error by denying Defendant's motion to continue, Defendant is unable to show

this assumed error prejudiced him. Defendant urges that prejudice from the denial of the motion to continue "should be presumed" and, quoting *State v. Rogers*, contends that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote." *State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000) (marks and citations omitted).

¶ 18 In *Rogers*, our Supreme Court stated:

> While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation only when surrounding circumstances justify this presumption of ineffectiveness.

Id. (marks and citations omitted). The facts of *Rogers* are easily distinguished from those of the present case. *Rogers* addressed a situation in which the defense attorneys were appointed "to a case involving multiple incidents in multiple locations over a two-day period for which they had only thirty-four days to prepare" for the "bifurcated capital trial" of a complex case involving many witnesses. *Id.* Our Supreme Court expressly based its holding upon "the unique factual circumstances" of the case. *Id.* at 126, 529 S.E.2d at 676. The instant case does not present "the unique factual circumstances" that were present in *Rogers*.

¶ 19 For example, a thorough review of the Record reveals Valentine had adequate time to prepare. The case was assigned to Valentine at some point in June 2019. Defendant's trial began on 30 July 2019. There is nothing in the Record to indicate that at least one month was not enough time for Valentine to prepare for trial. To the contrary, Valentine indicated he "spent a good amount of time over the weekend and [the day before trial] preparing if the case did go to trial." Further, the case here was not complicated. Unlike in *Rogers*, where the case involved "multiple incidents in multiple locations over a two-day period[,]" the case here involved a single incident that occurred on one day: the controlled purchase of cocaine that was captured on video and audio recording. *Rogers*, 352 N.C. at 125, 529 S.E.2d at 675. On the facts of this case, prejudice cannot be presumed; the Record before us appears to demonstrate that Valentine spent adequate time preparing for Defendant's trial. Defendant makes no other argument regarding prejudice. As Defendant

is unable to show prejudice resulting from the assumed error, the trial court did not err in denying the motion to continue.

CONCLUSION

¶ 20 As there are factual discrepancies in the Record, we are unable to determine the effectiveness of counsel upon examination of the cold Record. We dismiss this issue without prejudice to Defendant's right to file a motion for appropriate relief.

¶ 21 Assuming, without deciding, the trial court erred in denying Defendant's motion to continue, the facts of this case do not present the type of highly unusual situation in which prejudice should be presumed. The trial court did not err in denying Defendant's motion to continue.

DISMISSED WITHOUT PREJUDICE IN PART; NO ERROR IN PART.

Chief Judge STROUD and Judge GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
HAROLD EUGENE SWINDELL, DEFENDANT

No. COA20-263

Filed 3 August 2021

Criminal Law—jury instructions—possession of a firearm by a felon—requested instruction—justification defense

In a trial for murder and possession of a firearm by a felon, defendant was entitled to his requested instruction on the affirmative defense of justification on the firearm charge, based on evidence, viewed in the light most favorable to defendant, supporting each of the required factors: defendant was approached by a group of people, one of whom hit him, causing him to fall, at which point defendant believed the other person was going to shoot him; defendant was not the aggressor and told the other person he was not there to fight; once defendant was attacked and fell, by a person who had a reputation for violence, there was no opportunity to retreat; and defendant only took hold of a gun to avoid being shot and dropped the gun when he was able to run away. Where a reasonable jury could have acquitted defendant based on the evidence, the failure to provide the instruction was prejudicial, necessitating a new trial.

Judge JACKSON dissenting.

Appeal by Defendant from judgments entered 27 November 2018 by Judge Jeffery K. Carpenter in Bladen County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

Leslie Rawls, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Harold Swindell ("Defendant") appeals from his convictions of second-degree murder and possession of a firearm by a felon. On appeal, Defendant contends the trial court erred when it declined to instruct the jury on justification as an affirmative defense to possession of a firearm by a felon. We agree.

I. Factual and Procedural Background

¶ 2 On May 17, 2017, Defendant received a phone call from his brother, Darryl. Darryl called Defendant because he was worried about a potential physical altercation at Darryl's apartment complex. Defendant and his friend, Broadus Justice ("Justice"), traveled to Darryl's complex, where they witnessed Darryl engaging in a physical altercation with James Ratliff, Anthony Smith ("Anthony"), Bobby Lee Ratliff, and Cequel Stephens ("Cequel"). Defendant and Justice broke up the fight. Defendant, Justice, and Darryl then returned to Defendant's residence.

¶ 3 Darryl's wife called shortly thereafter, requesting Darryl return to their apartment complex. When the three returned to Darryl's apartment complex, Defendant remained outside and conversed with Darryl's neighbors. Defendant then noticed Lonnie Smith ("Lonnie") approach with James Ratliff, Anthony, Bobby Lee Ratliff, and Cequel.

¶ 4 Shawbrena Thurman ("Thurman"), a resident of the apartment complex, testified at trial. According to Thurman, Lonnie asked Defendant, "So you say somebody going to die?" Defendant responded he had no intention of killing anyone or getting into an altercation. In response, Lonnie began to hit Defendant in the face. Thurman testified she did not observe Defendant fall when Lonnie punched him. Thurman testified that, after the fight began, Cequel also engaged in the physical altercation. A crowd formed around them.

¶ 5 Thurman further testified Defendant came to the complex with a firearm and that he never dropped it during the fight with Lonnie. According to Thurman, Defendant yelled, "Back up," and Cequel retreated. Lonnie and Defendant continued to fight for a few moments after Cequel ran. As Lonnie turned to run, Thurman watched as Defendant shot him. Thurman testified she never saw Lonnie with a gun. However, Thurman later testified, "[Lonnie] didn't never have a gun. He didn't never have a gun. He was trying to fight. And he pulled a gun out of his — and I don't even think he knew that he had a gun." She testified that once Lonnie fell, Defendant stood over him and shot again. Shaquay Mullins ("Mullins"), another resident, testified she observed Defendant pull a gun from his pants and shoot Lonnie.

¶ 6 Defendant's recollection of the altercation differed from Thurman and Mullins's. Defendant testified that when Lonnie initially hit him, he took a step back, slipped, and fell onto his buttocks. According to Defendant, Anthony yelled "[b]ack the F up." Defendant observed the crowd begin to retreat. Defendant believed Anthony had a gun because Justice also retreated. In Defendant's opinion, Justice was a large man who would not retreat from a smaller man like Anthony unless he had a firearm. Defendant testified he heard his brother warn that Anthony had a gun.

¶ 7 Defendant further testified he observed a gun a foot or two in front of him and reached up from the ground to obtain the gun before Lonnie could do so. Defendant admitted he intentionally fired the weapon three times because he believed he was about to be killed. Defendant testified he had this belief because he had heard Anthony yell, "Pop him." After Lonnie was shot, Defendant retreated to his vehicle and left. Defendant called 911 and reported the shooting once he had returned to his residence.

¶ 8 Dr. Lauren Scott ("Dr. Scott") performed an autopsy on Lonnie and testified as an expert in forensic pathology at trial. According to Dr. Scott, Lonnie was shot two or three times. The autopsy report reveals one bullet had an upward trajectory, entering Lonnie's back, and traveling through organs into his chest. Another bullet entered Lonnie's right thigh, "centered 28.5 [inches] to the right heel[,]" and exiting "centered 27.5 [inches] to the right heel." A third wound track revealed a gunshot wound in Lonnie's left thigh. The autopsy report speculates whether the third wound track "represent[s] a re-entrance wound . . . or a separate gunshot wound."

¶ 9 At trial, Defendant requested a jury instruction on the affirmative defense of justification. The trial court denied this request. Defendant's

counsel objected and renewed his objection after the jury received its instructions. On appeal, Defendant asserts the trial court erred in failing to instruct the jury on the justification defense.

II. Discussion

¶ 10 Defendant's sole argument on appeal is that the trial court erred in declining to instruct the jury on the affirmative defense of justification to possession of a firearm by a felon. "In North Carolina, requests for special jury instructions are allowable pursuant to [N.C. Gen. Stat.] §§ 1-181 and 1A-1, Rule 51(b)." *State v. Napier*, 149 N.C. App. 462, 463, 560 S.E.2d 867, 868 (2002). A trial court must give all requested jury instructions if the requested instructions "are proper and supported by the evidence." *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005) (citation omitted). To determine "whether a defendant is entitled to a requested instruction, [appellate courts] review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to [the] defendant." *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citation omitted); *see also State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979) (holding that if there is sufficient evidence in the light most favorable to defendant to support an instruction for an affirmative defense, "the instruction must be given even though the State's evidence is contradictory."(citation omitted)). A trial court's erroneous failure to give a requested instruction "is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted).

¶ 11 Under N.C. Gen. Stat. § 14-415.1(a), it is "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). A person found in violation of Section 14-415.1(a) is guilty of a Class G felony. N.C. Gen. Stat. § 14-415.1(a).

¶ 12 Our Supreme Court has recently adopted justification as an affirmative defense to possession of a firearm by a felon. *State v. Mercer*, 373 N.C. 459, 838 S.E.2d 359 (2020).[1] For a defendant to be entitled to a jury instruction on justification, he must meet a four-part test:

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1. The justification defense originates in our federal courts. *See U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Our Supreme Court's adoption of the justification defense for possession of a firearm by a felon comes after this Court applied the defense in several instances, assuming, but not deciding, that the justification defense applied in North Carolina.

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464, 838 S.E.2d at 363 (quoting *U.S. v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000)); *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389. The defense of justification has been reserved for "narrow and extraordinary circumstances." *Mercer*, 373 N.C. at 463, 838 S.E.2d at 362. The justification instruction must be given when evidence for each factor is presented. *Id.* at 464, 838 S.E.2d at 363.

¶ 13 Our case law has placed an emphasis on the timing of a defendant's possession of the firearm. To be entitled to the justification defense, a defendant must only possess the firearm while "under unlawful and present, imminent, and impending threat." *Id.* at 464, 838 S.E.2d at 363 (citation omitted). In *State v. Napier*, 149 N.C. App. 462, 560 S.E.2d 867 (2002), this Court held the justification defense is inapplicable to a defendant who voluntarily armed himself several hours prior to a threat. *Id.* at 464, 560 S.E.2d at 868-69. In *Napier*, the defendant was a convicted felon who had an ongoing dispute with a neighbor. *Id.* at 462, 560 S.E.2d at 868. The defendant walked to his neighbor's property and stayed there for several hours before shooting the neighbor's son. *Id.* at 463-65, 560 S.E.2d at 868-69. As the defendant was armed during a period where there was no "unlawful and present, imminent, and impending threat," this Court held he was not entitled to a justification instruction. *Id.* at 465, 560 S.E.2d at 869; *see also State v. Boston*, 165 N.C. App. 214, 222, 598 S.E.2d 163, 167-68 (2004); *State v. Monroe*, 233 N.C. App. 563, 570, 756 S.E.2d 376, 381 (2014); *State v. Edwards*, 239 N.C. App. 391, 396, 768 S.E.2d 619 (2015); *State v. McNeil*, 196 N.C. App. 394, 398, 674 S.E.2d 813, 821 (2009); *State v. Ponder*, No. COA11-1365, 220 N.C. App. 525, 725 S.E.2d 674, 2012 WL 1689526 (N.C. Ct. App. May 15, 2012) (unpublished) (all holding the defendant was not entitled to the justification defense because there was no imminent threat at the time the defendant acquired the firearm).

¶ 14 In *State v. Craig*, 167 N.C. App. 793, 606 S.E.2d 387 (2005), this Court declined to expand the justification doctrine to include instances where the defendant possessed the firearm after the threat had passed,

"because there was a time period where [the d]efendant was under no imminent threat while possessing the gun." *Id.* at 797, 606 S.E.2d at 389; *see also State v. McFadden*, No. COA15-957, 247 N.C. App. 400, 786 S.E.2d 433, 2016 WL 1745118 (2016) (N.C. Ct. App. May 3, 2016) (unpublished); *State v. Litaker*, No. COA19-189, 269 N.C. App. 385, 836 S.E.2d 782, 2020 WL 64798 (N.C. Ct. App. Jan. 7, 2020) (unpublished).

¶ 15 In addition to possessing the firearm in the presence of an imminent threat, a defendant must not have a reasonable alternative to violating the law. In *Edwards*, the defendant was found "standing with other[s] in a vacant lot . . . . When [the] defendant saw the officers, he 'hurriedly started walking away' and 'reached into his waistband and pulled out a [handgun] . . . ." 239 N.C. App. at 391, 768 S.E.2d at 620. Although the defendant contended he was being threatened and needed the gun for protection, he failed to present evidence of "the circumstances under which defendant was 'in a situation where he would be forced to engage in criminal conduct'; [and] whether defendant had a reasonable alternative to violating the law . . . ." *Id.* at 395, 768 S.E.2d at 622. Because the defendant obtained the firearm nearly an hour before law enforcement discovered he was in possession of the weapon, this Court held he was not entitled to the justification defense. *Id.* at 394-95, 768 S.E.2d at 621-22.

¶ 16 Likewise, several of our unpublished justification decisions have recognized that, where the defendant obtains a firearm in anticipation of an imminent threat, he has a reasonable alternative to violating the law. *See*, *e.g.*, *Ponder*, No. COA11-1365, 220 N.C. App. 525, 725 S.E.2d 674, 2012 WL 1689526, at *2 (defendant not entitled to justification where he voluntarily obtained a firearm and waited to confront the victim, instead of "telephon[ing] the police"); *State v. Lyles*, No. COA02-1139, 157 N.C. App. 142, 578 S.E.2d 327, 2003 WL 1701564, at *3 (N.C. Ct. App. April 1, 2003) (unpublished) (defendant had a reasonable alternative to violating the law where he "had only to refuse to take the gun that was already in [another's] safekeeping.").

¶ 17 However, the justification defense shall apply where a defendant can present evidence of all four elements. *See State v. Mercer*, 260 N.C. App. 649, 818 S.E.2d 375 (2018), *aff'd*, 373 N.C. 459, 838 S.E.2d 359 (2020). In *Mercer*, the defendant's cousin had been involved in several physical altercations in the defendant's neighborhood. *Id.* at 650-51, 818 S.E.2d at 376-77. The defendant's cousin was engaged in an altercation in the defendant's yard while the defendant was not home. Upon arriving, the defendant became involved in the altercation. *Id.* at 651, 818 S.E.2d at 377. The defendant heard guns cocking, and saw that his

cousin, as well as the persons whom he had observed engaging in the altercation with his cousin, was armed. *Id.* at 653, 818 S.E.2d at 378. Defendant took possession of the firearm when he observed his cousin struggling with it. *Id.* At trial, the State presented evidence suggesting the defendant brought a firearm to the fight. *Id.* at 651, 818 S.E.2d at 376-77. The defendant was later convicted of possession of a firearm by a felon. *Id.* at 650, 818 S.E.2d at 376. On appeal, the State argued the defendant was not entitled to the justification defense, as his actions were not reasonable. However, this Court held reasonableness was a "question for the jury, after appropriate instruction." *Id.* at 658, 818 S.E.2d at 381 (citation omitted). This Court further held that the defendant was entitled to an instruction on justification, because the defendant presented evidence "that he only grabbed the gun . . . when he heard guns being cocked, and threw it back to [his cousin] when he was able to run away" and that he was not the aggressor. *Id.* at 657, 818 S.E.2d at 380.

¶ 18 In the present appeal, the evidence tends to show Defendant fell onto his buttocks after Lonnie hit him. Defendant testified he was in "complete fear" and thought he was "about to be killed and using the gun was the only thing that could save his life." Prior to the shooting, Defendant heard his brother call out, "Watch out. He got [sic] a gun." Defendant heard Lonnie's brother say, "Pop him. Pop him," which he understood to mean "shoot him." Defendant testified he only grabbed the gun because he fell and believed Lonnie would shoot him. Defendant's testimony that he fell to his buttocks is corroborated by the autopsy report, which provides that the likely-fatal bullet wound followed an upward trajectory. Immediately after the shooting, Defendant "threw the gun" on the ground and ran to his vehicle. Taking the evidence in the light most favorable to Defendant, we hold Defendant only possessed the firearm during the time he was under "an unlawful and present, imminent, and impending threat." *See Mercer*, 373 N.C. at 464, 838 S.E.2d at 363-64.

¶ 19 Addressing the second element, the evidence demonstrated that Defendant broke up a fight earlier in the day. After the fight, Defendant returned to his residence for approximately fifteen minutes. Defendant, Darryl, and Justice returned to Darryl's complex at the request of Darryl's wife. After returning to the complex, Defendant remained outside and conversed with several residents, many of whom asked about the earlier fight. Approximately half an hour after Defendant returned to the complex, the second altercation occurred. Defendant was not the aggressor and attempted to explain to Lonnie that he was not there to fight with anyone. Taking "the evidence in the light most favorable to [D]efendant, we conclude that a jury could find [] he did not negligently or recklessly

place himself in a situation where he would be forced to arm himself." *See id.* at 465, 838 S.E.2d at 364.

¶ 20 The State argues that, even if the first two elements are met, Defendant is not entitled to the justification instruction because he had a reasonable alternative to violating the law. The State contends Defendant could have retreated to his vehicle after the altercation began and left the scene without obtaining the firearm. Defendant testified that he "imagine[d]" he could have gotten into his vehicle and left prior to the shooting. However, evidence also tended to show Defendant was physically attacked by Lonnie—who had a reputation for violence—and that Defendant fell after Lonnie initiated the second fight. Defendant saw a gun in front of him and heard Lonnie's associates call for Lonnie to shoot him. Taking the evidence in the light most favorable to Defendant, "a reasonable jury could conclude that it was too late to call 911 and that running away would have put him at greater risk of being shot. A jury could have concluded that defendant had no reasonable legal alternative to violating the law." *Id.*

¶ 21 Finally, Defendant meets the fourth element as there was evidence which tended to show a direct causal relationship between the avoidance of imminent harm and Defendant's possession of a firearm. Defendant testified he only took possession of the firearm after he heard bystanders warning that the victim had a gun and because he had fallen onto his buttocks. Defendant feared that if he did not use the firearm, he would be shot. Further, Defendant abandoned the firearm when he was able to run away. Although the State presented evidence to the contrary, taking "the evidence in the light most favorable to [D]efendant, a jury could find that his gun possession was directly caused by his attempt to avoid a threatened harm." *Id.* at 466, 838 S.E.2d at 364.

¶ 22 Taking the evidence in the light most favorable to the defense, Defendant presented evidence in support of all factors necessary for the justification defense. As our Supreme Court emphasized in *Mercer*, we do not determine whether Defendant "was actually justified in his possession of the firearm, as the State did present relevant conflicting evidence on several points. We hold only that he was entitled to have the justification defense presented to the jury." *Id.*

¶ 23 Having determined Defendant was entitled to a jury instruction on justification, we next determine whether Defendant was prejudiced by the trial court's failure to give such an instruction. *See id.* "[A] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility

that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. §15A-1443(a) (2020). Here, the jury was not instructed on the justification defense to possession of a firearm by a felon, and it subsequently convicted Defendant on that charge. We hold that, under the facts of this case, a reasonable jury may have acquitted Defendant had it been permitted to consider whether Defendant was justified in his possession of the firearm.

III. Conclusion

¶ 24 Viewing the evidence in the light most favorable to Defendant, we conclude Defendant has made the requisite showing of each element of the justification defense. The trial court committed prejudicial error by denying Defendant's request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge JACKSON dissents by separate opinion.

JACKSON, Judge, dissenting.

¶ 25 The issue in this case is whether the trial court erred by denying Defendant's request for a jury instruction on justification as an affirmative defense to his charge of possession of a firearm by a felon. Because I believe the evidence shows that Defendant intentionally placed himself in a dangerous situation, and because he had many reasonable alternatives to violating the law, I would hold that Defendant could not have satisfied the elements of the justification defense. Accordingly, I would hold that the trial court did not err in denying Defendant's requested jury instruction. I respectfully dissent.

I. Factual and Procedural Background

¶ 26 This case arises out of a series of altercations that occurred between Defendant, his brother, and his brother's neighbors in May 2017. In the afternoon of 17 May 2017, Defendant was at home when he received a phone call from his brother Darryl Swindell, asking that Defendant come to Darryl's apartment complex (Oakdale Homes) to pick him up. Darryl asked for a ride because he owed his neighbors money and feared the

neighbors might try to start a fight with him. Defendant left home, accompanied by his friend Broadus Justice, and the two drove to Oakdale Homes to pick up Darryl.

¶ 27 When they arrived at Oakdale, Defendant saw four people (James Ratliff, Anthony Smith, Bobby Lee Ratliff, and Cequel Stephens) beating up his brother. As soon as Defendant got out of the car and began approaching the group, Cequel Stephens approached him and tried to punch him, but Defendant pushed him away. Defendant immediately set to work trying to break up the fight, which was over in approximately two to three minutes. As they began to leave, Anthony Smith shouted at Defendant and his brother "You don't belong out here anyway . . . This is NFL territory." Defendant knew that "NFL" was a local gang which was led by Anthony's brother, Lonnie Smith. Defendant ignored Anthony's statement and returned home with Broadus and his brother.

¶ 28 The group remained at Defendant's home for only ten to 15 minutes before receiving a phone call from Darryl's wife, who lived at Oakdale. Darryl's wife informed him that "the individuals [who fought with Darryl] were back," and Darryl relayed this information to Defendant. Darryl then "asked [Defendant] to take him back to his home" because he "was concerned." So Defendant drove his brother and Broadus back to Oakdale. As Defendant parked and got out of the car, he saw that a group of about ten neighbors were gathered in the Oakdale parking lot having a cookout. Defendant joined the group and remained there for some time, chatting with the neighbors.

¶ 29 After spending approximately 30 minutes socializing with neighbors in the parking lot, Defendant noticed a group of men approach from behind the apartment building. This group included several of the individuals who Defendant had seen fighting earlier that day (Cequel Stephens, Bobby Lee Ratliff, and Anthony Smith) as well as two other individuals who Defendant knew, but who had not been present at the earlier fight (Lonnie Smith and Robert Ratliff). The approaching group was led by Lonnie Smith, who Defendant knew to be "the leader of a local gang called 'NFL,' " and who Defendant characterized as "a pretty tough guy . . . pretty brutal" with a "bad reputation . . . for violence."

¶ 30 After this point, accounts differed on how the altercation between Lonnie and Defendant progressed. According to the voluntary statement which Defendant provided to Officer Rodney Warwick (which occurred later that same evening), Lonnie walked up to Defendant and asked if Defendant had been looking for him, to which Defendant responded "It weren't like that." Lonnie then "began to hit him" in the head and upper

body, and the two "got into a tussle." "[A]s they tussled, other individuals became involved in the altercation; [and] during the altercation, a gun just suddenly appeared . . . everything happened quickly, and the gun just went off." Defendant told Officer Warwick that he had not brought the gun, and that he didn't know who the gun belonged to.

¶ 31 Defendant told Officer Warwick two slightly differing accounts of how the gun ended up going off. Defendant first stated that after the gun appeared, there was a struggle for possession of the weapon, and that "during the tussle for the weapon, that he never had it, but that he definitely touched it," and that he eventually "heard it go off." In another account, Defendant stated that he and Lonnie "struggled over the gun, that [Defendant] got the gun, and the gun went off."

¶ 32 Defendant's trial testimony painted a different picture of the altercation. According to Defendant's trial testimony, as Lonnie and his group approached him in the Oakdale parking lot, Lonnie asked if Defendant had been fighting with Lonnie's brother Anthony. In an attempt to diffuse the situation, Defendant replied "[n]o, I didn't jump on your brother. I was just trying to . . . break up a fight." But Lonnie was not deterred, and began punching Defendant in the head and face. At some point, Lonnie hit Defendant so hard that he stumbled backwards, slipped on some trash on the ground, and fell backwards onto the ground.

¶ 33 Defendant stated that as he was sitting on the ground, trying to recover, Lonnie's brother (Anthony) and Cequel Stephens approached from the side, and Anthony screamed "back the F up" to "the other guys that were with [Defendant]." Defendant's friends obeyed, and backed up away from the fight—which caused Defendant to feel afraid because his friends are large and formidable, whereas Anthony (the one telling them to back up) was "a little guy." Defendant surmised that Anthony must be holding a gun, because otherwise his friends would not have "backed up [that] easy."

¶ 34 Defendant testified that Darryl then called out to him, saying "Watch out. He got a gun." Somewhere in the commotion, Defendant noticed "a gun on the ground" in front of him, but he did not see where it came from. As Anthony and Cequel continued to approach him, Defendant heard one of them say "Pop him," which he understood to mean shoot him. According to Defendant, he then saw Lonnie reach for the gun on the ground, but before Lonnie could reach it Defendant snatched up the gun.

¶ 35 Defendant testified that at that point, he was feeling "complete fear" for his life, because he thought that Lonnie was reaching for the gun to shoot him, and he suspected that Anthony had a gun as well. Defendant

stated that he believed that picking up the gun was "the only thing that could save [his] life at that time." Defendant testified that he then "just picked [the gun] up, basically, and fired" at Lonnie. As soon as he fired the gun, Defendant then dropped it, got into his car, and drove away as quickly as he could.

¶ 36 A witness to the altercation, Shawnbrena Thurman, offered a different account of that night's events during her trial testimony. She stated that as she watched Lonnie approach Defendant, she knew that Lonnie came with the intention of fighting—in fact, she even attempted to stop Lonnie as he approached Defendant, but Lonnie was determined to fight. She testified that after Lonnie reached Defendant, the two began speaking, and she overheard Lonnie say to Defendant "Oh, so you say somebody going to die?" to which Defendant responded "Nah man. It ain't even like that." She then saw Lonnie hit Defendant in the side of the face, and the two men began "throwing their hands up like they was going to fight," and "[s]quaring up to fight." She stated that this "squaring up" went on for some time, and that "[t]he whole time when they was doing the square-up thing, they didn't never say nothing to each other." Lonnie swung at Defendant again, and the two men began throwing punches. She stated that she never saw Defendant fall to the ground.

¶ 37 Soon after, she saw Cequel Stephens "[come] around on the other side of Lonnie like he wanted to fight too, like, trying to act like he was squaring up." Defendant then "backed up and just snatched the gun from [Cequel], right there from the front of his pants." Defendant then told Cequel to "back up," and Cequel ran away. She testified that Lonnie didn't run away, however—Lonnie "was still, like trying to fight [Defendant], even with the gun." Unlike with Cequel, she did not hear Defendant give Lonnie a warning—"[Defendant] didn't never say anything to Lonnie like, 'Back up.' He just went to him like, pow, and just shot him . . . . He just did it."

¶ 38 Shawnbrena testified that after being shot once, Lonnie tried to run away and fell, but Defendant pursued Lonnie, and "shot him again" while he was "on the ground"—"[Lonnie] hit the ground falling, [and Defendant] was already up on top of him and shot him again." While Lonnie lay on the ground bleeding, Shawnbrena asked Defendant why he shot Lonnie, and Defendant responded "I told that MF'er." She testified that she never saw Lonnie holding a gun, and that even after Defendant grabbed the gun from Cequel, there was never "any fight or tussle over the gun," and Defendant "had it in his hand the whole time."

¶ 39 Witness Shaquay Mullins offered similar testimony at trial, stating that as soon as Lonnie threw the first punch at Defendant, the two men

started to "square up one-on-one" to fight. As a crowd began to gather around the fight, she heard Defendant say "If y'all jump me, then I'm going to kill all of y'all." The next thing she saw was that Defendant "pulled the gun out of his pants and just started shooting." She testified that as soon as Defendant started shooting, Lonnie had tried to run away, but that Lonnie "got caught in the back of the legs" by one of Defendant's bullets before he could escape. She stated that Defendant fired at Lonnie "four or five times," and that Lonnie was shot while "he was running away." She never saw Lonnie with a gun.

¶ 40 The State presented forensic evidence from Dr. Lauren Scott at trial, indicating that Lonnie Smith had died from two to three gunshot wounds. One gunshot had entered the right side of his back and exited in the front of his chest; a second had entered from the side of his right leg and exited from the front of his thigh; and a third had entered from the middle of his left thigh and exited from the side of his left leg. Dr. Scott was unable to determine if the gunshot wounds on Lonnie's legs had originated from a single gunshot, or two different gunshots. Dr. Scott stated that the first gunshot wound to the back would have been fatal.

¶ 41 Defendant was indicted on 5 June 2017 in Bladen County Superior Court for first-degree murder and possession of a firearm by a felon.[1] Trial occurred beginning on 13 November 2018 before Judge Jeffery K. Carpenter. Following the presentation of all evidence, Defendant's trial counsel requested that the jury be instructed on self-defense (with regard to the murder charge) and on justification (with regard to the possession of a firearm charge). After hearing argument, the trial court ultimately ruled that Defendant was not entitled to the jury instruction on justification, but chose to still instruct the jury on self-defense.

¶ 42 On 27 November 2018, the jury issued a verdict finding Defendant guilty of second-degree murder and possession of a firearm by a felon. The trial court sentenced Defendant to 300 to 372 months for second-degree murder and a consecutive term of 19 to 32 months for possession of a firearm by a felon. Defendant filed a timely appeal to this Court.

II. Analysis

¶ 43 Defendant raises only one issue on appeal, contending that the trial court erred by denying his requested jury instruction on the justification defense as a potential affirmative defense to the charge of possession of a

1. Defendant was previously convicted of a felony, possession with intent to sell and deliver marijuana, on 16 June 2013.

firearm by a felon. For the reasons explained below, I would hold that the trial court did not err in refusing Defendant's request for this instruction.

A. Preservation

¶ 44 As an initial matter, I first address whether Defendant has properly preserved this issue for appellate review. Specifically, it is necessary to address Defendant's failure to include a copy of his written request for special jury instructions in the appellate record.

¶ 45 Our statutes provide that when a party desires that the trial court provide a specific jury instruction to the jury, the party "may tender written instructions" to the trial court and the other parties "[a]t the close of the evidence or at an earlier time directed by the judge." N.C. Gen. Stat. § 15A-1231(a) (2019). Though the statute uses the permissive verb "may," our courts have typically held that requests for jury instructions must be in writing. *See, e.g.*, *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005) ("[T]his Court has held that a trial court did not err where it declined to give requested instructions that had not been submitted in writing.").

¶ 46 However, I believe this rule is still satisfied when it is clear from the *entire record* that the defendant did, in fact, submit a written instruction request to the trial court—even though the written request was somehow omitted from the appellate record. *See, e.g.*, *State v. Locklear*, 363 N.C. 438, 472, 681 S.E.2d 293, 317 (Brady, J., dissenting) (2009) (concluding that the defendant's instruction request was improper when "*nothing in the record* indicat[es] that defendant ever tendered a written request to the trial court") (emphasis added).

¶ 47 Here, although the record does not contain a copy of Defendant's requested written jury instruction on justification, the transcript makes clear that Defendant did, in fact, submit a written request to the trial court. During the charge conference on the final day of trial, the transcript demonstrates that Defendant "handed" the prosecutor and the trial court "a request for jury instructions regarding the possession of a firearm by a felon [charge] that contemplates the *Deleveaux* [justification] test." Moreover, on several occasions during bench conferences the trial court discussed or recited the *Deleveaux* factors (which are the most commonly accepted test for the justification defense), apparently reading from Defendant's written requested jury instruction.

¶ 48 Moreover, after the trial court ultimately denied Defendant's requested instruction, Defendant objected, and the court stated that it would "note your objection for the record. It's certainly . . . an issue

that's explorable on appeal." Defendant also properly objected after the instructions were presented to the jury. *See* N.C. R. App. P. Rule 10(a)(2); *Geoscience Grp., Inc. v. Waters Const. Co.*, 234 N.C. App. 680, 686-87, 759 S.E.2d 696, 700-01 (2014) (noting that our appellate rules require counsel to object to disputed jury instructions both during the charge conference and before the jury retires for deliberation).

¶ 49 Thus, I believe the record demonstrates that Defendant properly submitted his request for the justification instruction in writing, and that Defendant properly objected to the jury instructions in accord with our Appellate Rules. I would hold that this issue has been preserved.

B. Justification Defense

¶ 50 Defendant contends that the trial court should have instructed the jury on the justification defense in connection with his charge of possession of a firearm by a felon. Under North Carolina law, it is illegal for a convicted felon to possess a firearm, no matter how briefly or temporarily. *See* N.C. Gen. Stat. § 14-415.1(a) (2019) (making 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"). However, our Supreme Court has recently held, in a case of first impression, that a felon may nevertheless possess a firearm under "narrow and extraordinary circumstances" when presented with an "imminent and impending threat of death or serious bodily injury," such that he has no choice but to arm himself in his defense. *State v. Mercer*, 373 N.C. 459, 462-64, 838 S.E.2d 359, 362-63 (2020). This doctrine is known as the justification defense, and functions as "an affirmative defense," similar to self-defense, which requires that the defendant prove all elements of the defense "to the satisfaction of the jury" in order to be excused of liability for possessing a firearm. *Id.* at 463, 838 S.E.2d at 363.

¶ 51 In general, a trial court must give the substance of a requested jury instruction if it is "correct in itself and supported by [the] evidence." *Locklear*, 363 N.C. at 464, 681 S.E.2d at 312 (internal marks and citation omitted). In order to determine "whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *Mercer*, 373 N.C. at 462, 838 S.E.2d at 362. A trial court's erroneous failure to give a requested instruction "is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (internal marks and citation omitted). "The defendant has the burden of demonstrating prejudice." *Id.*

¶ 52 The four elements of the justification defense are as follows:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Mercer, 373 N.C. at 464, 838 S.E.2d at 363 (quoting *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000)). A trial court is required to instruct the jury on justification when evidence of each of the four elements is present. *Id.*

¶ 53 The most prominent case analyzing these four elements was *Mercer*, wherein the defendant illegally fired a weapon after a large group of people ambushed him outside his home. *Id.* at 460, 838 S.E.2d at 361. A group of 15 people had "walked to defendant's home to fight two of defendant's friends," and when the defendant arrived home he found the group in his driveway "urging defendant and his friends to fight them and blocking defendant from going into his house." *Id.* The defendant tried to speak to them to diffuse the situation, but the group "continued to approach him saying they were 'done talking.' " *Id.* The defendant noticed that several members of the group were armed, and he "heard the sound of guns cocking." *Id.* He noticed that his younger cousin had a gun too, and was struggling to operate it—so the defendant took the gun from his cousin, pointed it at the group and "told them to 'back up.' " *Id.* at 461, 838 S.E.2d at 361. He heard shots begin to fire, and he "dashed to the side of the street" to get away, but when he saw over his shoulder that someone was still shooting at him, he "shot back once and then the gun jammed," whereupon he immediately "threw the gun back" to his cousin and ran away. *Id.* The defendant's testimony was supported by the testimony of his mother, who confirmed that a large group had "ambush[ed]" defendant as he arrived home; that several members of the group were armed; and that someone from the group was "chasing defendant and shooting at him." *Id.* at 460-61, 838 S.E.2d at 361.

¶ 54 During trial, the defendant requested that the jury be instructed on the justification defense (in accord with *United States v. Deleveaux*), but the trial court denied his request. *Id.* The case was appealed to our Supreme Court, which formally adopted the justification test as set out in *Deleveaux*, while emphasizing that the defense was only available under "narrow and extraordinary circumstances." *Id.* at 463, 838 S.E.2d at 362. After reviewing each of the four *Deleveaux* elements, the Court ultimately held that the defendant had presented sufficient evidence to entitle him to the jury instruction. *Id.* at 464, 838 S.E.2d at 363.

¶ 55 The Court found that the first element—whether the defendant was under an imminent serious threat—was satisfied because the defendant was ambushed by a large aggressive group outside his house, and while "backing away from the group, defendant heard the sound of guns cocking and heard someone in the group say they were 'done talking.' " *Id.* at 464-65, 838 S.E.2d at 363-64. The Court found that the second element—whether the defendant recklessly placed himself in a dangerous situation—was satisfied because the defendant found himself in this situation "simply by arriving at his home and trying to explain himself to the group who were blocking him from entering his home." *Id.* at 465, 838 S.E.2d at 364.

¶ 56 The Court found that the third element—whether the defendant had a reasonable alternative to breaking the law—was satisfied because, after the defendant heard guns being cocked, "a reasonable jury could conclude that it was too late to call 911 and that running away would have put him at greater risk of being shot." *Id.* The Court found that the fourth and final element—whether there was a causal relationship between the criminal action and the threatened harm—was satisfied because the defendant only briefly took possession of the gun "when he heard other guns being cocked, and he gave the gun back to his cousin when it jammed and he was able to run away." *Id.* Thus, because the defendant "presented sufficient evidence of each *Deleveaux* factor," the Supreme Court held that "he was entitled to have the justification defense presented to the jury." *Id.* at 466, 838 S.E.2d at 364.

¶ 57 Applying these elements in the present case, I conclude that Defendant has not presented sufficient evidence of each of the four *Deleveaux* factors and thus the trial court did not err in denying him the jury instruction. Specifically, I do not believe that Defendant can satisfy either the second or third element of the test.

¶ 58 The second element of the *Deleveaux* test requires a showing that Defendant "did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct." *Mercer*, 373

N.C. at 464, 838 S.E.2d at 363. Here during the afternoon of 17 May 2017, Defendant had several opportunities to avoid a dangerous confrontation at Oakdale Homes, but each time he chose to go forward despite the danger.

¶ 59 First, Defendant chose to go back to Oakdale Homes for a second time that afternoon, fresh from a fight, despite knowing that more trouble was likely to ensue. Defendant's first visit to Oakdale Homes that afternoon involved breaking up a fight between his brother (Darryl), Lonnie's brother (Anthony), and several others. As Defendant was leaving the fight, Anthony shouted at them "You don't belong out here anyway . . . This is NFL territory"—putting Defendant on notice that he was unwelcome at Oakdale and that Oakdale was considered gang territory.

¶ 60 Defendant then drove his brother to Defendant's home, where they remained for only ten to 15 minutes before receiving a phone call from Darryl's wife, who lived at Oakdale. Darryl's wife informed him that "the individuals [who fought with Darryl] were back," and Darryl relayed this information to Defendant. Darryl then "asked [Defendant] to take him back to his home" because he "was concerned." So, despite knowing that the people he had just fought with were at still at Oakdale, Defendant chose to leave his house again and drive his brother back to Oakdale.

¶ 61 Moreover, according to the written statement that Officer Warwick recorded during his interview with Defendant (which occurred the same night as the shooting), Defendant answered as follows when asked why he returned to Oakdale Homes for a second time that afternoon:

> **[Officer Warwick]:** Being that there was an altercation that . . . [Defendant] went and got his brother from, and then he agreed to take his brother back in just a short time when he knew there was problems, he – he kind of downplayed it, indicated that he – he didn't suspect there would be additional problems, but if there was, that it would only be – rise to the level of a fight.
>
> **[Prosecutor]:** Okay. So [Defendant] told you – he acknowledged there was a likelihood of a fight going back over there?
>
> . . .
>
> **[Officer Warwick]:** Yes

¶ 62 Defendant had a multitude of safer options available to him instead of returning to Oakdale—he could have stayed home and lent his vehicle

to his brother so Darryl could to Oakdale; he could have asked his friend Broadus (who was present with Defendant throughout the whole day) to drop off Darryl; he could have convinced Darryl to stay at Defendant's place until things cooled down; he could have told Darryl's wife to stay inside and call the police if she feared another fight. But Defendant took none of these reasonable precautions—instead, he chose to return to Oakdale, fully knowing that he would see the people he had just fought, and fully knowing there was "a likelihood of a fight" should he return.

¶ 63 Even more rashly, once Defendant arrived at Oakdale, he didn't simply drop his brother off and then depart. Nor did he go inside his brother's apartment to avoid further confrontation. Instead, Defendant chose to congregate with a group of people out in the open in the Oakdale parking lot, chatting and mingling, and even talking with the neighbors about the earlier fight. After spending at least 30 minutes outside chatting, Defendant then saw a group of men approaching him—a group which was led by Lonnie Smith, and also included several of the men who had fought his brother earlier that day (Cequel Stephens, Bobby Lee Ratliff, and Anthony Smith). Defendant knew that Lonnie was dangerous—he himself described Lonnie as "a pretty tough guy . . . pretty brutal" with a "bad reputation . . . for violence," and Defendant further knew that Lonnie was "the leader of a local gang called 'NFL.' " But Defendant nevertheless stood his ground and watched as Lonnie approached.

¶ 64 The moment that Defendant saw Lonnie and the group approaching, he again had a number of safer options available to him—he could have immediately left in his vehicle (which remained in close proximity); he could have gone inside his brother's apartment; he could have called the police if he feared for his safety. In fact, Defendant himself acknowledged that he knew he could have simply gotten in his car and left the moment he saw Lonnie approaching:

> **[Prosecutor]:** So when Mr. Smith approached you . . . you could have – instead of talking to him, you could have just gone – gone to your car and left. You could have done that, couldn't you?
>
> **[Defendant]:** Before he punched me, I just didn't think it would elevate to that level.
>
> **[Prosecutor]:** No. But you could have simply gone to your car, like you did after you shot him, right? You could have gotten in your car and left?
>
> **[Defendant]:** I would imagine so.

[Prosecutor]: But you didn't do that.

[Defendant]: No, I didn't.

¶ 65 Instead of leaving during this opportunity, Defendant carelessly chose to remain in the area and stand his ground while Lonnie and his gang approached, with the obvious intention of fighting.

¶ 66 Thus, I believe the sum of the evidence clearly demonstrates that Defendant recklessly placed himself in a situation where he knew he would likely be forced to engage in criminal conduct. Defendant recklessly returned to Oakdale and lingered in the parking lot despite: (1) getting into a fight with the brother of a local gang leader only 30 minutes prior; (2) being told by a gang member not to come back; (3) being told by Darryl's wife that the people he had fought with were still at Oakdale; and (4) seeing that same gang leader approach him from across the lot.

¶ 67 Defendant argues that he should receive the justification instruction because this case is "significantly similar" to *Mercer*, but the evidence shows otherwise. The defendant in *Mercer* easily satisfied the second element of the *Deleveaux* test because he had no role whatsoever in bringing about the danger that befell him—he simply arrived at his home, fresh from a job interview, only to find himself ambushed by a hostile mob that was intent on fighting him and blocking him from entering his house. *Mercer*, 373 N.C. at 460, 838 S.E.2d at 361. But unlike the defendant in *Mercer*, Defendant here knowingly placed himself into a situation where he knew that violence was likely to arise. Defendant had many opportunities to choose a safer path that day, but instead willingly chose a dangerous route at every turn. Defendant thus cannot satisfy the second element of the *Deleveaux* test.

¶ 68 Nor can Defendant satisfy the third element of the *Deleveaux* test—showing that he "had no reasonable legal alternative to violating the law." *Id.* at 464, 838 S.E.2d at 363. Even when viewing the evidence from Defendant's point of view, there were many rational alternatives that Defendant could have chosen instead of picking up a gun that day.

¶ 69 Defendant's own accounts differ significantly in describing how the second fight outside of Oakdale progressed. According to the statement that Defendant gave to Officer Warwick, after Lonnie began to hit Defendant, the two "got into a tussle," and "as they tussled, other individuals became involved in the altercation; [and] during the altercation, a gun just suddenly appeared." Defendant stated that he and Lonnie "struggled over the gun, that [Defendant] got the gun, and the gun went off."

¶ 70 According to Defendant's trial testimony, after Lonnie approached him and began hitting him, Defendant stumbled and fell backwards, and as he was sitting on the ground he heard Anthony say "back the F up" to "the other guys that were with [Defendant]." Defendant noticed "a gun on the ground" in front of him, but he did not see where it came from. Defendant heard Darryl say "Watch out. He got a gun"—though it is unclear who Darryl was referring to. Defendant heard someone say "Pop him," and before Lonnie could reach for the gun, Defendant snatched it up and immediately shot.

¶ 71 Under either of these accounts, Defendant would have still had several reasonable legal alternatives to picking up the gun and shooting—he could have tried to exit the "tussle" as soon as other individuals became involved; he could have tried to flee to his car or into the apartment building; he could have kicked the gun away out of Lonnie's reach; he could have called for help; or asked his friends to help him fend off Lonnie so he could escape. Defendant chose none of these options, and instead chose to pick up the gun and shoot.

¶ 72 This conclusion is also supported by the forensic evidence presented at trial, which showed that Lonnie had died from a gunshot wound that entered in his back and exited through the front of his chest. This naturally raises the question—if Defendant was truly shooting to defend himself from an imminent threat, and if he truly had no other options, then why did he shoot Lonnie from behind while his back was turned?

¶ 73 Defendant again analogizes to *Mercer* in an attempt to support his argument, but the facts are distinguishable. In *Mercer*, the defendant only took possession of a gun after he heard the attacking group say they were "done talking," saw several of them holding guns, and "heard the sound of guns cocking." *Mercer*, 373 N.C. at 460-61, 838 S.E.2d at 361. He then grabbed the gun from his cousin (who had been struggling to operate it), "shot back once" as he retreated, and then immediately "threw the gun back" to his cousin and ran away. *Id.* Here, even according to Defendant's own account, he never heard any guns cocking, and he never actually saw Lonnie or anyone else holding a gun. The only gun he saw was the one that mysteriously landed on the ground right in front of him. Moreover, once in possession of the gun, Defendant here (unlike the Defendant in *Mercer*) didn't simply fire a warning shot to cover his retreat as he fled—Defendant shot Lonnie Smith at close range, in the back, and fired at least two to three shots. This is not the behavior of a person who has no reasonable alternative to taking up a gun. Thus, I believe that Defendant cannot show that he had no reasonable legal alternative to violating the law, and he cannot satisfy the third element of the *Deleveaux* test.

¶ 74 I recognize that this case presents somewhat sympathetic circumstances—where a seemingly peaceable man, who had earlier gone out of his way to break up a fight, became embroiled in a conflict that he did not start. It is true that Defendant was not the initial aggressor in either of the fights that occurred that day. However, this does not change the fact that Defendant had many chances to do the prudent thing and prevent further violence from occurring—he could have simply not returned to Oakdale for the second time (knowing, as he did, that he was not welcome and that another fight was very likely to ensue); he could have left or gone inside as soon as he saw Lonnie's group approaching from across the parking lot; or he could have sought an opportunity to escape the altercation instead of picking up a gun and shooting. But he did not.

¶ 75 Thus, because Defendant recklessly placed himself in a dangerous situation, and because he had several reasonable alternatives to breaking the law, I believe he cannot satisfy either the second or third element of the *Deleveaux* test. He was accordingly not entitled to have the justification instruction presented to the jury, and the trial court did not err in failing to provide the instruction. I therefore respectfully dissent.

STATE OF NORTH CAROLINA
v.
KIMBERLY GAIL TEESATESKIE, DEFENDANT

No. COA20-190

Filed 3 August 2021

1. Motor Vehicles—driving while impaired—felony death by motor vehicle—impairment—sufficiency of the evidence

In a trial for driving while impaired and felony death by motor vehicle, the State presented substantial evidence from which a jury could find that defendant was appreciably impaired, either mentally or physically, when she drove off a road and struck a tree, including the results of several field sobriety tests, defendant's statements to law enforcement regarding her ingestion of alcohol and hydrocodone that evening, her slurred and strange speech, her unsteady gait while walking, and the opinion of a law enforcement officer that defendant was impaired. Any inconsistencies in the evidence were for the jury to resolve.

2. Evidence—expert testimony—presence of drug in defendant's blood—prejudice analysis

In a trial for driving while impaired and felony death by motor vehicle, a statement by the State's expert that it was possible hydrocodone was present in defendant's blood when defendant drove off a road and struck a tree was not prejudicial even if it had been admitted in violation of Evidence Rule 702. There was not a reasonable possibility that the jury would have reached a different result absent the testimony in light of defendant's statement to an officer that she had ingested hydrocodone approximately an hour and fifteen minutes before the accident.

Appeal by Defendant from judgment entered 12 July 2019 by Judge J. Thomas Davis in Graham County Superior Court. Heard in the Court of Appeals 9 February 2021.

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

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant.

MURPHY, Judge.

¶ 1 A trial court properly denies a defendant's motion to dismiss charges of driving while impaired and felony death by motor vehicle when there is sufficient evidence of the defendant's impairment. Sufficient evidence of impairment is such evidence, viewed in the light most favorable to the State, as a reasonable mind might accept as adequate to support the conclusion that the defendant was appreciably impaired, either mentally or physically. Here, the trial court properly denied Defendant's motion to dismiss, where there was sufficient evidence of appreciable physical impairment due to Defendant's failure of multiple sobriety tests, unsteady gait, lethargy, slurred speech, and a drug recognition expert's opinion that Defendant was impaired.

¶ 2 Additionally, a defendant must show an abuse of discretion to be entitled to relief for a trial court's error in allowing expert testimony that does not comply with the requirements of North Carolina Rule of Evidence 702. However, when the substance of improperly admitted expert testimony is admitted properly via another source, a defendant cannot show prejudice. Here, even assuming the trial court abused its discretion in admitting expert testimony indicating that Hydrocodone

could have been in Defendant's blood test and been hidden by other results, this assumed abuse of discretion was not prejudicial since there was evidence that Defendant admitted to an officer that she had taken Hydrocodone.

BACKGROUND

¶ 3 On 1 January 2015, around 10:45 p.m., Defendant Kimberly Teesateskie was driving back from a party with her best friend, Maggie Whachacha, in the passenger seat when Defendant drove off Snowbird Road, a state-maintained highway, and struck a tree. Defendant sustained minor injuries; however, Ms. Whachacha did not survive her injuries. As a result of the accident, Defendant was charged with felony death by motor vehicle, reckless driving, driving while impaired, and murder. Defendant's murder charge was later voluntarily dismissed by the State.

¶ 4 When first responders arrived at the scene of the accident, they had Defendant leave her vehicle and walk to a patrol car so that emergency services could try to help Ms. Whachacha. On the way to the car, Defendant walked normally and without need of assistance. One of the first responders testified Defendant struggled to stay awake and fell asleep while sitting in his patrol car. Additionally, an emergency medical technician ("EMT") testified that, after the accident, Defendant could hear and understand him, had properly functioning and reacting eyes, good pulse and blood pressure, and was able to answer questions competently, such that he did not believe Defendant had ingested any impairing substance.

¶ 5 However, Trooper Harold Hoxit of the North Carolina Highway Patrol, upon speaking with Defendant at the scene, was concerned that she was impaired. Defendant spoke with a "thick fat tongue, sort of mumbling her speech" and seemed to struggle to stay awake. She was responsive and Trooper Hoxit did not notice a smell of alcohol or observe glassy eyes, although he did notice she swayed when walking and he believed it seemed like her balance was off. Defendant claimed to Trooper Hoxit that she was blinded by a truck's headlights, causing her to drive off the left side of the road and her car hit the tree almost immediately after. Trooper Hoxit believed "she possibly could be impaired" and contacted a drug recognition expert. Trooper Hoxit then drove Defendant in his patrol vehicle to the Graham County Sheriff's Office.

¶ 6 A drug recognition expert, Trooper Mike McLeod of the North Carolina Highway Patrol, met Defendant and Trooper Hoxit at the Sheriff's office. Defendant appeared to be asleep in the car when they

arrived, and when she awoke and walked into the Sheriff's office she shuffled and was unsteady on her feet. After a preliminary examination and conducting multiple sobriety tests, Trooper McLeod ultimately concluded Defendant was under the influence of a central nervous system depressant and narcotic analgesic and her mental and physical faculties were appreciably impaired by these substances. Trooper McLeod based this opinion on the totality of the circumstances, including Defendant's results from a horizontal gaze nystagmus ("HGN") test, which revealed six out of six indicators of impairment, a lack of convergence eye test, which indicated impairment, a walk and turn test, which revealed seven out of eight indicators of impairment, a finger to nose test, which indicated possible impairment, her pupil's reaction to light, which revealed a possible indicator of ingestion of drugs due to her pupil's "very slow" reaction to light, her muscle tone check, which indicated possible ingestion of drugs due to the muscle tone being "flaccid [and] excessively soft," and Defendant's statement regarding her drug and alcohol consumption.[1]

¶ 7 Defendant told Trooper McLeod that she had taken Citalopram, Ranitidine HCL, Metformin, Tramadol, Gabapentin, and Hydrocodone earlier that day. She also stated she drank a mixed drink, which had one-and-a-half shots of vodka, and two beers that evening, most recently at 9:30 p.m. Further, she stated she took two 10 mg Hydrocodone pills at 9:30 p.m. A blood sample taken at 2:12 a.m. found a blood alcohol concentration of 0.00 grams of alcohol per 100 millimeters, but revealed the presence of Xanax, Citalopram, and Lamotrigine. Over objection, the State's blood analyst confirmed it was possible "that Hydrocodone could have been present in [Defendant's] blood," but that "[she] could not [report its presence] based on a masking effect of Lamotrigine" or it could have been present in "an abundance that is much smaller than what [she could report] or it may have all been metabolized." The jury was only instructed on alcohol, Alprazolam, also known as Xanax, and Hydrocodone as potential impairing substances. Alcohol and Xanax are central nervous system depressants, and Hydrocodone is a narcotic analgesic.

¶ 8 At the conclusion of the State's evidence, Defendant moved to dismiss the charges, which the trial court denied. Defendant renewed this motion at the conclusion of all evidence, which was again denied.

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1. Trooper McLeod conducted an HGN test, a vertical gaze nystagmus test, a lack of convergence eye test, a modified Rhomberg balance test, a walk and turn test, a finger to nose test, and checked Defendant's vital signs, pupil size and reaction to light, oral and nasal cavities, and muscle tone.

¶ 9 Defendant was convicted of all charges and sentenced to 60 to 84 months in prison.[2] She was convicted of felony death by motor vehicle and driving while impaired under the theory of impairment in N.C.G.S. § 20-138.1(a)(1). N.C.G.S. § 20-138.1(a)(1) (2019) ("A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance"). Defendant timely appeals.

ANALYSIS

¶ 10 On appeal, Defendant contends the trial court erred in denying her motion to dismiss as there was insufficient evidence of impairment to support her charge of driving while impaired and, in turn, her charge of felony death by motor vehicle. Defendant also argues that she was prejudiced by the trial court's abuse of discretion in admitting speculative expert testimony that Hydrocodone could have been in Defendant's blood. We disagree.

A. Motion to Dismiss

¶ 11 **[1]** Defendant argues her motion to dismiss the charges of felony death by motor vehicle and driving while impaired should have been granted because the evidence of impairment here was insufficient, as it only raised a suspicion or conjecture that Defendant was appreciably impaired.

> We review the trial court's denial of [a] [d]efendant's motion to dismiss de novo. When ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented sufficient evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. To be sufficient, the State must present such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> As always, in our review of a ruling on a motion to dismiss, we must view the evidence in the light most favorable to the State and allow the State every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both.

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2. Defendant was properly sentenced only on the reckless driving charge and the felony death by motor vehicle charge, as driving while impaired is a lesser included offense of felony death by motor vehicle.

State v. McDaris, 852 S.E.2d 403, 406-07 (N.C. Ct. App. 2020) (citations and marks omitted). "If there is a conflict in the evidence, the resolution of the conflict is for the jury." *State v. Mason*, 336 N.C. 595, 597, 444 S.E.2d 169, 169 (1994). "A motion to dismiss should be granted, however, when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *State v. Simpson*, 235 N.C. App. 398, 403-04, 763 S.E.2d 1, 5 (2014). It is not the role of our Court to sit in place of the jury and impose our interpretation of the evidence. *See State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) ("The jury's role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove.").

¶ 12 Here, Defendant's motion to dismiss concerned the charges of felony death by motor vehicle and driving while impaired. "The elements of felony death by [motor] vehicle are: (1) [the] defendant unintentionally causes the death of another; (2) while driving impaired as defined by [N.C.G.S. § 20-138.1(a)(1)] . . . ; and (3) the impairment was the proximate cause of the death." *State v. Davis*, 198 N.C. App. 443, 446-47, 680 S.E.2d 239, 243 (2009) (quoting *State v. Bailey*, 184 N.C. App. 746, 748, 646 S.E.2d 837, 839 (2007)).

¶ 13 In terms of driving while impaired, our statutes read, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C.G.S. § 20-138.1(a)(1) (2019).

¶ 14 Since Defendant only challenges the impairment element, we only analyze whether there was sufficient evidence of impairment. *See* N.C. App. R. 28(a) (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.").

> To support a charge of driving while impaired, the State must prove that the defendant has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. However, the State need not show that the defendant was "drunk," *i.e.*, that his or her faculties were

> materially impaired. The fact that a motorist has been drinking, when considered in connection with faulty driving *or other conduct indicating an impairment of physical and mental faculties*, is sufficient prima facie to show a violation of [N.C.G.S. § 20-138.1]. It follows that evidence of such faulty driving, along with evidence of consumption of both alcohol and cocaine, is likewise sufficient to show a violation of [N.C.G.S. § 20-138.1].

State v. Norton, 213 N.C. App. 75, 78-79, 712 S.E.2d 387, 390 (2011) (second emphasis added) (citations, footnote, and marks omitted). Giving the State every reasonable inference from the evidence, there was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant was impaired. *McDaris*, 852 S.E.2d at 407.

¶ 15 Defendant argues the evidence here "did not lend itself to a reasonable inference that [she] was appreciably impaired, but only raised a suspicion or conjecture of that possibility." Defendant bases this argument on evidence showing: the accident occurred at night on a curvy mountain road; Defendant gave consistent explanations of how the accident happened; Defendant expressed concern for the safety of Ms. Whachacha; Defendant was responsive according to EMTs; was able to walk without help; was overweight, diabetic, and had two bad knees in addition to the car accident, which affected the results of her sobriety tests; and that not all of the sobriety tests suggested she was intoxicated. However, Defendant relies only on evidence that conflicts with other evidence presented by the State.

¶ 16 Here, the State presented sufficient evidence of impairment to survive Defendant's motion to dismiss. This evidence includes: Defendant's results from several standardized field sobriety tests, including the HGN test, the walk and turn test, the convergence test, and the finger-to-nose test; Defendant's statement to Trooper McLeod that she drank three and half drinks, with her last being only one hour and fifteen minutes before the accident; Defendant's statement to Trooper McLeod that she took 20 mg of Hydrocodone one hour and fifteen minutes before the accident; Defendant, although not suffering a related injury, was unable to stay awake following the accident; Defendant was observed walking with an unsteady gait; Defendant had slurred and strange speech; and Trooper McLeod's opinion that Defendant was impaired as result of both her performance on the sobriety tests and her behavior. This evidence of impairment of Defendant's physical faculties—namely her slurred

speech, lethargy, unsteady gait, and failed sobriety tests, in connection with an admission to drinking and taking drugs—is sufficient evidence of impairment under N.C.G.S. § 20-138.1. *See Norton*, 213 N.C. App. at 79, 712 S.E.2d at 390 (emphasis added) ("The fact that a motorist has been drinking, when considered in connection with faulty driving *or other conduct indicating an impairment of physical and mental faculties*, is sufficient prima facie to show a violation of [N.C.G.S. § 20-138.1].").

¶ 17 Furthermore, we have held that "[t]he opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). In *Mark*, we held "the State presented sufficient evidence that [the] defendant was impaired" based on a law enforcement officer's "[testimony] that he formed an opinion that [the] defendant was appreciably impaired after conducting a field sobriety test." *Id.* "Accordingly, we [found] no merit to [the] defendant's third assignment of error [to the trial court's denial of his motion to dismiss the driving while impaired charge]." *Id.*

¶ 18 Here, Trooper McLeod, a drug recognition expert, testified that he formed an opinion that Defendant was appreciably impaired by a central nervous system depressant or narcotic analgesic based upon a standardized 12-step drug influence evaluation, which included indications of impairment from Defendant's results on multiple field sobriety tests. This evidence was sufficient evidence of Defendant's impairment. *See id.*

¶ 19 Although Defendant points us to conflicting evidence, conflicting evidence does not allow the trial court to grant a motion to dismiss; it is well established that conflicting evidence is for the jury to resolve. *See Mason*, 336 N.C. at 597, 444 S.E.2d at 169 ("The defendant's only assignment of error is to the overruling of his motion to dismiss for the insufficiency of the evidence. He bases this argument on certain inconsistencies in the evidence and particularly on some evidence that the pistol may have fired accidentally. In determining whether evidence is sufficient to survive a motion to dismiss, the evidence is considered in the light most favorable to the State. If there is a conflict in the evidence, the resolution of the conflict is for the jury."). Defendant's contention that the evidence presented here was only sufficient to create a suspicion of impairment is incorrect, and the conflicting evidence Defendant points to was for the jury to resolve, not us on appeal. The trial court properly denied Defendant's motion to dismiss as there was sufficient evidence of impairment to proceed to a jury, despite conflicting evidence.

B. Expert Testimony

¶ 20 **[2]** Defendant argues the trial court should not have allowed the State's expert, Amber Rowland, to testify:

> It is possible that [Hydrocodone] came out [in the blood test] at the same time as Lamotrigine; and, therefore, I could not call it based on a masking effect of Lamotrigine. It can also be an abundance that is much smaller than what we could call or it may have all been metabolized.

Defendant argues this speculative testimony about the presence of Hydrocodone was in violation of Rule 702 "because it was not based on scientific or technical knowledge that could assist the jury in understanding the evidence or deciding a fact in issue. Moreover, it was impermissibly based on unreliable principles and methods." Further, Defendant argues it was prejudicial to her because "[a]t the heart of this trial was the question of whether [Defendant] was appreciably impaired at the time of the accident" and the expert's testimony regarding Hydrocodone, a drug Defendant claims to be stigmatized,[3] pushed otherwise insufficient and conflicting evidence over the line to convince the jury Defendant was guilty. Specifically, she points to the jury's note asking, "[d]id witness Amber Rowland state in her testimony that Hydrocodone was found in conformatory [sic] or other testing?"

¶ 21 The State contends this issue was not properly preserved because any objection was waived by previous testimony that was not objected to, and Defendant only objected based on relevance and not Rule 702, with any Rule 702 objection not being apparent from the context.

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2021). "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*,

3. Defendant raises the stigmatization argument for the first time on appeal.

339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). "Even valid objections may be, and are usually waived in [non-capital cases] by failure to follow the recognized practice by motion to strike or by motion to limit if the evidence is not competent." *State v. Beam*, 45 N.C. App. 82, 84, 262 S.E.2d 350, 352 (1980) (quoting *State v. Battle*, 267 N.C. 513, 520-21, 148 S.E.2d 599, 604 (1966)).

¶ 22 Additionally, Rule 702(a) states:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2019). Regarding Rule 702, our Supreme Court has stated:

> The trial court [] concludes . . . whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability. This ruling will not be reversed on appeal absent a showing of abuse of discretion. And a trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes outcome determinative.

State v. McGrady, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citations and marks omitted).

¶ 23 Assuming, without deciding, that this issue was preserved for appeal and that the admission of Rowland's statement was an abuse of discretion in violation of Rule 702, the statement's admission was not prejudicial given the admission of testimony regarding Defendant's statement to Trooper McLeod that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

¶ 24 Defendant argues this testimony was prejudicial because the evidence that Defendant was impaired was "far from overwhelming," expert testimony is given more weight by the jury, Hydrocodone is a stigmatized drug as a result of the opioid crisis, and the testimony "weighed on the minds of the jurors while they deliberated, as indicated by the jury's note to the trial court during deliberations." However,

> [a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N.C.G.S. § 15A-1443(a) (2019).

¶ 25 There was not a reasonable possibility that a different result would have been reached if the trial court had excluded the testimony regarding the possible presence of Hydrocodone in Defendant's blood. Although there would not have been expert testimony that Hydrocodone could have been within Defendant's blood, there was testimony from Trooper McLeod that Defendant told him she had ingested 20 mg of Hydrocodone at 9:30 p.m. on the night of the accident.[4] This testimony from Trooper McLeod tended to show Defendant had taken Hydrocodone prior to the accident and may have been impaired by it, in a more convincing way than Rowland's expert testimony did. As a result, any abuse of discretion in admitting Rowland's testimony was not prejudicial.

CONCLUSION

¶ 26 The trial court did not err in denying Defendant's motion to dismiss the charges of driving while impaired and felony death by motor vehicle, as, despite conflicting evidence, there was sufficient evidence of impairment to go to the jury. Further, even assuming, without deciding, that the trial court abused its discretion in admitting expert testimony regarding the potential presence of Hydrocodone in Defendant's blood test results,

4. This testimony has not been challenged on appeal.

Defendant was not prejudiced due to the admission of her statement that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

NO ERROR.

Judges DILLON and ARROWOOD concur.

HANIA H. WILLIAMS AS EXECUTOR AND ADMINISTRATOR OF THE ESTATE OF PATRICK WILLIAMS, PLAINTIFF

v.

MARCHELLE ISYK ALLEN, P.A., NILES ANTHONY RAINS, M.D., BRONWYN LOUIS YOUNG II, M.D., EMERGENCY MEDICINE PHYSICIANS OF MECKLENBURG COUNTY, PLLC D/B/A US ACUTE CARE SOLUTIONS, LLC, C. PETER CHANG, M.D., CHARLOTTE RADIOLOGY, P.A., THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS HEALTHCARE SYSTEM OR ATRIUM HEALTH, DEFENDANTS

No. COA20-724

Filed 3 August 2021

1. Appeal and Error—interlocutory appeal—substantial right—order compelling discovery—medical review privilege

An order compelling discovery in a wrongful death action against a medical group and a physician assistant (defendants) was immediately appealable where defendants argued that the document plaintiff sought in her motion to compel—the physician assistant's notes regarding her interactions with and medical treatment of the decedent—was protected under the medical review privilege, and therefore the order affected a substantial right.

2. Discovery—medical review privilege—statutory elements—insufficient findings

An order compelling discovery in a wrongful death action against a medical group and a physician assistant (defendants) was vacated and remanded where defendants argued that the document plaintiff sought in her motion to compel—the physician assistant's notes regarding her interactions with and medical treatment of the decedent—was protected under the medical review privilege (N.C.G.S. § 90-21.22A), but where the trial court failed to enter any findings of fact or conclusions of law regarding whether defendants met their burden of satisfying each statutory element required to assert the privilege.

Judge MURPHY dissenting.

Appeal by defendants from order entered 24 March 2020 by Judge Forrest Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 May 2021.

Knott & Boyle, PLLC, by W. Ellis Boyle, for plaintiff-appellee.

Dickie, McCamey & Chilcote, P.C., by John T. Holden, for defendants-appellants Marchelle Allen and Emergency Medicine Physicians of Mecklenburg County, PLLC.

TYSON, Judge.

¶ 1 Marchelle Isyk Allen, P.A. and Emergency Medicine Physicians of Mecklenburg County, PLLC ("EMP") (collectively "Defendants") appeal from an order filed 24 March 2020 compelling production of a document claimed as privileged by Defendants. We remand for additional findings of fact and conclusions of law.

I. Background

¶ 2 Patrick Williams ("Williams") suffered back, stomach, and hip pains, which worsened throughout the morning and afternoon of 6 May 2016. Williams' wife, Hania H. Williams, ("Plaintiff") took Williams to the Piedmont Urgent Care-Baxter in Fort Mill, South Carolina.

¶ 3 Williams could not get out of the car at Piedmont Urgent Care-Baxter. After speaking with Plaintiff, staff at Piedmont Urgent Care-Baxter called 911 for assistance. Williams' condition was not evaluated by a healthcare provider at Piedmont Urgent Care-Baxter. Emergency Medical Services responded to Piedmont Urgent Care-Baxter, moved Williams into an ambulance, and transported him to the emergency department ("ED") at Carolinas Medical Center Pineville Hospital ("CMC-Pineville"). Williams arrived in the ED at 3:52 p.m.

¶ 4 Dr. Brownyn Louis Young, II ordered 7.5 mg of oral hydrocodone and 600 mg of ibuprofen for Williams. The record does not show whether these medicines were issued pursuant to "standing orders" by Dr. Young, or if he had evaluated Williams prior to these orders being administered. Around 4:50 p.m., Physician Assistant Marchelle Allen ("Allen") met with and evaluated Williams. Williams reported he was experiencing increasing lower back pain that radiated down his left leg. Allen ordered 4 mg of morphine, 10 mg of Decadron, 10 mg of Flexeril, 4 mg of Zofran, and an x-ray to be administered to Williams' spine.

¶ 5 Dr. C. Peter Chang read the x-ray and reported "no acute osseous abnormality" and "unusual linear calcifications seen to the right and left of the lumbar spine along the retroperitoneum likely vascular in nature." Dr. Chang noted the x-rays were "negative for acute pathology, . . . negative for acute bony abnormality . . . [and] show vascular calcifications."

¶ 6 Allen did not order further diagnostic tests for Williams. Williams was diagnosed with "left lumbar radiculopathy." Allen ordered prescriptions for Flexeril and hydrocodone. Williams was discharged from CMC-Pineville with instructions to schedule an office visit with OrthoCarolina "within 2-4 days." Dr. Niles Anthony Rains signed Williams' record of the treatment provided by Allen on 7 May 2016 at 6:36 a.m.

¶ 7 Once home, Williams took the prescribed hydrocodone every six hours, but his pain persisted. Williams also developed abdominal pains. Williams returned to the CMC-Pineville ED on 7 May 2016 at 9:56 p.m. Williams presented with low blood pressure and reported severe abdominal pain.

¶ 8 Dr. Rains ordered a CT angiogram of Williams' chest, abdomen, and pelvis with an IV contrast. Dr. Charlie McLaughlin read the images and diagnosed Williams with a ruptured abdominal aortic aneurism measuring 12 x 9.7 centimeters. Dr. Rains contacted the ED at Carolinas Medical Center Main ("CMC-Main") about transferring Williams for immediate surgical repair of the ruptured aneurism. Williams was transferred to CMC-Main by helicopter. Surgery to repair the ruptured aneurism was unsuccessful in saving Williams' life. Williams was pronounced dead at 3:24 a.m. on 8 May 2016.

¶ 9 Dr. Rains spoke with Allen on 9 May 2016 and informed her of Williams' death. Dr. Rains also relayed to Allen Plaintiff's 7 May 2016 statement to emergency department staff if anything should happen to Williams, she would be filing a claim against the personnel who treated him during his 6 May 2016 visit. Dr. Rains instructed Allen to memorialize her interactions with and treatment of Williams on an electronic form provided by her EMP group employer.

¶ 10 Williams' estate brought this action for wrongful death on 2 May 2018, and Plaintiff asserted claim for loss of consortium. Plaintiff requested production of documents relating to investigation by Defendants and any information related to Defendants' interactions with and their care provided to Williams.

¶ 11 Allen submitted a privilege log identifying a four-page "diary" entry she had written on 10 May 2016, concerning the event claiming: "Work Product, and Prepared by the Defendants in anticipation of litigation,

peer review." Plaintiff filed a motion to compel on 17 July 2019 pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(a) (2019). Plaintiff sought the production of a four-page document identified as typed notes Allen had created 10 May 2016, as identified in the privilege log produced on 11 July 2019. After hearing from the parties and examining the document at issue, the trial court granted Plaintiff's motion to compel and the four-page document was delivered to Plaintiff.

¶ 12 Allen was deposed on 30 October 2019. During Allen's deposition, her "diary" entry was presented to her, and the existence of an additional document was discovered. This additional two-page document was not included in Defendants' privilege log, and it was withheld from disclosure due to Defendants' claim of Medical Review Committee and other privileges under N.C. Gen. Stat. § 90-21.22A (2019). Allen created this document utilizing EMP's company website and submitted it to risk management.

¶ 13 Plaintiff filed a motion to enforce her previous motion to compel, pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(b) (2019). In her motion, Plaintiff argued Allen's diary entry that was eventually produced was not in fact what they were seeking in their first motion to compel hearing. Plaintiff alleged she was seeking this second document submitted to risk management and the arguments made by Defendants' counsel at the motion to compel hearing about privilege and peer review were asserted to this second document. Plaintiff argued the asserted privilege could not relate to Allen's diary entry. After hearing from the parties, reviewing the affidavits, and conducting an in-camera review of the disputed second document, the trial court granted the motion, but ordered the subject document to be kept under seal, pending appeal. The trial court denied Plaintiff's sanctions motion and awarded no fees or sanctions. Defendants appealed.

II. Jurisdiction

¶ 14 **[1]** "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). Our Court has held: "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).

¶ 15 "Appeals from interlocutory orders are only available in exceptional cases." *Id.* (citation and internal quotation marks omitted). Our rules

"against interlocutory appeals seek[] 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).

¶ 16 "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 omitted).

¶ 17 An order compelling or enforcing discovery or for sanctions may be immediately appealable 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 a party asserts a statutory privilege, which directly relates to the matter to be disclosed, and the assertion of the privilege is not "frivolous or insubstantial." *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4 (2011) (citation omitted). Orders compelling discovery of materials asserting protection by the medical review privilege affects a substantial right and are immediately reviewable on appeal. *Hammond v. Saini*, 229 N.C. App. 359, 362, 748 S.E.2d 585, 588 (2013), *aff'd as modified*, 367 N.C. 607, 766 S.E.2d 590 (2014). This issue is properly before this Court.

III. Issue

¶ 18 Defendants argue the trial court erred by granting Plaintiff's motion to enforce its previous motion to compel production.

IV. Motion to Compel

A. Standard of Review

¶ 19 "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (internal citation omitted), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006). Questions of statutory interpretation are reviewed *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011).

B. Analysis

¶ 20 **[2]** The medical review committee privilege is "designed to encourage candor and objectivity in the internal workings of medical review committees." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986). The party asserting the privilege bears the burden of proof. *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006).

¶ 21 Defendants argue the "fundamental and sole requirement for members of a medical review committee under N.C. Gen. Stat. § 90-21.22A" is that they be licensed. To claim the medical review committee privilege under the statute, a claimant must demonstrate the committee is composed of "healthcare providers licensed under this chapter," the committee be "formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing," and the documents must be "produced or presented" by the medical review committee. N.C. Gen. Stat. § 90-21.22A (2019).

¶ 22 The trial court did not make the requested findings of fact or conclusions concerning these statutory elements. When asked specifically to do so by counsel, the trial court declined to rule about whether the peer review privilege applied or not. When requested, the trial court's findings of fact and conclusions of law must be sufficiently detailed to allow for meaningful appellate review. *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

¶ 23 Defendants' counsel correctly sought clarification of the ruling and requested the trial court to make specific findings and conclusions. "Without setting forth findings of fact, this Court cannot conduct a meaningful review of the conclusions of law and test the correctness of the trial court's judgment." *Earl v. CGR Dev. Corp.*, 242 N.C. App. 20, 24, 773 S.E.2d 551, 554 (2015) (citations, alternations, and internal quotation marks omitted).

¶ 24 The order of the trial court is remanded for factual findings and conclusions of whether Defendants carried their burden to demonstrate the peer or medical review committee they are relying on is composed exclusively of licensed providers under Chapter 90, formed for the purpose of evaluating the quality of the healthcare provided, and whether Allen's document was actually "produced or presented" at the request of her medical superior to the medical review committee in order to properly invoke the privilege under the statute. *See* N.C. Gen. Stat. § 90-21.22A.

V. Conclusion

¶ 25 The trial court failed to make the Defendant's requested and requisite findings of fact and conclusions for meaningful appellate review of the Defendants' burden to invoke the privilege. *Id*. Upon remand, the trial court is free to hear arguments or receive additional material to make and enter factual findings and conclusions consistent with the requirements of N.C. Gen. Stat. § 90-21.22A. *It is so ordered.*

REMANDED.

Judge JACKSON concurs.

Judge MURPHY dissents with separate opinion.

MURPHY, Judge, dissenting.

¶ 26 Without the document at issue contained in the Record before us, we cannot meaningfully review the trial court's order granting enforcement of Plaintiff's preexisting motion to compel. For that reason, I would hold Defendants waived this issue by failing to comply with the requirements established by our rules of appellate procedure, and dismiss the appeal on those grounds.

¶ 27 Even setting aside this error by Defendants, I would nonetheless affirm the trial court's order, and hold Defendants failed to satisfy their burden of production in asserting the medical review committee privilege provided by N.C.G.S. § 90-21.22A. Further, contrary to the Majority's holding, the trial court was not obligated to make specific findings of fact in its order concerning the statutory elements of Defendants' medical review committee privilege claim. Consequently, I find it unnecessary to remand this matter to the trial court. For all of these reasons, I must respectfully dissent.

ANALYSIS

A. Insufficient Record on Appeal

¶ 28 Defendants appeal the trial court's order granting Plaintiff's motion to enforce an existing motion to compel discovery pursuant to N.C.G.S. § 1A-1, Rule 37(b). After learning of the existence of a document in a 30 October 2019 deposition of Defendant Allen, Plaintiff filed a motion seeking its disclosure on 21 November 2019. The trial court entered an order on 24 March 2020 (the "Order") that stated, in relevant part:

> Plaintiff's [m]otion for enforcement of the existing [o]rder pursuant to Rule 37(b) is granted. . . . The [trial] [c]ourt has ordered that this document that [] Defendants handed up under seal during the hearing be maintained under seal by the Clerk's office pending the time for any appeal to be filed, and if appeal is taken, to remain there until the outcome of that appeal is completed before actually producing it to the other parties[.]

¶ 29 As the Majority correctly states, the Order stipulates that the document at issue be maintained under seal, pending appeal. *Supra* at ¶ 13. However, the fact that the document is maintained under seal does not relieve Defendants of their "duty . . . to ensure this Court has everything needed for a proper review of [the] issues on appeal." *Gilmartin v. Gilmartin*, 263 N.C. App. 104, 107, 822 S.E.2d 771, 774 (2018) (citing *State v. Davis*, 191 N.C. App. 535, 539, 664 S.E.2d 21, 24 (2008)), *disc. rev. denied*, 372 N.C. 291, 826 S.E.2d 702 (2019).[1]

¶ 30 Rule 9 of the North Carolina Rules of Appellate Procedure, which governs the record on appeal, states in relevant part:

> (a) . . . . In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal . . . .
>
> > (1) . . . . The record on appeal in civil actions and special proceedings shall contain:
> >
> > . . .
> >
> > e. so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal . . . ;
> >
> > . . .

1. *See also Doe v. Doe*, 263 N.C. App. 68, 71-72, 72 n.2, 823 S.E.2d 583, 586 & n.2 (2018) (reviewing a sealed court file in its entirety *in camera*); *State v. McCoy*, 228 N.C. App. 488, 492, 745 S.E.2d 367, 370 (2013) ("During the preparation of the record on appeal, [the] defendant's appellate counsel requested and obtained a copy of the sealed [document] from the trial court."), *disc. rev. denied*, *appeal dismissed*, 367 N.C. 530, 762 S.E.2d 462 (2014); *Daly v. Kelly*, 272 N.C. App. 448, 453 n.7, 846 S.E.2d 830, 833 n.7 (2020) ("This Court has reviewed the records under seal[.]"); *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 352, 804 S.E.2d 599, 603 (2017) (noting "we considered all of the documents and testimony under seal").

> j. copies of all other papers filed . . . in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the transcript of proceedings . . . ;
>
> . . . .
>
> (c) Presentation of Testimonial Evidence and Other Proceedings. . . . .
>
> . . . .
>
> (4) Presentation of Discovery Materials. . . . . In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: . . . . discovery materials, including . . . motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits.

N.C. R. App. P. 9(a)(1)(e), (a)(1)(j), (c)(4) (2021). Notwithstanding the fact this sealed document is central to our ability to meaningfully review the issues presented in this appeal, Defendants failed to include it in the Record, send it as a documentary exhibit, or provide it under seal.

¶ 31 The failure to follow the rules of appellate procedure "ordinarily forfeit[s] [a party's] right to review on the merits." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). "[T]he appellate court may not consider sanctions of any sort [including dismissal] when a party's noncompliance with nonjurisdictional requirements of the [appellate] rules does not rise to the level of a 'substantial failure' or 'gross violation.' " *Id.* at 199, 657 S.E.2d at 366. "In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the [appellate] court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review." *Id.* at 200, 657 S.E.2d at 366.

¶ 32 Here, Defendants' Appellate Rules violation is the failure to include the document at issue in the Record on appeal. In the absence of this document, "we cannot, without engaging in speculation," assess the merits of the Order granting Plaintiff's motion, or the claim by Defendants

that the document is covered by medical review committee privilege under N.C.G.S. § 90-21.22A. *CRLP Durham, LP v. Durham City/Cty. Bd. of Adjustment*, 210 N.C. App. 203, 212, 706 S.E.2d 317, 323 ("From the record before us, we cannot [review the issue presented], without engaging in speculation . . . as [the] petitioner failed to include in the record on appeal any portion of the [document at issue]."), *disc. rev. denied*, 365 N.C. 348, 717 S.E.2d 744 (2011). This violation severely impairs our ability to conduct meaningful appellate review and rises to the level of a "substantial failure" and "gross violation." *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366.

¶ 33 Upon concluding the noncompliance rises to a level of a substantial failure or gross violation, the next step is to "determine which, if any, sanction under Rule 34(b) should be imposed. [] [I]f . . . dismissal is the appropriate sanction, [the final step is to] consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal." *Id.* at 201, 657 S.E.2d at 367.

¶ 34 Rule 34(b) of the North Carolina Rules of Appellate Procedure provides:

> (b) A court of the appellate division may impose one or more of the following sanctions:
>
> (1) dismissal of the appeal;
>
> (2) monetary damages including, but not limited to,
>
> a. single or double costs,
>
> b. damages occasioned by delay,
>
> c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;
>
> (3) any other sanction deemed just and proper.

N.C. R. App. P. 34(b) (2021). Dismissal is appropriate here because without the document at issue contained in the Record, we cannot determine whether the trial court erred in granting Plaintiff's motion to enforce the existing motion to compel. "[I]n a case such as this, and in order to ensure better compliance with the appellate rules, . . . dismissal is appropriate and justified." *Ramsey v. Ramsey*, 264 N.C. App. 431, 437, 826 S.E.2d 459, 464 (2019). The only way we could reach the merits of this case is by invoking Rule 2.

¶ 35 Rule 2 "may only [be invoked] on rare occasions and under exceptional circumstances to prevent manifest injustice to a party, or to expedite decision in the public interest[.]" *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367 (marks and citations omitted). The decision whether to invoke Rule 2 is purely discretionary and is "to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (marks omitted). Nothing in this matter demonstrates any "exceptional circumstances" to suspend or vary the appellate rules. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. The circumstances of this case do not justify invoking Rule 2, and I would decline to reach the merits of the case on that basis. However, because the Majority addresses the merits of the case and I disagree with its analysis and resolution, my dissent must also encompass the merits in the following sections. *See* N.C. R. App. P. 16(b) (2021) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent[.]"). I would hold the Order should be affirmed for the reasons discussed in Parts B and C, below.

B. Burden of Production under N.C.G.S. § 90-21.22A

¶ 36 Even if the appeal was not dismissed for failure to produce the document at issue, I would nonetheless affirm the Order, as Defendants failed to produce evidence that they are entitled to the medical review committee privilege set forth in N.C.G.S. § 90-21.22A.

¶ 37 Located in Chapter 90, Article 1D of our General Statutes, N.C.G.S. § 90-21.22A provides:

> (a) As used in this section, the following terms mean:
>
> (1) "Medical review committee." - A committee composed of health care providers *licensed under this Chapter [90]* that is formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing. "Medical review committee" does not mean a medical review committee established under [N.C.G.S. §] 131E-95.
>
> (2) "Quality assurance committee." - Risk management employees of an insurer licensed to write medical professional liability insurance in this State, who work in collaboration with health care providers

> licensed under this Chapter, and insured by that insurer, to evaluate and improve the quality of health care services.
>
> (b) A member of a duly appointed medical review or quality assurance committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee.
>
> (c) The proceedings of a medical review or quality assurance committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of [N.C.G.S. §§] 132-1, 131E-309, or 58-2-100; and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter . . . , which civil action results from matters that are the subject of evaluation and review by the committee. . . . . However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. . . . .
>
> (d) This section applies to a medical review committee, including a medical review committee appointed by one of the entities licensed under Articles 1 through 67 of Chapter 58 of the General Statutes.
>
> (e) Subsection (c) of this section does not apply to proceedings initiated under [N.C.G.S. §] 58-50-61 or [N.C.G.S. §] 58-50-62.

N.C.G.S. § 90-21.22A (2019) (emphasis added).

¶ 38 The parties dispute the burden required to demonstrate compliance with N.C.G.S. § 90-21.22A. Specifically, Plaintiff argues "Defendants had to affirmatively prove that all members of its nation-wide central medical review committee . . . were Chapter-90-licensed health care providers under North Carolina law." Defendants assert that because the term "health care provider" as used in N.C.G.S. § 90-21.22A(a)(1) is not defined in Chapter 90 general definitions, we must look to definitions con-

tained in other articles to interpret its meaning. Defendants specifically point to the definition of "health care provider" in N.C.G.S. § 90-21.11, located in Chapter 90, Article 1B of our General Statutes, which states, in pertinent part:

> The following definitions apply in *this Article [1B]*:
>
> (1) Health care provider. - Without limitation, any of the following:
>
> a. A person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology.

N.C.G.S. § 90-21.11(1)(a) (2019) (emphasis added). Defendants' argument is unpersuasive, as the application of this proposed definition would contravene basic principles of statutory interpretation.

> Statutory interpretation properly begins with an examination of the plain words of the statute. If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. However, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Canons of statutory interpretation are only employed if the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings.

JVC Enters. v. City of Concord, 376 N.C. 782, 2021-NCSC-14, ¶ 10 (citations and marks omitted). The plain words of N.C.G.S. § 90-21.22A indicate a medical review committee must be composed of "health care providers licensed under [Chapter 90.]" N.C.G.S. § 90-21.22A(a)(1) (2019). The statute is clear and unambiguous–it contains no contradictions, and it is not "fairly susceptible of two or more meanings." *JVC*, 376 N.C. 782, 2021-NCSC-14 at ¶ 10. Consequently, we must interpret its words in accordance with their plain and definite meaning, and need

not look to definitions in other articles, consider legislative intent, or employ other canons of statutory construction. *Id.* By its plain language, N.C.G.S. § 90-21.22A requires members of a medical review committee to be health care providers licensed under Chapter 90, to wit, to be licensed by North Carolina. In addition, N.C.G.S. § 90-21.11 explicitly states "[t]he following definitions apply *in this Article*[,]" and contains no indication that the definition of "health care provider" located in Article 1B in N.C.G.S. § 90-21.11(1) would apply to other articles within Chapter 90. N.C.G.S. § 90-21.11 (2019) (emphasis added).

¶ 39 "[D]efendants, as the parties objecting to the disclosure of the [document] on the basis of this privilege, bear the burden of establishing that [P]laintiff's discovery request[] fall[s] within the scope of the privilege." *Hammond v. Saini*, 229 N.C. App. 359, 365, 748 S.E.2d 585, 589 (2013), *modified and aff'd by* 367 N.C. 607, 766 S.E.2d 590 (2014). To satisfy their burden in claiming the medical review committee privilege, Defendants needed to prove to the trial court's satisfaction that every member of the qualifying medical review committee is a health care provider licensed under Chapter 90. N.C.G.S. § 90-21.22A(a)(1) (2019). Defendants attempted to meet their burden by filing an affidavit of Justin Otwell, Esq. ("Otwell"), the Vice President of Claims and Risk Management at an affiliate corporation of EMP. Otwell's affidavit "sets forth the procedure by which EMP set up its medical review committee and how materials are submitted to that committee." Otwell's affidavit states:

> At the time that Mr. Williams was seen by Ms. Allen, EMP had a central medical review committee. This was a committee composed of licensed healthcare providers which was formed for the purpose of evaluating the quality, costs and necessity for the healthcare services provided by EMP. It also was created and empowered to evaluate and improve the quality of healthcare services provided by EMP's doctors and physician's assistants.
>
> As part of the work of the medical review committee, providers could, in appropriate circumstances, provide information to the committee about patient care for evaluation by the committee. One way such information could be supplied to the committee in 2016 was via a computer program available at EMP locations throughout the country. A provider would enter information about the patient, and it

> would be transmitted to the medical review committee for evaluation.
>
> In the case of Mr. Williams, Ms. Allen supplied information to the medical review committee utilizing a computer terminal at CMC Pineville hospital. This information was supplied to the committee via a computer generated form. Attached to this affidavit as "Sealed Exhibit A" is the form generated by Ms. Allen in May 2016 and submitted to the committee with information about Mr. Williams. "Sealed Exhibit A" was used as part of the proceedings of the medical review committee at EMP and was generated for the purposes of that committee. This document was not created as part of the medical record in this case, and it is not a publicly available document.
>
> This document was provided to John Holden, our North Carolina counsel on [5 November 2019], at his request.
>
> It is my understanding that the activities and proceedings of a medical review committee, including the materials it considers, shall be confidential and are not public records under [N.C.G.S. §] 90-21.22A. The document attached to this affidavit as "Sealed Exhibit A" is part of the proceedings of the committee and was generated for the use of the committee in evaluating patient care. As such, I would respectfully request that it be withheld from discovery.
>
> It is imperative that the actions of medical review committees be confidential and that the materials considered and generated by them not be utilized in litigation, to ensure full openness in the activities of the committee. These committees are utilized by medical organizations, including EMP, to improve patient care and as a learning tool for clinicians.

¶ 40 Defendants asserted Otwell's affidavit demonstrated the document at issue "clearly falls within the privilege set forth in [N.C.G.S.] § 90-21.22A for medical review committee documentation." However, nowhere in his affidavit does Otwell state the names of the members of the committee or their status as health care providers licensed under Chapter 90 of the North Carolina General Statutes. While arguments

alone would not carry Defendants' burden as they are not evidence, it is important to note that at no point in their arguments at the trial court or on appeal have Defendants argued that the committee is "composed of health care providers licensed under [Chapter 90.]" N.C.G.S. § 90-21.22A(a)(1) (2019). By failing to include information plainly required for an assertion of medical review committee privilege under N.C.G.S. § 90-21.22A, Defendants did not meet their burden of production, much less any burden of proof, and are not entitled to the privilege they seek. For this reason, I would affirm the Order.

C. Defendants' "Requested" Findings Concerning N.C.G.S. § 90-21.22A

¶ 41 The Majority states "[t]he trial court did not make the requested findings of fact or conclusions concerning [the] statutory elements [in N.C.G.S. § 90-21.22A]" and holds the Order must be "remanded for factual findings and conclusions." *Supra* at ¶¶ 22, 24. I disagree. Defendants failed to make a specific request to the trial court for findings of fact and the trial court was under no obligation to provide findings of fact in the Order. For these reasons, it is unnecessary to remand the Order to the trial court.

¶ 42 Rule 52 of the North Carolina Rules of Civil Procedure, which governs findings by a trial court, provides:

> Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu *only when requested by a party* and as provided by Rule 41(b).[2] Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

---

2. Rule 41(b) of the North Carolina Rules of Civil Procedure, which specifically pertains to the dismissal of actions, provides: "After the plaintiff . . . has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The [trial] court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the [trial] court renders judgment on the merits against the plaintiff, the [trial] court shall make findings [of fact] as provided in Rule 52(a)." N.C.G.S. § 1A-1, Rule 41(b) (2019). Here, the trial court entered an interlocutory order; it did not grant a motion to dismiss the proceedings. Thus, the trial court was not required to make findings of fact in its Order under Rule 41(b).

N.C.G.S. § 1A-1, Rule 52(a)(2) (2019) (emphasis added). Citing our Supreme Court's decision in *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980), the Majority asserts that "[w]hen requested, the trial court's findings of fact and conclusions of law must be sufficiently detailed to allow for meaningful appellate review." *Supra* at ¶ 22. However, the Majority's reliance on *Coble* is taken out of context.

¶ 43 In *Coble*, the defendant challenged a trial court's order requiring her to provide partial child support on the grounds that she was capable of contributing child support payments and the plaintiff was entitled to contribution from her. *Coble*, 300 N.C. at 709, 268 S.E.2d at 187. Our Supreme Court remanded the case for further evidentiary findings and stated:

> [T]he requirement that the [trial] court make findings of those specific facts which support its ultimate disposition of the case is . . . to allow the appellate courts to perform their proper function in the judicial system.
>
> Under [N.C.G.S. § 50-13.4(c)] an order for child support must be based on the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. *These conclusions* must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents.
>
> . . . .
>
> 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. Evidence must support findings; findings must support conclusions; conclusions must support the judgment.

Id. at 712, 714, 268 S.E.2d at 1889, 190. (citations and marks omitted) (emphasis added). This language demonstrates the order in *Coble* was remanded for "further evidentiary findings" due to the trial court's failure to comply with the specific requirements for an order for child support under N.C.G.S. § 50-13.4(c). *Id.* at 714, 268 S.E.2d at 190. Given that the

present case does not involve an order under N.C.G.S. § 50-13.4(c), the Majority improperly relies on *Coble* in support of a premise for which it does not stand.

¶ 44 Further, contrary to the Majority's assertion (without reference to the Record), Defendants did not specifically request that the trial court make any findings of fact at the hearing held on 31 January 2020. *Supra* at ¶ 23. Defense Counsel had the following exchange with the trial court:

> THE COURT: . . . . I'm going to direct that that document be provided to [] [P]laintiff. Now, at this time, I'll retain it under seal (clears throat) in the file . . . .
>
> [DEFENSE COUNSEL]: Well, Your Honor, that's what I wanted to clarify because as you know the, uh, legitimate and bona fide assertion of a privilege, even is – is not an interlocutory appeal. So, I just need – if the [c]ourt can clarify and perhaps this can be worked out, whether you are ruling the privilege was waived, the privilege doesn't apply, the privilege is – somehow defeated so that we can establish the parameters of the argument for [the] Court of Appeals –-
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: –- if that should be the case.
>
> . . .
>
> [PLAINTIFF'S COUNSEL]: Your Honor, not to object, but it may help if the question is posed as, "Are you granting the [m]otion for 37(b) to enforce an existing order?"
>
> THE COURT: Yes, yes.
>
> [DEFENSE COUNSEL]: So, you'll – so, if that – so, the [c]ourt's order, as I understand it is that the peer review privilege that was identified in the original privilege log was the subject of the or- of the argument before Judge Ervin is overruled and it is – the privilege is (inaudible) as to this document, that you have found?
>
> THE COURT: The – what my ruling is specifically is that the issues before me today were encompassed by the order of Judge Ervin, and therefore my order

is pursuant to Rule 37(b) that, um, [] [P]laintiff is entitled to enforce the order of Judge Ervin and that enforcement will require the production of this particular document.

. . . .

[DEFENSE COUNSEL]: . . . . So, you're saying you're basing – you're enforcing his prior ruling, even though our position is it was a different document that we were arguing about in front of him? You're saying it was the same document and the argument ---

THE COURT: I'm not saying it's the same document. I'm saying that this document was responsive to the request for discovery that were [sic] before Judge Ervin at that time. So, that in response to those discovery requests, this document should have been identified and if a privilege was claimed, it should've been asserted as to this particular document.

[DEFENSE COUNSEL]: Okay. Because today we've had a lot of arguments about the nature – we've had arguments about the nature of the committee that reviewed it in the system and all that. I just want to know if that's going to be part of the issue that's going to be taken into – that could be potentially taken up. I don't know. I assume my client is going to want to partiprotect their – their medical review committee and that's not casting (inaudible) on anyone in this room ---

THE COURT: I know.

[DEFENSE COUNSEL]: --- I'm just saying, I assume that's going to be their position.

THE COURT: Sure.

[DEFENSE COUNSEL]: So, it needs to be as – as clear as we can get it. So, you know, I don't know if [Plaintiff's Counsel] and I can go back and forth and find something that would – that would satisfy, Your Honor.

THE COURT: Yeah. Why don't – y'all [Defense Counsel and Plaintiff's Counsel] work on the order

> and I'll take a look at what you draft, and we'll go from there. . . .
>
> . . . .
>
> [DEFENSE COUNSEL]: Is it your position it's the same doc – because he was looking at a document and he ordered it to be produced and we produced it ---
>
> THE COURT: Yeah.
>
> [DEFENSE COUNSEL]: --- and now we're being told that we didn't comply with his order by producing a different document. So, that's what I'm trying to figure out how to – how to craft this. I understand the [c]ourt's ruling, I just want to put it in a box where I can explain it.
>
> THE COURT: Yeah, I don't know that I can answer that question until I can see each version of the proposed orders.
>
> . . . .
>
> THE COURT: All right. Anything else we need to address?
>
> [DEFENSE COUNSEL]: No.

¶ 45 This exchange demonstrates that Defense Counsel sought clarification pertaining to the trial court's ruling on the privilege to "establish the parameters of the argument" for an appeal, and stated that he "[understood] the [c]ourt's ruling," but wanted "to put it in a box where [he could] explain it." When the trial court declined to answer Defense Counsel's questions at the time, and asked if anything else needed to be addressed, Defense Counsel replied "[n]o." Based on this exchange, it is apparent that Defendants only requested detailed conclusions of law, but made no specific request for the trial court to make findings of fact in accordance with Rule 52, and accordingly, the trial court was under no obligation to make such findings. *See Brown v. Brown*, 47 N.C. App. 323, 325, 267 S.E.2d 345, 347 (1980) ("[T]he record fails to show that [the] defendant requested [] findings [of fact] . . . . Absent request, the [trial] court is not required to find facts . . . ."); *Kolendo v. Kolendo*, 36 N.C. App. 385, 386, 243 S.E.2d 907, 908 (1978) ("[I]f no request is made by the parties to a hearing on a motion, then the trial [court] is not required to find the facts upon which he bases his ruling.").

¶ 46 As no findings of fact were specifically requested by Defendants, and were not required by statute, we must "presume[] that the [trial] court on proper evidence found facts to support its judgment." *Brown*, 47 N.C. App. at 325, 267 S.E.2d at 347. Adopting this presumption, I would hold it is patently unnecessary to remand this matter for further evidentiary findings.

CONCLUSION

¶ 47 Defendants failed to include the document at issue in the Record on appeal, send it as a documentary exhibit, or provide it under seal. This failure was a violation of the appellate rules, and due to the severe impact on our ability to conduct meaningful appellate review, Defendants' noncompliance rose to the level of a substantial failure and gross violation. Dismissal is the appropriate remedy under Rule 34, and the circumstances of this case do not justify invoking Rule 2.

¶ 48 Setting aside this violation, as the Majority implicitly does, I reach the merits and fully dissent from the Majority's analysis. I would hold the Order should be affirmed. Defendants failed to produce evidence that they are entitled to the medical review committee privilege set forth in N.C.G.S. § 90-21.22A. In addition, Defendants did not specifically request that the trial court make any findings of fact and the trial court was not obligated under any authority to do so. For these reasons, I disagree with the Majority's decision to remand for further findings and respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 AUGUST 2021)

ETHEL P. GOFORTH PRIMARY TR. v. LR DEV.-CHARLOTTE, LLC 2021-NCCOA-411 No. 20-558	Iredell (17CVS361)	AFFIRMED AND MODIFIED IN PART; REVERSED AND REMANDED IN PART.
IN RE N.T. 2021-NCCOA-412 No. 20-891	Forsyth (18JA123) (18JA124) (18JA125)	Vacated and Remanded
STATE v. BOSTON 2021-NCCOA-413 No. 20-674	Buncombe (17CRS93691)	Dismissed
STATE v. BRISBON 2021-NCCOA-414 No. 20-408	Rutherford (18CRS51942) (19CRS253)	No Error
STATE v. CRAWFORD 2021-NCCOA-415 No. 20-502	Burke (19CRS588-589)	No Error
STATE v. ELLER 2021-NCCOA-416 No. 20-342	Wilkes (18CRS52377) (18CRS52381) (18CRS52383) (19CRS64-67)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. GREEN 2021-NCCOA-417 No. 20-456	Forsyth (18CRS53210)	Affirmed
STATE v. GREENE 2021-NCCOA-418 No. 20-598	Wake (18CRS216077)	No Error
STATE v. MARTIN 2021-NCCOA-419 No. 20-738	Avery (18CRS50492) (19CRS93)	NO PLAIN ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING
STATE v. O'KELLY 2021-NCCOA-420 No. 20-693	Durham (15CRS59450)	Reversed

STATE v. PRYOR 2021-NCCOA-421 No. 20-363	Brunswick (18CRS1288) (18CRS51737) (19CRS1771-72)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

law were considered separately from the mother's challenges to the findings of fact. **In re B.R.W., 382.**

Fitness of parent—support by findings of fact—guardianship—The trial court erred by concluding that a mother was unfit where the findings of fact did not support such a conclusion. However, because the trial court's conclusion that the mother had acted in a manner inconsistent with her constitutionally protected status as a parent was supported by the findings of fact, which were supported by competent evidence, the trial court did not err by applying the "best interests" standard and granting guardianship to the children's grandmother. **In re B.R.W., 382.**

Neglect—dependency—conclusions of law—sufficiency of evidence—The trial court's adjudication of three children as neglected and dependent was reversed where its findings (regarding neglect, dependency, and the reasonableness of efforts by the department of social services (DSS)), which were more properly reviewed as conclusions of law, were not supported by evidence. Although DSS opened several investigations into the family's access to housing and food, many of the allegations against the parents were not substantiated, resulting in each investigation against them being closed without services being provided, and no evidence was presented that the children were harmed. **In re H.P., 195.**

Neglect—substantiation—sufficiency of evidence—The trial court did not err in a neglect case where its finding of fact that the department of social services (DSS) had substantiated neglect by respondent was supported by clear and convincing evidence. Although DSS's initial investigation report said, "services needed" for neglect rather than "services substantiated," the evidence—revealing that respondent admittedly used improper physical discipline with the children, refused to attend parenting classes or therapy to address the problem, and failed to seek necessary therapy for the children to address their own mental health issues—showed that the children faced a substantial risk of physical, emotional, and mental harm under respondent's care. **In re A.D., 637.**

Neglect—sufficiency of findings—determination of "services needed" rather than "substantiated"—The trial court's findings of fact supported its neglect adjudication, including its finding that the department of social services (DSS) "substantiated" neglect by respondent even though DSS's initial investigation report said, "services needed" rather than "services substantiated." The official policies governing in-home services treat the phrases "services needed" and "services substantiated" similarly, and DSS was not even required to substantiate neglect in order to proceed with the juvenile petition. In fact, N.C.G.S. § 7B-302(c) required DSS to file the petition where DSS properly determined that family services were necessary but where respondent refused to participate in those services, and the evidence of respondent's refusal to engage with her case plan at the time DSS filed the petition supported the court's neglect adjudication. **In re A.D., 637.**

Permanency planning hearing—appointment of guardians—understanding of legal significance—sufficiency of evidence—In a permanency planning matter in which the trial court granted guardianship of a child to her aunt and aunt's partner, with whom the child had previously been placed, sufficient evidence was presented—testimony from one of the guardians and the social worker, as well as a home study report—from which the trial court could verify, as required by N.C.G.S. §§ 7B-600(c) and 7B-906.1(j), that both of the proposed guardians understood the legal significance of the guardianship. **In re B.H., 183.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Permanency planning hearing—notice—waiver—In a neglect and dependency case where the trial court entered a permanency planning order after a hearing that was designated as a ninety-day review hearing, respondent-mother waived her right to notice of a permanency planning hearing under N.C.G.S. § 7B-907(a) by attending the hearing, participating in it, and failing to object to the lack of notice. **In re E.A.C., 608.**

Permanency planning—ceasing further review hearings—findings—In a permanency planning matter, the trial court erred by ceasing further review hearings without first making findings of fact addressing each of the factors contained in N.C.G.S. § 7B-906.1(n). **In re K.P., 42.**

Permanency planning—custody to non-relatives—understanding of legal significance—findings—In a permanency planning matter, the trial court erred when it awarded custody of the child to non-relative custodians without first ensuring that the custodians understood the legal significance of the placement and had adequate resources to care for the child as required by N.C.G.S. § 7B-906.1(j). Testimony from one of the custodians that he and his wife were willing to care for the child was insufficient. **In re K.P., 42.**

Permanency planning—primary plan of reunification—eliminated—sufficiency of findings—The trial court's review order and permanency planning orders in a neglect and dependency case were vacated and remanded where the court had established reunification as the primary permanent plan at the initial disposition hearing but then eliminated reunification as a permanent plan at a subsequent hearing. Contrary to respondent-mother's argument, it was legally permissible for the court to eliminate reunification after it had already been part of the initial permanent plan. However, the court erred in eliminating reunification where it failed to enter sufficient findings of fact indicating whether reunification efforts would have been successful, and instead only entered findings showing that respondent-mother was unable to make progress toward reunification because of her status as an undocumented immigrant and her inability to obtain a U Visa. **In re E.A.C., 608.**

Permanency planning—reunification eliminated as part of plan—sufficiency of findings—A permanency planning order granting custody of a child to non-relative custodians was vacated where the trial court effectively eliminated reunification with the mother as a plan without first making the necessary findings of fact pursuant to N.C.G.S. § 7B-906.2(b) and (d) regarding whether reunification would be unsuccessful or inconsistent with the child's safety. Further, the trial court erred by determining that the primary plan had been achieved because the initial primary plan was to give custody to a relative, and instead, the child was placed with non-relatives. **In re K.P., 42.**

Permanent plan of reunification—eliminated—trial court's refusal to list steps for regaining custody—The trial court in a neglect and dependency case neither abused its discretion nor acted under a misapprehension of the law when, after removing reunification as a primary permanent plan, it told respondent-mother's counsel that it was not obligated to list what respondent-mother had to do to regain custody of her children. Under N.C.G.S. § 7B-904, courts have the discretion to direct parents to certain orders and enter dispositions that clearly spell out what parents must do to regain custody. Moreover, a family services agreement had been in place for some time that respondent-mother was aware of and that delineated the specific steps she needed to take to regain custody, and therefore any injury caused by the court's refusal to list those steps was harmless. **In re E.A.C., 608.**

EVIDENCE—Continued

Hearsay—medical records—authentication—business records exception— In a trial for rape, kidnapping, and robbery, the victim's medical records were properly authenticated by a qualified witness under the business record exception to the hearsay rule (Evidence Rule 803(6)) where a staff nurse at the emergency department of the hospital where the victim was treated testified regarding the hospital's record-keeping procedures. The trial court provided additional safeguards by ordering that any language that could be construed as a legal conclusion be redacted prior to publication to the jury. **State v. Elder, 493.**

Hearsay—out-of-court statements—by defendant to officer—In a joint murder trial, there was no error in the admission of one defendant's out-of-court statements, made to a law enforcement officer, in which she denied knowing her co-defendant and declared she had not seen the victim in years. The statements were admissible, relevant, and did not give rise to a reasonable possibility that, absent their admission, the jury would have reached a different verdict. **State v. Abbitt, 692.**

Hearsay—statements attributed to deceased victim—plain error analysis— There was no plain error in defendant's trial for rape, kidnapping, and robbery by the admission of testimony by the victim's family members regarding the victim's state of mind after the attack, items of personal property that were missing from the victim's house, or the victim's relation of events in an interview with law enforcement. The challenged statements either did not constitute hearsay but were based on a witness's personal observations or were corroborated by other witnesses. **State v. Elder, 493.**

Lay opinion—contents of recorded phone call—murder trial—no prejudicial error—The trial court in a murder prosecution did not abuse its discretion by allowing an undercover detective to testify about defendant's phone call from jail on the day of the victim's death, where defendant did not dispute the detective's ability to identify him as the caller and the detective otherwise provided a proper lay opinion based on her perceptions from listening to the call. Although a recording of the call was played for the jury, the detective's familiarity with defendant, the person he called, and their respective voices (as well as the jail's telephone system) made her more likely than the jury to correctly discern what was said in the "garbled" and "distorted" recording. Further, the detective's testimony did not prejudice defendant where it was not the only evidence from which the jury could have inferred defendant's guilt. **State v. Lowery, 333.**

Lay witness testimony—defendant's intent—prejudice analysis—The trial court erred in defendant's trial for first-degree murder by admitting impermissible lay witness opinion testimony, over defendant's objections, that defendant drove to his cousin's house in order to obtain a gun and that defendant later attempted to set up the cousin to be killed (because the cousin was cooperating with police in their investigation of defendant for the murder), where the jury was as well qualified as the witnesses to draw those inferences from the evidence. However, the errors in admitting these two statements were not prejudicial in light of the overwhelming evidence of defendant's guilt. **State v. Malone-Bullock, 736.**

Murder trial—potentially exculpatory evidence—other possible perpetrators—not inconsistent with defendant's guilt—In a joint murder trial, there was no prejudicial error in the trial court's decision to exclude defendants' proffered evidence—including a handgun and latex gloves that belonged to another person—that they contended showed two other people committed the crimes for which they were

STATUTES OF LIMITATION AND REPOSE—Continued

instruments subject to the provisions of the Uniform Commercial Code, where the note was executed "under seal," it was a sealed instrument subject to the ten-year statute of limitations in N.C.G.S. § 1-47(2), as provided by N.C.G.S. § 25-3-118(h). **Pedlow v. Kornegay, 239.**

Breach of promissory note—ten-year statute of limitations—accrual of claim—upon execution of note—In an action to collect on a promissory note, which was signed under seal and therefore subject to the ten-year statute of limitations in N.C.G.S. § 1-47(2), as provided by N.C.G.S. § 25-3-118(h), the cause of action accrued on the date the note was signed, since that was when the note became enforceable, and not on the earlier date appearing on the face of the note. **Pedlow v. Kornegay, 239.**

TRIALS

Hearing—civil no-contact order—findings of fact paraphrasing testimony—reasonable inference drawn—In a matter between next-door neighbors, where the trial court entered a civil no-contact order against defendant, which included a finding of fact stating that defendant said, "plaintiff smells," defendant's argument that the trial court had misquoted her lacked merit. Rather, the trial court had accurately paraphrased testimony from the hearing and drew a reasonable inference from the many statements defendant made about plaintiff (for example, she testified that she "smelled a bad smell" when she passed by plaintiff's garage door, and plaintiff testified that she texted him statements like "my house stinks like skunks from you and your people, you stinky criminal"). **Angarita v. Edwards, 621.**

WILLS

Caveat proceeding—undue influence—probative factors—forecast of evidence—In an estate dispute, sufficient evidence was presented regarding decedent's mental acuity and independence in directing her estate affairs at the time she revised her will and trust (to exclude plaintiff, one of her sons, as a beneficiary of her estate) to undermine plaintiff's claim of undue influence. Defendants (plaintiff's two siblings) presented sufficient evidence to rebut a presumption of undue influence, which arose because one defendant was in a fiduciary relationship with his mother at the time she changed her estate documents, and plaintiff's evidence failed to show any genuine issue of material fact to support his claim. **Anton v. Anton, 150.**