NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 280

19 OCTOBER 2021

7 DECEMBER 2021

RALEIGH
2022

CITE THIS VOLUME

280 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
DARREN JACKSON

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.
WANDA G. BRYANT
PHIL BERGER, JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK

Clerk

DANIEL M. HORNE, JR.[1]

EUGENE H. SOAR[2]

Assistant Clerk

Shelley Lucas Edwards

OFFICE OF APPELLATE DIVISION STAFF

Executive Director

Jaye E. Bingham-Hinch[3]

Jonathan Harris[4]

Director

David Alan Lagos

Staff Attorneys

Michael W. Rodgers

Lauren M. Tierney

Caroline Koo Lindsey

Ross D. Wilfley

Hannah R. Murphy

J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director

Andrew Heath

Assistant Director

David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen

Jennifer C. Peterson

Niccolle C. Hernandez

[1]Retired 30 June 2021.
[2]Sworn in 1 July 2021.
[3]Resigned 19 November 2021.
[4]Began 7 October 2021.

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CROSS-REFERENCE TABLE[1]

CASE	N.C. APP. REPORTS CITATION	UNIVERSAL PARALLEL CITATION
In re A.C.	280 N.C. App. 301	2021-NCCOA-280
Lowrey v. Choice Hotels Int'l, Inc.	*280 N.C. App. 129*	*2021-NCCOA-438*
Duke Energy Carolinas, LLC v. Kiser	280 N.C. App. 1	2021-NCCOA-558
In re W.C.T.	280 N.C. App. 17	2021-NCCOA-559
Leary v. Anderson	280 N.C. App. 46	2021-NCCOA-560
Locklear v. N.C. Dep't of Agric. & Consumer Servs.	280 N.C. App. 59	2021-NCCOA-561
Sharpe-Johnson v. N.C. Dep't of Pub. Instruction E. N.C. Sch. for the Deaf	280 N.C. App. 74	2021-NCCOA-562
State v. Campbell	280 N.C. App. 83	2021-NCCOA-563
State v. Heggs	280 N.C. App. 95	2021-NCCOA-564
State v. Neal	280 N.C. App. 101	2021-NCCOA-565
State v. Sander	280 N.C. App. 115	2021-NCCOA-566
In re A.G.	*280 N.C. App. 129*	*2021-NCCOA-567*
In re A.T.	*280 N.C. App. 129*	*2021-NCCOA-568*
In re V.W.	*280 N.C. App. 129*	*2021-NCCOA-569*
In re X.D.P-S.	*280 N.C. App. 129*	*2021-NCCOA-570*
Jacobs v. Dudley	*280 N.C. App. 129*	*2021-NCCOA-571*
McKinney v. Eshleman	*280 N.C. App. 129*	*2021-NCCOA-572*
Provident Life & Accident Ins. Co. v. Brown	*280 N.C. App. 129*	*2021-NCCOA-573*
State v. Amerson	*280 N.C. App. 129*	*2021-NCCOA-574*
State v. Best	*280 N.C. App. 129*	*2021-NCCOA-575*
State v. Farrior	*280 N.C. App. 129*	*2021-NCCOA-576*
State v. Green	*280 N.C. App. 130*	*2021-NCCOA-577*
State v. Hale	*280 N.C. App. 130*	*2021-NCCOA-578*
State v. Inman	*280 N.C. App. 130*	*2021-NCCOA-579*
State v. Reed	*280 N.C. App. 130*	*2021-NCCOA-580*
State v. Riggs	*280 N.C. App. 130*	*2021-NCCOA-581*
Alexander v. Becker	280 N.C. App. 131	2021-NCCOA-582

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*.

CROSS-REFERENCE TABLE

CROSS-REFERENCE TABLE

CROSS-REFERENCE TABLE

CROSS-REFERENCE TABLE

CASE	N.C. APP. REPORTS CITATION	UNIVERSAL PARALLEL CITATION
Kandaras v. Jones	*280 N.C. App. 561*	*2021-NCCOA-675*
Monti v. Adelstein	*280 N.C. App. 561*	*2021-NCCOA-676*
Neal v. Prestwick Homeowners Ass'n of Union Cnty., Inc.	*280 N.C. App. 561*	*2021-NCCOA-677*
Nesbeth v. Flynn	*280 N.C. App. 561*	*2021-NCCOA-678*
Preston v. Preston	*280 N.C. App. 561*	*2021-NCCOA-679*
Salvadore v. Salvadore	*280 N.C. App. 561*	*2021-NCCOA-680*
State v. Brown	*280 N.C. App. 561*	*2021-NCCOA-681*
State v. Burch	*280 N.C. App. 561*	*2021-NCCOA-682*
State v. Henry	*280 N.C. App. 561*	*2021-NCCOA-683*
State v. Joyner	*280 N.C. App. 561*	*2021-NCCOA-684*
State v. Parker	*280 N.C. App. 561*	*2021-NCCOA-685*
State v. Whisenant	*280 N.C. App. 562*	*2021-NCCOA-686*
Stevenson v. ANC Highlands Cashiers Hosp., Inc.	*280 N.C. App. 562*	*2021-NCCOA-687*

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DUKE ENERGY CAROLINAS, LLC, PLAINTIFF
v.
MICHAEL L. KISER, ROBIN S. KISER, AND SUNSET KEYS, LLC,
DEFENDANTS/THIRD-PARTY PLAINTIFFS
v.
THOMAS E. SCHMITT AND KAREN A. SCHMITT, ET AL., THIRD-PARTY DEFENDANTS

No. COA20-333

Filed 19 October 2021

1. Easements—bodies of water—flowage—permits to third parties

Where, decades ago, a married couple granted Duke Power Company (Duke) two easements—a flowage easement and a flood easement—over their property for Duke's project of flooding lands adjacent to the Catawba River to create Lake Norman, leaving the couple with some lakebed property and an unsubmerged island, which they subdivided and sold much of to third parties, Duke lacked authority under the flowage easement to permit the third parties (who were strangers to the easement agreement) to build and maintain docks and other structures over and into the submerged land retained by the married couple's heirs.

2. Waters and Adjoining Lands—Federal Energy Regulatory Commission license—easements—permits to third parties for docks

Where, decades ago, a married couple granted Duke Power Company (Duke) two easements—a flowage easement and a flood easement—over their property for Duke's project of flooding lands adjacent to the Catawba River to create Lake Norman, leaving the couple with some lakebed property and an unsubmerged island,

which they subdivided and sold much of to third parties, Duke's Federal Energy Regulatory Commission license did not give Duke the authority to permit the third parties (who were strangers to the easement agreement) to build and maintain docks and other structures over and into the submerged land retained by the married couple's heirs.

3. Waters and Adjoining Lands—navigability—public trust doctrine and riparian rights—man-made lake—questions of fact

In a dispute over permits granted by a power company for docks to be built into a man-made lake (Lake Norman), where the parties raised the issues of the public trust doctrine and riparian rights for the first time on appeal, the appellate court declined to consider the merits of these new arguments, because they largely involved questions of fact regarding navigability for a fact-finder to determine.

Appeal by Defendants from orders and judgments entered 27 August 2018 and 2 January 2020 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2021.

Redding Jones, PLLC, by Ty K. McTier and David G. Redding, for Defendants-Appellants.

Troutman Sanders LLP, by Kiran H. Mehta and Victoria A. Alvarez, for Plaintiff-Appellee.

Jones, Childers, Donaldson & Webb, PLLC, by Mark L. Childers, Kevin C. Donaldson, and C. Marshall Horsman, III, for Third-Party Defendants-Appellees.

David P. Parker, PLLC, by David P. Parker, for Thomas E. Schmitt, Karen A. Schmitt, Linda Gail Combs, and Robert Donald Shepard, Third-Party Defendant-Appellees.

WOOD, Judge.

¶ 1 This case concerns the rights of third-party landowners to build and maintain docks and other structures over and into the submerged land belonging to another, such land comprising a portion of the lakebed, subject to the easement of a power company. For reasons outlined below, we reverse and remand.

I. Factual and Procedural Background

¶ 2 From 1946 to 1960, before the construction of Lake Norman, B. L. and Zula Kiser (the "Kiser Grandparents") acquired the land at issue in fee simple. In 1960, much of the bed of Lake Norman was dry. By 1961, Duke Power Company ("Duke")[1] intended to flood lands adjacent to the Catawba River, the river that now feeds Lake Norman, with the construction of the Cowan's Ford Dam. Duke obtained titles and easement rights to those lands that are now submerged under Lake Norman pursuant to the requirements of a Federal Energy Regulatory Commission ("FERC") license. The majority of the owners of the now submerged land sold their property in fee to Duke, while the Kiser Grandparents chose to grant only easements to Duke. The Kiser Grandparents granted Duke the following easements:

> [A] permanent easement of water flowage, absolute water rights, and easement to back, to pond, to reaise [sic], to flood and to divert the waters of the Catawba River and its tributaries in, over, upon, through and away from the 280.4 acres, more or less, of land hereinafter described, together with the right to clear, and keep clear from said 280.4 acres, all timber, underbrush, vegetation, buildings and other structures or objects, and to grade and to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke Power Company.
>
> . . . .
>
> And . . . a permanent flood easement, and the right, privilege and easement of backing, ponding, raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or away from the land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part, of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant

1. In the present case, Duke Energy Carolinas, LLC is the controlling subsidiary of Duke Energy Corporation (previously Duke Power Company) and is likewise referenced as "Duke."

> to be constructed at or near Cowan's Ford on the Catawba River . . . . [2]

¶ 3 The first easement (the "Flowage Easement") references 280.4 acres of land by metes and bounds, which topographically rested below an "elevation 760 feet above mean sea level," and which would become part of the bed of Lake Norman. The second easement (the "Flood Easement") references land by metes and bounds which topographically rested between 760 feet and "770 feet above mean sea level," that would remain dry land, but subject to flooding, after the creation of Lake Norman. The Kiser Grandparents and their successors made no further grants or conveyances of the land to Duke.

¶ 4 In 1963, Duke flooded the lands that today comprise Lake Norman. Of those lands not submerged, the Kiser Grandparents retained an area of land that became an island (the "Kiser Island"). The Kiser Grandparents subsequently subdivided the Kiser Island into residential waterfront lots and conveyed title in fee simple to most of those lots to various buyers (the "Third Parties") between 1964 and 2015. The Kiser Grandparents retained at least one lot (the "Kiser Lot") for their continued personal use.

¶ 5 Consistent with its license from the FERC to dam the Catawba River, Duke instituted a project plan that outlined requirements and a permitting process for the construction of shoreline improvements into the waters of Lake Norman. Relying upon Duke's permitting process, many of the Third Parties on Kiser Island proceeded to construct docks and other structures that extended from the dry land of their lots over and into the waters of Lake Norman, and "that are anchored to or at least touch in some way . . . the submerged tract, the Kiser property that's beneath Lake Norman." Some of these structures were built prior to when Duke's permitting process began and were memorialized as existing when the procedure commenced.

¶ 6 In 2015, M. L. Kiser ("M.L."), a grandson of the Kiser Grandparents, erected a retaining wall (the "2015 wall") approximately seventeen and a half feet from the Kiser Lot into Lake Norman and upon the 280.4 acres to which Duke has an easement. M.L. began backfilling the wall to add additional dry surface area to the Kiser Lot, which extended his shoreline. Unlike the Third Parties, M.L. did not originally apply for a permit from Duke to construct the 2015 wall; though, the new construction did encompass land previously submerged and subject to Duke's Flowage Easement.

---

2. For purposes of review, the language of the easement here reflects a filed copy that immaterially differs from the original through spelling and grammatical differences.

¶ 7 In response to this construction, Duke issued a Stop-Work Directive, and the North Carolina Division of Water Resources notified M.L. that the construction of the wall would impact the waters of Lake Norman. A survey conducted on the Kisers' property by a licensed professional land surveyor in August 2016 revealed that "the total area of the retaining wall and backfill within Lake Norman is approximately 2,449 square feet."

¶ 8 After the death of M.L.'s father in March 2016, he and his two brothers became the owners of the land at issue. That land was then conveyed to Sunset Keys, LLC ("Sunset Keys"), of which M.L. and his two brothers are the members.

¶ 9 On January 27, 2017, Duke commenced this action against M. L. Kiser, his wife, Robin S. Kiser, and, later, Sunset Keys, LLC ("the Kisers") alleging trespass and wrongful interference with an easement and requested injunctive relief. The Kisers responded with counterclaims against Duke, challenging Duke's authority under the easements to demand removal of the 2015 wall, to issue permits to the Third Parties for the construction of docks on their lots, and to open the waters above those lots to recreational use. The Kisers subsequently moved to join the Third Parties as defendants on February 13, 2017.

¶ 10 Duke moved for partial summary judgment regarding its claim for injunctive relief on August 13, 2018. The trial court entered an order and judgment granting partial summary judgment on August 22, 2018 (the "2018 Order"), to have the 2015 retaining wall and the backfilled area cleared.[3] Duke and the Third Parties then moved for summary judgment denying all of the Kisers' counterclaims and allowing Duke's remaining trespass claim on October 24, 2019, and October 25, 2019, respectively. On November 15, 2019, the trial court entered an order and judgment enforcing the 2018 Order.

¶ 11 On January 2, 2020, the trial court entered an order and judgment (the "2020 Order) granting summary judgment in favor of Duke and the Third Parties by quieting title in the lots, improvements, and use of the waters to the Third Parties. The trial court ruled Duke had operated within its "Scope of Authority" when it granted permission for the Third Parties to construct improvements over and into the Kiser's submerged land. The trial court stated, "[T]his Order and Declaratory Judgment does not dispose of all the claims in this action." The Kisers filed and served a notice of appeal for the 2020 Order on January 24, 2020, and

3. For reasons stated below, the 2018 Order to remove the wall and fill material is not reviewed here.

later filed and served a notice of appeal for the 2018 Order on February 3, 2020. While the 2020 Order was certified for review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the 2018 Order was not.

II. Discussion

¶ 12 We review a trial court's summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted). We cannot affirm a trial court's summary judgment order if a "genuine issue as to any material fact" remains when viewed in the light most favorable to the non-moving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)). When reviewing a summary judgment order, "we view the evidence in the light most favorable to the non-movant." *Scott & Jones, Inc. v. Carlston Ins. Agency, Inc.*, 196 N.C. App. 290, 293, 677 S.E.2d 848, 850 (2009) (quoting *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007) (citation omitted)).

¶ 13 Because not all issues are disposed of in this case, we review this case as an interlocutory appeal. *See Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015). The parties correctly note that a non-certified, interlocutory judgment is not ripe for review when the appellant does not raise the issue in the appellant's principal brief. *Id.* at 79, 772 S.E.2d at 96. This being true of the 2018 Order, we decline to review the 2018 Order and limit our review and analysis to the 2020 Order.

A. Third Party Activity upon Easement

¶ 14 The Kisers first contend Duke did not act within its scope of authority when it permitted the use of the 280.4 acres to the Third Parties without the Kisers' consent and the trial court ultimately erred in quieting title of the lakefront structures to the Third Parties. We agree.

¶ 15 A "cloud upon title" arises when there is a claim or encumbrance that affects the ownership of a property. *See York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968) ("A cloud upon title is, in itself, a title or encumbrance, apparently valid, but [is] in fact invalid. It is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it." (citation omitted)). The elements have been defined by this Court as "(1) the plaintiff must own the land in controversy, . . . and (2) the defendant must assert some claim in the land adverse to plaintiff's

title, estate, or interest." *Greene v. Trustee Servs. of Carolina, LLC*, 244 N.C. App. 583, 592, 781 S.E.2d 664, 671 (2016) (citations omitted); *see also York*, 2 N.C. App. at 488, 163 S.E.2d at 285; *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004).

¶ 16 The elements of a "cloud on title" action are the same as those for a "quiet title" claim. *See Greene*, 244 N.C. App. at 591-92, 781 S.E.2d at 670-71; *see also Quinn v. Quinn*, 243 N.C. App. 374, 380, 777 S.E.2d 121, 125 (2015) (citation omitted). The purpose of a quiet title or cloud upon title action is to "free the land of the cloud resting upon it and make its title clear and indisputable." *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971) (citation omitted). Here, the land at issue is owned by the Kisers and subject to easements granted to Duke by the Kiser Grandparents. The Third Parties are not parties to the easement.

¶ 17 "An easement is an incorporeal hereditament, and is an interest in the servient estate. . . . 'A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.' " *Davis v. Robinson*, 189 N.C. 589, 597-98, 127 S.E. 697, 702 (1925) (citations omitted). More simply, an "easement is a privilege, service, or convenience which one neighbor has of another." *Id.*

¶ 18 Beginning with the nature of easements generally, "[a]n easement deed, such as the one in the case at bar, is, of course, a contract." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). "A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court." *Simmons v. Waddell*, 241 N.C. App. 512, 520, 775 S.E.2d 661, 671 (2015) (quoting *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994)).

¶ 19 The interpretation of ambiguous contracts, by contrast, "is for the jury." *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). Ambiguity exists where the contract may be "fairly and reasonably susceptible to either of the constructions asserted by the parties." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Associates, Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988) (quoting *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981) (citation omitted)). Though a dispute as to contractual interpretation may lend credence to its ambiguity, id. (citation omitted), "ambiguity is not established by the mere fact that one party makes a claim based upon a construction of its language which the other party asserts is not its meaning." *RME Mgmt., LLC v. Chapel H.O.M. Assocs., LLC*, 251 N.C.

App. 562, 568, 795 S.E.2d 641, 645 (2017) (alterations omitted) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

¶ 20 "Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citation omitted). In doing so, "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted).

¶ 21 Easements may either be appurtenant or in gross. *Davis*, 189 N.C. at 598, 127 S.E. at 702. While an appurtenant easement "attaches to, passes with[,] and is an incident of ownership of the particular land" referred to as the dominant tenement, *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992), an easement in gross "is a mere personal interest in or right to use the land of another" that is not attached to any dominant tenement and "usually ends with the death of the grantee." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963) (citation omitted). An easement appurtenant is an easement that benefits one parcel of land, the dominant tenement, to the detriment of another parcel of land, the servient tenement. *See Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 825-26 (2006) (citations omitted).

¶ 22 In determining whether an easement is appurtenant or in gross, we look to

> the nature of the right and the intention of the parties creating it, and [such] must be determined by the fair interpretation of the grant . . . creating the easement, aided if necessary by the situation of the property and the surrounding circumstances. If it appears from such a construction of the grant . . . that the parties intended to create a right in the nature of an easement in the property retained for the benefit of the property granted, . . . such right will be deemed an easement appurtenant and not in gross, regardless of the form in which such intention is expressed. On the other hand, if it appears from such a construction that the parties intended to create a right to be attached to the person to whom it was granted . . . , it will be deemed to be an easement in gross. An easement is appurtenant to land, if it is so in fact, although

> it is not declared to be so in the deed or instrument creating it; and an easement, which in its nature is appropriate and a useful adjunct of land owned by the grantee of the easement, will be declared an 'easement appurtenant,' and not 'in gross,' in the absence of a showing that the parties intended it to be a mere personal right. In case of doubt, an easement is presumed to be appurtenant, and not in gross.

Shingleton, 260 N.C. at 455, 133 S.E.2d at 186 (internal citations omitted).

¶ 23 We hold the language of the easement at issue is unambiguous on its face, and, though the parties dispute whether Duke may permit third-party activity upon the easement, such dispute solicits an examination of the rights of strangers to an agreement, which is properly a matter of law. While a deed should be considered in its entirety to ascertain the intent of the parties, the Flowage Easement encompasses the land at issue here, and it is the controlling easement.

¶ 24 As to the type of easements in this case, the deed conveying both easements does not indicate on its face whether the easements here are appurtenant or in gross. The record shows that Duke owns submerged land that is adjacent to—in fact, surrounding—the Kiser's submerged 280.4 acres of land. Because of Duke's adjacent land interests and the strong presumption in favor of interpreting easements as appurtenant, we hold that the easement *sub judice* constitutes an appurtenant easement. Here, the dominant tenement is owned by Duke, and the servient tenement is owned by the Kisers. The Third Parties are not parties to the easement.

1. Duke's Scope of Authority under the Easement

¶ 25 **[1]** Turning now to the matter at issue, we address whether Duke possesses authority under the Flowage Easement to permit the Third Parties to erect and maintain structures over and into the Kisers' submerged land. We look first to the document itself and note that the Flowage Easement is broad in its scope. In its most liberal reading, the Kiser Grandparents granted "Duke . . . absolute water rights . . . to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable." On its own, this language could easily be read to virtually convey a fee simple interest in the property; however, we decline to read the conveyance here in such a way.

¶ 26 The Kiser Grandparents, unlike some of their neighbors, clearly intended to retain title to the submerged 280.4 acres through the conveyance of an easement to Duke, rather than a conveyance in fee simple,

and effect must be given to this decision. Though property held in fee simple cannot be said to be "more sacred" than an easement, *Sweet v. Rechel*, 159 U.S. 380, 395, 16 S. Ct. 43, 47, 40 L. Ed. 188, 195 (1895), a fundamental difference exists between the nature of these two conveyances. We recognize the broad interest conveyed to Duke under the Flowage Easement in light of the nature of easements generally.

¶ 27 The question of whether an easement holder with virtually unlimited authority to "treat" property "in any manner" includes the power for the easement holder to permit strangers to the agreement to use the land for their own benefit has not been squarely addressed in this State. In *Lovin v. Crisp*, this Court addressed whether an easement holder could utilize water rights in his neighbor's springs to benefit other nearby landowners. 36 N.C. App. 185, 186, 243 S.E.2d 406, 407-08 (1978). Though the easement holder created an agreement with his neighbor to benefit the easement holder's land, the nearby landowners were not parties to the easement agreement. *Id.* at 186, 243 S.E.2d at 408. We concluded "that the deed created an easement appurtenant to the lands conveyed therein and to no others." *Id.* at 189, 243 S.E.2d at 409. While that case is not entirely analogous to the case *sub judice*, we nonetheless adopt the same principles in holding that, unless an easement explicitly states otherwise, an easement holder may not permit strangers to the easement agreement to make use of the land, other than for the use and benefit of the easement holder, without the consent of the landowner where such use would constitute additional burdens upon the servient tenement. *Id.*

¶ 28 This holding is consistent with the sensible principle outlined in the Restatement of Property: that "an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate." Restatement (Third) of Prop.: Servitudes, § 4.11 (Am. L. Inst. 2000). Moreover, other states have adopted this rule. *See Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo. 1998) (holding that "an easement holder may not use the easement to benefit property other than the dominant estate." (citation omitted)); *Thornton v. Pandrea*, 161 Idaho 301, 310-11, 385 P.3d 856, 865 (2016) (holding consistent with § 4.11); *Reeves v. Godspeed Props.*, 426 P.3d 845, 850 (Alaska 2018) (quoting Restatement (Third) of Property: Servitudes § 4.11); *Wisconsin Ave. Props., Inc. v. First Church of the Nazarene*, 768 So. 2d 914, 917 (Miss. 2000) (noting that "by granting to one party an easement for its specific use, no rights are acquired by others not a party to the instrument creating the easement. This tenant is so fundamental that Mississippi has never needed to address the issue." (citation omitted)); *but see Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 551, 808 P.2d 1289, 1296

(1991) (holding that "a third party may obtain a license from an easement holder to use the easement without the notice to and consent from the servient estate owner so long as, and expressly provided that, the use of the easement is consistent with and does not unreasonably increase the burden to the servient estate").

¶ 29 Here, the Third Parties are not mentioned in either the Flowage Easement or elsewhere in the conveyance and are, thus, strangers to the easement agreement. The Third Parties had no property interest in the land at issue when the easement was created between the Kiser Grandparents and Duke. Therefore, absent other considerations, Duke exceeded its scope of authority by permitting the Third Parties to construct and maintain structures over and into the Kisers' submerged land without the Kisers' consent.

¶ 30 It may be argued Duke's deed of easement allows it to *assign* its easement rights to the Third Parties, rather than merely grant permissive use of the land at issue. However, this theory, too, fails. As in *Grimes v. Virginia Electric & Power Co.*, 245 N.C. 583, 96 S.E.2d 713 (1957), no easement right assignment was effectuated here. In *Grimes*, an individual conveyed an easement to a power company so that the company might maintain electric lines above the individual's property. *Grimes*, 245 N.C. at 583, 96 S.E.2d at 713. Later, the power company permitted the City of Washington to affix its own lines to the company's poles upon a theory of assignment. *Id.* at 584, 96 S.E.2d at 714. Our Supreme Court dispelled that theory, holding that the power company had not assigned anything and stating that "[t]wo power companies enjoy an easement over his land. He granted only one." *Id.* Likewise, no assignment of the easement has occurred or is present in this case. Here, Duke continues to exercise its rights under the easements and has not granted or conveyed to the Third Parties its rights under the easements. Duke has allowed the Third Parties to use the land subject to the easements in accordance with permits issued by Duke and without consent from the owner of the servient estate.

2. Duke's Scope of Authority under the FERC License

¶ 31 **[2]** Duke and the Third Parties assert that, regardless of Duke's authority under the easements, Duke maintains federally pre-empted authority to unilaterally permit third-party construction over and into the submerged 280.4 acres on account of Duke's license with the FERC. While we recognize that this license requires Duke to possess certain authority to manage and control shoreline development of Lake Norman, so as to maintain Duke's license and standing with the Commission, such

requirement does not, by itself, beget nor provide delegated authority to overburden or deprive others of their property. Indeed, as we held in *Zagaroli v. Pollock*, the requirements of a FERC license do "not abolish private proprietary rights." 94 N.C. App. 46, 54, 379 S.E.2d 653, 657 (1989) (citation omitted). *Zagaroli* is analogous here in that, though the easement in that case was much more limited than the Flowage Easement here, the defendants in that case asserted Duke's authority under its FERC license in a similar situation. This Court held that

> [a]lthough a FERC licensee may exercise the power of eminent domain over lands which will make up the bed of a lake associated with a hydroelectric dam, neither Duke Power nor its predecessor in title took the land in question by eminent domain. . . . [T]he Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff's property without the assent of the plaintiff. To hold otherwise would in effect authorize the taking of property without just compensation.

Id. at 54, 379 S.E.2d at 657-58 (internal citation omitted).

¶ 32 Put another way and as a court in another jurisdiction held,

> while the FERC license gives [the licensee] the *authority* to regulate certain uses and occupancies of land in the FERC Project Boundary without prior FERC approval, it does not give [the licensee] the *right* to do so. This is because [the licensee] must still have obtained independent control of land needed to operate and maintain [the] Project.

Tri-Dam v. Keller, No. 1:11–cv–1304–AWI–SAB, 2013 WL 2474692, at *3 (E.D. Cal. June 7, 2013) (unpublished).

¶ 33 The record here indicates that Duke had the authority and opportunity to seize in fee the property of the Kisers' predecessors through eminent domain but, instead, elected to negotiate an easement with the Kiser Grandparents. In so doing, Duke never acquired fee title to the submerged land and cannot now assert its authority under its FERC license as if it possessed the land in fee simple. As a result, Duke is limited to the uses and exercise of dominion over the Kiser Lake Parcel to those expressly granted in the easements. "[A]n easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement." *Hundley v. Michael*, 105 N.C. App. 432, 435, 413

S.E.2d 296, 298 (1992) (citation omitted). "If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such [use] will constitute an excessive use . . . ." *Hundley*, 105 N.C. App. at 435, 413 S.E.2d at 298 (citing *Hales v. Atlantic Coast Line Railroad Co.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916)).

¶ 34 The Federal Power Act does not give Duke Power more rights than those it acquired in the easements. Duke does not have the authority to grant the Third Parties the right to permit others to use the Kisers' property without the assent of the Kisers, because doing so would allow the taking of the Kisers' "property without just compensation." *Zagaroli*, 94 N.C. App. at 54, 379 S.E.2d at 658.

3. Duke's Inconsistent Permitting Policies

¶ 35 Next, the Kisers argue that Duke should not be allowed to prohibit the Kisers' maintenance of a structure within the 280.4 acre area, while simultaneously permitting the Third Parties' maintenance of structures within the same. The Kisers contend that this inconsistent treatment demonstrates an apparent discrepancy between Duke's actions and its rights under the easement or, alternatively, that the inconsistent treatment is not equitable. To the contrary, however, this argument is premised upon a misinterpretation of the rights and limitations conveyed in the controlling easement.

¶ 36 As noted above, the Kiser Grandparents granted two separate easements in the same conveyance. In relevant parts, the first easement "convey[ed] unto Duke . . . a permanent easement of . . . the right to clear, and keep clear from said 280.4 acres. . . all . . . structures . . . and . . . to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke . . . ." The second easement conveyed "unto Duke . . . a permanent flood easement . . . in connection with . . . the construction, operation, maintenance, repair, altering, or replacing of a dam" upon described land adjacent to the aforementioned 280.4 acres. While this second easement utilizes limiting language associated with Duke's operation of a dam, the first easement does not contain such limiting language. Rather, a plain reading of the first easement reveals that Duke possesses an unrestricted right, among others, to "clear, and keep clear . . . all . . . structures" upon the land. Though its actions upon the 280.4 acres are limited to those seemingly inexhaustive rights enumerated in the easement, Duke is not required to show that its use of the 280.4 acres of land is consistent with a greater purpose. Duke may eliminate interferences with its permanent easement rights to the 280.4 acres, consistent with its easement.

B. Navigability of Lake Norman

¶ 37 **[3]** Irrespective of easements and also arguing that the Third Parties have a common-law right to use the waters of Lake Norman above the Kiser's submerged land for recreational activities and to erect and maintain docks and other such structures that provide access from the Third Parties' lots to the waters of Lake Norman, Duke and the Third Parties assert the public trust doctrine and riparian rights respectively.

¶ 38 Exploring the first claim, the public trust doctrine is a common-law principle recognized by statute that provides for the public use of both public and private lands and resources consistent with certain activities such as "the right to navigate, swim, hunt, fish, and enjoy all recreational activities." *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 88, 780 S.E.2d 187, 194 (2015) (citations omitted); N.C. Gen. Stat. § 1-45.1 (2020). This doctrine applies to navigable waters. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988). When determining whether a body of water is navigable for the purpose of the public trust doctrine, this State has historically adopted several tests over nearly 200 years, that include the "ebb and flow" test, *Wilson v. Forbes*, 13 N.C. 30, 38 (1828), "sea vessel" test, *State v. Glen*, 52 N.C. 321, 333 (1859), and "navigable in fact" test, *State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 588 (1904). Currently, "the test of navigability in fact controls in North Carolina" and is described as follows:

> " 'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' " . . . In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose.

Gwathmey v. State of North Carolina, 342 N.C. 287, 299, 301, 464 S.E.2d 674, 682 (1995) (quoting *Twiford*, 136 N.C. at 608-09, 48 S.E. at 588). This test applies not only to ocean waters but also to inland rivers and lakes. *State v. Narrows Island Club*, 100 N.C. 477, 481 (1888).

¶ 39 Consistent with the navigable-in-fact test, the "natural condition" element espoused in *Gwathmey* "reflects only upon the manner in which the water flows without diminution or obstruction." *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 135, 693 S.E.2d 208, 212 (2010). Thus, even

artificial or man-made bodies of water are subject to navigability for the purpose of the public trust doctrine. *Id.* When evaluating the navigability of an artificial lake, however, our sparse caselaw on the matter further suggests that an artificial lake is not navigable in its natural condition merely because boats can navigate its surface. Indeed, a party must "show that the [feeding waterway of the lake] is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake." *Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 453, 681 S.E.2d 819, 827 (2009).

¶ 40 Artificial bodies of water may be navigable only when they arise from or are connected to already natural, navigable-in-fact waters. When positing navigability, though, "the mere fact that a dam has been placed across a navigable stream, without more, [does not] suffice[] to render that stream non-navigable." *Id.* at 451, 681 S.E.2d at 826.

¶ 41 Exploring the second claim, riparian rights are likewise the product of our common law. "Riparian rights are vested property rights that . . . arise out of ownership of land bounded or traversed by navigable water." *In re Protest of Mason*, 78 N.C. App. 16, 24-25, 337 S.E.2d 99, 104 (1985) (citation omitted). Irrespective of the ownership of submerged land, riparian owners enjoy "the right of access over an extension of their waterfronts to navigable water, and the right to construct wharfs, piers, or landings." *Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 159, 484 S.E.2d 446, 448 (1997) (quoting *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890) (alterations omitted)). As with the public trust doctrine, the existence of riparian rights hinges upon an "identical" navigability test. *Newcomb v. County of Carteret*, 207 N.C. App. 527, 542, 701 S.E.2d 325, 337 (2010). Similarly, then, a riparian owner may possess access rights to an artificial body of water. *Id.*

¶ 42 In the present case, because Duke and the Third Parties assert the public trust doctrine and the existence of riparian rights for the first time on appeal, the trial court was not given the opportunity to hear arguments for or against the navigability of the Catawba River and consequently Lake Norman and made no findings concerning these issues. To determine if a watercourse is navigable-in-law is to consider if it is navigable-in-fact, "[t]he navigability of a watercourse is therefore largely a question of fact," *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901), and, thus, is a determination that this Court is prohibited from considering.

¶ 43 This Court may only hear issues of law and is barred from making findings of fact. *Weaver v. Dedmon*, 253 N.C. App. 622, 627, 801 S.E.2d

131, 136 (2017). Rather, a jury is entrusted to review "evidence tending to show that the stream in question is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake." *Bauman*, 199 N.C. App. at 453, 681 S.E.2d at 827. While a prior opinion of this Court has suggested that the Catawba River may be navigable in its natural state, it has only done so in *dicta*. *Id.* at 451, 681 S.E.2d at 826 (noting that, by considering dams when making navigability decisions, "many of the major rivers in North Carolina, such as the Catawba and the Yadkin, would become non-navigable, which would be a troubling result"). "Language in an opinion not necessary to the decision is *obiter dictum*[,] and later decisions are not bound thereby." *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted); *see also Washburn v. Washburn*, 234 N.C. 370, 373, 67 S.E.2d 264, 266 (1951). Despite Duke's assertion to the contrary, the record does not show undisputed facts or contentions, which prove the navigability of the Catawba River consistent with the requirements and considerations above. This absence presents a genuine issue of material fact to be further determined.

III. Conclusion

¶ 44 We hold the trial court erred in granting summary judgment in favor of Duke and the Third-Parties and in granting use rights to the Third-Parties of the docks and other such structures over and into the Kisers' submerged 280.4 acres upon a cloud-upon-title theory. To hold otherwise would authorize the taking of the Kisers' property without just compensation. For the reasons outlined above, we reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.

IN RE W.C.T.

[280 N.C. App. 17, 2021-NCCOA-559]

IN THE MATTER OF W.C.T., W.J.A.T., & W.D.T.

No. COA21-178

Filed 19 October 2021

1. Child Abuse, Dependency, and Neglect—adjudication of abuse —unexplained injuries—inference of non-accidental means

The trial court did not err by adjudicating a child abused—based on severe burns the child suffered when he was three months old while in the exclusive care of his paternal grandmother—where the unchallenged findings of fact were supported by clear and convincing evidence and in turn supported an inference that the child's injuries were caused by non-accidental means. The parents created a substantial risk of physical injury by allowing the grandmother, who had previously displayed unstable behavior, to continue to care for the child and his siblings. Further, both the parents and the grandmother gave inconsistent and improbable theories to explain how the injury occurred and the parents did not cooperate with the agencies tasked with investigating the incident.

2. Child Abuse, Dependency, and Neglect—adjudication of dependency—inability to care for children—findings of fact

The trial court properly adjudicated three children as dependent—after the youngest child suffered severe burns by unexplained means while in the paternal grandmother's care—based on unchallenged findings of fact, which were supported by clear and convincing evidence, demonstrating that the parents' lack of adequate supervision led to the youngest child's injury, that they could not provide an alternative plan of care after a temporary placement ended, and that they were unable to meet the children's medical and educational needs.

3. Child Abuse, Dependency, and Neglect—steps toward reunification—proof of income—mental health treatment—reasonably related to risk factors in home

In a dispositional hearing after three children were adjudicated neglected and dependent and one of the three was also adjudicated abused, the trial court did not err by requiring a mother to show proof of a sufficient source of income and to "refrain from allowing mental health to impact parenting" (by, in part, participating in mental health treatment) as part of the reunification plan. The conditions were reasonably related to remedying the reasons for

the children's removal from the home, which were lack of care and supervision and suspected domestic violence.

4. Child Abuse, Dependency, and Neglect—visitation—high level of supervision—trial court's discretion

In a dispositional hearing after three children were adjudicated neglected and dependent and one of the three was also adjudicated abused, the trial court did not abuse its discretion when it limited a mother's visitation with the children to one hour of highly-supervised weekly visits where it reasonably based its decision on recommendations from the guardian ad litem and social workers, and left open the option for the children's foster family and parents to agree to additional visitation time.

5. Appeal and Error—waiver of constitutional issue—right to parent—notice and opportunity to be heard

Where a mother in an abuse, neglect, and dependency matter was on notice that guardianship with a third party was recommended for her three children and would be considered at the dispositional hearing, she waived any argument on appeal that her constitutional right to parent was violated by failing to raise that issue when she had the opportunity.

Appeal by respondents from order entered 17 December 2020 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 11 August 2021.

Wendy Walker for Petitioner-Appellee Alamance County Department of Social Services.

Office of the Parent Defender, by Parent Defender Wendy C. Sotolongo and Assistant Parent Defender J. Lee Gilliam, for Respondent-Appellant-Mother.

Edward Eldred for Respondent-Appellant-Father.

Forrest Firm, P.C., by Brian C. Bernhardt, for Guardian ad Litem.

CARPENTER, Judge.

¶ 1 Respondent-Mother and Respondent-Father (collectively "Respondents") appeal from the trial court's Adjudication and

Disposition Order adjudicating minor child, Wade,[1] as an abused, neglected, and dependent juvenile; adjudicating the other two minor children, Wes and Wren, as neglected and dependent juveniles; and vesting custody of the children with Alamance County Department of Social Services ("ACDSS"). Respondents argue the trial court erred in adjudicating Wade abused and dependent, and adjudicating Wes and Wren dependent. Respondent-Mother also argues the trial court abused its discretion by limiting her visitation with the children to highly supervised, one-hour weekly visits; requiring proof of income; and ordering her to "refrain from allowing mental health to impact parenting." Finally, Respondent-Mother contends the trial court erred in concluding she acted inconsistently with her constitutionally protected status as a parent. For the reasons set forth below, we affirm the Adjudication and Disposition Order.

I. Factual & Procedural Background

¶ 2 Respondent-Mother and Respondent-Father are the biological parents of three children: "Wes," eight years old; "Wren," three years old; and "Wade," one year old. Respondent-Mother is legally married to her estranged husband, Peter, and was married to, but separated from, Peter[2] prior to the births of the three children. Peter is not a party to this appeal.

¶ 3 On 12 March 2020, Wade, then three months old, was taken to Moses Cone Hospital for second and third degree burns on 8.3% of his left thigh, left calf, and left foot. Immediately after arriving to Moses Cone Hospital, Wade was transferred to Wake Forest Baptist Medical Center/ Brenner Children's Hospital ("BCH") for treatment by its burn team. The injury was not witnessed, and the parties have offered multiple, inconsistent, and implausible stories to explain the circumstances surrounding the child's injury.

¶ 4 Respondents reported to Moses Cone Hospital staff that Wade was in a baby swing or rocker downstairs when their German Shepherd dog knocked over the swing. Respondents alleged that Wade fell out of the swing and was pushed up against an electrical space heater for what they estimated was approximately thirty minutes; they reported finding him laying against the heater. Respondents claimed to have immediately transported Wade to the hospital after discovering his injuries. Respondents also told this story to both BCH staff and a Forsyth

1. Pseudonyms have been used to protect the identities of the children.

2. A pseudonym has been used.

County Department of Social Services ("FCDSS") social worker who interviewed them on 13 March 2020. During the interview with the social worker, Respondent-Mother admitted Wade was not yet able to roll over at the time of injury.

¶ 5 BCH triage notes indicate the "burn distribution is consistent w[ith the] story" Respondents told. The notes also document concerns regarding: the child being left unattended by a heater, the thirty- to forty-minute period for which Respondents could not account, how a dog knocked over the swing, why the space heater was left on during a hot day, and why the parents did not immediately hear the child's cries. The initial screening for domestic violence, abuse, and neglect did not raise concerns; however, child abuse protocol was initiated by BCH on 13 March 2020 at 2:30 a.m. after BCH received an anonymous phone call from someone who claimed to be familiar with Respondent's family and sought the case be reported to Child Protective Services ("CPS"). The caller claimed to have recordings of the paternal grandmother threatening Wade the day of his injury. The caller also stated that the paternal grandmother often leaves the children unattended and claimed Respondent-Mother was at risk for abuse. The attending physician referred Wade for a consultation with Dr. Meggan Goodpasture of the BCH Pediatric Child Protection team. Dr. Goodpasture met with the maternal grandmother and Respondent-Father. Although the maternal grandmother expressed safety concerns in her meeting with Dr. Goodpasture, the family had no subsequent meetings with the doctor because Respondent-Father advised BCH that he did not want Dr. Goodpasture in Wade's hospital room again. Based on Dr. Goodpasture's initial consultation, she recommended, *inter alia*, CPS and law enforcement reconstruct the scene of the injury and perform full child medical evaluations on each of the three children.

¶ 6 Guilford County Department of Social Services ("GCDSS") received a report for physical abuse concerning Wade on 13 March 2020. Later that day, GCDSS sent a request to FCDSS to assist in the investigation. Social Worker Pope of FCDSS interviewed nurse staff of BCH as well as the Respondents. After Social Worker Pope left Wade's hospital room, Respondent-Father stated to the attending nurse, Nurse Green, that the social worker told him the burn was caused by boiling water. He then became "visibly upset" and stated, "I feel like I'm being accused of a crime that I did not commit." Respondent-Father indicated an unidentified staff member in scrubs had also commented the burn was "from boiling water." Nurse Green was able to "diffuse the situation" by indicating physicians did not have suspicions of Respondents' story, Respondent-Father became more at ease and mentioned he has

post-traumatic stress disorder ("PTSD") from being "burned and abused" by his own father, which caused him to distrust "the system." Neither the emergency department notes, nor the social workers' reports state the burn was caused by boiling water.

¶ 7 On 27 March 2020, Dr. John Bailey of the BCH burn team entered a progress note regarding Wade's case. He documented he and Dr. Goodpasture agreed Wade "appear[ed] to have suffered a contact burn." He also noted that neither of the doctors could "offer more than a speculation regarding the true mechanism [of the injury], although involvement of the pet seems less likely."

¶ 8 On 1 April 2020, a Child and Family Team meeting was held between GCDSS, Respondent-Mother, and Respondent-Father. At the meeting, Respondents agreed to enter a safety agreement whereby the children would be placed with the maternal grandparents as a temporary safety provider, Respondents would not have unsupervised visits or overnight stays with the children, and Respondents would receive mental health services. Wade was discharged from BCH into the maternal grandparents' care the following day.

¶ 9 On 2 April 2020, another Child and Family Team meeting was held via conference call with Respondents, GCDSS, and the paternal grandmother, and Krispen Culberton ("Attorney Culberton")—attorney for Respondents' family. Attorney Culberton reported Respondents' concerns for Wren's behavior and her aggression towards Wade. According to Attorney Culberton, Respondents were afraid to report they believed Wren caused Wade's injuries. The paternal grandmother claimed at the meeting she was the sole caretaker of the juveniles when Wade was injured. According to the paternal grandmother's version of events, she fed Wade and laid him in his bassinet, she put Wren down in her playpen, and she went downstairs to prepare dinner. She later sent Wes upstairs to check on Wren and Wade. Immediately after, Wes came running downstairs screaming Wade had been burned. The paternal grandmother speculated that Wren climbed out of her playpen, pulled Wade out of his bassinet, and climbed back into her playpen. Following the injury, the paternal grandmother treated Wade's burns with Vaseline before taking him to the hospital. Respondents adopted this story and later reported this account of events to Detective Gerald Austin ("Detective Austin") of the Guilford County Sheriff's Department, who handled the criminal investigation into Wade's injury.

¶ 10 On 16 April 2020, a child medical evaluation was performed on each of the three children by Dr. Esther Smith of the Cone Health

Child Advocacy Medical Clinic, as recommended by Dr. Goodpasture. In Dr. Smith's opinion, "it is possible that [Wade's] injuries are consistent with having been burned by prolonged direct or near-direct contact with [Respondents'] space heater"; however, she noted "there is a very high concern for [an i]ntentional[ly i]nflicted injury (at worst) . . . and/or [n]eglect resulting in [an u]nintentional [i]njury (at best)." She expressed concerns for the red flags identified by BCH as well as concerns for the "very unsafe infant sleep environment" which included lack of supervision, close proximity to a heat source, suffocation risk due to excess blankets in bassinet, and potential fall risk due to a cradle that may have been improperly assembled.

¶ 11 In May of 2020, the case was transferred from GCDSS to ACDSS due to a potential conflict of interest that arose after Respondent-Father and his attorney threatened to sue GCDSS and/or its employees over an alleged HIPAA violation.

¶ 12 On 21 July 2020, concerns arose regarding the kinship placement with the maternal grandparents when ACDSS social workers arrived at the maternal grandparents' home unannounced and found the maternal grandmother overwhelmed with caring for the children. The maternal grandmother admitted that she was frustrated by Respondents' tardiness to scheduled visitations. She also admitted to "backhand[ing]" Wren after Wren spit in her face. ACDSS immediately terminated the kinship placement and advised Respondents that a replacement temporary safety provider was needed.

¶ 13 On 21 July 2020, the children were placed with a neighbor of the maternal grandparents who agreed to be a temporary placement until 21 August 2020. Respondents gave ACDSS the name of another family for a potential placement. However, one of the proposed caretakers of the new family was an employee of ACDSS so the agency concluded the family was ineligible due to a conflict of interest. In August of 2020, ACDSS received multiple phone calls from individuals who claimed Respondents were seeking potential placements off the street and through social media. ACDSS held a Child and Family Team meeting with Respondents on 21 August 2020 to inform them that the agency would need to seek court involvement if Respondents could not provide a viable placement option. After Respondents did not provide an alternative placement, ACDSS informed the parents that it would be filing a non-secure order for custody of the children.

¶ 14 On 21 August 2020, ACDSS filed a petition alleging Wade was an abused, neglected, and dependent juvenile, and petitions alleging Wes

and Wren were neglected and dependent juveniles. The petitions alleged, *inter alia*: (1) "that [Wade's] parents and/or caretaker have inflicted or allowed to be inflicted serious physical injury, possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means"; (2) that "[t]he juveniles have been neglected in that the juveniles do not receive appropriate care, supervision, or discipline from their parents and/or caretaker"; (3) "[t]hat the parents do not have an appropriate plan of care for the juveniles"; and (4) "[t]hat the juveniles would be at significant risk of harm if placed with the parents and/or paternal grandmother."

¶ 15 On 21 August 2020, the Alamance County District Court issued orders for nonsecure custody of the three children, finding a reasonable factual basis to conclude the children were exposed to a substantial risk of physical injury. The court ordered the children placed in nonsecure custody with ACDSS and set a hearing on 26 August 2020 to determine the need for continued nonsecure custody. ACDSS obtained nonsecure custody of the children and placed them together in a foster home in Moore County.

¶ 16 On 26 August 2020, a hearing was held before the Honorable Kathryn W. Overby to determine the need for continued non-secure custody of the children. Following the hearing, Judge Overby entered an order on 16 September 2020 finding, *inter alia*, that the juveniles' return to their own home would be contrary to the best interests of the juveniles, and mandating, *inter alia*, that temporary custody of the juveniles be continued in ACDSS for non-secure placement.

¶ 17 An adjudication hearing was held between 18 November 2020 and 20 November 2020 before Judge Overby. Testimony was given by two social workers familiar with the case, Respondent-Mother, Respondent-Father, the maternal grandmother, a co-worker of Respondent-Mother, Detective Austin, and the guardian *ad litem* for the children.

¶ 18 Detective Austin testified he investigated the case after he became aware through BCH that a child "suffered burns under suspicious circumstances . . . ." Detective Austin spoke with Respondent-Mother and Respondent-Father while they were visiting BCH on 18 March 2020, to make them aware of his investigation. Respondent-Father used a recording device to record his conversation with Detective Austin and advised he had an attorney.

¶ 19 Detective Austin testified he obtained a search warrant to search Respondents' home and executed the search warrant on 19 March 2020. Two GCDSS social workers accompanied him during his search of the

home. Detective Austin testified he seized the space heater that was alleged to have been the mechanism of the injury and took photographs of Respondents' home. He later performed tests on the heater using a "calibrated thermometer to record temperatures at . . . different points" of the heater. He determined that at the vents of the heater, the temperature fluctuated between 178.7- and 248.6-degrees Fahrenheit, rather than keeping a steady temperature. The vents were the warmest points of the heater. Following Detective Austin's investigation, Respondent-Father, Respondent-Mother, and the paternal grandmother were charged with and arrested for felony negligent child abuse resulting in serious bodily injury.

¶ 20 Respondent-Mother testified as to the events of 12 March 2020. According to Respondent-Mother, she called her mother to pick her up because Respondent-Father took the truck she had driven to work, to get it fixed and inspected, and he was not answering his phone. Respondent-Mother testified she left the store between 5:00 p.m. and 5:30 p.m. When asked why she gave multiple stories regarding Wade's injury, Respondent-Mother responded that she and Respondent-Father "panicked," and "were terrified that something was going to happen to [Wren]."

¶ 21 The maternal grandmother testified that Respondent-Mother called her upset and crying at about 4:00 p.m. on 12 March 2020 and told her mother she did not have a ride home; the maternal grandmother agreed to pick up Respondent-Mother at the end of her shift. Shortly after 5:00 p.m., Respondent-Mother called the maternal grandmother to tell her she was ready to be picked up. When the maternal grandmother arrived around 5:30 p.m., Respondent-Mother stated, "she did not want to go back home" and requested to go to the maternal grandmother's house instead. Respondent-Mother told the maternal grandmother that Respondent-Father and the paternal grandmother leave the children alone, and Respondent-Mother has found the children alone when she has come home from work. At approximately 6:00 p.m., Respondent-Father arrived at the maternal grandmother's house. Respondents spoke in the driveway for approximately two hours regarding "some incidents that were happening at the store" where Respondent-Mother worked. The maternal grandmother testified that Respondent-Father's phone "kept ringing," and he "eventually . . . tossed it over into the yard . . . ." When Respondent-Mother was asked at the hearing if she was arguing with Respondent-Father at the maternal grandmother's home on the evening of 12 March 2020, Respondent-Mother stated they were discussing her job because she was trying to have the district manager transfer

her co-worker "Robert,"[3] who had been "making sexual advances towards" her.

¶ 22 The record reveals the paternal grandmother called Respondent-Father eighteen times between 7:01 p.m. and 7:52 p.m. and Respondent-Father answered just one of her calls at 7:52 p.m. Respondent-Father then "hurried [Respondent-M]other home without telling her the nature of the phone call." The maternal grandmother's testimony indicates Respondents left her home between 8:00 p.m. and 8:20 p.m. According to Respondent-Mother, she and Respondent-Father arrived at their home at about 8:15 p.m. Respondent-Mother testified Wade was not crying when they got home. She took him upstairs to look at his burns. Shortly thereafter, Respondents took Wade to the hospital.

¶ 23 Respondent-Mother's co-worker Robert testified regarding events that had transpired at the store and incidents in which Respondent-Mother had confided in him. According to Robert, he would "hear things from other people" about Respondent-Mother and would ask Respondent-Mother if they were true. On one such instance, Robert asked Respondent-Mother if the paternal grandmother "had pulled a gun on her when [Wes] was a young boy . . . and told [Respondent-Mother] that she would hurt her and no one would ever find her," while the two were in the presence of Wes. Robert testified Respondent-Mother confirmed this incident had occurred. Robert also testified to speaking with Respondent-Mother the day of Wade's injury. Respondent-Mother told him that just the day before, on 11 March 2020, "she . . . went home and the kids were at home by [themselves], and it was a couple hours later that [the paternal grandmother] and [Respondent-Father]" arrived home. On the day of 12 March 2020, Robert testified he saw Respondent-Father and the paternal grandmother behind the store dumping their personal trash in the store's dumpster. He did not see the three children in the pickup truck. Later that day, Robert overheard the store's manager on duty taking a call from the paternal grandmother. Robert testified he could hear the paternal grandmother through the phone using obscenities referring to the Respondent-Mother and stating, "[Respondent-Mother] needs to come home and take care of her children or someone would take care of them for her."

¶ 24 An initial disposition hearing was held before Judge Overby on 20 November 2020 following the adjudication hearing. After the presentation of all evidence, the trial court announced its judgment in open court and ordered custody of the juveniles be vested with ACDSS.

3. A pseudonym has been used.

On 17 December 2020, the trial court entered the Adjudication and Disposition Order in which it made factual findings supported by clear and convincing evidence to conclude Respondents and/or a caretaker inflicted or allowed to be inflicted serious physical injury possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means, Respondents and/or a caretaker did not provide appropriate care or supervision for the juveniles, and Respondents and/or a caretaker created an injurious environment placing the juveniles at substantial risk of harm. The trial court also concluded Wade is an abused, neglected, and dependent juvenile, and Wes and Wren are neglected and dependent juveniles. Respondent-Mother and Respondent-Father each filed timely notices of appeal from the Adjudication and Disposition Order.

II. Jurisdiction

¶ 25 This Court has jurisdiction to address Respondent-Father's and Respondent-Mother's appeals from the Adjudication and Disposition Order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019) and N.C. Gen. Stat. § 7B-1001(a)(3) (2019).

III. Issues

¶ 26 On appeal, Respondent-Mother and Respondent-Father raise two common issues: (1) whether the trial erred in adjudicating Wade an abused juvenile; and (2) whether the trial court erred in adjudicating Respondents' three children dependent juveniles. Respondent-Mother raises three additional issues: (1) whether the trial court erred in ordering Respondent-Mother to show proof of income and to refrain from allowing mental health to impact parenting as steps to remedy the conditions in the home that led to the juveniles' adjudications; (2) whether the trial court abused its discretion in limiting Respondent-Mother's visitation with the children to highly supervised, one-hour weekly visits; and (3) whether the trial court erred in concluding Respondent-Mother had acted inconsistently with her constitutionally protected parental status.

IV. Adjudication

A. Standard of Review

¶ 27 "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2019). "When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions

are supported by findings of fact.' " *In re F.C.D.*, 244 N.C. App. 243, 246 780 S.E.2d 214, 217 (2015) (quoting *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008)). "If supported by competent evidence, the trial court's findings are binding on appeal even if the evidence would also support contrary findings." *Id.* at 246, 780 S.E.2d at 217 (citation omitted). Unchallenged findings of fact are deemed supported by competent evidence and binding on appeal. *In re J.M.W.*, 179 N.C. 788, 792, 635 S.E.2d 916, 919 (2006) (citation omitted). The determination of whether a child is abused, neglected, or dependent is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999). The trial court's conclusions of law are reviewed *de novo*. *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158 (citation omitted), *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001).

B. Adjudication of Abuse

1. *Findings of Fact regarding Abuse*

¶ 28 **[1]** On appeal, Respondent-Mother argues the trial court erred in adjudicating Wade abused on the basis there was no clear and convincing evidence that the injuries were "other than accidental." Similarly, Respondent-Father contends "[t]he trial court's evidentiary findings of fact do not support the ultimate finding that Wade's injury was non-accidental"; rather, the findings establish that the injury was "caused by a 'lack of supervision.' "

¶ 29 The Juvenile Code defines an "abused juvenile" in pertinent part as

> [a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker:
>
> a. [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
>
> b. [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means.

N.C. Gen. Stat. § 7B-101(1)(a)-(b) (2019).

¶ 30 "This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained." *In re J.M.*, 255 N.C. App. 483, 495, 804 S.E.2d 830, 838–39 (2017); *see In re T.H.T.*, 185 N.C. App. 337, 648 S.E.2d 519 (2007) (affirming an abuse adjudication where a physician concluded a child's skull fracture

was caused by non-accidental means, the mother's explanations were not consistent with the injuries observed, and the mother failed to seek medical attention for the child). Additionally, this Court has held that a respondent mother's knowledge of a substantial risk of serious physical injury posed to her children was sufficient to conclude that respondent "allowe[d] to be created a substantial risk of serious physical injury to the juvenile[s] by other than accidental means." *In re M.G.*, 187 N.C. App. 536, 549, 653 S.E.2d 581, 589 (2007), *rev'd in part on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009) (upholding an abuse adjudication where the respondent mother knew of the respondent father's violent and abusive nature and "failed to take the necessary steps to protect [her] minor children"). As our Court stated in *In re K.L.*, the exact cause of a child's injury may be unclear in a case involving an adjudication of abuse; however, if the trial court's findings of fact support the inference the respondents are responsible for the unexplained injury by clear and convincing evidence, the abuse adjudication will be affirmed. 272 N.C. App. 30, 40, 845 S.E.2d 182, 191, *disc. rev. denied*, 2020 N.C. LEXIS 1353 (2020).

¶ 31 In the instant case, the trial court concluded Respondents had "inflicted or allowed to be inflicted serious physical injury, possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means" and "did not provide appropriate care or supervision for the juveniles and created an injurious environment placing the juveniles at substantial risk of harm." The trial court made the following pertinent findings of fact, which support its adjudication of abuse:

> 27. On March 12, 2020, the respondent parents along with the three juveniles lived with . . . the respondent father's mother (paternal grandmother to the juveniles) . . . .
>
> 28. The respondent mother was employed . . . and worked approximately sixty (60) hours each week,
>
> 29. The respondent father was not employed. He indicated to hospital employees that he has post-traumatic stress disorder (PTSD).
>
> 30. The respondent mother told co-worker [Robert] and her mother . . . that she had found [her children] alone and unsupervised on March 11, 2020 when she came home from work. She had no idea how long the juveniles had been left alone in the home.

31. On March 12, 2020 the respondent mother told [Robert] and her mother that she was upset about finding the juveniles alone the day before.
32. The respondent mother told Robert and her mother that [the paternal grandmother] had held a gun to her while she was holding [Wes] as an infant. She reported that this was due to [the paternal grandmother] not taking her medication.
33. On July 14, 2018, the respondent parents spoke to a clinical social worker and the respondent mother noted that [the paternal grandmother] "can be verbally abusive to her" due to [the paternal grandmother's] non-compliance with her medication.
34. On March 12, 2020, the respondent mother worked her shift . . . . During the shift the paternal grandmother drove the respondent father to the [respondent mother's work] to get the pick-up truck that the respondent mother had driven to work that day. She was left without any way to get home after her shift. The respondent mother called the respondent father multiple times to pick her up and bring her home, but he did not answer any of her calls or texts. According to her co-worker and her mother, the respondent mother was very upset and crying that day. The respondent mother called her mother . . . to come pick her up from [work].
35. Around 4:30 pm [Robert] saw the respondent father and [the paternal grandmother] at [the respondent mother's work] together in the pick-up truck without the juveniles.
36. [The maternal grandmother] took the respondent mother to her house and not to the respondent mother's home on March 12, 2020 between 5:30 pm and 6:00 pm.
37. After the respondent mother had left [work], the respondent father arrived and inquired if the respondent mother was still there.

38. After the respondent father left [the respondent mother's work] (sometime after 6:00 pm), [the paternal grandmother] arrived and came inside the store and left a few minutes later.

39. After appearing at [the respondent mother's work], [the paternal grandmother] called the store several times and spoke to the manger [sic]. [Robert] heard [the paternal grandmother] call the respondent mother names and said the respondent mother had been at work since 6:00 a.m. and that she needed to come home and take care of her kids and if she doesn't come home someone will take care of her kids for her.

40. The respondent father came to [the maternal grandmother's] home and spoke to the respondent mother and [the maternal grandmother] for approximately two hours. During the conversation, the respondent father's phone rang approximately eighteen (18) times with the paternal grandmother calling him, between 7:01 and 7:52 pm. He did not answer and tossed his phone at one point because he was tired of the repeated calls. At 7:52 pm the respondent father answered the call from his mother and then hurried the respondent mother home without telling her the nature of the phone call. The paternal grandmother did not call the respondent father again until 8:42 pm, right as the respondent parents arrived at Moses Cone hospital with [Wade].

. . . .

42. When the respondent parents returned home, [the paternal grandmother] was holding [Wade] (the youngest juvenile) in her arms, wrapped in a blanket and she told the respondent parents that [Wade] had been burned. The respondent mother took [Wade], walked him up the stairs, laid him down and unwrapped the blanket to inspect his injuries (which were bleeding, blistered, and oozing at that time) before she wrapped him back up and took him downstairs and out to the car. The respondent parents then took [Wade] to Moses Cone hospital.

43. They arrived at Moses Cone hospital at 8:41 pm. Both respondent parents told hospital employees that [Wade] was in his swing when the family dog knocked over the swing causing [Wade] to fall out of the swing and onto a space heater. That this happened just prior to arrival and they came immediately to Moses Cone. This series of events was a complete lie that was told by both parents and the paternal grandmother over and over to hospital employees, social workers, and law enforcement. The respondent parents did not just panic and tell a story about [Wade's] injuries on March 12, 2020; they conspired together with [the paternal grandmother] to develop a completely false narrative.
44. At no time between [the paternal grandmother] discovering [Wade's] injury and arrival at 8:41 pm did anyone call 911. [The paternal grandmother] did not call 911 while she was at home alone with the juveniles; instead she called the respondent father 18 times before he answered his phone. The respondent parents did not call 911 after learning of the injuries, when they saw [Wade] at the home or on the way to the hospital.
45. The lack of supervision of these juveniles led to [Wade] sustaining his injuries.
46. [Wade] was transported via ambulance to Wake Forest Baptist Medical Center (WFBMC)/ Brenner's Children's Hospital at 11:15 pm. By 2:30 a.m. abuse protocol was initiated, and security was placed bedside for [Wade]. There was a note that a social worker consult was required because of "vague explanations by parents" of the mechanism of [Wade's] injuries.
47. The WFBMC records have different stories about how [Wade] sustained his injuries: He was in a rocker, glider, tripod swing, or wooden bassinet; he was knocked out of the swing and onto the heater; he rolled out of the rocker and rolled into the heater. At some point, a physician notes that [Wade's] burns were consistent with burns

from a heater, but it was not likely that there was a dog involved.

48. [Wade] sustained first, second, and third degree burns to 8.3 percent of his body area, concentrated on the left thigh, calf, and foot. He had second degree burns around his left hip area and a slight first degree burns to the left abdomen and under his left arm. He required surgery to remove the dead skin. [Wade] remained at WFBMC until April 2, 2020.

49. Guilford County social worker (SW) Cquadayshia Sharpe received an investigative assessment for physical abuse and/or injurious environment that required immediate response on March 13, 2020.

50. SW Sharpe went to [the respondents' home] and met with [the paternal grandmother] on March 13, 2020. [The paternal grandmother] would not allow SW Sharpe inside the home or to have access to the two juveniles that were present [Wren and Wes]. When SW Sharpe indicated that she would have to get law enforcement involved if she could not see the two juveniles, [the paternal grandmother] brought the juveniles outside. SW Sharpe tried to talk to [Wes], but [the paternal grandmother would answer the questions for the juvenile.

. . . .

52. The respondent father indicated to hospital employees and the Guilford County Department of Social Services (GCDSS) that he hired an attorney within days of March 12, 2020.

53. SW Sharpe was never allowed into the home voluntarily by the respondent parents or [the paternal grandmother]. She set up one walk through for March 16, 2020, however, the respondent father called and canceled that on advice of counsel.

. . . .

64. There are many inconsistencies in the respondent parents' stories about this incident, as delineated in the findings of fact and also including,

but not limited to, the heater being run for days even though it was warm outside, [Wade] only wearing a diaper and shirt even though it was cold enough to run the heater, and the children were being kept in that room to keep them warm.

. . . .

93. Although respondent mother had concerns with [Wren's] behaviors at her 12-month well child checkup, respondent mother did not attend a parent educator appointment nor did [Wren] attend her 15-month well child appointment. The respondent parents brought up [Wren's] challenging behaviors (and specifically repeated attempts to hurt other people) at [Wade's] one-month well baby check on January 17, 2020 but cancelled her 18-month appointment three times in the month of February and rescheduled when she was 20 months old (March 30, 2020). The respondent parents had allowed [Wren's] Medicaid coverage to lapse. The respondent parents have not attended to [Wren's] medical needs as necessary.

94. If the respondent parents had such a concern about [Wren's] behavior's towards others, leaving she and [Wade] in a bedroom unattended would not have been appropriate.

95. "Although it is possible, I find it highly unlikely that [Wren] climbed out of her crib, displaced [Wade] from his cradle, and then climbed back into her crib." This statement from Dr. Esther Smith, MD was noted on page 16 of [Wren's] CME.

. . . .

99. [Wade] did not roll over by himself until he was placed in kinship placement with the [maternal grandparents], which would have been sometime after April 2, 2020. He could not roll over by himself on March 12, 2020.

100. Dr. Esther Smith, MD indicated that [Wade's] sleeping environment was unsafe in that it was in close proximity to a heat source, there were

excessive blankets creating a suffocation risk, and a fall risk due to an improperly assembled rocking cradle.

101. Dr. Esther Smith, MD spoke to Dr. Meggan Goodpasture, who reported meeting with [the maternal grandmother] and then with the respondent father. Dr. Goodpasture "felt the initial meeting was not even that inflammatory, dad just seemed controlling." Dr. Goodpasture was aware of an allegation of domestic violence between the parents, but the hospital "staff could never get mom alone." After Dr. Goodpasture advised [the maternal grandmother] to explain any safety concerns to CPS, she received a call from the hospital compliance department, advising that respondent father does not want her going back into [Wade's] room any further. This was documented on page 4 of [Wade's] CME.

102. That in regard to [Wade], the respondent parents and/or caretaker have inflicted or allowed to be inflicted serious physical injury, possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means.

103. That the juveniles' parents and/or caretaker did not provide appropriate care or supervision for the juveniles and created an injurious environment placing the juveniles at substantial risk of harm.

¶ 32 Respondent-Mother contends finding of fact 102 is a conclusion of law. We agree. Accordingly, we will review finding of fact 102 as a conclusion of law below. *See Stan D. Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) ("If [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal."). Respondents do not challenge any other findings of fact; therefore, the remaining findings of fact are deemed supported by competent evidence and are binding on appeal. *See In re J.M.W.*, 179 N.C. at 792, 635 S.E.2d at 919.

¶ 33 Respondent-Mother relies on *In re K.L.* in arguing the trial court's abuse adjudication must be reversed because there is no clear and

convincing evidence that Wade's injury was non-accidental. 272 N.C. App. 30, 845 S.E.2d 182. In *In re K.L.*, our Court reversed the trial court's order adjudicating a juvenile abused on the basis that there was "nothing to bridge the evidentiary gap between the unexplained injuries . . . and the conclusion that Respondents inflicted them . . . ." *Id.* at 46, 845 S.E.2d at 194. Multiple physicians testified at the adjudication hearing. *Id.* at 34–35, 845 S.E.2d at 187. Although one treating doctor who testified had ordered the child's entire body to be assessed for other injuries, he made no abnormal findings. *Id.* at 34, 845 S.E.2d at 187. Despite the lack of abnormal findings, the doctor opined that some type of physical abuse was "highly probable" because the parents could not provide a history to explain the six fractures in the child's legs. *Id.* at 34, 845 S.E.2d at 187. The Court reasoned that reversal of the abuse adjudication was proper on the ground there were no red flags in the record such as substance abuse, domestic violence, or inappropriate discipline or other evidence by which the trial court could infer the child was abused; thus, the fact that respondents could not explain the baby's fractures was insufficient to support the trial court's conclusion of abuse. *Id.* at 46, 845 S.E.2d at 194. Furthermore, the respondent mother did not delay in seeking medical treatment and was "forthcoming and cooperative" in DDS's investigation. *Id.* at 46, 845 S.E.2d at 194. Finally, there was no clear or convincing evidence to support the finding the child's injury had occurred while the child was in the exclusive care of the parents on a certain date. *Id.* at 37–38, 845 S.E.2d at 189–190.

¶ 34 We reject Respondent-Mother's contention that *In re K.L.* demands reversal of the trial court's adjudications in this case. We note it is undisputed that Wade's injury occurred on 12 March 2020 while he was in the exclusive care of the children's caretaker, the paternal grandmother. Here, unlike *In re K.L.*, there are ample, unchallenged findings of fact to support the inference the child's injury occurred by non-accidental means. *See id.* at 40, 845 S.E.2d at 191.

¶ 35 First, doctors and social workers pointed to multiple red flags of potential domestic abuse, which were documented in the trial court's findings of fact, including findings of fact 32, 33, 43, 46, 47, 64, 95, 99, and 100. These findings of fact establish the paternal grandmother had made several threats to or regarding Respondent-Mother or the children including on the day of Wade's injury; Respondents and the paternal grandmother conspired to create "false narratives"; Respondents and the paternal grandmother repeated multiple, inconsistent stories regarding the events surrounding Wade's injuries, who was caring for Wade on 12 March 2020, and when treatment was sought; Respondents provided

vague, improbable explanations regarding the mechanism of the injury; Respondents' final story of events blaming their toddler daughter was "highly unlikely"; and doctors treating Wade had reasons to suspect abuse in Respondents' home, including BCH receiving an anonymous call in which the caller alleged domestic abuse in Respondents' home. These unchallenged findings of fact are deemed supported by clear and convincing evidence. *See In re J.M.W.*, 179 N.C. at 792, 635 S.E.2d at 919.

¶ 36 Second, the findings of fact show there was a delay of approximately one hour and forty minutes from the time the paternal grandmother initially called Respondent-Father at 7:01 p.m. to report the injury to 8:41 p.m. when Wade was taken to the hospital for treatment; at no point did the paternal grandmother or either Respondent seek emergency medical services from 911 for Wade's severe burns.

¶ 37 Finally, findings of fact 50, 53, 63, 70, 73, 77, and 80 show Respondents were not "forthcoming" or "cooperative" with the agencies handling investigations into Wade's injuries, including GCDSS, ACDSS, and the Guilford County Sheriff's Office; rather, Respondents told a "complete lie" and multiple "false narratives" to explain Wade's injury and would not assist ACDSS with completing a review of Respondents' home to ensure concerns were addressed. *In re K.L.*, 272 N.C. App. at 46, 845 S.E.2d at 194. For the previously stated reasons, "the trial court's findings of fact . . . support the inference" Respondents and the paternal grandmother are responsible for Wade's injury, and the injury was non-accidental. *See In re K.L.*, 272 N.C. App. at 40, 845 S.E.2d at 191.

2. *Conclusions of Law regarding Abuse*

¶ 38 As an initial matter, we consider finding of fact 102 as a conclusion of law to determine whether it is supported by the findings of fact. *See In re F.C.D.*, 244 N.C. App. at 246 780 S.E.2d at 217. Respondent-Mother focuses on the trial court's lack of the essential element of "non-accidental means" to argue Respondents and the paternal grandmother did not *inflict* serious physical injury on Wade, in violation of N.C. Gen. Stat. § 7B-101(1)(a) (2019). She fails to address the trial court's conclusions that Respondents posed a "*substantial risk of harm*" to the children and there was a "serious risk of physical injury by other than accidental means" in the home. However, as analyzed in detail above, there are sufficient findings of fact to support the legal conclusions that the injury was non-accidental, and Wade is an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1)(b). *See In re F.C.D.*, 244 N.C. App. at 246 780 S.E.2d at 217; N.C. Gen. Stat. § 7B-101(1)(b).

¶ 39 Both Respondents maintain that there was no witness testimony to support a finding that the injuries were non-accidental. We find Respondents' arguments that witness testimony is *required* to support a finding that an injury is "non-accidental" are without merit. Respondents point to no cases to support their contentions that medical testimony or other witness testimony is required to prove under N.C. Gen. Stat. § 7B-101(1) an injury is "by other than accidental means." We note in the instant case, there is no witness testimony, or any other direct evidence for that matter, that the juvenile was burned through "non-accidental" means. Again, the trial court's conclusion is supported by sufficient, binding findings, which in turn support the inference the injuries were non-accidental.

¶ 40 Next, Respondents both argue that the lack of supervision of a juvenile falls under the statutory definition of neglect, not abuse. *In re K.B.*, our Court considered this argument when a trial court found a juvenile's parents failed to properly provide the juvenile with his prescribed medications used to treat his mental health and behavioral issues and adjudicated the minor abused, neglected, and dependent. 253 N.C. App. 423, 428, 801 S.E.2d 160, 164 (2017). The trial court also found the parents did not properly supervise the special-needs juvenile to ensure he would not hurt himself. *Id.* at 435, 801 S.E.2d at 167–68. We upheld the trial court's adjudications and held the respondents created a substantial risk of physical injury by other than accidental means by failing to provide the juvenile's medication and by failing to provide adequate supervision of their child; therefore, the trial court's findings supported the conclusion that the juvenile was abused. *Id.* at 435, 801 S.E.2d at 168.

¶ 41 Similar to *In re K.B.*, in the case *sub judice*, the trial court made multiple findings, including findings of fact 31, 35, 38, and 45, to support the conclusion Respondents created a substantial risk of physical injury for their young juvenile children by allowing them to be left unsupervised. *See id.*, 253 N.C. App. at 434–35, 801 S.E.2d at 167–68. The findings show Respondent-Mother knew of the paternal grandmother's unstable behavior, which necessitated medication, and the substantial risk of physical injury her volatile conduct posed to the children. *See In re M.G.*,187 N.C. App. at 549, 653 S.E.2d at 589; *In re L.C.*, 253 N.C. App. 67, 72, 800 S.E.2d 82, 87 (2017) (stating a respondent mother's *knowledge* of her child's previous abuse in her home would support a conclusion that the parent allowed a substantial risk of serious injury to the child to be created by allowing the perpetrator to remain in the home). Despite this risk, Respondent-Mother allowed the paternal grandmother to continue to care for her children, and she failed to take

steps to ensure her children were properly supervised and protected. *See In re M.G.*,187 N.C. App. at 549, 653 S.E.2d at 589. The unchallenged findings of fact 32, 33, and 39 establish the paternal grandmother pointed a gun and threatened Respondent-Mother while in the close presence of Wes when he was an infant due to the paternal grandmother failing to take her medication; the paternal grandmother was verbally abusive to Respondent-Mother when she did not take her medication; and, on the day of the injury, the paternal grandmother left the small children alone in the home and later called Respondent-Mother's manager at work to call Respondent-Mother names, and to threaten "someone w[ould] take care of [Respondent-Mother's] kids for her" if she did not. Therefore, we hold the trial court's adjudication of abuse is supported by findings of fact, which are in turn deemed supported by clear and convincing evidence. *See In re F.C.D.*, 244 N.C. App. at 246 780 S.E.2d at 217.

B. Adjudication of Dependency

¶ 42 **[2]** Respondent-Mother argues that there was no evidence in the record or findings of fact made by the trial court to demonstrate her inability to care for the children. Similarly, Respondent-Father contends the trial court did not find he or Respondent-Mother was unable to care for their children. We disagree.

¶ 43 The Juvenile Code defines a "dependent juvenile" as a

> [j]uvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2019). The trial court is required to make findings of facts that address both prongs of N.C. Gen. Stat. § 7B-101(9): (1) the parent's inability to provide care or supervision; and (2) the unavailability to the parent of alternative child care arrangements before a juvenile may be adjudicated as dependent. *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). A juvenile may not be adjudicated dependent so long as at least one parent is capable of providing or arranging for adequate care and supervision of the child. *In re V.B.*, 239 N.C. App. 340, 342, 768 S.E.2d 867, 868 (2015).

¶ 44 "[T]he purpose of an adjudicatory hearing [for a dependency proceeding] is to determine only 'the existence or nonexistence of any of

the conditions alleged in a petition.' " *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 869–70 (quoting N.C. Gen. Stat. § 7B-802).

¶ 45 Here, the trial court made the following uncontested findings of fact pertinent to the children's dependency adjudication:

> 45. The lack of supervision of these juveniles led to [Wade] sustaining his injuries.
>
> . . . .
>
> 80. ACDSS was not allowed to enter into the respondent parent's home before the petition was filed even though the juveniles were not placed at that residence. ACDSS attempted at least six (6) home visits with the respondent parents before the petition was filed. ACDSS was unable to follow up with an in-home review (before the petition was filed) to see if any concerns had been corrected.
>
> . . . .
>
> 82. On July 21, 2020 [the maternal grandmother] told ACDSS social workers that she was overwhelmed with all three juveniles, that she had "backhanded" [Wren] because [Wren] split in [her] face, and that she was frustrated with the respondent parents being late to their visits. ACDSS immediately removed the juveniles from the [maternal grandparents] home and began finding another placement.
>
> . . . .
>
> 86. Between July 21, 2020 and August 21, 2020, ACDSS inquired of the respondent parents for an alternative plan of care for the juveniles. The respondent parents were able to give two names to SWS Baldwin for the vetting process. ACDSS received lots of calls and emails from random individuals inquiring about caring for the juveniles during this time period. ACDSS would not discuss the care of the juveniles on these calls and emails due to confidentiality. ACDSS followed up with the respondent parents by asking them repeatedly to not have random people call

ACDSS, but rather just submit their proposed caregivers to SW Chaney and SWS Baldwin.

87. Of the two names that were given to ACDSS by the respondent parents, one person was determined to work at ACDSS (but not in the CPS unit) and was thus ineligible. The second person called ACDSS and left a voicemail stating that he was a neighbor of the respondent parents and was approached randomly by the respondent father and asked to care for the juveniles. He indicated that he was not able to care for the juveniles.

88. This failure to make an appropriate plan of care for the juveniles led to the filing of the petitions on August 21, 2020.

89. [Wes] did not see a primary care pediatrician . . . from 7 months until he was 32 months old. He also went from age 32 months until age 5 years old without seeing a primary care pediatrician. In his medical records, there were notes about developmental delays (including severe delayed speech) and a concern about possible autism and services were recommended to the parents, but they were discontinued due to multiple missed appointments. [Wes] failed a hearing test at age 5, but passed a hearing test at age 6. The respondent parents have not attended to [Wes's] developmental and medical needs as necessary.

. . . .

91. Although [Wes] had developmental delays, the respondent parents did not enroll him in public kindergarten. They also did not have an established home school structure in place for [Wes]. The respondent parents have not attended to [Wes's] educational needs as necessary.

. . . .

93. Although respondent mother had concerns with [Wren's] behaviors at her 12-month well child checkup, respondent mother did not attend a

> parent educator appointment nor did [Wren] attend her 15-month well child appointment. The respondent parents brought up [Wren's] challenging behaviors (and specifically repeated attempts to hurt other people) at [Wade's] one-month well baby check on January 17, 2020 but cancelled her 18-month appointment three times in the month of February and rescheduled when she was 20 months old (March 30, 2020). The respondent parents had allowed [Wren's] Medicaid coverage to lapse. The respondent parents have not attended to [Wren's medical needs as necessary.
>
> . . . .
>
> 100. Dr. Esther Smith, MD indicated that [Wade's] sleeping environment was unsafe in that it was in close proximity to a heat source, there were excessive blankets creating a suffocation risk, and a fall risk due to an improperly assembled rocking cradle.
>
> . . . .
>
> 103. That the juveniles' parents and/or caretaker did not provide appropriate care or supervision for the juveniles and created an injurious environment placing the juveniles at substantial risk of harm.
>
> 104. The juveniles' parents and/or caretaker did not have an appropriate, alternative plan of care.

¶ 46 In this case, ACDSS filed its petitions on 21 August 2021 alleging all three children were dependent. Prior to the petitions being filed, ACDSS gave Respondents the opportunity to provide an alternative kinship placement because the placement with the neighbors of the maternal grandparents was scheduled to end on 21 August 2021. When Respondents could not provide another placement, ACDSS sought non-secure custody. ACDSS also gave Respondents the opportunity to address the agency's concerns with their home; however, Respondents failed to allow ACDSS to perform an in-home review to assess the changes and refused ACDSS into their home on more than six occasions. Based on the findings of fact, the trial court concluded as a matter of law that Wade, Wren, and Wes were dependent juveniles under N.C. Gen. Stat. § 7B-101(9).

¶ 47 The above findings of fact related to the juveniles' dependency were not challenged by Respondents; thus, the findings are binding on appeal. *See In re J.M.W.*, 179 N.C. at 792, 635 S.E.2d at 919. The findings of fact establish: (1) Respondents' lack of care and supervision over the children led to Wade's injury; (2) Respondents were unable to provide ACDSS with an alternative plan of care for the children after the temporary placement with the maternal grandparents' neighbors ended; (3) Respondents failed to meet Wes' educational needs; and (4) Respondents failed to meet the children's medical needs. We hold the findings of fact are sufficient to support a conclusion that Respondents were "unable to provide for the juvenile[s'] care or supervision and lack[ed] an appropriate alternative child care arrangement." *See* N.C. Gen. Stat. § 7B-101(9).

V. Disposition

A. Steps toward Reunification

¶ 48 **[3]** The North Carolina General Statutes grants a trial judge the authority to order a parent at a dispositional hearing to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent . . . ." N.C. Gen. Stat. § 7B-904(d1)(3) (2019). "For a court to properly exercise the authority permitted by [Section 7B-904(d1)], there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015) (citation omitted).

¶ 49 In this case, the trial court ordered Respondent-Mother to take part in certain activities which it found were reasonably related to the reasons for the juveniles' removal and were aimed at achieving the plan of reunification. Respondent-Mother challenges portions of the following steps imposed by the trial court:

> 1. The mother is to provide proof of a sufficient source of income to support herself and her children and use funds to meet basic needs. She can work to achieve this goal by providing income receipts and a budget to the [social worker].
> 2. That the mother will refrain from allowing mental health to impact parenting and provide a safe, appropriate home by not exposing her children to injurious environment. In order to achieve this goal, the mother will obtain and follow the recommendations of a mental health assessment

> and psychological evaluation. The mother will also participate in domestic violence assessment and participate in all recommended services.

¶ 50 Respondent-Mother first argues that her "only 'fault' [is] she was working many hours to provide financially for her family and left her children in the care of their grandmother;" thus, the requirement to show proof of income is unnecessary. We disagree.

¶ 51 Here, the trial court found a condition that led to the children's adjudication was lack of care and supervision. In response, the court ordered Respondent-Mother to show proof of income. This requirement is reasonably related to ensuring the children have adequate care and supervision and to addressing the risk factors identified by ACDSS, including to ensure a safe home environment. *See In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 623–33 (2013) (holding proof of income was reasonably related to remedying the condition of domestic violence, which led to children's removal from their parents' home).

¶ 52 Next, Respondent-Mother argues there is no evidence in the record that she suffered from mental illness; therefore, the provision that Respondent-Mother "refrain from allowing mental health to impact [her] parenting" bears no relationship to her children's removal from her home. We disagree. Again, the trial court's findings that Respondent-Mother had conspired with Respondent-Father and the paternal grandmother "to develop a completely false narrative" about Wade's injuries and that Respondent-Mother "promulgated [a] false narrative" about her toddler child being at fault for Wade's burns support the trial court's mandate. Additionally, physicians and social workers had reason to suspect domestic violence occurred in Respondents' home but "could never get mom alone" and the social workers were never able to complete their in-home review before the adjudication petitions were filed. The trial court's decree is reasonably related to ensuring the children's safety and proper supervision.

¶ 53 We hold the trial court's order that Respondent-Mother show proof of income and "refrain from allowing mental health to impact parenting" are "appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication." *See* N.C. Gen. Stat. § 7B-904(d1)(3).

B. Visitation

¶ 54 **[4]** Respondent-Mother contends the trial court abused its discretion by limiting Respondent-Mother's visitation with her children to one-hour

of highly supervised weekly visits because "[t]here is absolutely zero evidence in the record that [Respondent-Mother] presented any kind of threat to harm her children." We disagree.

¶ 55 "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citation omitted).

¶ 56 N.C. Gen. Stat. § 7B-905.1 provides:

> [a]n order that removes custody of a juvenile from a parent . . . or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation.

N.C. Gen. Stat. § 7B-905.1(a) (2019).

¶ 57 Here, the trial court addressed Respondent-Mother's visitation with her children in its dispositional order and granted the following plan:

> [Respondent-Mother] shall have visitation on Fridays from 11 a.m. until 12 p.m. which is consistent with the juveniles' health and safety. That the level of supervision shall include high—eyes and ears on, direct supervision. The parties may mutually agree to additional visitation with the same level of supervision or to change the location of visitation.

¶ 58 Respondent-Mother relies on the trial court's finding that the visits with her children while they were placed with the neighbor of the maternal grandmother were "normal" and "loving" to argue her visitation should not have changed from four hours per day to once per week after the children were placed in a foster home. However, Respondents were aware that the neighbors could act only as a temporary placement until 21 July 2020. Respondents failed to provide ACDSS with the name of an appropriate alternative placement before the placement with the neighbors ended. Accordingly, ACDSS filed petitions and sought nonsecure custody of the children. ACDSS placed the children with a foster family in Moore County, an approximate one-and-a-half-hour drive from Respondents' home, so that all three children could be placed together. Respondent-Mother fails to cite to any case in which this Court held that a limitation on visitation to once per week was an abuse of discretion after a juvenile had been placed in foster care. The highly supervised, one-hour weekly visits with Respondents is consistent with the 4 November 2020 recommendation of the guardian *ad litem* as well as

ACDSS's recommendations in its 18 November 2020 dispositional court report. Additionally, the trial court's order allows the option for the foster family and Respondents to agree to additional visitation time. Therefore, the trial court had a reasonable basis for limiting Respondent-Mother's visitation with the children to one-hour, weekly visits.

C. Constitutional Right to Parent

¶ 59 **[5]** "The standard of review for alleged violations of constitutional rights is *de novo*." *In re L.C.*, 253 N.C. App. 67, 72, 800 S.E.2d 82, 87 (2017) (citation omitted). "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted).

¶ 60 "This Court has held that where a parent is on notice that guardianship with a third party has been recommended and will be determined at the hearing, if the parent fails to raise this argument at the hearing, appellate review of the constitutional issues is waived." *In re S.R.J.T.*, 2021-NCCOA-94 ¶ 17. In order for waiver to occur, the parent must have been afforded the opportunity to object or raise the argument at the hearing. *In re R.P.*, 252 N.C. App. 301, 305, 798 S.E.2d 428, 431 (2017); *see In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (holding waiver occurred where a respondent did not "argue[ ] to the court or otherwise raise[ ] the issue that guardianship would be an inappropriate disposition *on a constitutional basis*.") (emphasis added).

¶ 61 In this case, Respondent-Mother's counsel was on notice that guardianship of the children was recommended, and she had an opportunity to be heard at the dispositional hearing on the issue. In response, counsel stated at the hearing that Respondent-Mother would "of course . . . like to have custody of the children, and it's her position that she could handle that. We would like to ask for expanded visitation, and that has been offered." Counsel for Respondent-Mother also argued to the trial court at the dispositional hearing that the allegations against Respondents related to abuse, neglect, and dependency be dismissed and the children be returned to Respondents' home. At no point during the hearing did Respondent-Mother or Respondent-Mother's counsel raise the issue of Respondent-Mother's constitutional rights afforded to her as a parent. Therefore, we hold Respondent-Mother waived her right to raise the constitutional argument on appeal. *See In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (holding the respondent mother waived review of the issue of whether she acted in a manner inconsistent with her constitutionally protect status as a parent because she failed to object at trial).

VI. Conclusion

¶ 62 We affirm the trial court's adjudication of Wade as an abused, neglected, and dependent juvenile and its adjudication of Wes and Wren as neglected and dependent juveniles. We hold the trial court did not err in mandating Respondent-Mother to show proof of income and "to refrain from allowing mental health to impact parenting" as appropriate steps to remedy the conditions in the Respondents' home that led to the juveniles' adjudications. We affirm the trial court's visitation plan in the disposition order. Finally, we hold Respondent-Mother waived her constitutional argument as to the trial court's conclusion that she acted in a manner inconsistent with her status as a parent.

AFFIRMED.

Judges DILLON and INMAN concur.

MARY LEARY, BY AND THROUGH HER POWER OF ATTORNEY WILLIAM LEARY; WILLIAM LEARY, AND ROBERT MCCLINTON, PLAINTIFFS
v.
RITA ANDERSON AND GOKAM PROPERTIES LLC, DEFENDANTS

No. COA21-230

Filed 19 October 2021

Real Property—sale of home on behalf of incompetent woman—validity of multiple powers of attorney—genuine issues of material fact

In an action brought on behalf of an elderly woman to contest the sale of her home by her daughter, the trial court erred by granting summary judgment in favor of the home's buyer and in cancelling plaintiffs' notice of lis pendens, where genuine issues of material fact existed regarding the validity and scope of powers of attorney (POAs) purportedly held by the daughter and by one of the woman's sons, including whether either POA was durable, and whether any of the parties had authority to act on behalf of the woman after she was declared partially incompetent in a special proceeding before a clerk of court.

Appeal by plaintiffs from order entered 7 October 2020 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2021.

Justice in Action Law Center, by Alesha S. Brown, for plaintiffs-appellants.

Offit Kurman, P.A., by Robert B. McNeill and Alexandra M. Edge, for defendant-appellee Gokam Properties LLC.

TYSON, Judge.

¶ 1 Mary Leary, by and through her attorney-in-fact William Leary, with William Leary and Robert McClinton, individually (together, "Plaintiffs"), appeal from a superior court's order granting summary judgment in favor of Gokam Properties, LLC" ("Gokam Properties") regarding its acquisition of property from Rita Anderson ("Anderson") under a power of attorney, (together, "Defendants"). The superior court granted summary judgment and dismissed all claims against Gokam Properties and dismissed Plaintiffs' *lis pendens*. Plaintiffs timely appealed.

I. Background

A. The Home

¶ 2 Mary Leary (Mrs. Leary) and Will Leary purchased property located at 1418 Russell Avenue, Charlotte, North Carolina ("the home") as tenants by the entirety in June 1963. Will Leary died in 2001, and Mrs. Leary acquired full title to the home by right to survivorship. Mrs. Leary continued to occupy the home as the sole owner until January 2017. Gokam Properties acquired the home on 20 September 2019 from Anderson under acting as Mrs. Leary's limited power of attorney to sell real estate.

B. Rita Anderson's Purported Durable Power of Attorney

¶ 3 Mrs. Leary was 87 years old in January 2017 when this case arose. Rita Anderson moved her mother, Mrs. Leary, into her own home in January 2017. Mrs. Leary purportedly executed a durable power of attorney ("DPA") before a notary on 11 January 2017 for Anderson. The purported DPA appointed Anderson as Mrs. Leary's agent and empowered Anderson to act on behalf of her mother.

¶ 4 The purported DPA was not filed with the Mecklenburg County Register of Deeds until 21 October 2019, roughly one month after Mrs. Leary's home was conveyed to Gokam Properties on 20 September 2019 and 11 days after this lawsuit was filed.

C. Mary Leary's Capacity

¶ 5 On 12 January 2017, Anderson accompanied Mrs. Leary, who presented for a doctor's visit with Michelle L. Foster, M.D. The medical

records specifically state, "her [Mrs. Leary's] daughter [Anderson] is seeking power of attorney and guardianship asthma (sic) some areas no longer able to make informed decisions," and "[t]oday I did advise her daughter that she cannot stand alone and I do suggest that she obtain power of attorney to handle all of her affairs." Dr. Foster further wrote "I am asking that her daughter (Rita Leary Anderson) assume power of attorney for Ms. Leary."

¶ 6 Dr. Foster stated the following concerning Mrs. Leary's condition: (1) "past medical history significant for coronary artery disease, hypertension, hyperlipidemia, increase in memory loss and some mild dementia as well as worsening weakness and weight loss;" (2) "[s]he also has had worsening vision and increasing memory loss and worsening dementia;" (3) "[s]he still has limited judgment and insight secondary to her mild dementia;" (4) "Dementia: Appears to be worsening;" and (5) "Mary Leary is under my care for multiple medical problems including dementia, anemia, hypertension and increasing cognitive difficulty secondary to dementia."

¶ 7 William Leary recorded a general power of attorney ("POA") from Mrs. Leary giving him authority to conduct real property transactions, estate transactions and other responsibilities less than five months later on 7 May 2017. William Leary avers in his sworn affidavit he was granted a DPA at that time.

D. Incompetency Hearing

¶ 8 A hearing was held in a special proceeding, *In the Matter of Mary Alice Wilson Leary* before the clerk of superior court in file number 18-SP-1559, to determine Mrs. Leary's competency and her ability to function on her own on 8 June 2018. Mrs. Leary was 89 years old by the time of the hearing.

¶ 9 During the 8 June 2018 hearing, the guardian *ad litem* ("GAL"), Attorney Fatina Lorick, issued a report, which noted:

> I spoke with Respondent about her home, and the fact that her sons lived in the home. Respondent expressed a desire to allow them to remain in her home. She also emphasized th[at] she took pride in her home, and that she and her late husband worked hard to obtain and maintain her home.
>
> . . . .

> Based upon my investigations, I believe that it is in (sic) [Mrs. Leary] has some competency but requires assistance. I have concerns regarding the validity of [Anderson's] Power of Attorney and whether or (sic) [Mrs. Leary] had an adequate level of competency when she executed the document.

¶ 10 At the June 2018 hearing, the court found Mrs. Leary was "incompetent to a limited extent" and could "understand[] conversation and communicate[] personal needs," "make and communicate decisions about residential options," "demonstrates willingness to vote and can acquire information accordingly," as well as had capacity to determine her social and religious involvement. The court ordered Mrs. Leary had "final say for her living arrangements." Mrs. Leary as declared incompetent to make legal decisions or to execute legal documents at that hearing, and "if M. Anderson [was]unable to be bonded and qualify within 90 days of this order, atty (sic) to be appointed GOE [Guardian of the Estate]." Anderson failed to qualify as Mrs. Leary's guardian.

E. Selling the Home

¶ 11 Over a year later, Anderson signed Mrs. Leary's name on a Limited Power of Attorney to Sell Real Estate on 6 September 2019. Based upon this purported Limited Power of Attorney to Sell Real Estate Mrs. Leary's home was sold and deeded to Gokam Properties on 20 September 2019.

¶ 12 Anderson knew Plaintiffs were residing in their mother's home, but Anderson did not tell Plaintiffs of the sale until 23 September 2019. Anderson purportedly told an agent of Gokam Properties not to notify Plaintiffs of the sale until after it was completed. A representative of Gokam Properties met William Leary and Robert McClinton at the home and offered each of them $300.00 if they would move out in two days.

¶ 13 Anderson did not place the proceeds of sale into an account for the benefit of Mrs. Leary. Instead, she contacted her brother, Robert McClinton to divide the proceeds between them, offering him $20,000.00 and she would keep the remaining $75,000.00 in proceeds.

F. Trial Court Proceedings

¶ 14 Plaintiffs filed this instant lawsuit on 10 October 2019 to challenge the conveyance of the home. Defendants subsequently answered. On 9 December 2019, a hearing was held in 18-SP-1559 to modify Mrs. Leary's guardianship. In the GAL Report issued again by Attorney Fatina Lorick, it is reported Mrs. Leary did not want to sell her home and wanted to know if Attorney Lorick could help her get her home back.

¶ 15 Attorney Lorick noted:

> I was able to speak with [Mrs. Leary] who is now at Mecklenburg County Rehabilitation Center ("Center"). [Mrs. Leary] informed me that she was there at the Center because she has no other place to go due to her home being sold by [Anderson]. She also asked me if there were any way for me to try to get her house back. She let me know that she recently moved into the Center and that none of her family was aware that she was at the center.
>
> . . . .
>
> Given [Anderson's] unwillingness to meet with me and provide information to me, I have concerns regarding her ability and fitness to remain guardian. It was only after I threated to to (sic) use law enforcement that she disclosed to me [Mrs. Leary's] location. In my communication with other family members, [Anderson] did not inform the rest of the family she [had] placed [Mrs. Leary] in the Center. Pursuant to the Order of the Court, [Anderson] is not qualified to assume general guardianship.

¶ 16 In an order dated 9 December 2019 in *In the Matter of Mary Alice Wilson Leary*, 18-SP-1559, the court found "Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of [Mrs. Leary's] property. Court shall appoint Guardian of Estate."

¶ 17 Anderson filed her purported 11 January 2017 DPA with the Mecklenburg County Register of Deeds on 21 October 2019. Gokam Properties contend summary judgment is proper because it purchased Mrs. Leary's home through the holder of a DPA. The trial court entered summary judgment for Gokam Properties. Plaintiffs appeal.

II. Jurisdiction

¶ 18 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019).

III. Issues

¶ 19 Two issues are presented on appeal: (1) whether the trial court erroneously granted Gokam Properties' motion for summary judgment; and, (2) whether the trial court erroneously cancelled the filed *lis pendens*.

IV. Standard of Review

¶ 20 This Court reviews a summary judgment order *de novo*. *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 410, 618 S.E.2d 858, 860 (2005). Summary judgment is proper only when the "pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that no genuine issue of material fact exists between the parties with respect to the controversy being litigated and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

¶ 21 The movant bears the burden of establishing "there is no triable issue of material fact [by] proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Davis v. Cumberland Cnty. Bd. of Educ.*, 217 N.C. App. 582, 585, 720 S.E.2d 418, 420 (2011) (citations omitted).

¶ 22 "[A]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 146 (2002) (citation omitted).

V. Argument

¶ 23 Plaintiffs argue summary judgment is improper because several genuine issues of material fact exist: (1) whether William Leary has standing; (2) whether an incompetent person's property was sold by a purported guardian without court approval; (3) whether Anderson, acting as a guardian, followed the required special proceedings to sell the home and whether she wrongfully retained the proceeds; and, (4) whether Anderson's DPA or Limited POA were sufficient to sell the home.

A. William Leary's Standing

¶ 24 Gokam Properties argues there is no genuine dispute of material fact of the termination of William Leary's May 2017 POA upon Mrs. Leary's adjudication of incapacity. The record shows Mrs. Leary appointed William Leary as her attorney-in-fact on 7 May 2017. William Leary's affidavit asserts, "I was granted Durable Power of Attorney on May 7, 2017, which was prior to my mother being declared incompetent in June 2018." Gokam Properties argues the William Leary POA, even if valid, was terminated when Mrs. Leary became incompetent because such power of attorney was not "durable."

¶ 25 A POA/DPA created prior to 1 January 2018 is governed by N.C. Gen. Stat. § 32A-2 (2017). *See* N.C. Gen. Stat. § 32C-1-106(b) (2019). Pursuant to the now-repealed N.C. Gen. Stat. § 32A-8, a POA is "durable" if it was

made in writing and either contained: (1) "a statement that it was executed pursuant to the provisions" of Chapter 32A; (2) the words "[t]his power of attorney shall not be affected by my subsequent incapacity or mental incompetence;" (3) the words "[t]his power of attorney shall become effective after I become incapacitated or mentally incompetent;" or, (4) similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence.

¶ 26 Gokam Properties argue William Leary's POA is merely a statutory short form of a general POA pursuant to N.C. Gen. Stat. 32A-1. Gokam Properties assert as a non-durable POA, William Leary's POA was terminated upon the court's adjudication of Mrs. Leary as incompetent on 8 June 2018. *See* N.C. Gen. Stat. § 32C-1-110 (2019) (power of attorney terminates if the power of attorney is not durable and the principal becomes incapacitated).

¶ 27 Plaintiffs argue they have standing to bring this lawsuit pursuant to our Supreme Court precedent in *In re Lancaster*, 290 N.C. 410, 226 S.E.2d 371 (1976). In *In re Lancaster*, Ms. Lancaster was declared incompetent and, as in this case, her attorney and her heir were presumed to have acted for their own financial interest and gain, and not in the best interest of the ward. *Id.* at 415, 226 S.E.2d at 375. The attorney filed an application on the ward's behalf to have a guardian appointed and to stop the sale of the ward's land. *Id.* at 416, 226 S.E.2d at 376. This Court affirmed the trial court's determination the attorney and the heir did not have standing to bring the action on behalf of the incompetent woman. *Id.* at 420, 226 S.E.2d at 378. In response, the Supreme Court of North Carolina remanded and held:

> Ordinarily the one who acts on behalf of an incompetent is his guardian, trustee, or guardian *ad litem* and the incompetent, being under a disability, is not accorded "standing." But where the complaint is that the guardian himself is acting either wickedly, incompetently or in ignorance of the facts, the concept of "standing" must necessarily give way to the primary duty of the court itself as the ultimate guardian to protect the incompetent's interest. In the performance of this duty the court must receive, and should welcome, any pertinent information or assistance from any source. . . . "While . . . [an incompetent] must be represented, in all judicial proceedings, by the guardian, it is entirely proper, *either in his own*

> *person or through any friend*, for him to call attention to any matter then pending and under the control of the court, to the end that it may be investigated and his rights protected."

Id. at 424–25, 226 S.E.2d at 380 (emphasis original) (citations omitted).

¶ 28 Here, it is not disputed that on 7 May 2017, before Mrs. Leary was adjudicated incompetent, she signed a general POA before a notary appointing William Leary as her attorney-in-fact and giving him broad authority over her finances and real property. This POA was properly recorded prior to any other POA executed by Mrs. Leary. It is disputed if a guardian or holder of a DPA acted on actual authority and on behalf of Mrs. Leary's best interest and for her benefit when her home was sold. It is also disputed if Anderson acted under valid authority or for her own personal interest. In *In re Lancaster*, the ward's attorney was given standing to bring the lawsuit and the court "must receive, and should welcome, any pertinent information or assistance from any source." *Id.* at 425, 226 S.E.2d at 380.

¶ 29 A genuine issue of material fact exists to determine whether Plaintiffs have standing. Although Anderson may initially have served as Mrs. Leary's *de facto* guardian, she failed to qualify to serve as guardian, leaving Mrs. Leary with no legal guardian. Even if we were to presume Anderson was serving as guardian, viewing the evidence in the light most favorable to Plaintiffs, an issue of fact exists whether Anderson was "acting either wickedly, incompetently or in ignorance of the facts" in the sale of the home with knowledge of Mrs. Leary's status and pending special proceeding to deny summary judgment in favor of Gokam Properties. *Id.* at 424, 226 S.E.2d at 380.

B. Court Appointed Guardian

¶ 30 Plaintiffs also argue summary judgment is improper because Mrs. Leary's DPA and guardianship is disputed, and the home could only be sold by her court appointed guardian. Our Supreme Court has held the sale of property by "one who is not [a person deemed incompetent's] duly appointed and duly qualified guardian is void." *Buncombe County v. Cain*, 210 N.C. 766, 775, 188 S.E. 399, 404 (1936). The Court further held the purchaser of the incompetent person's property "has sustained no damages by reason of the sale and conveyance, and therefore cannot recover on the official bond of the clerk of the Superior Court[.]" *Id.*

¶ 31 It is undisputed Mrs. Leary was declared incompetent on 8 June 2018 to make legal decisions or to execute legal documents. The trial

court held Mrs. Leary was declared "incompetent to a limited extent" and ordered she could not "communicate wishes regarding legal documents or services on her own."

¶ 32 The record is unclear whether Anderson was Mrs. Leary's "duly appointed and duly qualified guardian" at the time of the 8 June 2018 hearing. In the 8 June 2018 Order, the trial court directed "if M. Anderson [was] unable to be bonded and qualify within 90 days of this order, Atty to be appointed G.O.E. [Guardian of Estate]." In the subsequent order dated 9 December 2019 in the same matter, the court found "Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of [Mrs. Leary's] property. Court shall appoint Guardian of Estate (GOE)."

¶ 33 If Anderson did not possess legal authority to sell Mrs. Leary's home, the sale is void. *Buncombe County*, 210 N.C. at 775, 188 S.E. at 404. If the sale of Mrs. Leary's home is void, Plaintiff's claims against Gokam Properties should not have been adjudicated on summary judgment. At minimum, the award of guardianship and timing and recording of relevant forms is in dispute. Summary judgment for Gokam Properties was improper.

C. Special Proceeding

¶ 34 Plaintiffs also argue the sale of Mrs. Leary's home is invalid and void as a matter of law because a special proceeding hearing was not held to approve the sale.

> (b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in his discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof [of one to five elements]
>
> . . . .
>
> (d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or

> lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

N.C. Gen. Stat. § 35A-1301(b), (d) (2019).

¶ 35 A "ward's estate is very carefully regulated, and the sale [of real property] is not allowed except by order of court[.]" *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968). Our Supreme Court has long held that "a contract by a guardian to sell the ward's real estate, in advance of legal authority, is contrary to public policy and void." *LeRoy v. Jacobosky*, 136 N.C. 443, 456, 48 S.E. 796, 800 (1904) (citations omitted).

¶ 36 Mrs. Leary was adjudicated incompetent in June 2018. Anderson sold Mrs. Leary's home without an order of the court authorizing the sale on 20 September 2019. A genuine dispute exists regarding Anderson's authority to sell Mrs. Leary's home. Summary judgment for Gokam Properties was improper.

D. Anderson's Purported DPA

¶ 37 Plaintiffs argue the trial court erred in finding the January 2017 purported DPA to Anderson is valid. During the hearing on summary judgment, the court questioned whether a pre-existing POA survives an incompetency proceeding and allowed the parties to submit supplemental briefing on that narrow issue.

¶ 38 Plaintiffs further argue even if the issue is relevant, summary judgment was not proper because: (1) an agent established by a DPA is still required to obtain court approval prior to selling the home of an individual declared incompetent by a court pursuant to N.C. Gen. Stat. § 35A-1301(b); (2) there is an issue of fact regarding whether a valid DPA existed prior to Mrs. Leary's declaration of incompetence; and, (3) if the 11 January 2017 DPA existed, there is an issue of fact regarding Mrs. Leary's capacity to grant a DPA in 2017.

1. Valid POA/DPA

¶ 39 Our General Statutes provide: "If, after a principal executes a power of attorney, the clerk of superior court appoints a guardian . . . the agent is accountable to the guardian or the fiduciary as well as to the principal. N.C. Gen. Stat. § 32C-l-108(b) (2019).

¶ 40 In June 2018, the court declared Mrs. Leary partially incompetent concerning legal documents and decisions. The court ordered a general guardian be appointed and gave Anderson the opportunity to qualify and

serve as Mrs. Leary's guardian if she qualified within 90 days. Anderson filed the purported DPA with the register of deeds more than a year later on 21 October 2019. On 9 December 2019, the court found and concluded "Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of Ward's property."

¶ 41 Plaintiffs argue Anderson failed to qualify as Mrs. Leary's guardian, and any alleged pre-existing DPA could not be used to convey Mrs. Leary's home until a guardian was appointed by the court and an order of sale had been entered. Mrs. Leary had been declared incompetent and an attorney-in-fact under a DPA is accountable to the court appointed guardian, as well as their principal, for the sale and the accounting of any proceeds therefrom. N.C. Gen. Stat. § 32C-1-108(b)(2019).

2. Disputed January 2017 DPA

¶ 42 Plaintiff argues summary judgment was improper because a material issue of fact exists pertaining to the validity of Anderson's January 2017 DPA.

¶ 43 "A power of attorney executed in this State before January 1, 2018, the effective date of this Chapter is valid if its execution complied with the law of this State as it existed at the time of execution." N.C. Gen. Stat. § 32C-1-106. When the purported DPA was created, the North Carolina statutes provided:

> A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains a statement that it is executed pursuant to the provisions of this Article or the words "This power of attorney shall not be affected by my subsequent incapacity or mental incompetence," or . . . similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence.

N.C. Gen. Stat. § 32A-8 (2017) (repealed by Session Law 2017-153, s. 2.8). The current statute governing the validity of DPAs, provides "[a] power of attorney created pursuant to this Chapter is durable unless the instrument expressly provides that it is terminated by the incapacity of the principal." N.C. Gen. Stat. § 32C-1-104 (2019). N.C. Gen. Stat. § 32C-1-105 (2019) provides:

> A power of attorney must be (i) signed by the principal or in the principal's conscious presence by

> another individual directed by the principal to sign the principal's name on the power of attorney and (ii) acknowledged. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgements.

¶ 44 "[W]hen a mentally incompetent person executes a contract or deed before their condition has been formally declared, the resulting agreement or transaction is voidable. *O'Neal v. O'Neal*, 254 N.C. App. 309, 314, 803 S.E.2d 184, 188 (2017). Further, "a contract or deed executed after a person has been adjudicated incompetent is absolutely void absent proof that the person's mental capacity was restored prior to executing the instrument. *Id.* at 314–15, 803 S.E.2d at 188–89.

¶ 45 Here, the medical records from Mrs. Leary's 12 January 2017 visit with Dr. Foster stated Anderson was working to secure a power of attorney but had not done so as of that date. The medical records state, "her daughter is seeking power of attorney and guardianship asthma (sic) some areas no longer able to make informed decisions," and "[t]oday I did advise her daughter that she cannot stand alone and I do suggest that she obtain power of attorney to handle all of her affairs." Dr. Foster wrote "I am asking that her daughter (Rita Leary Anderson) assume power of attorney for Ms. Leary."

¶ 46 The medical records tend to show Mrs. Leary had not yet issued a DPA to Anderson as of 12 January 2017 and Dr. Foster was requesting Anderson to obtain a guardianship of Mrs. Leary or a DPA. The undisputed evidence further demonstrates the purported 11 January 2017 DPA was not filed with the Mecklenburg County Register of Deeds until 21 October 2019, after the sale of her home had closed. This document was recorded 11 days after this lawsuit was filed on 10 October 2019.

¶ 47 Anderson stated under oath Mrs. Leary executed the Limited Power of Attorney to Sell Real Estate on 6 September 2019, nearly 15 months after Mrs. Leary was adjudicated incompetent.

¶ 48 A reasonable jury could find Mrs. Leary's doctor would not have suggested and advised Anderson to become Mrs. Leary's POA at the 12 January 2017 doctor's visit if Mrs. Leary had already executed a DPA naming Anderson her agent the day before.

¶ 49 A reasonable jury could also find Anderson's failure to record the purported 11 January 2017 DPA for over two and one-half years, and until almost a month after the home was sold, and 11 days after this

lawsuit was filed demonstrates the 11 January 2017 DPA was not actually executed on that date or it was not executed by Mrs. Leary. A reasonable jury could also find if the 11 January 2017 general DPA is valid, then Anderson's self-admitted subsequent Limited Power of Attorney to Sell Real Estate would not have been necessary. A reasonable jury could also find Mrs. Leary lacked capacity to authorize the 6 September 2019 limited POA after she was adjudicated incompetent in June 2018.

¶ 50 Genuine issues of material fact existed regarding Anderson's authority, her purported DPA and limited POA to sign the deed without prior court approval and, the proper disposition of the proceeds from the sale.

VI. *Lis Pendens*

¶ 51 For the foregoing reasons, Gokam Properties was not entitled to summary judgment. The trial court's cancellation of Plaintiffs' Notice of *Lis Pendens* is error as record notice of this pending litigation is proper. See N.C. Gen. Stat. § 1-116(a),(c) (2019).

VII. Conclusion

¶ 52 Summary judgment is a well-established procedural safeguard with protections built in for the nonmoving party. Upon *de novo* review, genuine issues of material fact exist in the record before us. We reverse the summary judgment for Gokam Properties and the cancellation of Plaintiffs' Notice of *Lis Pendens* and remand for further proceedings. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge STROUD and Judge DILLON concur.

ANNETTE LOCKLEAR, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF
AGRICULTURE AND CONSUMER SERVICES, RESPONDENT

No. COA20-604

Filed 19 October 2021

Public Officers and Employees—career employees—dismissal—unacceptable personal conduct—just cause—falsification of records

The administrative law judge's decision upholding a career state employee's (petitioner) dismissal from her job was affirmed where petitioner falsified records in connection with processing a pest control license renewal application and refused to cooperate in the subsequent investigation. Her actions constituted unacceptable personal conduct and conduct unbecoming to a state employee that is detrimental to state service, and her employer had just cause to dismiss her because her violation was severe, it resulted in a company being double billed and reputational harm to petitioner's employer, and she had a history of unacceptable work and conduct.

Appeal by petitioner from final decision entered 18 May 2020 by Administrative Law Judge Tenisha S. Jacobs in the Office of Administrative Hearings. Heard in the Court of Appeals 25 May 2021.

Jennifer J. Knox, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for respondent-appellee.

STROUD, Chief Judge.

¶ 1 Annette Locklear ("Petitioner") appeals from a final decision by an administrative law judge ("ALJ") following a contested case hearing that found the North Carolina Department of Agriculture and Consumer Services ("the Department" or "Respondent") had just cause to dismiss Petitioner from her career state employment for unacceptable personal conduct. Petitioner first argues her actions did not constitute unacceptable personal conduct. Then, Petitioner argues even if her actions were unacceptable personal conduct, Respondent still did not have just cause to dismiss her. Because after *de novo* review we determine Petitioner

engaged in unacceptable personal conduct providing just cause to dismiss her, we affirm.

I. Background

¶ 2 The uncontested Findings of Fact in this case show Petitioner worked for the Department's[1] Structural Pest Control and Pesticides Division, Structural Pest Control Section, which enforces the Structural Pest Control Act of North Carolina of 1955, North Carolina General Statute § 106-65 (2019), prior to her dismissal for unacceptable personal conduct. At the time of the conduct at issue, John Feagans managed the unit as Petitioner's direct supervisor; Nicky Mitchell was a co-worker of Petitioner with the same duties; and James Burnette, Jr. was the director of the division. Alongside those people, Petitioner's job was to assist with "the licensing and certification of individuals authorized to perform structural pest control" work in the state. As relevant here, Petitioner processed annual license renewal applications using the Agricultural Regulatory System ("the System").[2]

¶ 3 The Findings of Fact describe the importance of the System:

> 17. The accuracy of the information in the AgRSys is critically important given that it is relied upon by NCDA&CS in regulating the structural pest control industry, members of the structural pest control industry that require a license/card in order to work, and members of the public. (TI pp 28-30, 106-06, 232-33; TII pp 307-09)
>
> 18. In explaining the importance of the AgRSys, Mr. Feagans testified:
>
> > [W]ith my job as the manager of the licensing system, there is no more important factor than our licensing system is accurate. There are too many people that rely on the information in this licensing system both in our office, out in the field, or the general public. And considering we're licensing people to do something potentially dangerous, as far as applying pesticides, we need to have a resource that we know the qualifications, whether they're legal and -- and

1. In the ALJ's Findings of Fact, the Department is abbreviated "NCDA&CS."

2. In the ALJ's Findings of Fact, the System is abbreviated "AgRSys."

> in compliance when they make these applications, and any other information.
>
> But it has to be reliable. We have to be able to go to this system and trust the information in it . . .
>
> (TI pp 105-06)
>
> 19. Errors in the AgRSys can reflect negatively on NCDA&CS and hinder the ability of NCDA&CS employees to complete their investigations and determine if violations of the law have occurred. (TI pp 30, 233; TII p 310) Additionally, maintaining inaccurate records that handles public funds (the renewal fees) could subject NCDA&CS to adverse internal/external audit findings. (TI p 109; TII p 310)

(Alteration in original).

¶ 4 Petitioner's conduct at issue in this case related to a specific license renewal application and the related information in the System. On 11 June 2018, Petitioner received a renewal application from Pest Management Systems, Inc. ("the Company") along with a $2,260 check (Check #41569) to cover the cost of renewal. When the Company had not heard about the status of its application by 20 June—well beyond the expected three to four day time period to process a renewal even during the busy renewal season—it called and reached Petitioner's co-worker Mitchell. Mitchell was unable to find the original renewal application, so with the renewal deadline looming, she told the Company to resubmit its application along with a new check and informed her supervisor, Feagans, about her actions, although Mitchell did not communicate with Petitioner. After receiving the application and a new $2,260 check (Check #41656), Mitchell processed the renewals, deposited the new check, and updated the information in the System on 26 June 2018.

¶ 5 Once Mitchell had completed the Company's license renewals, the System would reflect the renewals when anyone looked at it. In order to prevent issues after a renewal had already been processed, the Department also implemented multiple failsafe mechanisms. First, the System would show an error message to anyone attempting to proceed with a duplicate renewal and then prohibit such duplicate renewal. Second, the Department had paper files where an employee could look to determine if renewals had been processed when they received an error message from the System. Third, once renewals had been processed, only the IT Department could change the pertinent information

in the System. Petitioner and Mitchell further both knew they were only to contact IT after notifying their supervisor, Feagans, a fact of which Petitioner had been reminded as recently as 11 June 2018. Given these fail safes:

> [h]ad Petitioner, or anyone else, attempted to process the Pest Management Systems, Inc. renewals after Ms. Mitchell had already done so on 26 June 2018, it would be obvious that these licenses/cards had already been renewed and that depositing an additional check would result in the company being erroneously billed a second time. (Tl pp 209-12, 225-28, 231)

¶ 6 Despite those fail safes, and without notifying her supervisor as required, on 2 July 2018, Petitioner contacted IT to request the check number for the Company's renewal be changed in the System to reflect the check she had originally received, Check #41569. After IT made the requested changes, Petitioner undertook a series of actions that led to the System reflecting false information and the Department overbilling the Company by $2,260:

> 50. Following IT making the changes requested by Petitioner, the AgRSys "ReceiptNumber" listed Check #41569 as having been used to process the 38 license/card renewals for Pest Management Systems, Inc. on 26 June 2018. (Resp. Ex. 7) Additionally, as a result of the changes in the AgRSys requested by Petitioner, there was no record of Check #41656 in the system and anyone attempting to search for that check number would be unable to locate it. (TI p 61)
>
> 51. At the hearing, Petitioner admitted that, following her requested changes, the AgRSys would have shown that Check #41569 was used to issue the Pest Management Systems, Inc. renewals on 26 June 2018 and that she did not issue those licenses/cards on that date. (TII pp 468-69)
>
> 52. The evidence does show, and the Undersigned does find, that following Petitioner's requested changes to the AgRSys, the information reflected in the AgRSys for the altered records was false.
>
> 53. Given the multiple failsafe mechanisms, and the abundance of information available to Petitioner indicating that the renewals for Pest Management

> Systems, Inc. had already been renewed, the evidence does show, and the Undersigned does find that Petitioner knowingly falsified records in the AgRSys by her 2 July 2018 request for IT to change the Check Number associated with the renewals at issue.
>
> 54. After receiving the notification from IT that her requested changes had been made, Petitioner deposited Check #41569 on 3 July 2018 (22 days after it was originally assigned to her for processing). (Resp. Ex. 4 and 8)
>
> 55. By depositing Check #41569 on 3 July 2018, Petitioner over-billed Pest Management Systems, Inc. by $2,260.

¶ 7 On 7 August 2018, the Company realized it had been double billed and called Mitchell to report the problem. After Mitchell came to him to ensure the Company received a refund, Feagans began investigating. While Feagans originally believed Mitchell had made a mistake, the next day he learned about Petitioner's request to IT to change the information in the System. Following Petitioner's return from an unrelated leave, Feagans asked Petitioner to explain how the receipt number for the Company's license renewal had been changed in the System. Despite multiple opportunities to do so over the following days,[3] Petitioner never informed Feagans about her request to IT. In a final meeting with Feagans on 10 October, Petitioner again denied requesting IT change the check number in the System and also denied that Mitchell had performed the renewals, stating instead that Petitioner herself had processed the renewals.

¶ 8 On 2 November 2018, Petitioner was dismissed for unacceptable personal conduct on three grounds:

> 1. Material falsification of a State application or other employment documentation to include falsification of work-related documents (Falsification of records in the . . . System);
>
> 2. Conduct for which no reasonable person should expect to receive warning (Failure to cooperate with

3. Between Finding of Fact 60 and Finding 61, the listed year of the events changes, without explanation, from 2018 to 2019. Given the record indicates Petitioner returned from leave in October 2018, in accordance with Finding 60 and that Petitioner's dismissal occurred on 2 November 2018, the switch to 2019 appears to be a clerical error. The relevant events described in the Findings all appear to have occurred in 2018.

> an investigation and manipulating the licensing system in an attempt to falsely implicate a coworker and conceal your own wrongful actions); and
>
> 3. Conduct unbecoming a State employee that is detrimental to State service (Failure to cooperate with an investigation and manipulating the licensing system in an attempt to falsely implicate a coworker and conceal your own wrongful actions).

Following her dismissal, Petitioner filed an internal grievance, and, following a Step 2 Hearing, her dismissal was upheld on 18 January 2019. Petitioner then filed a petition commencing a contested case in the Office of Administrative Hearings. The ALJ's final decision following a contested case hearing affirmed the Department's decision to dismiss Petitioner based on unacceptable personal conduct. Petitioner appeals.

II. Analysis

¶ 9 Career state employees receive statutory protections from being, *inter alia*, discharged without "just cause." N.C. Gen. Stat. § 126-35(a) (2019). Just cause includes two potential bases for adverse disciplinary action: (1) action "imposed on the basis of unsatisfactory job performance" or (2) action "imposed on the basis of unacceptable personal conduct." 25 N.C. Admin. Code 1J.0604(b). Petitioner was dismissed for unacceptable personal conduct, so the issues here arise only from that basis.

¶ 10 Focusing on that basis, in *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol*, this Court established a three-part test for determining whether just cause existed for adverse employment action against career state employees based on unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012) (quoting *North Carolina Dept. of Environment and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)).

¶ 11 Here, Petitioner only argues the ALJ's decision erred with respect to *Warren*'s second and third inquiries.[4] Petitioner first argues she prevails under the second inquiry because her actions did not constitute unacceptable personal conduct. Although the argument is not listed as a separate issue presented, Petitioner then raises an issue under the third inquiry when she contends this Court should find no just cause to dismiss her because "something less than dismissal was the proper discipline for her actions." After addressing the standard of review, we will address each of the two contested inquiries in turn.

A. Standard of Review

¶ 12 As both parties agree, the standard of review for an administrative agency's decision is governed by North Carolina General Statute § 150B-51 (2019), which provides:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the 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.

---

4. Petitioner also would fail on the first inquiry because she did not challenge any of the ALJ's Findings of Fact on appeal. When Findings of Fact are not challenged, they are binding on appeal. *Smith v. N.C. Department of Public Instruction*, 261 N.C. App. 430, 444, 820 S.E.2d 561, 570–71 (2018) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Because the Findings are binding on appeal, they establish "that [Petitioner] did, in fact, engage in the conduct described therein. Accordingly, the first prong of the *Warren* test is satisfied . . . ." *Id.*, 261 N.C. App. at 444, 820 S.E.2d at 571.

> (c) . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

¶ 13 As subsection (c) explains, the standard of review depends on the type of case. N.C. Gen. Stat. § 150B-51(c). The differing standards of review can be broken down along the lines of the three inquiries under *Warren* as well. In *Carroll*—the case which *Warren* would later interpret, 221 N.C. App. at 380–83, 726 S.E.2d at 924–25—the Supreme Court explained "[d]etermining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for [the disciplinary action taken]." *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (internal quotations omitted) (second alteration in original). This Court has previously explained that the first *Carroll* inquiry is a question of fact reviewed under the whole record test and that the second *Carroll* inquiry is a question of law reviewed *de novo*. *Whitehurst v. East Carolina University*, 257 N.C. App. 938, 943–44, 811 S.E.2d 626, 631 (2018). *Warren* determined that *Carroll*'s second inquiry required two separate analyses, which became the second and third *Warren* inquiries. *See Warren*, 221 N.C. App. at 380–83, 726 S.E.2d at 924–25 (explaining the difficulty in reconciling within the second *Carroll* inquiry *Carroll*'s insistence that a court find unacceptable personal conduct and that not all unacceptable personal conduct amounted to just cause before deciding to "balance the equities after the unacceptable personal conduct analysis" as part of three inquiry framework).

¶ 14 Thus, relying on *Whitehurst* provides the following standards of review. *Warren*'s first inquiry mirrors *Carroll*'s first inquiry. *Compare Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925 *with Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. As a result, the first *Warren* inquiry employs the same standard of review as the first *Carroll* inquiry, the whole record test. *See Whitehurst*, 257 N.C. App. at 943, 811 S.E.2d at 631 (explaining first *Carroll* inquiry uses whole record test). Given the second and third *Warren* inquiries both derive from the second *Carroll* inquiry, they employ the same standard of review as the second *Carroll* inquiry, *de novo* review. *See id.*, 257 N.C. App. at 943–44, 811 S.E.2d at 631 (explaining the second *Carroll* inquiry uses *de novo* review).

¶ 15 Here, Petitioner only raises—and only can raise, *see supra* footnote 4 —issues under the second and third *Warren* inquiries. As a result, both issues are reviewed *de novo*. "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Wetherington v. North Carolina Dept. of Public Safety*, 368 N.C. 583, 590, 780 S.E.2d 543, 547 (2015) ("*Wetherington I*") (internal quotations and alterations omitted).

B. *Warren* Inquiry Two: Unacceptable Personal Conduct

¶ 16 Petitioner first argues "none of [Petitioner's] actions constitute unacceptable personal conduct under the law," which aligns with *Warren*'s second inquiry. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. First, Petitioner contends she could not have falsified records in the System because the term "falsify . . . indicates knowledge of untruth" and there is no evidence Petitioner "had any motive to falsify records" or "even knew that she was entering" inaccurate information. Petitioner then argues she also did not fail to cooperate with the investigation because she "made a mistake and did not intend to falsify the data" such that "it is more logical to conclude that any statements made to her supervisor during the investigation were the result of" a lapse in memory.

¶ 17 Unacceptable personal conduct "is a broad 'catch-all' category that encompasses a wide variety of misconduct by State employees that can result in dismissal without the need for a prior warning." *Smith*, 261 N.C. App. at 444, 820 S.E.2d at 571. As relevant here, unacceptable personal conduct includes:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .
>
> (e) conduct unbecoming a state employee that is detrimental to state service;
>
> . . .
>
> (h) falsification of a state application or in other employment documentation.

25 N.C. Admin. Code 1J.0614(8). In the past, this court has clarified conduct unbecoming under subsection (e) does not require a showing of actual harm, "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Smith*, 261 N.C. App. at 445, 820 S.E.2d at 571 (internal quotations omitted). Additionally, as the State Human Resources Manual explains, falsification under subsection (h)

includes "falsification of work-related documents." State Human Resources Manual § 7, p. 4 (2017).[5]

¶ 18 Here, the ALJ's Findings of Fact are undisputed and therefore binding on appeal. *Smith*, 261 N.C. App. at 444, 820 S.E.2d at 570–71 (citing *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731). The ALJ found that after Petitioner's requested changes were made to the System, the information in the System "was false" because the System would have indicated the check number she used was for work done on 26 June 2018, which Petitioner admitted was not the date she issued a license renewal. Further, "[g]iven the multiple failsafe mechanisms, and the abundance of information available to Petitioner indicating that the renewals for [the Company] had already been renewed," the ALJ found "Petitioner *knowingly* falsified records" in the System. (Emphasis added) Those two findings alone show Petitioner falsified work related documents, which amounts to unacceptable personal conduct under 25 N.C. Admin. Code 1J.0614(8) and the State Human Resources Manual § 7, p. 4.

¶ 19 The same findings also refute Petitioner's argument she did not know she was entering inaccurate information because Petitioner "*knowingly* falsified" the information. (Emphasis added) Further, the System included numerous fail safes to prevent such inadvertent error. The System would provide an error message to anyone trying to proceed with a license renewal that had already been completed, prohibit such duplicate renewal, and indicate in the hard copy file who had renewed the licenses and on what date. Given those fail safes, we agree with the ALJ's binding Finding of Fact that Petitioner knowingly falsified the records. Additionally, the false nature of the information in the System would be apparent to anyone who looked. The System said Petitioner had completed the work on 26 June even though she did not make a request to IT to enable her to perform the work until 2 July. Based on the circumstances, Petitioner knew she was entering false information to the System regardless of her current attempt to claim otherwise.

¶ 20 Petitioner's argument she lacked motive is similarly unconvincing. She cites no authority indicating motive is a relevant consideration when determining whether she falsified a work-related document. Additionally, even Petitioner's own definition of falsify requires merely knowledge of untruth, not a specific reason for causing the untruth. Thus, using Petitioner's definition, the undisputed facts show Petitioner falsified a work related document.

---

5. Available at: https://oshr.nc.gov/media/1580/open (as of 9 September 2021).

¶ 21 The falsification basis alone would be enough for Petitioner to fail on the second *Warren* inquiry because "[o]ne act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." *Hilliard v. North Carolina Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005). However, the ALJ also concluded Petitioner had committed unacceptable personal conduct on the basis that she engaged in "conduct unbecoming a state employee that is detrimental to state service." 25 N.C. Admin. Code 1J.0614(8)(e). While Petitioner does not clearly state she is challenging this basis, we assume she is because she argues she "had no motive or reason to lie or be uncooperative in the ensuing investigation" and such failure to cooperate was listed as a basis for the conduct unbecoming charge in her original dismissal letter. First, to the extent that this argument is based on her argument that she did not knowingly falsify records, it fails because the uncontested Findings of Fact support that Petitioner knowingly falsified the information in the System. Second, other Findings of Fact layout how Petitioner lied and was uncooperative in the ensuing investigation regardless of whether she had motive to be. Petitioner repeatedly failed to inform her supervisor that she had contacted IT to request they change information in the System and also falsely told her supervisor that she, rather than her co-worker Mitchell, had completed the Company's renewals. These undisputed facts indicate Petitioner failed to cooperate in the investigation, supporting the separate conduct unbecoming basis for finding unacceptable personal conduct.

¶ 22 The conduct unbecoming basis also finds strong support in the record based on Petitioner's other actions. As the uncontested Findings of Fact state, the System's accuracy in general is important because the public uses it to confirm that people applying potentially dangerous pesticides are licensed and because the state uses it to regulate the industry and conduct investigations as necessary. The System also contains records related to public funds, and, thus, inaccuracies could subject the Department to adverse audit findings. The inaccuracies Petitioner caused resulted in the Company being temporarily overbilled by $2,260. Based on those facts, Petitioner's conduct "could potentially adversely affect the mission or legitimate interests of the State employer," as required to conclude an employee committed unbecoming conduct, and, in fact, Petitioner's actions did cause such harm. *Smith*, 261 N.C. App. at 445, 820 S.E.2d at 571. Thus, even if Petitioner had not falsified records, as we concluded above, she still committed conduct unbecoming of a state employee and thus engaged in unacceptable personal conduct. Based on our *de novo* review, we conclude Petitioner

committed unacceptable personal conduct, thereby satisfying the second *Warren* inquiry.

C. *Warren* Inquiry Three: Just Cause

¶ 23 Finally, Petitioner contends the ALJ erred in conducting *Warren*'s third inquiry, which requires determining "whether th[e] misconduct amounted to just cause for the disciplinary action taken." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Petitioner first contends she was never "told the truth" that the application had been reassigned to her coworker Mitchell and argues this "deliberate[] exclu[sion] from important office communications" and then firing her "when she erred in the absence of that information . . . is simply not the *equity and fairness* to the employee required in the just cause context." (Emphasis in original) (internal quotations omitted) Petitioner then separately argues we should reconsider the relevant just cause factors because they "show that something less than dismissal was the proper discipline for [Petitioner's] actions."

¶ 24 When making the just cause determination, the reviewing court must examine "the facts and circumstances of each individual case" because just cause "is a flexible concept, embodying notions of equity and fairness." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotations omitted). To aid in making that individualized determination during *Warren*'s third inquiry, we look at the factors set forth in *Wetherington I*. *Whitehurst*, 257 N.C. App. at 945, 811 S.E.2d at 632. Those factors include: "the severity of the violation, the subject matter involved, the resulting harm, the [employee]'s work history, or discipline imposed in other cases involving similar violations." *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. We have recently explained that, in context, the word "or" in the list "must be read as 'and' when applied to the factors which should be considered." *Wetherington v. North Carolina Dept. of Public Safety*, 270 N.C. App. 161, 189–90, 840 S.E.2d 812, 831 (2020) ("*Wetherington II*"). Thus, courts must consider "any factors for which evidence is presented." *Id.*, 270 N.C. App. at 190, 840 S.E.2d at 832.

¶ 25 Petitioner first contends she was not afforded the general "equity and fairness to the employee required in the just cause context" because "she was deliberately excluded from important office communications regarding matters to which she had been assigned, and then fired when she erred in the absence of that information. (Emphasis removed) In support of this argument, Petitioner cites *Whitehurst* for the point that "an employee's conduct must be judged with reference to the facts of which he was aware at the time of his actions."

¶ 26 Petitioner's reliance on *Whitehurst* is misplaced. *Whitehurst* states the cited point in the context of a case where a police officer knew that a person had committed an assault but did not know that the same person had separately been assaulted because no one told him about the second assault, including the victim of the second assault when the officer explicitly asked him what happened. 257 N.C. App. at 947, 811 S.E.2d at 633. In that case, the officer did not have facts held against him in a situation where he took steps to try to ascertain the unknown facts. By contrast, here Petitioner did not act in a way that would have led her to uncover the facts she now complains were withheld from her. Beyond the System's failsafe mechanisms that we have already discussed, the uncontested Findings of Fact detail how Petitioner was supposed to notify her supervisor before requesting IT make changes in the System but failed to take that step. Had Petitioner acted properly and asked her supervisor before contacting IT, her supervisor, who knew that Petitioner's co-worker had inquired about the renewal application before going on to process it herself, would have informed Petitioner that the co-worker had processed the application already. Thus, this case is not similar to *Whitehurst* because here Petitioner did not try to uncover the unknown facts about which she now complains despite Petitioner being told to follow a process that would have uncovered those very facts.

¶ 27 Further, Petitioner still ultimately decided to enter false information into the System as laid out above. Other people failing to inform her of certain facts did not change her own actions. Thus, Petitioner's argument she was not afforded the general equity and fairness underlying just cause does not sway us.

¶ 28 Turning to Petitioner's second argument, we are asked to reweigh the *Wetherington I* factors, which include: "the severity of the violation, the subject matter involved, the resulting harm, the [employee]'s work history, [and] discipline imposed in other cases involving similar violations." *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548; *see Wetherington II*, 270 N.C. App. at 189–90, 840 S.E.2d at 831 (explaining the "or" in the original factors list must be read as "and" given the context). We briefly address each factor again relying on the uncontested Findings of Fact.

¶ 29 Taking the first two factors together, the violation is severe precisely because of the subject matter involved. As explained previously, the System relies on accurate information to protect the public from unlicensed people performing potentially dangerous pesticide applications. Petitioner herself even verified the importance of the System having

accurate information because she checks the System to verify licensure status. Given the importance of the integrity of the System in protecting the public, Petitioner's violation was severe.

¶ 30 Petitioner's violation was also severe because of the resulting harm. Petitioner's actions led to the Company being double billed and thus overpaying $2,260. While a refund was issued about a month later, the Company still lacked money it should rightfully have had for that month. Further, the Company itself discovered the error and was "not happy" according to Petitioner's co-worker Mitchell, who received their call, which indicates this instance was one of the situations where an error in the System "reflect[ed] negatively" on the Department leading to reputational harm. Thus, while Petitioner contends the ALJ found no harm resulted, we conclude on *de novo* review that Petitioner's actions caused actual harm both to the overbilled Company and to the Department's reputation.

¶ 31 Examining the fourth factor, Petitioner's work history also favors finding just cause. Petitioner's supervisors described her as "uncooperative, aggressive towards her coworkers, and disrespectful and dismissive" during "the course of her employment." (Internal quotations omitted) They also described her work as "oftentimes unacceptable" and merely "acceptable at best," an assessment borne out by her overall "Does Not Meet Expectations" rating in her 2017-2018 performance review. Further, Petitioner had already received a prior written warning for unacceptable personal conduct and a two-week disciplinary suspension without pay for a violation of the workplace violence policy. Additionally, Petitioner's supervisors had attempted to help improve her performance and workplace conduct for "over a decade" and even reiterated their desire to help her as recently as 30 April 2018, mere months before the conduct that led to Petitioner's dismissal. While Petitioner argues the ALJ only examined the prior two years when reviewing her work history, the uncontested Findings of Fact describe behavior "over the course of [Petitioner's] employment" and convey attempts to help her improve for "over a decade."

¶ 32 The record before us resembles another case where this Court recently found just cause. There, this Court found just cause when the employee's work history included "a pattern of petulant, inappropriate, and insubordinate behavior . . . that extended over the course of several years" and that did not change "[d]espite repeated attempts" from supervisors to help the employee. *Smith*, 261 N.C. App. at 446–47, 820 S.E.2d at 572. The record here shows a similar pattern with Petitioner's behavior, which also did not improve after her supervisor's repeated attempts

to help. Thus, we similarly conclude Petitioner's work history supports finding just cause.

¶ 33 The final *Wetherington I* factor is whether the discipline in this case aligns with discipline in similar cases. 368 N.C. at 592, 780 S.E.2d at 548. Petitioner first highlights "there was no evidence or findings of fact regarding the disciplined [sic] imposed in other cases involving similar violations." While Petitioner is correct, this absence does not impact our overall analysis. The decisionmaker is only required to consider factors "*for which evidence is presented*" such that they cannot rely on one factor while ignoring others. *Wetherington II*, 270 N.C. App. at 190, 840 S.E.2d at 832 (emphasis added). The ALJ here considered all four other *Wetherington I* factors and could not have considered the similar discipline factor because as Petitioner admits, there is no evidence on that factor. Petitioner also repeats her argument that the ALJ failed to take into account that no one was disciplined for not informing her they separately processed the license renewal, but we have already rejected that argument above.

¶ 34 After reviewing each of the *Wetherington I* factors, equity and fairness support the decision to dismiss Petitioner. Thus, after our *de novo* review, we find just cause to dismiss Petitioner existed.

D. Findings of Fact Supporting Conclusions of Law

¶ 35 In addition to the arguments within the *Warren* framework, Petitioner's "Issues Presented" section of the brief also raises as an issue for review whether "the trial court's findings of fact regarding the discipline imposed on Petitioner support its conclusions of law?" (Capitalization altered) However, at no point in the remainder of the brief does Petitioner discuss this issue or indicate which Conclusions of Law are unsupported by the Findings of Fact. As a general matter, issues "in support of which no reason or argument is stated[] will be taken as abandoned." N.C. R. App. P. 28(b)(6); *see also* N.C. R. App. P. 28(a) ("Issues not presented and *discussed* in a party's brief are deemed abandoned.") (emphasis added). This Court has also previously said that when an appellant listed an additional "Issue Presented" in its brief but "fail[ed] to argue this issue in the text of the brief" the appellant abandoned the challenge. *Capital Resources, LLC v. Chelda, Inc.*, 223 N.C. App. 227, 233 n.4, 735 S.E.2d 203, 208 n.4 (2012). Here, we similarly conclude Petitioner has abandoned the issue of whether the Findings of Fact support the Conclusions of Law by "failing to argue this issue in the text of the brief." *Id.*

¶ 36 Even if Petitioner had not abandoned the challenge, we still find no error. Many of the potentially contested Conclusions of Law concern the second and third *Warren* inquiries, and we have already reviewed those Conclusions *de novo* and the Conclusions are supported by the uncontested Findings of Fact. Further, as stated above, we did not review the Conclusions for the first *Warren* inquiry because they simply relied on the uncontested Findings of Fact. *See supra* footnote 4. Thus, even if the issue is not abandoned, the Findings of Fact support the Conclusions of Law based on what we have already explained.

III. Conclusion

¶ 37 After *de novo* review of the two contested *Warren* inquires, we find there was just cause to dismiss Petitioner. To the extent Petitioner has not abandoned the issue, the Findings of Fact support the Conclusions of Law. Therefore, we affirm the decision of the ALJ upholding Petitioner's dismissal.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

VELMA SHARPE-JOHNSON, Petitioner
v.
NC DEPARTMENT OF PUBLIC INSTRUCTION EASTERN NORTH CAROLINA SCHOOL FOR THE DEAF, Respondent

No. COA20-869

Filed 19 October 2021

Public Officers and Employees—career state employee—just cause for dismissal—driving school bus in excess of speed limit

Just cause existed to dismiss petitioner from employment as a school bus driver based upon substantial evidence that she drove in excess of 55 miles per hour when transporting a student in a vehicle that met the definition of "school activity bus" in N.C.G.S. § 20-4.01(27)(m). Petitioner's average rate of speed of over 70 miles per hour along a 90-mile route in violation of state law and state agency regulations constituted grossly inefficient job performance and unacceptable personal conduct.

Appeal by Petitioner from final decision entered 28 September 2020 by Administrative Law Judge William T. Culpepper, III, in the Office of Administrative Hearings. Heard in the Court of Appeals 8 September 2021.

Jennifer J. Knox for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Stephanie C. Lloyd, for Respondent-Appellee.

COLLINS, Judge.

¶ 1 Petitioner Velma Sharpe-Johnson appeals from a Final Decision of the Office of Administrative Hearings affirming her dismissal from her position as an Educational Development Assistant by Respondent North Carolina Department of Public Instruction, Eastern North Carolina School for the Deaf. Petitioner argues that "the trial court err[ed] in determining that there was substantial evidence to prove that the Petitioner committed the alleged conduct[.]" Because substantial evidence in the whole record supported the findings that Petitioner engaged in grossly inefficient job performance and unacceptable personal conduct, we affirm.

I. Procedural History

¶ 2 Respondent dismissed Petitioner from employment on 19 December 2019 and issued a final agency decision affirming the dismissal on 24 March 2020. Petitioner timely filed a petition for a contested case hearing in the Office of Administrative Hearings.

¶ 3 On 28 September 2020, an Administrative Law Judge ("ALJ") issued a Final Decision affirming Respondent's dismissal of Petitioner. Petitioner exhausted the agency processes to grieve the dismissal. Petitioner timely gave notice of appeal to this Court.

II. Factual Background

¶ 4 The Eastern North Carolina School for the Deaf ("ENCSD") serves both day students and residential students. Residential students arrive at the school on Sunday afternoon, remain on campus throughout the school week, and return home on Friday afternoon. ENCSD operates bus routes to pick up residential students on Sundays and return them home on Fridays. Each bus is staffed by two ENCSD Educational Development Assistants; one serves as the driver and the other as the bus monitor. The bus monitor is responsible for recording departure times, arrival times, and student attendance in real time on a "route sheet." The

busses contain a GPS supplied by the school that is supposed to blink red and beep if the bus exceeds 55 miles per hour.

¶ 5 Petitioner was a career state employee employed by ENCSD as an Educational Development Assistant. Petitioner's responsibilities included "[d]riving ENCSD vehicles for student transportation and maintaining a non-expired NCDMV operations license," "complet[ing] all necessary training regarding the operation of state vehicles," supervising students being transported, and "providing safe and secure travel to and from ENCSD."

¶ 6 In August 2019, Petitioner signed a "Statement of Understanding – 2019-2020" containing the following acknowledgements:

> I am aware that the NC DPI Education Services for the Deaf and Blind's Policy and Procedures Manual, NC DPI Policies and Procedures, [and] the OSHR State Human Resources Manual . . . [are] available to me on the ENCSD Intranet and/or the NC Dept of Public Instruction's website and/or upon request to my manager or Human Resources.
>
> I recognize that I am responsible for reading/viewing these policies and for making myself familiar/knowledgeable of all OSHR, ESDB, NC DPI policies as they may relate to my employment.
>
> I agree to conduct my activities in accordance with all Education Services for the Deaf and Blind's and DPI procedures and policies and understand that breaching these standards may result in disciplinary action up to and including dismissal.
>
> Web addresses to the aforementioned policies and procedure[s] have been provided to me during the Human Resources, New Employee Orientation presentation.

The Education Services for the Deaf and Blind Policies included a requirement that "[s]taff transporting students shall meet all the requirements and safety regulations of the Department of Motor Vehicles and the Department of Public Instruction."

¶ 7 Petitioner also participated in a training for ENCSD transportation staff at the beginning of the 2019-20 school year. At the training, Petitioner received a "North Carolina School Bus Driver Handout" which stated:

According to G.S. 20-218(b):

> It is unlawful to drive a school bus occupied by one or more child passengers over the highways or public vehicular areas of the State at a greater rate of speed than 45 miles per hour.
>
> It is unlawful to drive a school activity bus occupied by one or more child passengers over the highways or public vehicular areas of North Carolina at a greater rate of speed than 55 miles per hour.

¶ 8 Debra Pierce, first shift transportation coordinator for ENCSD, received a phone call at approximately 3:00 pm on Friday, 22 November 2019, from a person who identified himself as Terry Grier. According to Pierce, the caller

> said he was calling out of concern, that there was a bus on I-40. He identified the bus as a white activity bus that had Eastern North Carolina School for the Deaf on the side, Bus Number 34. And he said it was going at a high rate of speed, occupied by one or more passengers.

The caller informed Pierce that he "was observing the bus going at a high rate . . . of speed, between 80 and 85" and "at some points 90 to 95 miles per hour" with at least two passengers on board the bus. In the video, the caller can be heard stating:

> I am riding down Interstate 40, this is activity bus number 34, it says that it's from the Eastern NC School for the Deaf, Wilson County, my speedometer . . . is averaging between 80 and 90 miles per hour, looks like there is a driver and at least two passengers on the van, it seems to be going pretty fast for an activity bus on the interstate.

¶ 9 Based on the time of the call and the direction of travel, Pierce concluded that the bus was en route to the final stop in Supply, North Carolina. Pierce knew that Petitioner, ENCSD employee Sheeneeka Settles, and a student passenger were on Bus 34 at that time. Pierce went to the office of Dr. Michele Handley, director of ENCSD, and called the bus cell phone. Settles answered the phone and confirmed that Petitioner was driving the bus.

¶ 10 According to the route sheet from 22 November 2019, Bus 34 left the stop in Warsaw, North Carolina at 2:32 pm with one student on board

and arrived at the Supply stop at 3:49 pm. Pierce testified that the bus was not scheduled to arrive at the Supply stop until 4:15 pm.

¶ 11 On 2 December 2019, ENCSD placed Petitioner on investigatory leave with pay. That day, Pierce spoke with Petitioner. According to Pierce, Petitioner denied driving 80 to 85 miles per hour but "admit[ted] to speeding up a little over 55 to pass a vehicle that was in front of her" and acknowledged that one student was on the bus. In a handwritten note on the bottom of the letter informing Petitioner of the investigatory leave, Petitioner wrote, "I was not going 80 mph, I pass and had to speed up to pass, and when I try to get back over the car speeded up and would not let me over . . . . I have [a] CDL and would not take that chance of losing my CDL."

¶ 12 During the investigation, on Friday, 13 December, Pierce drove Bus 34 on the same route that Petitioner had driven on Friday, 22 November. Settles rode with Pierce and completed the route sheet. Pierce departed the stop in Warsaw at 2:30 pm and arrived at the stop in Supply at 4:15 pm. Pierce also spoke with Settles during the investigation. According to Pierce, Settles indicated that she was looking out the window and not paying attention to Petitioner's driving, and that she did not see the GPS red light or hear the beeping.

¶ 13 Respondent held a predisciplinary conference on 18 December 2019 at which Petitioner insisted that she had not driven over 55 miles per hour. ENCSD dismissed Petitioner effective 19 December 2019 based on both grossly inefficient job performance and unacceptable personal conduct of "exceed[ing] a speed of 55 mph while operating a student and staff occupied" ENCSD activity bus, which violated N.C. Gen. Stat. § 20-218 and Education Services for the Deaf and Blind Policies, and created "the potential to cause death or serious bodily injury."

¶ 14 After Respondent's final agency decision upholding the dismissal, Petitioner filed a petition for a contested case hearing. Following a hearing, the ALJ found that Petitioner had engaged in the alleged conduct by "operat[ing] ENCSD bus #34, traveling on Interstate 40, at a speed in excess of 55 miles per hour which is in violation of N.C.G.S. § 20-218(b)" and the Education Services for the Deaf and Blind Policies. The ALJ found that Petitioner's conduct amounted to grossly inefficient job performance and unacceptable personal conduct as follows:

> 21. . . . [D]riving at a speed that exceeds the set limit increases the risk that the driver will lose control of the vehicle while trying to adapt to changing road conditions. In turn, this increased risk creates further

potential for death or serious bodily injury to the driver, the passengers entrusted to the driver's care, and everyone else sharing the road with him or her.

22. Petitioner's conduct of driving an ENCSD bus at a grossly excessive speed over the 55 miles per hour speed limit was a gross failure of Petitioner to perform her job requirements as specified by management. By Petitioner's own admissions, it was an expectation of her job not to exceed 55 miles per hour while driving a bus. . . .

23. Petitioner's driving of an ENCSD bus at an average speed in excess of 70 miles per hour for a distance of 90 miles and for a time period of 1 hour and 17 minutes created the potential for death or serious bodily injury to her fellow employee, Ms. Settles, members of the public, and a member of the ENCSD student population over whom Petitioner had responsibility.

. . . .

26. Petitioner's conduct falls within the first category of unacceptable personal conduct. Given the inherent risks associated with Petitioner's conduct, most significantly, the increased risk of death or serious bodily injury to a member of the student population entrusted to her care, no reasonable person should expect to receive a prior warning for such conduct.

27. Petitioner's conduct falls within the second category of unacceptable personal conduct. Petitioner's conduct was a violation of state law, to wit: N.C.G.S. § 20-218(b), which makes it unlawful to operate a school activity bus occupied by one or more child passengers over the highways or public vehicular areas of North Carolina at a greater rate of speed than 55 miles per hour.

28. Petitioner's conduct falls within the third category of unacceptable personal conduct. By Petitioner's own admissions and testimony, she violated known or written work rules. Petitioner repeatedly admitted that she was not to drive a bus more than 55 miles per hour during the performance of her work duties. . . .

> 29. Petitioner's conduct falls within the fourth category of unacceptable personal conduct. . . .
>
> . . . .
>
> 30. Here, Petitioner's conduct had the potential to detrimentally impact Respondent's mission and legitimate interests of providing educational programs to deaf and hard of hearing students while simultaneously promoting their safety and wellbeing.
>
> . . . .
>
> 31. . . . Petitioner's conduct of far exceeding the required 55 miles per hour speed limit while transporting a student was potentially detrimental to Respondent's mission and legitimate interests and, thus, was conduct unbecoming of a state employee and detrimental to state service.

The ALJ concluded that Petitioner's grossly inefficient job performance and unacceptable personal conduct amounted to just cause for dismissal and affirmed Petitioner's dismissal. Petitioner appeals.

III. Discussion

¶ 15 Petitioner challenges the ALJ's finding that she engaged in the alleged conduct.

¶ 16 A career state employee subject to the North Carolina Human Resources Act may only be discharged "for just cause." N.C. Gen. Stat. § 126-35(a) (2020). "Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (quotation marks, brackets, and citation omitted). We review de novo the conclusion that an employer had just cause to dismiss an employee. *Id.* at 666, 599 S.E.2d at 898.

¶ 17 Where a party contends that a final decision was unsupported by substantial evidence, "the court shall conduct its review of the final decision using the whole record standard of review." N.C. Gen. Stat. § 150B-51(b)(5), -51(c) (2020). "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Hum. Res.*, 91 N.C. App. 527,

530, 372 S.E.2d 887, 889 (1988) (citation omitted). Substantial evidence "means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2020). Unchallenged findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 18 Petitioner argues that there was not substantial evidence in support of the determination that she violated N.C. Gen. Stat. § 20-218 because Bus 34 was neither a "school bus" nor an "activity bus" as defined in N.C. Gen. Stat. § 20-4.01(27)(m) and (n). Petitioner's argument is misguided.

¶ 19 The ALJ found "that ENCSD bus #34 is a school activity bus as defined in N.C.G.S. § 20-4.01(27)(m)." A school activity bus is defined as "[a] vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work." N.C. Gen. Stat. § 20-4.01(27)(m) (2020). A school bus is defined, in part, as "[a] vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day . . . that is painted primarily yellow below the roofline. . . ." *Id.* § 20-4.01(27)(n).

¶ 20 Evidence presented at the hearing showed that the vehicle driven by Petitioner was "a white activity bus" that is "one of the shorter buses" that the school has. The words "Eastern North Carolina School for the Deaf" and the number "34" were visible on the side of the bus.

¶ 21 Petitioner argues that because the bus was being used to transport a child home from the school, the bus did not fit the definition of an activity bus. Specifically, Petitioner argues that "[w]hile bus #34 looked like a school activity bus, its primary purpose was to transport students to and from school over an established route for their regularly scheduled school day." However, the evidence at the hearing was that the bus was being used to pick up residential students from various stops in southeastern North Carolina on Sundays, transport them to the school grounds where they resided until Friday afternoons, and then transport them back to southeastern North Carolina. At the time in question, Bus 34 was not being used to transport a student to and from school for the regularly scheduled school day but was instead being used to transport a student from their place of residence at the school to their place of residence at home, outside of the regularly scheduled school day, on a route which was approximately six and a half hours round trip. Furthermore, while an activity bus is a vehicle whose "primary purpose" is to transport students to and from events

other than regular classroom work, nothing in the statute prohibits an activity bus from being used for other purposes, such as transporting a child to and from their residence for the week. There was substantial evidence in the whole record to support the ALJ's finding that Bus 34 was an activity bus as defined in section 20-4.01(27)(m).

¶ 22 Substantial evidence in the whole record otherwise supports the ALJ's findings that Petitioner engaged in unacceptable personal conduct and grossly inefficient job performance. Pierce testified, and the ALJ found, that Petitioner was driving Bus 34 with a coworker and student on board; the route sheets showed that Petitioner had completed the route 28 minutes faster than Pierce had; and the witness stated to Pierce that Bus 34 was being driven "at a high rate of speed, between 80 and 85 mph, and at some points going as fast as 90 to 95 mph[.]"[1] The ALJ further found that "for Petitioner to travel the 90 miles between the Warsaw stop and the Supply stop in 1 hour and 17 minutes on the day in question, she would have had to average a speed in excess of 70 mph the entire way." This finding was supported by the ALJ's official notice of the distance between the two stops, pursuant to N.C. Gen. Stat. §§ 150B-30 and 8C-1, Rule 201, which Petitioner does not appeal. Lastly, the ALJ found that "Petitioner's own admissions show that it was a requirement of her job and a known work rule that she was not to drive an ENCSD bus at a speed greater than 55 miles per hour." Because Petitioner does not challenge this finding, it is binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

¶ 23 Petitioner contends that "[a]t no time did the GPS monitor beep or flash on the route the Petitioner drove" on 22 November 2019. While Petitioner testified that the GPS monitor did not flash, Pierce, Handley, and Petitioner herself each testified that the GPS devices were unreliable. Though Settles testified that she did not see the GPS blinking or flashing to indicate that Petitioner was speeding, the ALJ also received evidence that Settles had been looking out the window of the bus and had no view of the speedometer.

¶ 24 Petitioner also attacks the credibility of the reporting witness' opinion that Petitioner reached speeds of 80 to 95 miles per hour, questions the weight the ALJ gave to the route sheets admitted into evidence, and contends that Respondent should have introduced other route sheets recorded on the Friday afternoon route. These arguments are unavailing because, "[l]ike the jury in a jury trial, the ALJ is the sole judge of

1. The ALJ also admitted the audio portion of the recording that the witness sent Pierce as a present sense impression pursuant to N.C. Gen. Stat. § 8C-1, Rule 803.

the credibility of the witnesses and the weight to be given to the evidence as the finder of fact." *N.C. Dep't of State Treasurer v. Riddick*, 274 N.C. App. 183, 852 S.E.2d 376, 382 (2020). Moreover, a reviewing "court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins v. N.C. St. Bd. of Dental Examiners*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004).

IV. Conclusion

¶ 25 Substantial evidence in the whole record supported the ALJ's findings that Petitioner engaged in grossly inefficient job performance and unacceptable personal conduct. The ALJ did not err by affirming Respondent's dismissal of Petitioner.

AFFIRMED.

Judges ARROWOOD and JACKSON concur.

STATE OF NORTH CAROLINA
v.
ALLEN ANTHONY CAMPBELL, DEFENDANT

No. COA20-646

Filed 19 October 2021

1. Appeal and Error—Appellate Rule 2—exceptional circumstances—trial court's comments regarding race and religion

The Court of Appeals invoked Appellate Rule 2 to consider the merits of defendant's argument that the trial court's comments regarding race and religion during jury selection deprived him of a fair trial, where defendant did not object at trial, the issue was not preserved as a matter of law, and the case presented exceptional circumstances justifying the use of Rule 2.

2. Criminal Law—structural error—trial court's comments during jury selection—race and religion

There was structural error in defendant's trial for multiple traffic offenses where, after excusing a potential juror who claimed that his Baptist religion prevented him serving as a juror, the trial court made comments regarding race and religion in an effort to admonish

African American potential jurors regarding their duty to serve as jurors. The trial court's comments could have negatively influenced the jury selection process, including by discouraging other potential jurors from responding honestly to questions regarding their ability to be fair and honest, thereby denying defendant a fair trial.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 2 December 2019 by Judge Lora Christine Cubbage in Superior Court, Guilford County. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Allen Anthony Campbell ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of various traffic offenses. We agree with both Defendant and the State that the trial court's comments during jury selection deprived Defendant of a fair and impartial trial. Defendant is entitled to a new trial.

I. Background

¶ 2 On 22 July 2019, in connection with events occurring on 7 June 2019, Defendant was indicted with driving while license revoked, failure to heed light or siren, speeding, reckless driving to endanger, fictitious altered title or registration card, failure to wear a seat belt, fleeing to elude arrest, and attaining habitual felon status. Defendant's jury trial began on 18 November 2019 in Guilford Country Superior Court. During jury selection, the prosecutor questioned the whole panel of potential jurors:

> Do any of the 12 of you have such strong personal beliefs -- some folks call it "sitting in judgment" -- that they don't feel comfortable sitting and listening to the evidence in this case and rendering a verdict of either "guilty" or "not guilty" in this case? And that could be because of religious reasons or ethical reasons or moral reasons. Anybody have such strong beliefs?

In response, prospective juror Hairston raised his hand. After explaining that the jury's role is not "really judging a defendant" but, instead, "to determine whether the State has met its burden of proof[,]" the prosecutor inquired if juror Hairston would "still feel uncomfortable or . . . would be unable to perform the function of a juror in this case[.]" Juror Hairston said "yes" based on "religion[.]"

¶ 3 When the prosecutor moved to challenge juror Hairston for cause, the trial court interjected:

> THE COURT: Well, hold on. Let me question Mr. Hairston a little bit more. So, Mr. Hairston, you're saying that you don't think because of -- what religion are you?
>
> JUROR HAIRSTON: Non-denominational. A Baptist.
>
> THE COURT: So non-denomina[tional] Baptist, you don't think that you could sit here and listen to the facts of the case and decide whether you think this gentleman over here is "guilty" or "not guilty"?
>
> JUROR HAIRSTON: No, ma'am.
>
> THE COURT: Okay. I'm going -- we're going to excuse him for cause, but let me just say this, and especially to African Americans: Everyday we are in the newspaper stating we don't get fairness in the judicial system. Every single day. But none of us -- most African Americans do not want to serve on a jury. And 90 percent of the time, it's an African American defendant. So we walk off these juries and we leave open the opportunity for -- for juries to exist with no African American sitting on them, to give an African American defendant a fair trial. So we cannot keep complaining if we're going to be part of the problem. Now I grew up Baptist, too. And there's nothing about a Baptist background that says we can't listen to the evidence and decide whether this gentleman, sitting over at this table, was treated the way he was supposed to be treated and was given -- was charged the way he was supposed to be charged. But if your -- your non-denomina[tional] Baptist tells you you can't do that, you are now excused.

The jury was impaneled, and the trial proceeded.

¶ 4 After presentation of the evidence, the trial court dismissed the fictious altered title or registration card charge. On 21 November 2019, the jury returned verdicts finding Defendant not guilty of failure to wear a seat belt, and guilty of the remaining charges. Defendant pleaded guilty to attaining habitual felon status. The trial court arrested the convictions for driving while license revoked and reckless driving, and sentenced Defendant to 86 to 116 months imprisonment. Defendant appeals.

II. Trial Court's Statements

¶ 5 Defendant argues he "was denied a fair trial in an atmosphere of judicial calm before an impartial judge and a jury with free will in violation of his rights." (Capitalization altered.) Specifically, Defendant asserts his "due process rights to a fair trial were violated" because "he was tried by a judge with particular views on religion that intimidated the jurors from exercising their own beliefs" and "[t]he judge also gratuitously interjected race into the trial." We agree.

A. Preservation

¶ 6 **[1]** Defendant acknowledges that he did not object to the trial court's statements during jury selection. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Defendant asserts his argument is preserved as a matter of law because the trial court violated North Carolina General Statute § 15A-1222, which prohibits a trial judge from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2019); *see also State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) ("A defendant's failure to object to alleged expressions of opinion by the trial court in violation [N.C. Gen. Stat. § 15A-1222 and N.C. Gen. Stat. § 15A-1232] does not preclude his raising the issue on appeal."). Alternatively, in the event this Court deems Defendant's argument was not preserved as a matter of law, Defendant asks this Court to invoke Rule 2 "to suspend the Rules and review the claim of the lack of an atmosphere of judicial calm to prevent the manifest injustice of allowing [Defendant] to be convicted in violation of his rights to a trial before an impartial judge and an unprejudiced jury."

¶ 7 Although the trial court's statements could be construed as opinions on the role African Americans play in the justice system or the teachings of a "Baptist background[,]" the opinions did not go to "fact[s] to be decided by the jury." N.C. Gen. Stat. § 15A-1222. As a result, a remaining

vehicle for this Court to review Defendant's unpreserved argument is Appellate Rule 2:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted). Here, noting that "Defendant has sufficiently shown he is entitled to a new trial[,]" the State concedes "that this is one of the narrow circumstances in which it is appropriate for this Court to invoke Rule 2." We agree that this case presents an exceptional circumstance justifying the use of Rule 2. *See id.* As a result, in the exercise of our discretion, we suspend Rule 10(a)(1)'s preservation requirements under Rule 2 and review the merits of Defendant's argument. N.C. R. App. P. 2.

B. Analysis

¶ 8 **[2]** Defendant argues he is entitled to a new trial because the trial court's statements "intimidated the jurors from exercising their beliefs, free will, or judgment throughout the remainder of jury selection and the trial" and "also surprisingly interjected race into this matter."[1] The State concedes that the trial court's statements constitute structural error and Defendant is entitled to a new trial.

> Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal citations and quotation marks omitted). Structural "error[ ] is reversible

1. We note that the same trial judge made similar comments during jury selection in *State v. Farrior*, COA20-513, filed concurrently with this opinion. However, in *Farrior*, because we vacated the defendant's conviction based on insufficient evidence of the offense charged, we did not substantively address the trial court's comments.

per se." *Id.* The United States Supreme Court has identified six instances of structural error; this case implicates an instance of "a biased trial court judge[.]" *State v. Polke*, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006) (citation omitted); *see also State v. Frink*, 158 N.C. App. 581, 587, 582 S.E.2d 617, 620 (2003) ("Structural error may arise by the absence of an impartial judge." (citation omitted)). A biased trial court judge is a structural error requiring a new trial because it is a "well-recognized rule that every person charged with a crime has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Cousin*, 292 N.C. 461, 462, 233 S.E.2d 554, 556 (1977) (citation omitted).

¶ 9 The trial court's open court comments encouraging juror participation were specifically directed at African Americans in the venire. These comments appear to reflect the trial court's desire that Defendant—who is African American—have a fair trial by virtue of a representative jury. But "the probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial." *State v. Bryant*, 189 N.C. 112, 114, 126 S.E. 107, 108 (1925). Our Supreme Court has cautioned that

> [m]any decisions have warned that remarks made before prospective jurors must be engaged in with the greatest of care and that the judge must be careful not to make any statement or suggestion likely to influence the decision of the jurors when called upon later to sit in a given case.
>
> . . . .
>
> ". . . The judge should be the embodiment of even and exact justice. He should *at all times* be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance, which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged."

State v. Carriker, 287 N.C. 530, 533–34, 215 S.E.2d 134, 137–38 (1975) (quoting *Withers v. Lane*, 144 N.C. 184, 56 S.E. 855 (1907)) (emphasis in original).

¶ 10 Further, courts have cautioned that irrelevant references to religion, race, and other immutable characteristics can impede a defendant's right to equal protection and due process. *See Miller v. State of N.C.*, 583 F.2d 701, 707 (4th Cir. 1978) ("One of the animating purposes of the equal protection clause of the fourteenth amendment, and a continuing principle of its jurisprudence, is the eradication of racial considerations from criminal proceedings." (citation omitted)); *see also United States v. Runyon*, 707 F.3d 475, 494 (4th Cir. 2013) ("The Supreme Court has long made clear that statements that are capable of inflaming jurors' racial or ethnic prejudices 'degrade the administration of justice.' Where such references are legally irrelevant, they violate a defendant's rights to due process and equal protection of the laws . . . ." (citation omitted)). Here, the trial court's interjection of race and religion could have negatively influenced the jury selection process. After observing the trial court admonish prospective juror Hairston in an address to the entire venire, other potential jurors—especially African American jurors—would likely be reluctant to respond openly and frankly to questions during jury selection regarding their ability to be fair and neutral, particularly if their concerns arose from their religious beliefs. We hold the trial's statements constituted structural error and award Defendant a new trial.[2]

III. Conclusion

¶ 11 Because the trial court's statements improperly injected race and religion into the voir dire and violated Defendant's right to a trial before an impartial jury, we vacate Defendant's conviction and remand for a new trial.

NEW TRIAL.

Judge TYSON concurs.

Judge DILLON dissents.

DILLON, Judge, dissenting.

¶ 12 Defendant argues that he is entitled to a new trial based on comments made by the trial judge during jury selection ("voir dire") as she

2. Because we award Defendant a new trial, we need not address Defendant's argument that being sentenced as a habitual felon violated his rights to be free of cruel and unusual punishment. However, we note that Defendant's brief acknowledges that "this Court has previously upheld the statutory scheme against an identical challenge and raises this issue in brief to urge the Court to re-examine its prior holdings[.]"

was excusing a potential juror from service. The potential juror, who is African American, stated that he could not sit on a jury based on his Baptist religion. Defendant is also African American. The trial judge, who is also African American, stated that she too was a Baptist and appeared skeptical of the juror's excuse, stating that there was nothing in her faith that prevented her from faithfully serving on a jury, but gave him the benefit of the doubt and excused him. However, as the trial judge was excusing the juror, she directed comments to the remaining African Americans in the jury pool, admonishing them as to their duty to serve and the importance of their willingness to serve to better ensure that African American defendants receive a fair trial.

¶ 13 The majority concludes that the trial judge's comments constituted *structural* error, thus requiring a new trial. I agree with the majority that, though the trial judge may have had good intentions in making her comments, some of her word choice was inappropriate. However, I disagree with the majority that Defendant is entitled to a new trial. I do not believe that the trial judge's comments amounted to *structural* error. In any event, even if her comments did constitute structural error, Defendant failed to preserve any "structural error" or other constitutional argument. And given the low likelihood that the trial judge's comments caused prejudice to Defendant, I would not invoke Appellate Rule 2 to reach the issue. Furthermore, to the extent that the trial judge's comments constituted a non-constitutional error, I do not believe her comments amounted to reversible error. Accordingly, I dissent.

1. Analysis

A. No *Structural* Error

¶ 14 Defendant argues the trial judge's comments during voir dire directed to potential African American jurors constituted *structural* error because they exhibited bias on her part. The State agrees with Defendant. However, I disagree that the comments constituted structural error. While her comments were inartful and some of her word choice was inappropriate, they do not rise to the level of structural error.

¶ 15 Constitutional errors, when preserved, are generally subject to harmless error analysis on appeal. However, our Supreme Court, quoting the United States Supreme Court, has held that certain constitutional errors rise to the level of "structural error" and are "reversible *per se*," without having to engage in any prejudice analysis:

> Structural error is a rare form of constitutional error . . . which [is] so serious that "a criminal trial cannot

> reliably serve its function as a vehicle for determination of guilt or innocence."

State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Indeed, the United States Supreme Court differentiates *structural* error from other constitutional errors as follows:

> [T]he defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

Weaver v. Massachusetts, ___ U.S. ___, ___, 137 S. Ct. 1899, 1907 (2017) (quotation omitted).

¶ 16 Our Supreme Court and the United States Supreme Court have identified those types of constitutional errors which rise to the level of structural error. One type of structural error, which Defendant states is the error in this case, occurs when the trial is presided over by "a biased trial judge." The case oft cited (and referenced by both parties in their appellate briefs) for the proposition that a biased judge constitutes *structural* error is *Tumey v. Ohio*, 273 U.S. 510 (1927). In that case, the Court stated that when the presiding judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case," he (the defendant) is *per se* denied due process. *Id*. at 523. The Court differentiated such conflicts of interest from mere concerns over "matters of [the trial judge's] kinship, personal bias, state policy, [and] remoteness of interest," stating that these lesser concerns are not constitutional concerns, but rather are "matters merely of legislative discretion." *Id*. at 523.

¶ 17 Here, Defendant does not make any claim that the trial judge had any personal interest in his case. Rather, the crux of Defendant's argument is that the trial judge made inappropriate comments during voir dire that may have caused prospective jurors "from exercising their beliefs, free will, or judgment throughout the remainder of jury selection and the trial."

¶ 18 It may be true that a judge's comments that affect the impartiality of the jury may constitute error, even constitutional error. However, such comments do not constitute "structural error." That is, such comments are not *per se* reversible. Rather, there must be an analysis concerning the prejudice caused by the comments; whether it is the defendant's burden to show that the comments were prejudicial, or the State's burden

to show that the comments were not prejudicial, beyond a reasonable doubt. Defendant cites *State v. Carter* for the proposition that the trial court must be careful in her comments to the jury, but even in that case our Supreme Court recognized that inappropriate comments by the judge are not *per se* reversible:

> The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. This is so because a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

State v. Carter, 233 N.C. 581, 583, 65 S.E.2d 9, 10-11 (1951) (cleaned up). In fact, neither Defendant nor the majority cite to any case for the proposition that the comments of a trial judge which might influence the ability of the jury to remain impartial constitutes "structural" error. Just last year, our Supreme Court engaged in a *prejudicial error* analysis where the alleged error, involving the actions of a trial judge during voir dire, may have resulted in a racially biased jury. *State v. Crump*, 376 N.C. 375, 392, 851 S.E.2d 904, 917-18 (2020) (holding that "the trial court's restrictions on defendant's questioning during voir dire [about prospective juror's racial bias] were prejudicial").

B. Waiver

¶ 19 In any event, Defendant waived his right to assert that the trial judge's comments constituted structural or other constitutional error. Our Supreme Court has recognized that "[s]tructural error, no less than other constitutional error, should be preserved at trial." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. The United States Supreme Court also requires structural errors to be preserved for review on appeal. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997).

¶ 20 Here, Defendant had the opportunity to object to the trial judge's comments and ask for a continuance, where a new jury pool would be available, but no objection was made. And Defendant has not articulated

on appeal how manifest injustice would result by our Court refusing to invoke Rule 2 to consider his unpreserved constitutional arguments. There is no showing that the trial judge demonstrated any bias or expressed any bias about Defendant, or his case, or that any juror was biased against Defendant by her comments. Further, I do not perceive the trial judge's comments as a means of coercing prospective jurors to be *dishonest* in their voir dire answers. Rather, she was admonishing just the opposite—for the jurors to be honest about whether their objection to sitting on the jury was truly based on a religious reason.

¶ 21 I note Defendant's contention that his argument concerning the trial judge's comments are otherwise preserved because the comments violated the statutory mandate codified in Section 15A-1222 of our General Statutes. This statute provides that the trial 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). I do not believe, however, that this statute has been implicated, as Defendant does not make any argument that the trial judge's comments had any relation to any question of fact that the jury was to decide in his case. Rather, her comments only concerned jury service and ensuring that African American defendants receive a fair trial.

C. No Reversible Error

¶ 22 A trial judge has broad discretion in addressing potential jurors during voir dire to admonish them to be honest in their answers to questions. Though, I do agree with my colleagues that some of the word choice by the trial judge here was inappropriate.

¶ 23 First, the trial judge should not have directed comments to just the African Americans in the jury pool about the importance of jury service, but she should have directed her comments more generally to the jury pool as a whole.

¶ 24 Second, she should have been more careful in her word choice when she suggested that she was among those who felt that the judicial system is not fair to African American defendants, by stating: "Everyday *we* are in the newspaper stating we don't get fairness in the judicial system. Every single day. But none of *us* – most African Americans do not want to serve on a jury." (Emphasis added.)

¶ 25 Third, she should not have injected race by stating an irrelevant statistic that ninety percent (90%) of defendants are African Americans.

¶ 26 Assuming we were to reach Defendant's arguments concerning the trial judge's inappropriate comments, I do not see how the comments

were prejudicial against Defendant. I do not see any likelihood that someone remained on the jury who abandoned his/her presumption that Defendant was innocent based on anything the trial judge said. The trial judge never made any comment suggesting that Defendant was guilty but rather that Defendant was entitled to jurors who could be fair in assessing the case against him. Also, I do not see any likelihood that her comments caused someone to be seated on the jury who was prejudiced against Defendant, who would have otherwise spoken up about his/her prejudice but for the trial judge's comments.

¶ 27 The trial judge's comments, taken at face value, admonished the African Americans in the jury pool to be honest in advising the attorneys about their ability to be fair and impartial in their service.

II. Conclusion

¶ 28 Though the trial judge may have had good intentions, in my opinion she did cross the line in her word choice during voir dire. I do not believe, however, that her comments constituted structural error. Defendant's arguments, whether based on the constitution or on N.C. Gen. Stat. § 15A-1222, are not preserved; and her comments were not egregiously prejudicial *against* Defendant—if prejudicial against him at all—to warrant invocation of Rule 2 of our Rules of Appellate Procedure.

¶ 29 Accordingly, I conclude Defendant had a fair trial, free from reversible error. This includes the trial court's sentencing of Defendant as a habitual felon. My vote is NO ERROR.

STATE v. HEGGS

[280 N.C. App. 95, 2021-NCCOA-564]

STATE OF NORTH CAROLINA
v.
BARROD HEGGS, DEFENDANT

No. COA20-862

Filed 19 October 2021

Sentencing—aggravating factors—stipulated—supporting evidence —same as evidence of elements of crime

The trial court erred by finding two of three stipulated aggravating factors in sentencing defendant upon his guilty plea for felony death by motor vehicle where the only evidence supporting the two erroneous aggravating factors—that the victim was killed in the collision and that defendant was armed with deadly weapon (a vehicle)—was the same evidence supporting the elements of the crime. Defendant's plea agreement was vacated and remanded for a new disposition.

Appeal by Defendant from judgment entered 14 December 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Aberle & Wall, by A. Brennan Aberle, for the Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Barrod Heggs appeals from a judgment entered upon his guilty plea to the charge of felony death by motor vehicle. Defendant argues the trial court erred by sentencing him in the aggravated range because the evidence supporting three stipulated factors in aggravation was the same as the evidence supporting the elements of felony death by motor vehicle. Upon review, we conclude that the trial court erred in finding two aggravating factors. We vacate Defendant's sentence and plea agreement and remand for a new disposition.

I. Factual and Procedural Background

¶ 2 During the early morning hours on 24 February 2018, Trooper Clay with the North Carolina State Highway Patrol responded to a collision between two vehicles on Interstate 540. The crash "involved a white

Dodge Challenger[,]" operated by Defendant, and a "white sport[] utility vehicle." The driver of the SUV was killed during the collision. When Trooper Clay arrived on scene, Defendant was standing by his vehicle and "admitted to driving." "Trooper Clay noticed a strong odor of alcohol coming from [Defendant's] breath and noticed that [Defendant] displayed red and glassy eyes."

¶ 3 "Trooper Clay had [Defendant] perform some standardized field sobriety tests" and administered "two portable breath tests[,]" both of which indicated that Defendant's blood alcohol content exceeded the legal limit. Defendant was subsequently arrested for driving while impaired. Defendant refused to comply with additional testing, at which point "a search warrant was obtained for [a] blood" sample. A test of that sample measured Defendant's blood alcohol content as 0.13.

¶ 4 "As the North Carolina State Highway Patrol continued [its] investigation, [it] learned from multiple witnesses that . . . [D]efendant was travelling at speeds estimated in excess of 120 miles per hour prior to the crash." "There were 911 calls placed by concerned drivers [who] questioned, . . . due to [Defendant's] speed[,]" "maneuvering" and "weaving in and out of traffic, whether [what they witnessed] was actually a high-speed chase by the State Highway Patrol." "A CDR download, which is effectively the black box of the vehicle, was performed and showed that there was no deceleration by [Defendant] prior to [the crash] and that [Defendant] was going at speeds in excess of 98 miles per hour at the point of impact[.]"

¶ 5 A Wake County grand jury indicted Defendant on one count of felony death by motor vehicle. Defendant pled guilty to driving while impaired and felony death by motor vehicle. Pursuant to a plea agreement with the State, Defendant stipulated to the existence of the following aggravating factors for sentencing purposes: (1) "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person"; (2) Defendant "was armed with a deadly weapon at the time of the crime"; and (3) "[t]he victim of th[e] offense suffered serious injury that is permanent and debilitating." Defendant further stipulated that he was a Record Level I for sentencing purposes. The State agreed not to seek an indictment for second-degree murder as a condition of the plea agreement.

¶ 6 The trial court entered a judgment upon Defendant's plea of guilty to felony death by motor vehicle and arrested judgment on the charge of driving while impaired. The court found the three aggravating factors to which Defendant stipulated, as well as five mitigating factors, and

sentenced Defendant in the aggravated range. Defendant subsequently filed a petition for writ of certiorari with this Court seeking review of the trial court's judgment, which was granted.

II. Analysis

¶ 7 Defendant argues that the trial court erred by sentencing him in the aggravated range because the evidence supporting the three aggravating factors was the same as the evidence supporting the elements of felony death by motor vehicle. We agree that the trial court erred in finding two of the three aggravating factors. Because Defendant stipulated to the existence of these factors in his plea agreement with the State and now seeks to repudiate this part of the agreement, we vacate the trial court's judgment, as well as the plea agreement between the State and Defendant, and remand for a new disposition.

¶ 8 N.C. Gen. Stat. § 15A-1340.16(a1) provides that a "defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury[.]" N.C. Gen. Stat. § 15A-1340.16(a1) (2019). When "aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence" in the aggravated range. *Id.* § 15A-1340.16(b). However, "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" *Id.* § 15A-1340.16(d).

¶ 9 The essential elements of felony death by motor vehicle are that the defendant (1) "unintentionally cause[d] the death of another person"; (2) "was engaged in the offense of impaired driving"; and (3) "[t]he commission of the [impaired driving] offense . . . [was] the proximate cause of the death." *Id.* § 20-141.4(a1) (2019).

¶ 10 In this case, the trial court found the following aggravating factors at sentencing: (1) "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person"; (2) Defendant "was armed with a deadly weapon at the time of the crime"; and (3) "[t]he victim of th[e] offense suffered serious injury that is permanent and debilitating." The only evidence available to support factor (3) is that the victim was killed in the collision caused by Defendant. Because this is also an essential element of felony death by motor vehicle, the trial court erred in finding this aggravating factor. Similarly, the only evidence to support factor (2)—that Defendant "was armed with a deadly weapon at the time of the crime"—is that Defendant was

driving a vehicle when the crime occurred. Because felony death by motor vehicle requires that a defendant be engaged in impaired driving, evidence that Defendant was driving a vehicle cannot also be used to support factor (2).

¶ 11 With respect to factor (1), we conclude that the trial court did not err in finding that "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." There is ample evidence in the Record supporting this factor, none of which was required in order to find Defendant guilty of felony death by motor vehicle. When summarizing the factual basis supporting Defendant's conviction, the prosecutor stated that the North Carolina State Highway Patrol "learned from multiple witnesses that . . . [D]efendant was travelling at speeds estimated in excess of 120 miles per hour prior to the crash." "There were 911 calls placed by concerned drivers [who] questioned, . . . due to [Defendant's] speed[,]" "maneuvering" and "weaving in and out of traffic, whether [what they witnessed] was actually a high-speed chase by the State Highway Patrol." "A CDR download, which is effectively the black box of the vehicle, was performed and showed that there was no deceleration by [Defendant] prior to [the crash] and that [Defendant] was going at speeds in excess of 98 miles per hour at the point of impact[.]"

¶ 12 Evidence of excessive speed and reckless driving is not required in order to prove any of the essential elements of felony death by motor vehicle. In response to the State's summary of the facts, Defendant's counsel stated, "No additions, deletions or corrections to that statement, [y]our Honor. We understand that [this] is what would be introduced if we had chosen to go to trial. There's no correction[] to the way it was read." Accordingly, the trial court did not err in finding that "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person."

III. Remedy

¶ 13 With respect to the appropriate remedy, Defendant requests that we "remand for resentencing . . . or, in the alternative, vacate the plea."

¶ 14 "The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused his discretion. When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right." *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379–80 (1980).

> The presumption of lower court correctness and the wide discretion afforded our trial judges in rendering judgment is of necessity grounded on the theory that a trial judge who has participated in the actual disposition of the case [is] . . . in the best position to determine appropriate punishment for the protection of society and rehabilitation of the defendant.

State v. Harris, 27 N.C. App. 385, 387, 219 S.E.2d 306, 307 (1975) (citation and internal quotation marks omitted).

¶ 15 Our Structured Sentencing Act reflects this presumption by vesting discretion in our trial courts to impose an appropriate sentence. This includes the discretion to deviate from the presumptive term and instead sentence a defendant in the aggravated or mitigated range: "The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a). "If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range[.]" *Id.* § 15A-1340.16(b). This is true regardless of whether the trial judge finds only one factor in aggravation or several. *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985) ("[A] sentencing judge need not justify the weight he or she attaches to any factor. A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa.").

¶ 16 Although the trial court in this case erred in finding two aggravating factors, it correctly found one aggravating factor. Were we to remand this matter for resentencing, the trial court would have the discretion to reimpose the same sentence that it originally deemed appropriate. The factual basis for the plea has not changed. The judge would make his sentencing decision based on the same evidentiary presentation, regardless of whether the additional factors are found or not.

¶ 17 We therefore discern no prejudice to Defendant resulting from the trial court's erroneous finding of the two aggravating factors. Nonetheless, our Supreme Court has held that "in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). We are thus bound by precedent to, at

a minimum, vacate Defendant's sentence. However, because Defendant stipulated to the existence of the aggravating factors in his plea agreement with the State and now seeks to repudiate this part of the agreement, we are further required to vacate the plea agreement and remand for a new disposition rather than remand for a new sentencing hearing. *See State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

¶ 18 In *Rico*, the defendant was charged with first-degree murder. *Id.* at 110, 720 S.E.2d at 802. Pursuant to a plea agreement with the State, the defendant pled guilty to voluntary manslaughter and stipulated to the existence of an aggravating factor for sentencing purposes. *Id.* The trial court accepted the agreement and sentenced the defendant in the aggravated range. *Id.* at 111, 720 S.E.2d at 802. The defendant then appealed to this Court, challenging the aggravating factor as well as his aggravated sentence. *Id.* at 111, 720 S.E.2d at 802. However, because the defendant sought to repudiate the portion of the plea agreement in which he stipulated to the aggravating factor, "the entire plea agreement" was vacated. *Id.* at 122, 720 S.E.2d 809 (Steelman, J., dissenting) ("In the instant case, essential and fundamental terms of the plea agreement were unfulfillable. Defendant has elected to repudiate a portion of his agreement. Defendant cannot repudiate in part without repudiating the whole.").

¶ 19 As in *Rico*, Defendant seeks to repudiate the portion of his agreement with the State in which he stipulated to the existence of aggravating factors while retaining the portions which are more favorable; namely, his plea of guilty to felony death by motor vehicle in exchange for the State's agreement to not seek an indictment on the charge of second-degree murder. "Defendant cannot repudiate in part without repudiating the whole." *Id.*; *see also State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) ("Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge."). We therefore vacate Defendant's plea agreement in its entirety and remand for a new disposition.

IV. Conclusion

¶ 20 For the foregoing reasons, we vacate the judgment entered upon Defendant's conviction and remand for a new disposition.

VACATED AND REMANDED.

Judges TYSON and CARPENTER concur.

STATE v. NEAL

[280 N.C. App. 101, 2021-NCCOA-565]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER NEAL

No. COA20-915

Filed 19 October 2021

1. Appeal and Error—preservation of issues—jury instructions—different objection asserted on appeal—reviewed for plain error

Where defendant asserted a different ground on appeal for the objection he lodged at the trial court for its jury instruction on constructive possession (in a trial for possession of a firearm by a felon and other offenses), he failed to preserve his argument for appeal. However, since he clearly contended the instruction amounted to plain error, he was entitled to plain error review.

2. Criminal Law—jury instructions—constructive possession—possession of firearm by felon—pattern instruction used

In a trial for possession of a firearm by a felon and other offenses, the trial court did not err, much less plainly err, when it instructed the jury on constructive possession during the introductory general instructions or when it instructed the jury on the specific elements of possession of a firearm by a felon. The court followed the pattern jury instructions and gave an accurate statement of the law.

3. Appeal and Error—preservation of issues—jury instructions—no objection—reviewed for plain error

Defendant's challenge to the trial court's jury instruction on attempted first-degree murder did not constitute invited error where, although defendant requested an instruction, the trial court made an alteration before relating it to the jury, but defendant's failure to object to the instruction as given did not preserve the issue for appellate review. However, since he clearly contended the instruction amounted to plain error, he was entitled to plain error review.

4. Criminal Law—jury instructions—attempted first-degree murder—malice could not by inferred from evidence—no plain error

Defendant failed to demonstrate plain error in the trial court's jury instructions on attempted first-degree murder, which included a statement that the jury could infer that defendant acted unlawfully

and with malice if it found that he intentionally inflicted a wound upon the victim with a deadly weapon. Defendant could not show that the instruction had a probable impact on the guilty verdict where, even though there was no evidence that the victim was physically wounded during the shooting that led to the charges and therefore the jury could not have inferred that defendant acted unlawfully and with malice on that basis, the jury was presumed to follow the court's instructions.

5. Constitutional Law—right to speedy appeal—Barker factors—ten extensions of time to produce trial transcript for appeal

A defendant whose appeal from his convictions was delayed by a year because the court reporter requested ten extensions of time to produce the trial transcript failed to demonstrate that his constitutional right to a speedy trial was violated where, pursuant to the factors in *Barker v. Wingo*, 407 U.S. 514 (1972), the delay was due to neutral factors, defendant did not assert his right to a speedy appeal prior to his appellate brief, and, despite asserting additional stress due to being incarcerated during a pandemic, defendant did not otherwise show prejudice from the delay.

Appeal by Defendant from judgments entered 26 June 2019 by Judge David T. Lambeth Jr. in Alamance County Superior Court. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State-Appellee.

Meghan Adelle Jones for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Christopher Neal appeals from judgments entered upon jury verdicts of guilty of discharging a weapon into an occupied moving vehicle, assault with a deadly weapon with intent to kill, attempted first-degree murder, and possession of a firearm by a felon. Defendant argues that the trial court erred in its instructions on constructive possession and attempted first-degree murder, and that his due process rights were violated by a year-long delay in processing his appeal. We discern no error, much less plain error, in the constructive possession instruction; no plain error in the attempted first-degree murder instruction; and no violation of Defendant's due process rights.

I. Factual and Procedural Background

¶ 2 Defendant was indicted for discharging a weapon into a moving vehicle, assault with a deadly weapon with intent to kill, attempted first-degree murder, and possession of a firearm by a felon. The case came on for trial on 10 June 2019.

¶ 3 The evidence at trial tended to show the following: Carliethia Glover, a social worker for Rockingham County Department of Social Services ("DSS"), received a report from Child Protective Services ("CPS") on 12 June 2017 that a premature infant, whose umbilical cord had tested positive for the presence of marijuana, had recently been born at a hospital in Greensboro. The infant is the child of Defendant and Latonya Whetsell. Glover and her colleague Emily Pulliam visited the infant on 13 June 2017 at the hospital. Glover and Pulliam then travelled to Reidsville to the parents' address listed on the CPS report. At the listed address, Glover and Pulliam encountered Wilbert Neal ("Wilbert"), Defendant's father. Wilbert told Glover that Defendant and Whetsell sometimes lived at his home, but were not living there at that time. Wilbert directed them "around the corner" to a mobile home, which he owned and in which he allowed the couple to stay with their children. Unable to locate the mobile home, Glover called the telephone number listed on the CPS report for Whetsell. When Whetsell answered, Glover told Whetsell that Glover would need to see Whetsell's two other children that day.[1] Whetsell was angry and said, "get this phone before I have to cuss her out." Defendant got on the phone and told Glover that she would not be seeing his children. Glover then gave Pulliam the phone. Defendant yelled at Pulliam, "I'm going to see your M[other] F[***ing] punk A[**]."

¶ 4 As Glover and Pulliam continued driving through the neighborhood, Pulliam spotted a man, whom they later determined was Defendant, outside on the phone. Shortly thereafter, Glover and Pulliam noticed a blue BMW SUV following them. The BMW chased them down a highway, into a parking lot, and down a street. Pulliam saw a black male, whom she recognized as the same man who had been outside on the phone, "holding something up towards the car," but could not tell "at that point in time what was being pointed at us." Eventually they lost the BMW in traffic, and Glover stopped to telephone law enforcement.

---

1. Whetsell has three children with Defendant, including two who lived with Whetsell and the premature infant. Whetsell also has three children who were not fathered by Defendant and who had previously been taken into custody by DSS. Whetsell had not been cooperative in the agency's efforts to return them to her.

¶ 5 After the chase had ended, Defendant appeared at DSS and confronted social worker Jan Odum about the agency's involvement with his children. Odum had previously been involved with Whetsell when Odum was the foster care social worker for Whetsell's three oldest children. At trial, Odum characterized Defendant's demeanor that day as "angry," "loud," "menacing," and "threatening." A detective who worked at DSS was able to calm Defendant down, and Melissa Kaneko, Glover's supervisor at DSS, explained DSS's involvement to Defendant. Defendant told DSS that he and Whetsell were no longer a couple and suggested that she had previously made false allegations against him.

¶ 6 According to Whetsell's testimony, her relationship with Defendant had been tumultuous. During one argument, Defendant pistol-whipped her in the head with a nine-millimeter handgun that belonged to her. She received staples in her head as a result. She testified at trial that it was Defendant who had hit her and that she had refused to tell police who had hit her because she did not want him to get into trouble. During another argument, Defendant chased her on a highway in his car and pointed the handgun at her.

¶ 7 After the chasing incident, Whetsell sought a Chapter 50B domestic violence protective order against Defendant. In her 50B complaint, Whetsell detailed the above altercations. Additionally, she took out a warrant for Defendant's arrest for assault by pointing a gun. Whetsell did not pursue the 50B order because she "really didn't want him in trouble," and the assault charge was dismissed when she failed to appear in court.

¶ 8 The same afternoon that Glover and Pulliam had attempted to visit Defendant and Whetsell at the mobile home, Glover and Pulliam returned to DSS and discussed with staff members what to do about Whetsell's two children who remained in her care. Because there had been a previous 50B complaint filed against Defendant, it was decided that Glover needed to speak to Whetsell and see the children that same day, and, if Whetsell confirmed the allegations against Defendant were true, that the children should not remain in the home that night. Accompanied by law enforcement officers, Glover and Pulliam drove a county car to the mobile home.

¶ 9 Glover asked Whetsell about her drug use and any incidents between her and Defendant that might make the home dangerous. Whetsell claimed there had been "some kind of misunderstandings" between Defendant and her, and confirmed that someone did pistol-whip her, but claimed it was not Defendant and that she was just confused. Whetsell testified at trial, however, that the allegations in her 50B complaint about

him were true, but that she had lied to Glover to "protect" Defendant and keep DSS from taking her children.

¶ 10 Glover asked Whetsell if there was a relative or friend with whom the children could stay temporarily. Whetsell replied that her children were not going anywhere. Glover telephoned Kaneko, who asked the DSS attorney to move for temporary custody of the children. Upon this motion, a judge issued an order for nonsecure custody.

¶ 11 While Glover and Pulliam were still at the mobile home, Defendant arrived. Pulliam testified that she recognized Defendant as the same man who had chased her and Glover earlier that day. Defendant cursed and shouted at Glover and the law enforcement officers as Glover put the children into the car. Video from a body camera worn by one of the officers captured Defendant saying while facing Glover, "You might die tonight." Defendant asked Glover where she was taking the children, and Glover replied that she could not disclose that information. Glover drove to the Rockingham County Sheriff's Department to retrieve the non-secure custody order. Defendant and Whetsell also drove to the Sheriff's Department in his BMW. Glover and Pulliam, now accompanied by Sheriff's Deputy Carter, then drove to a foster home agency in Guilford County to drop off the children.

¶ 12 Around 10:30 p.m., Glover and Pulliam returned to DSS to retrieve their personal vehicles. Soon thereafter, Defendant and Whetsell arrived in Defendant's BMW. Deputy Carter told them to leave. After they left, Glover and Pulliam began driving to their respective homes, each with a law enforcement escort. Pulliam made it safely home. The officer escorting Glover home to Burlington followed her to the Rockingham County line, where he turned around.

¶ 13 At some point, Defendant and Whetsell returned to the mobile home and retrieved Whetsell's nine-millimeter loaded handgun. Whetsell put the gun in her purse. Whetsell testified that she assumed Defendant knew she had the handgun in her purse because she usually kept it with her.

¶ 14 Defendant and Whetsell left the mobile home and began driving on Highway 87 toward Burlington, the same direction Glover was driving. Whetsell testified that they were not initially following Glover but were on their way to Raleigh to hire a lawyer. Whetsell recognized Glover's car and directed Defendant, who was driving, to follow Glover. Whetsell testified that Defendant followed Glover because he knew that Whetsell was angry and "wanted to get at" one of the DSS social

workers. As Defendant and Whetsell neared Glover's car, Whetsell took her handgun out of her purse and set it on her lap.

¶ 15 Defendant followed Glover into a parking lot. While Defendant was chasing Glover around the parking lot, Whetsell fired her handgun at Glover, shattering the driver's side rear window of Glover's car. Whetsell testified that when shooting at Glover, she wanted to hit her. Whetsell did not hit Glover, however, and Glover was physically uninjured. Glover called 911 and drove to the Burlington police station. Glover identified Defendant by name to the police as the person who had shot at her.

¶ 16 After the shooting, Defendant dropped Whetsell off in a nearby neighborhood. Whetsell took her purse, with the handgun inside, with her. Whetsell told Defendant to return to Reidsville and switch out his car for hers. Defendant drove to Reidsville where he switched his BMW with a car that Whetsell did not recognize and returned to Burlington to pick up Whetsell. The couple then drove to Reidsville, intending to switch the car with Whetsell's car, but their house was surrounded by law enforcement. They retrieved Defendant's BMW instead. Whetsell testified that Defendant disposed of the handgun "somewhere in Reidsville." Law enforcement never recovered it.

¶ 17 Defendant and Whetsell drove to Myrtle Beach, South Carolina. On or about 15 June, South Carolina law enforcement arrested them and they were brought back to North Carolina.

¶ 18 Defendant testified and maintained throughout trial that he was not in the car when Whetsell shot at Glover. According to Defendant, he was in Reidsville at the time caring for his great aunt. Defendant's cousin Alexis Slade testified that she was with Defendant at their great aunt's house on the night of the shooting and was there with Defendant around 10:00 p.m. when they put their aunt to bed and when she went to bed herself. Defendant's cousin Monique Barnett testified that Whetsell told Barnett she was solely responsible for the shooting.

¶ 19 Whetsell pled guilty to assault with a deadly weapon with intent to kill and discharging a firearm into an occupied moving vehicle, and agreed to testify truthfully against Defendant.[2] In exchange, the State dropped the attempted first-degree murder charge against her. During trial, the State introduced a certified copy of Defendant's federal court records showing felony convictions for distributing cocaine.

---

2. While awaiting trial, Whetsell signed an unsworn statement wherein she claimed she acted alone when she shot at Glover. Whetsell later testified the statement was false.

¶ 20 The jury returned guilty verdicts on all charges.

¶ 21 The trial court entered judgments upon the jury's verdicts, sentencing Defendant to consecutive prison terms of 180 to 228 months for attempted first-degree murder, 73 to 100 months for discharging a weapon into an occupied moving vehicle, 29 to 47 months for assault with a deadly weapon with intent to kill, and 14 to 26 months for possession of a firearm by a felon. Defendant appealed.

II. Discussion

¶ 22 Defendant contends the trial court erred in its instruction on constructive possession, the trial court erred in its instruction on attempted first-degree murder, and that his due process rights were violated by a year-long delay in processing his appeal.

A. Constructive Possession Instruction

¶ 23 Defendant first argues that "[t]he trial court erred or plainly erred by instructing on constructive possession of a firearm by a felon, when that theory was not supported by the evidence." Defendant mischaracterizes the instruction he challenges, and his argument is without merit.

1. Preservation

¶ 24 **[1]** As a threshold matter, we address the State's contention that Defendant argued a different ground for his objection at trial than he does on appeal and thus, the argument he makes on appeal is unpreserved. We agree.

¶ 25 During the charge conference, the court engaged the parties in a lengthy discussion about the constructive possession instruction. Defendant, through standby counsel,[3] objected to the instruction, stating, "For the offense of possession of a firearm by a felon has to be actual physical possession. . . . So we object to a constructive possession charge in toto, since the actual possession is covered in the offense of possession of a firearm by a felon." Defendant now argues that because no firearm was found in this case, the constructive possession instruction was unsupported by the evidence.

¶ 26 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 . . . ." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Defendant's

3. Defendant represented himself at trial with an attorney as standby counsel. With the consent of Defendant, standby counsel acted as counsel during the charge conference.

argument that the constructive possession instruction was unsupported by the evidence, made for the first time on appeal, is not preserved for our review. However, as Defendant "specifically and distinctly" contends the instruction amounted to plain error, we review for plain error. N.C. R. App. P. 10(a)(4).

¶ 27 To show plain error, Defendant must demonstrate that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice— that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

2. Analysis

¶ 28 **[2]** The trial court instructed the jury on constructive possession in conformity with N.C.P.I. Crim–104.41 as follows:

> If you find beyond a reasonable doubt that an article was found in close proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of the article and had the power and intent to control its disposition or use.

¶ 29 Defendant first erroneously argues that this instruction was given "[a]s part of the instruction on possession of a firearm by a felon[.]" It was not. This instruction was given as part of the introductory general instructions–which included, among others, instructions on the presumption of innocence, the definition of reasonable doubt, and the jury members as the sole judges of credibility–preceding specific instructions on the specific charges Defendant faced. Defendant also erroneously argues that "[t]he trial court erred by instructing the jury that Mr. Neal's possession of the firearm could be inferred from its being found in close proximity to the defendant's person." The trial court did not so instruct. The above general instruction on constructive possession does not reference a firearm; it is a correct statement of the law of constructive possession and refers generally to "an article." *See State v. Bradshaw*, 366 N.C. 90, 93-94, 728 S.E.2d 345, 348 (2012) ("It is well established that possession may be actual or constructive. . . . A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." (quotation marks and citations omitted)).

¶ 30 The entirety of the trial court's specific instruction on possession of a firearm by a felon, which appears more than seven transcript pages after the general constructive possession instruction, is as follows:

> The defendant has been charged with possessing, having within defendant's custody, care, control a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> That on December 9, 2009 in United States District Court for the Middle District of North Carolina, the defendant was convicted of the felony of conspiracy to distribute crack cocaine and distribution of crack cocaine that was committed between 1988 up to and including December 19, 1994 in violation of the laws of the United States.
>
> And second, that after December 9, 2009, the defendant possessed, had within defendant's custody, care, control a firearm.

This instruction conforms with N.C.P.I.–Crim 254A.11, possession of a firearm by a felon, is an accurate statement of the law, and is supported by the evidence. *See Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347-48 ("To convict defendant of possession of a firearm by a felon the state must prove that (1) defendant was previously convicted of a felony and (2) subsequently possessed a firearm.") (citing N.C. Gen. Stat. § 14-415.1(a)). The trial court did not err, much less plainly err, in its instruction on constructive possession or its instruction on possession of a firearm by a felon.

¶ 31 Moreover, even if the inclusion of a general constructive possession instruction was given in error, after a review of the entire record, we cannot say that the challenged jury instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant's argument is overruled.

B. Attempted First-Degree Murder Instruction

¶ 32 Defendant next argues that the trial court erred when it instructed the jury on attempted first-degree murder, in conformity with N.C.P.I.–Crim 206.17A, that it could infer that the defendant acted unlawfully and with malice if it found that "the defendant intentionally inflicted a wound upon the victim with a deadly weapon."

1. Preservation

¶ 33 **[3]** The State argues Defendant invited any error and waived appellate review by affirmatively approving of the contents of the instruction he now challenges. Defendant argues he sufficiently objected at trial to the instruction, or, in the alternative, he specifically and distinctly contends on appeal that the instruction amounted to plain error.

¶ 34 With regard to invited error, "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). In *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996), defendant submitted a proposed jury instruction in writing to the trial court. The trial court changed one word in the instruction, and defendant stated that he had no objection to this change. *Id.* at 213, 474 S.E.2d at 383. On appeal, defendant argued that the instruction was erroneous. Explaining that the Supreme Court "has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests[,]" the Court concluded that defendant had invited the error by actively requesting the court to include an instruction that he later claimed prejudiced him. *Id.*

¶ 35 In this case, Defendant did not request the jury instruction he now challenges on appeal. Accordingly, Defendant did not invite error or waive appellate review of this issue. Defendant did, however, fail to properly object to the instruction, raising only a vague question as to its contents during the charge conference. A short time later, the court asked if Defendant was satisfied with the substantive law provided in the instruction; Defendant, through standby counsel, responded, "[I]t's a pattern jury instruction, and I'm sure it's been looked at by people much smarter than me." Defendant did not object further. Accordingly, Defendant has failed to preserve the issue for appellate review. As Defendant "specifically and distinctly" contends the instruction amounted to plain error, we review for plain error. N.C. R. App. P. 10(a)(4).

2. Analysis

¶ 36 **[4]** The trial court included the following instruction on attempted first-degree murder in conformity with N.C.P.I.–Crim 206.17A:

> The defendant has been charged with attempted first degree murder. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

> First, that the defendant intended to commit first degree murder.
>
> And second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime, but which fell short of the completed crime. Mere preparation or mere planning is not enough to constitute such an act, but the act need not be the last act required to complete the crime.
>
> First degree murder is the unlawful killing of a human being with malice, with premeditation[,] and with deliberation. Malice means not only ill will or spite, as it is ordinarily understood, to be sure that is malice. But it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in her death without just cause, excuse or justification.
>
> If the state proves beyond a reasonable doubt that the *defendant intentionally inflicted a wound upon the victim with a deadly weapon*, you may infer first, that the defendant acted unlawfully and second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the defendant acted unlawfully and with malice.

(Emphasis added).

¶ 37 Defendant contends that the instruction was erroneous because no evidence at trial supported that Glover was physically wounded during the shooting. Defendant further argues that the instruction rises to the level of plain error in that it allowed the jury to infer malice, an essential element of first-degree murder, from circumstances not supported by the evidence. Even if the instruction introduced an extraneous matter and was thus given in error, Defendant has failed to show that the error had a probable impact on the jury's finding that the defendant was guilty.

¶ 38 The instruction placed the burden on the State to "prove[] beyond a reasonable doubt" that Defendant intentionally inflicted a wound upon Glover with a deadly weapon before the jury was permitted to infer that

Defendant acted unlawfully and with malice. As Defendant points out, there was no evidence before the jury that Glover was wounded during the shooting. As the State could not meet its burden of proving that Defendant intentionally inflicted a wound upon Glover, the jury was not permitted to infer that Defendant acted unlawfully and with malice. We assume the jury followed the court's instructions. *See State v. White*, 343 N.C. 378, 389, 471 S.E.2d 593, 599 (1996).

¶ 39 After examination of the entire record, we cannot say that challenged jury instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, the trial court's instruction on attempted first-degree murder was not plainly erroneous.

C. Due Process Right to a Speedy Appeal

¶ 40 **[5]** Finally, Defendant argues that he was deprived of his constitutional due process right to a speedy appeal when the court reporter requested ten extensions of time to produce the trial transcript.

1. Standard of Review

¶ 41 We review alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

2. Analysis

¶ 42 For speedy appeal claims, "undue delay in processing an appeal *may* rise to the level of a due process violation." *State v. China*, 150 N.C. App. 469, 473, 564 S.E.2d 64, 68 (2002) (quotation marks and citation omitted). In determining whether a defendant's constitutional due process rights have been violated by a delay in processing an appeal, we consider the following factors as set out in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy appeal; and (4) any prejudice to defendant." *China*, 150 N.C. App. at 473, 564 S.E.2d at 68 (citing *State v. Hammonds*, 141 N.C. App. 152, 158, 541 S.E.2d 166, 172 (2000)). No one factor is dispositive; the factors are related and are considered with other relevant circumstances. *Id.*

a. Length of Delay

¶ 43 "[L]ower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652, n. 1 (1992). The one-year delay in processing Defendant's appeal is thus sufficient to trigger review of

the remaining *Barker* factors. *Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 175.

b. Reason for Delay

¶ 44 "[T]he burden is on the defendant to show the delay resulted from intentional conduct or neglect by the State." *State v. Berryman*, 360 N.C. 209, 220, 624 S.E.2d 350, 358 (2006). Even if none of the delay is attributable to defendant, that does not necessarily make the delay attributable to the State. *See Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 176. In *Hammonds*, as here, defendant argued that he had been denied a timely appeal due to the court reporter's delay in finishing the transcript. *Id.* at 164, 541 S.E.2d at 175. This Court stated, "Although none of the delay is attributable to defendant, in light of the fact that this Court consistently approved the reporter's requests for extensions of time, we are equally unable to find that the delay is attributable to the prosecution." *Id.* at 164, 541 S.E.2d at 176. As in *Hammonds*, the delay in this case was due to neutral factors, and Defendant failed to carry his burden to show delay due to neglect or willfulness of the State. *See id.* at 161, 541 S.E.2d at 174. Accordingly, the court reporter's delay in the instant case does not weigh in Defendant's favor with respect to the second *Barker* factor.

c. Defendant's Assertion of the Right

A defendant's assertion of his speedy appeal right "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 162, 541 S.E.2d at 174 (quoting *Barker*, 407 U.S. at 531-32). Conversely, a defendant's failure to assert a violation of his due process rights will not foreclose his claim, but does weigh against him. *Id.* (citing *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997)). Nothing in the record before us indicates that Defendant asserted his right to a speedy appeal prior to his brief on appeal. Defendant states in his brief that he "has frequently communicated with undersigned counsel and has repeatedly expressed his desire that his appeal be pursued." However, his failure to formally and affirmatively assert his speedy appeal right weighs against his contention that he has been unconstitutionally denied a speedy appeal. *See State v. Webster*, 337 N.C. 674, 680, 447 S.E.2d 349, 352 (1994).

d. Prejudice to Defendant

¶ 45 Finally, we consider Defendant's allegations of prejudice in light of the interests protected by the right to a speedy appeal: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be

impaired." *China*, 150 N.C. App. at 475, 564 S.E.2d at 69 (citation omitted). "Courts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor." *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981) (citations omitted).

¶ 46 Concerning the first two interests, Defendant asserts that his incarceration during the Covid-19 pandemic was "uniquely stressful and oppressive." Concerning the third interest, Defendant argues that the delay diminished his memory of the events and hindered his ability to correct mistakes in the transcript, thereby prejudicing his appeal.

¶ 47 Defendant's "[g]eneral allegations of faded memory are not sufficient to show prejudice resulting from delay[.]" *State v. Heath*, 77 N.C. App. 264, 269, 335 S.E.2d 350, 353 (1985), *rev'd on other grounds*, 316 N.C. 337, 341 S.E.2d 565 (1986). Defendant has failed to show that evidence lost by delay was significant and would have been beneficial. *See State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990) ("[T]he test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to delay[.]"). Further, "the transcript eventually prepared and made available to the parties was adequate to allow full development of appeal issues." *Hammonds*, 141 N.C. App. at 165, 541 S.E.2d at 176. Acknowledging Defendant's allegation of stress caused by incarceration during the pandemic, Defendant has failed to show prejudice resulting from the delay.

¶ 48 After balancing the four factors set out above, we hold that the delay in processing Defendant's appeal did not rise to the level of a due process violation.

III. Conclusion

¶ 49 The trial court did not err or plainly err in its instruction on constructive possession, and did not plainly err in its instruction on attempted first-degree murder. Further, Defendant's Constitutional due process rights were not violated by the court reporter's delay in producing the trial transcript.

NO ERROR; NO PLAIN ERROR.

Chief Judge STROUD and Judge DIETZ concur.

STATE v. SANDER

[280 N.C. App. 115, 2021-NCCOA-566]

STATE OF NORTH CAROLINA
v.
JON FREDERICK SANDER, DEFENDANT

No. COA20-475

Filed 19 October 2021

1. Constitutional Law—due process—competency to stand trial —sua sponte competency hearing

Due process did not require the trial court to conduct a sua sponte competency hearing in defendant's trial for first-degree murder where defendant had already undergone two pre-trial competency evaluations that found him competent to stand trial and his erratic actions at trial were all either: the same types of conduct that had already been considered in the previous competency evaluations, merely indicative of an unwillingness to work with his attorneys, suggestive of performance exaggeration, or demonstrative of an understanding of the proceedings against him.

2. Constitutional Law—effective assistance of counsel—claim prematurely asserted on direct appeal—dismissal without prejudice

Defendant's argument that he received ineffective assistance of counsel during his first-degree murder trial was dismissed without prejudice to his ability to file a motion for appropriate relief in the trial court, where the record on appeal did not clearly disclose an impasse between defendant and his trial counsel.

Appeal by Defendant from judgments entered 15 April 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Jon Frederick Sander ("Defendant") appeals from several judgments imposing consecutive life sentences for three counts of

first-degree murder. On appeal, Defendant contends that the trial court erred in failing to *sua sponte*: (1) order a third competency evaluation for Defendant; and (2) declare an impasse between Defendant and his trial counsel over jury selection disagreements. After careful review, we hold Defendant has failed to demonstrate error under his first argument. We dismiss Defendant's second argument, without prejudice to his filing a motion for appropriate relief in the trial court, because the record below does not definitively establish the impasse alleged.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below tends to show the following:

1. Defendant's History of Mental Illness

¶ 3 Defendant has a long history of mental illness. He was treated in 2008 in Pennsylvania for anxiety, depression, and insomnia. According to his family and longtime girlfriend, Defendant exhibited aspects of paranoia, including building safe rooms wherever he lived, changing the locks whenever he moved into a new home, and developing "escape plans" should he and his family come under some kind of imminent threat.

¶ 4 In 2011, Defendant was involuntarily committed in Pennsylvania for suicidal thoughts and agitation stemming from a dispute with an ex-employee. Medical records from the commitment proceeding indicated symptoms of delusions/paranoia. They also included notes that he was a "semi-reliable historian" and admitted to "acting delusional and overplay[ing] the issues" related to the ex-employee. After converting the commitment proceeding from involuntary to voluntary, Defendant was diagnosed with bipolar disorder, treated with medication, and discharged with signs of significant improvement.

¶ 5 In 2013, Defendant voluntarily sought psychiatric care again and was diagnosed by a psychologist with ADHD, bipolar I disorder, generalized anxiety, and panic disorder.

¶ 6 In 2014, Defendant moved to North Carolina and began living next door to his business partner and close friend, Sandy Mazzella ("Sandy"). In 2014, Defendant saw his general practitioner who noted that he had stopped taking his medications for bipolar disorder because "it does not make him feel like himself." During a later visit to that same doctor, Defendant reported that "his bipolar disorder has been stable," his business with Sandy was thriving, and that he "knows that if he gets manic he needs to go to the hospital."

2. Facts Underlying Defendant's Murder Convictions

¶ 7 Defendant's business and social relationship with the Mazzella family began deteriorating the following year. Sandy accused Defendant of embezzling money from their business, leading Sandy and his father, Sal Mazzella ("Sal"), to try to expel Defendant from the enterprise. Sandy and Sal also took a restraining order out against Defendant following alleged threats against them.

¶ 8 On 19 March 2016, Sandy's fourteen-year-old daughter told her mother, Stephanie Mazzella ("Stephanie"), that Defendant had touched her inappropriately, leading the Mazzellas to file a police report against Defendant. A few days later, Defendant went to the Mazzella's home with a gun and shot Sandy, Stephanie, and Sal's wife, Elaine. All three victims died. Following a standoff with police at his home, Defendant was arrested for the murders.

3. Defendant's First Competency Evaluation

¶ 9 Defendant was taken into custody and placed under constant psychiatric observation in a hospital mental health unit. Per a forensic psychiatric evaluator, his observation records generally disclosed "no signs of mental health symptoms," with a few notable exceptions. Beginning on 17 May 2016, Defendant reported hearing "voices in his subconscious mind," though similar reports were determined not to be hallucinations but instead instances of Defendant recalling and replaying past events in his head. In July of 2016, he reported "auditory hallucinations of 'screaming.' " In February of 2017, he claimed evil spirits were bothering him; these reports continued over the course of that month and ceased on 24 February 2017. Some of these reports were noted by Defendant's treatment staff to be "malingering and manipulative." From May 2017 to August 2018, Defendant displayed no concerning symptoms beyond depression.

¶ 10 Defendant's counsel eventually moved for a competency determination. That motion was granted and, following two interviews and a forensic psychiatric evaluation, on 14 November 2018 Defendant was determined competent to proceed. The evaluator based this opinion on her observations that "Mr. Sander amply demonstrated that the beliefs, whether attributed to sincerity or impression management, did not interfere in his capacity-related abilities."

4. Defendant's Second Competency Evaluation

¶ 11 Following his evaluation and return to Wake County Detention Center, Defendant grew increasingly antagonistic toward his lead trial

counsel, accusing him of conspiring with Sal to frame Defendant. He informed his counsel that he had met with an imaginary correction officer about his case. Defendant said the correction officer stated the State's photographic evidence was doctored and assured Defendant he would ultimately be acquitted on that basis. Defendant also told his attorneys the correction officer was to appear in court on the first day of trial alongside three out-of-town lawyers to file a "class action" against those involved in the conspiracy to convict him of murder.

¶ 12 Defendant's counsel moved for a second evaluation based on the above statements, which the trial court granted on 8 January 2019. Defendant repeated the statements he had made to his trial counsel to the forensic interviewer, telling her that the correction officer would make a public show of proving Defendant's innocence and take down the "legacy" of his lead counsel for framing Defendant. Defendant also said that he believed he would not be found guilty based on his character and that he would accept and work with his attorneys if his predictions regarding the correction officer did not come true. The examiner concluded that Defendant "continues to make choices regarding his [re]presentation, which may very well be considered self-sabotaging and very poor judgment . . . . These choices are not, however, the result of a psychotic disorder or other loss of capacity for rational thought." The trial court subsequently ruled Defendant was competent to proceed based on the expert conclusions reached in the first and second competency evaluations.

5. Subsequent Pre-Trial Motions

¶ 13 In advance of trial, Defendant's counsel moved for a third competency hearing, though they conceded that they had "no further evidence to offer the court . . . other than our original [two] applications [for competency determinations]." The trial court denied the motion. Defendant's counsel then moved to have Defendant restrained in handcuffs and ankle restraints based on prior threats to his attorneys and a fear that he may try to steal and use a bailiff's firearm. The trial court denied that motion but ordered all courtroom deputies to unload their firearms.

6. Jury Selection Interruptions

¶ 14 All three murder charges were joined for trial and jury selection began on 25 February 2019. Defendant was disruptive at various points throughout. On the third day of jury selection, the trial court observed that Defendant "began sitting and acting in an aggressive manner" toward prospective jurors. In response to Defendant's conduct, the trial court excused the jury pool and ordered Defendant be placed in ankle

restraints, all while Defendant argued with the judge and threatened court personnel. Defendant continued his outburst and threw a notepad across the room, leading the trial court to order wrist restraints.

¶ 15 Later that same day, as Defendant's counsel was questioning a potential juror, Defendant expressed that the State's evidence was not credible. The trial court requested Defendant be quiet and Defendant momentarily complied. A few moments later, after a potential juror stated any extreme punishment had to match the crime, Defendant again interjected with a question designed to show that the State's evidence and theory of the crime was unbelievable. The prospective juror was excused from the courtroom, Defendant argued with the judge, asserted his innocence on the record, and ceased speaking. The prospective juror was returned to the courtroom and Defendant remained quiet for the remainder of the day.

¶ 16 Defendant's outbursts continued on the following day. During examination of one potential juror, Defendant interjected to correct a statement by the prosecutor that the Mazzellas owned their home; moments later, Defendant claimed in front of the prospective juror that the photographs of the crime scene were "staged." On both occasions, Defendant was gently admonished by the court before apologizing and ceasing his interruptions. A few questions later, Defendant engaged in a more prolonged outburst, claiming that one of the State's key witnesses would not be testifying because she was too afraid. He also laughed at his lead defense counsel, and said "your legacy, ha, ha, ha, ha, ha. . . . [Y]our legacy is over." Defendant then threatened others inside the courtroom and was removed ahead of the lunch recess. Before calling the recess, the trial court noted on the record that Defendant "almost seems that he is inviting [further restraints], but I don't know that I'm going to accept his invitation."

¶ 17 Defendant was silent over the next several days of jury selection. On the eighth day, however, Defendant told the trial judge at the outset of proceedings that he believed his counsel had violated their fiduciary duties in sending him a letter requesting guidance as to whether he planned to testify in his own defense. Defendant's concern stemmed from his counsel's understanding that Defendant was claiming the victims were already dead, when Defendant claimed he was asserting: (1) he shot and *wounded* the victims; and (2) Sal then executed the victims. Defendant further expressed that he did not trust his lead counsel, but that he did trust another of his attorneys. The trial court denied Defendant's motion to dismiss his counsel on the basis that they had not violated their duties in seeking guidance and input from him. Later during jury

selection, Defendant's counsel asked the court to extend the deadlines for the defense's mitigation experts' opinions so that they could consider Defendant's actions during jury selection and prior to his testifying at trial. The trial court agreed.

¶ 18 As his counsel predicted, Defendant was not finished interrupting *voir dire*. At one point, Defendant asked to speak to the court. After being told to discuss the matter with his counsel and taking a moment to talk with his attorneys, Defendant withdrew the request. Next, as his counsel was questioning another prospective juror, Defendant interjected to question whether it was likely a person would "sexually molest[] a 14-year-old-girl at . . . [a] Super Bowl party at my house with everybody," suggesting that no person would do such a thing in the presence of so many witnesses. Defendant then claimed that the minor had sexually propositioned him the night before, and it would not have made sense for him to decline that advance in private and then pursue it in the presence of others. The prospective juror was excused from the courtroom during this outburst, as was Defendant after threatening others in the courtroom. When Defendant returned, the trial court ordered he be placed in a restraining chair "for control of the courtroom, safety of his counsel and safety of others in the courtroom." Defendant later informed the court, "that will be my last outburst on the Super Bowl thing," prompting the trial court to release him from the restraining chair.

¶ 19 Defendant later objected to the prosecutor's statement to a potential juror that "evidence" of child molestation may be introduced during the trial; Defendant interjected to say that it was actually an "allegation" of molestation before sarcastically denigrating his counsel. That juror was excused from the courtroom, and Defendant lobbed a non-sequitur at the State, challenging the prosecutor's understanding of controlled substance laws.

¶ 20 Defendant was quiet throughout the remainder of jury selection.

7. Defendant's Conduct During the Guilt/Innocence Phase

¶ 21 Prior to opening statements, Defendant's counsel informed the court that they were unsure as to whether to present an opening statement because Defendant had given them no direction as to what witnesses to call, what evidence to present, and whether Defendant was going to testify. The trial court explained to Defendant that he had placed counsel in a difficult position and what consequences could follow, leading Defendant to state that he understood the situation and was "going to let [counsel] handle [his defense]." Following a recess so that Defendant

could discuss the matter with his counsel, the State and Defendant's counsel both gave opening statements.

¶ 22 Defendant's counsel's opening stressed that the Mazzellas were putting economic pressures on Defendant in their attempts to divest him from the business and had taken legal action against Defendant through applications for protective orders. Defendant's counsel closed by telling the jury Defendant "denies that he killed those three people in that house. He denies that he committed first-degree murder in that house. And you'll hear his testimony as to what occurred in the house."

¶ 23 Defendant's next interjection came during Sal's testimony. Sal, who was in the Mazzella home at the time of the shooting, testified that he was standing in the kitchen when he heard gunshots; he then told everybody in his family to take cover and went into the dining room to find a weapon. When he returned, he saw Defendant shoot his wife after entering the house through the laundry room. Sandy then told Sal to run, so he ran into the woods near the house. Defendant interrupted this testimony, expressing that Sal was not credible. Defendant was removed from the courtroom and the jury was instructed to disregard the outburst and the fact that Defendant was in wrist and ankle restraints.

¶ 24 Defendant was quiet during the remainder of the State's case-in-chief. After the State rested, Defendant told the trial court that he did not wish to testify because "[t]he truth will come out." Defendant's wife then testified in his defense, as did a digital forensic examiner. After Defendant was found guilty on all three counts of first-degree murder, he told the court to "[p]ut me to death, that's what's happening anyway. I was framed. . . . That's the way it is. And justice will be served."

8. Sentencing Phase

¶ 25 Defendant introduced testimony from several mitigation experts in the sentencing phase of the hearing. His first expert acknowledged Defendant had a history of malingering, but testified she was ultimately unable to confirm he was exaggerating symptoms. His second expert was less circumspect, testifying that while Defendant was bipolar, he was also falsely magnifying his symptoms. Defendant's third expert, a prison warden who had reviewed Defendant's "demeanor and behavior during judicial proceedings," testified that Defendant's conduct in the courtroom was "disrespectful, threatening and created unwarranted discord," and that it was "highly unusual" for Defendant to have a completely clean disciplinary record over the three years he spent incarcerated pending trial.

¶ 26 The jury unanimously recommended a punishment of life imprisonment without parole, and on 15 April 2019 the trial court entered three judgments to that effect. The trial court adjourned at the conclusion of sentencing, but immediately resumed proceedings seconds later. Once back on the record, the trial court stated that "I'm going to note the defendant's appeal and I'm going to appoint the appellate defender as his counsel." Once Defendant's appeal was noted on the record, the trial court adjourned *sine die*.

¶ 27 Defendant's counsel filed a written notice of appeal later that day; the notice, however, included a file number for only one of Defendant's convictions and incorrectly identified the Supreme Court of North Carolina as the court to which the appeal was taken. Defendant's appellate counsel later filed a petition for writ of certiorari to review the judgments omitted from the written notice in the event Defendant's trial counsel failed to adequately perfect appeals from those convictions.

II. ANALYSIS

¶ 28 Defendant contends the trial court erred in failing to: (1) *sua sponte* order a competency hearing based on Defendant's conduct during jury selection and trial; and (2) declare an impasse over Defendant's disagreement with counsel over jury strikes. We first address Defendant's notices of appeal and his petition for writ of certiorari before proceeding to the merits of his appeal.

1. Appellate Jurisdiction

¶ 29 Defendant seeks a writ of certiorari to review the judgments below in the event the notices of appeal in the record failed to comply with Rule 4 of the North Carolina Rules of Appellate Procedure. The State acknowledges that the trial court noted an appeal by Defendant at the conclusion of the sentencing hearing and further concedes that a writ of certiorari is appropriately within our discretion under the circumstances presented. Assuming *arguendo* that the Defendant has failed to perfect his appeal pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, we grant Defendant's petition in our discretion to review all three of his convictions.[1]

---

1. Neither Defendant nor the State addresses the defect in the written notice of appeal filed by trial counsel identifying the Supreme Court, rather than this Court, as the court to which Defendant's appeal was taken. *See* N.C. R. App. P. 4(a)(2), (b), & (d) (2021) (providing that written notices of appeal must designate the Court of Appeals as the court to which appeal is taken in criminal cases where the death penalty has not been imposed). This oversight extends to Defendant's petition for writ of certiorari, which explicitly requests certiorari review of only the two file numbers not included in the defective written

2. Defendant's Competency

¶ 30 **[1]** Defendant asserts that his constitutional right to due process was violated by the trial court's failure to *sua sponte* conduct a competency hearing based on his erratic conduct in court. *See, e.g.*, *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 176 (2020) (recognizing a criminal defendant's constitutional due process right to a *sua sponte* competency hearing). A defendant "is competent to stand trial if 'he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.' " *Id.* (quoting *Ryan v. Gonzales*, 568 U.S. 57, 66, 184 L. Ed. 2d 528, 539 (2013)). The duty to conduct a *sua sponte* competency hearing is triggered when there is "sufficient doubt of [a defendant's] competence to stand trial," *Drope v. Missouri*, 420 U.S. 162, 180, 43 L. Ed. 2d 103, 118 (1975), based upon "substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977).

¶ 31 There is no bright-line rule establishing when a *sua sponte* competency hearing is required, as "whether substantial evidence of a defendant's lack of capacity exists . . . requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case . . . [and a] consideration of all the evidence in the record when viewed in its totality." *Sides*, 376 N.C. at 466, 852 S.E.2d at 181-82. Circumstances pertinent to this analysis include "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope*, 420 U.S. at 180, 43 L. Ed. 2d at 118. Severe mental illness, while relevant, is not dispositive. *See Indiana v. Edwards*, 554 U.S. 164, 178, 171 L. Ed. 2d 345, 357 (2008) (noting a defendant may suffer from severe mental illness and still be competent to stand trial); *cf. State v. Chukwu*, 230 N.C. App. 553, 562, 749 S.E.2d 910, 917 ("A defendant need not 'be at the highest stage of mental alertness to be competent to be tried.' " (quoting *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989)). Other relevant factors include, but are not limited to, whether the defendant's actions are: (1) a continuation of previously evaluated symptoms, *State v. Coley*, 193 N.C. App. 458, 461, 668 S.E.2d 46, 49 (2008); (2) indicative of malingering, *Chukwu*, 230 N.C. App. at 563, 749 S.E.2d at 917; (3) the result of an unwillingness to work with attorneys rather

---

notice of appeal. However, because neither party contests certiorari review of these judgments, the State has not sought to dismiss Defendant's appeal, all three first-degree murder charges were tried jointly, and Defendant's petition further requests that this Court "grant any other relief that it deems proper," in our discretion we allow Defendant's petition to review all three convictions.

than an inability to do so, *id.*; and (4) demonstrative of an understanding of the proceedings, *State v. Badgett*, 361 N.C. 234, 260, 644 S.E.2d 206, 221 (2007).

¶ 32 Defendant points to the following evidence as sufficient to raise a doubt as to his competency: (1) Defendant had a documented history of mental illness; (2) Defendant was not engaging with his attorneys and spoke of "spirits" during pre-trial preparations; (3) Defendant threatened his attorneys, requiring the trial court to shackle him; and (4) Defendant irrationally failed to contribute to his defense while facing potential capital punishment. We hold that these assertions do not constitute substantial evidence under the totality of the circumstances drawn from the complete record.

¶ 33 Defendant underwent two competency evaluations. Both determined that he was competent to stand trial notwithstanding his mental health diagnoses. Those prior diagnoses—already addressed in earlier competency evaluations—do not suggest incapacity at trial warranting a *sua sponte* competency hearing. S*tate v. Allen*, 377 N.C. 169, 2021-NCSC-38, ¶ 29 ("[T]he fact that a defendant has received mental health treatment in the past . . . does not, without more, suffice to require the trial court to undertake an inquiry into the defendant's competence on the trial court's own motion."); *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51 (holding no *sua sponte* competency hearing was required because the irrational behavior at issue was addressed in a prior evaluation deeming the defendant competent).

¶ 34 Defendant's lack of engagement with his attorneys, his threats towards them, and his belief that his attorneys were conspiring with Sal to frame him likewise do not suggest a lack of competency in light of previous evaluations. In fact, the second competency evaluation was conducted to evaluate these exact issues. The forensic evaluator nonetheless deemed Defendant competent following that examination, stating Defendant:

> has expressed an unwillingness to work cooperatively with his lawyer . . . . This evaluation does not find, though, that [Defendant] lacks *capacity* or *ability* to work with his lawyer in a reasonable and rational manner, should he choose to do so. . . . [Defendant] continues to make [poor] choices regarding his [rep] resentation . . . . These choices are not, however, the result of a psychotic disorder or other loss of capacity for rational thought.

In other words, Defendant's refusal to work with his counsel at trial, his belief he was being framed by them, and his aggression in the courtroom was not new conduct. Instead, these behaviors were the subject of a previous evaluation that determined him competent. As such, these facts do not suggest a change in competency warranting a *sua sponte* hearing under our caselaw. *See Chukwu*, 230 N.C. App. at 563, 749 S.E.2d at 917-18 (holding no *sua sponte* hearing required where the pre-trial competency evaluation deemed the defendant competent despite the defendant's belief that his attorney was working against him); *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51.

¶ 35 Defendant relies heavily on *State v. Whitted*, 209 N.C. App. 522, 705 S.E.2d 787 (2011), to argue that a *sua sponte* hearing was required. In that case, the defendant had not undergone a competency evaluation prior to trial. *See generally id.* On the third day of trial, the defendant refused to participate, stating that she would rely on her faith instead. *Id.* at 528, 705 S.E.2d at 791. The defendant was then "brought forcibly into court, handcuffed to a rolling chair after having been tasered, [and began] chant[ing] loudly and s[inging] prayers and religious imprecations." *Id.* at 528, 705 S.E.2d at 791-92. The defendant also confessed her guilt, asserted she did not care about a life sentence, and claimed her attorney was working for the State. *Id.* On appeal, we held that the trial court erred in failing to *sua sponte* order a competency evaluation based on the defendant's in-court conduct. *Id.*

¶ 36 *Whitted* is materially distinguishable. Most critically, in this case Defendant underwent two competency evaluations that focused on the same conduct that later arose at trial. So while Defendant had previously claimed that he spoke to spirits and believed his counsel was trying to frame him, both of those assertions—in a marked departure from *Whitted*—had already been deemed not indicative of incompetency at the time of trial. Further, unlike in *Whitted*, Defendant's outbursts showed an intention to challenge the State's case against him based on a cognizable—however strange—theory that Defendant only wounded the victims and Sal was ultimately responsible for killing them. These contentions by Defendant were considered in the prior evaluations deeming him competent, and thus did not trigger a requirement to conduct a new competency hearing *sua sponte*. *See Chukwu*, 230 N.C. App. at 564-65, 749 S.E.2d at 918 (holding the defendant's consistent assertion that he was a Nigerian diplomat was not indicative of incompetency requiring *sua sponte* evaluation when a prior evaluation considered this assertion and nonetheless determined the defendant was competent).

¶ 37 Given that Defendant's conduct at trial was largely the same as that examined in the prior competency evaluations finding him competent,[2] his disruptive conduct does not suggest an inability to stand trial. *Id.*; *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51. The remaining circumstances in the record likewise do not suffice to demonstrate potential incompetency. Defendant's own expert acknowledged Defendant's history of malingering and exaggeration of symptoms for show, an observation echoed by the trial court's own impressions of Defendant. *See Chukwu*, 230 N.C. App. at 563, 749 S.E.2d at 917 (malingering weighed against suggestion of incompetency). Defendant's conduct in the courtroom also stands in contrast to his out-of-court behavior, further suggesting his actions took on a performative aspect. *See id.* at 567, 749 S.E.2d at 920 (noting the contrast between in-court and out-of-court behavior suggested the defendant was competent). Lastly, Defendant's outbursts, though combative, inappropriate, and at times violent, do show an intent to deny the charges and an implicit understanding of the State's theory of the case and the probative value of the evidence arrayed against him. For example, Defendant interrupted jury selection on several occasions to assert his innocence or question—however untimely or unconvincingly—the believability of some of the State's evidence, demonstrating an understanding of proof, probative value, credibility, reliability, and other concepts important to his defense. The nature of these interjections militates against a determination that substantial evidence warranted a third *sua sponte* competency determination. *See Badgett*, 361 N.C. at 260, 644 S.E.2d at 221 (holding no substantial evidence of potential incompetency in part because the defendant "conferred with [his counsel] on issues of law applicable to his case" and "demonstrated a strong understanding of the proceedings against him").

¶ 38 In sum, Defendant's conduct at trial did not amount to substantial evidence requiring the trial court to *sua sponte* conduct a competency hearing in the face of two prior evaluations concluding he was competent. His actions were all either: (1) the subject of a prior evaluation deeming him competent to stand trial; (2) indicative of an unwillingness—rather

---

2. Defendant's assertion in his reply brief that his trial conduct was new and markedly different is simply not borne out by the record. All of Defendant's outbursts and threats to others related to: (1) his belief his counsel was conspiring with Sal to frame him; (2) his belief that Sal was the actual murderer; (3) his claim that photographic evidence of the crime scene had been doctored; and (4) his belief that the conspiracy against him would be revealed, he would be acquitted, and his counsel's "legacy" would be destroyed. These were all addressed in the second competency evaluation deeming Defendant competent to undergo trial.

than inability—to work with counsel; (3) suggestive of malingering and performative exaggeration; or (4) demonstrative of an understanding of the evidence, charges, and proceeding against him. We therefore hold, under the totality of the circumstances, that Defendant has not shown error in this regard.

3. Alleged Impasse and Ineffective Assistance of Counsel

¶ 39 **[2]** In his final argument, Defendant claims he reached an impasse with trial counsel over the use of jury strikes and was thus denied effective assistance of counsel. Defendant cites to the following exchange in the record for support:

> MR. SANDER: I just want to let you know that I don't think my team here is going to be picking jurors. We went through a bunch of them yesterday that were great. I just want to let you know that's my feeling. We had 22 pretty good people. We'll see what happens today, I guess.
>
> THE COURT: All right. If you want to consult with your attorneys about the selection—I know I've seen them—when they find someone acceptable, they consult with you, but if you would like to consult with them more, you're more than welcome.
>
> MR. SANDER: Yeah, I talked to [defense counsel] . . . yesterday. He asked me about a few of them that I said were good and they were dismissed.

¶ 40 Defendant's discussion with the trial court does not definitively reveal an impasse, as it could conceivably suggest an intention of Defendant to continue to work with his attorneys during jury selection despite his apparent disagreement with some of their strikes. We note Defendant did not raise the issue again in jury selection, during trial, or at sentencing, further suggesting no unresolvable impasse arose. Our Supreme Court has held that, where the record does not clearly disclose an impasse between a defendant and his trial counsel, the appropriate disposition is to dismiss the appeal without prejudice to filing a motion for appropriate relief with the trial court. *State v. Floyd*, 369 N.C. 329, 341, 794 S.E.2d 460, 468 (2016). Consistent with *Floyd*, we dismiss this portion of Defendant's appeal without prejudice to his right to file such a motion with the trial court on this ground.

III. CONCLUSION

¶ 41 For the foregoing reasons, we hold Defendant has not shown error in the trial court's failure to conduct a *sua sponte* competency hearing based on Defendant's conduct at trial. We dismiss his remaining argument without prejudice to raising that issue by a motion for appropriate relief.

PETITION FOR WRIT OF CERTIORARI GRANTED; NO ERROR IN PART; DISMISSED IN PART.

Judges WOOD and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 OCTOBER 2021)

LOWREY v. CHOICE HOTELS INT'L, INC. 2021-NCCOA-438 No. 20-782	Durham (19CVS3400)	VACATED AND REMANDED WITH INSTRUCTIONS
IN RE A.G. 2021-NCCOA-567 No. 21-96	Mecklenburg (19JA308)	Affirmed
IN RE A.T. 2021-NCCOA-568 No. 21-216	Bladen (20JA7)	Vacated and Remanded
IN RE V.W. 2021-NCCOA-569 No. 21-174	Mecklenburg (19JA287)	Affirmed
IN RE X.D.P-S. 2021-NCCOA-570 No. 21-109	Yadkin (18JA66)	Vacated and Remanded
JACOBS v. DUDLEY 2021-NCCOA-571 No. 21-120	Mecklenburg (19CVD12030)	Vacated and Remanded
McKINNEY v. ESHLEMAN 2021-NCCOA-572 No. 20-825	Forsyth (18CVS5258)	Affirmed
PROVIDENT LIFE & ACCIDENT INS. CO. v. BROWN 2021-NCCOA-573 No. 20-897	Mecklenburg (19CVS20436)	Affirmed
STATE v. AMERSON 2021-NCCOA-574 No. 20-836	Lee (14CRS50705)	No Prejudicial Error.
STATE v. BEST 2021-NCCOA-575 No. 20-614	Durham (13CRS59913) (16CRS2178-79)	No Error
STATE v. FARRIOR 2021-NCCOA-576 No. 20-513	Forsyth (17CRS59311)	Vacated

STATE v. GREEN 2021-NCCOA-577 No. 20-521	Surry (19CRS293) (19CRS51128-29)	No Error
STATE v. HALE 2021-NCCOA-578 No. 20-716	Mecklenburg (17CRS214592) (17CRS214595)	No Prejudicial Error
STATE v. INMAN 2021-NCCOA-579 No. 20-666	Guilford (18CRS87054-59)	No Error
STATE v. REED 2021-NCCOA-580 No. 20-906	Columbus (18CRS51956)	Vacated and Remanded
STATE v. RIGGS 2021-NCCOA-581 No. 21-71	Carteret (19CRS51820-22)	No Error

ALEXANDER v. BECKER

[280 N.C. App. 131, 2021-NCCOA-582]

DAVID BAYNE ALEXANDER, ET AL., PETITIONERS
v.
DIANE K. BECKER AND THOMAS H. BECKER, CO-TRUSTEES OF THE DIANE K. BECKER REVOCABLE LIVING TRUST DATED DECEMBER 19, 2008, ET AL., RESPONDENTS

No. COA20-802

Filed 2 November 2021

Real Property—condominium development—walls, roofs, and gutters—limited common elements—responsibility to repair, maintain, and insure

In a legal dispute among owners of single-family units within a residential condominium development, it was held that the outer walls, roofs, and gutters of each unit met the definition of "limited common elements" under the North Carolina Condominium Act (N.C.G.S. § 47C-2-102(4)). Therefore, under the terms of the condominium development's declaration, each unit owner was responsible for repairing and maintaining these elements on their respective units while the unit owners' association was required to insure these elements against fire, lightning, and similar perils.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by Petitioners from judgment entered 25 August 2020 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 June 2021.

Alexander Ricks, PLLC, by Roy H. Michaux, Jr. and Ryan P. Hoffman, for Petitioners-Appellants.

The McIntosh Law Firm, P.C., by Christopher P. Gelwicks, for the Respondents-Appellees.

DILLON, Judge.

¶ 1 This matter involves a dispute among unit owners within a certain residential condominium development located in Mecklenburg County. The dispute concerns whether it is the unit owner's association *or* the unit owners respectively who bear the responsibility to maintain and insure the outer walls, roofs, etc. Essentially, certain owners of the small units contend that the responsibility falls to each unit owner,

while certain owners of the larger units contend that these structures are common elements and that the association bears the responsibility to maintain them.

I. Background

¶ 2 The Courtyard of Huntersville (the "Community") is composed of fifty-one (51) residential units. Unlike many other condominium developments, each unit in the Community is located in its own free-standing, single-family dwelling structure. In other words, the Community outwardly resembles a single-family, residential subdivision made up of separately owned, single-family homes. However, the Community is, *legally*, a condominium,[1] established under a Declaration of Condominium (the "Declaration"), which heavily mirrors the North Carolina Condominium Act (the "Condominium Act"). Therefore, the occupant of a single-family structure within the Community does not actually own the outer walls of his/her structure, but rather only the air and walls within the outer walls.

¶ 3 The individual owners belong to a unit owners' association (the "Association"), as contemplated in the Declaration.

II. The Dispute

¶ 4 This dispute concerns whether it is the Association's responsibility to maintain and insure the roofs, outer walls (including siding), and gutters outside the outer wall of each single-family structure, or whether the responsibility lies with each unit owner to maintain these outer structures serving the unit (s)he lives in.

¶ 5 The answer is meaningful economically to the unit owners as the structures are of different sizes. Some unit owners live in structures that are twice as big as the structures other unit owners live in. Petitioners are owners of some of the smaller units. They contend that it is the responsibility of each unit owner to maintain the building which houses his/her unit. The Association Board and other unit owners, though, take the position that it is the Association which is responsible for maintaining the structures such that the costs would be borne more equally among the unit owners.

---

1. The term "condominium" is often understood colloquially to refer to a particular unit. However, the term *legally* refers to the condominium development as a whole. *See* N.C. Gen. Stat. § 47C-1-103(7) (2020). Accordingly, "condominium" as used in this opinion refers to a development as a whole. "Unit" or "condominium unit" refers to an individual unit within a condominium development.

¶ 6 In any event, the answer depends, at least in part, on how these real estate components (the roofs, outer walls, and gutters) are classified in the Declaration and the Condominium Act.

¶ 7 Specifically, under the Declaration, each property component within the Community is classified as *either* Unit Property *or* a Common Element.

¶ 8 "Unit Property" consists (with some exceptions) of the real estate within the outer walls of each unit, such as the interior walls or fixtures within a unit. A declaration *may* designate certain real property serving a single unit, but located outside the interior walls, as "unit property." For example, in the Declaration, a pipe leading to and serving a single unit is classified as unit property. Pursuant to the Declaration, it is generally the responsibility of each unit owner *to repair/maintain* the unit property designed to serve only his/her unit. For instance, each unit owner pays for the repainting of the interior walls in his/her unit. The Declaration, though, does provide that the Association bears the responsibility *to insure* such unit property against certain perils, such as fire. Therefore, if a building is struck by lightning and burns down, the Association insurance covers the reconstruction, not only of the outer shell of each building, but also the interior walls and most fixtures.

¶ 9 A "Common Element" is defined by the Declaration as any real property that is not unit property. This is consistent with the definition under the Condominium Act, which defines common elements as "all portions of the condominium other than the units." N.C. Gen. Stat. § 47C-1-103(4).

¶ 10 There is a subset of the common elements defined in the Declaration and the Condominium Act as "Limited Common Elements." Essentially, a common element designed for "the exclusive use of one or more but fewer than all of the units" is a "limited common element." For instance, the roof over a building that contains one or a few units within a development is a limited common element. However, if a common element is designed to serve *all* units, then that common element is not a limited common element. For instance, the club house and pool within a condominium development are common elements, as they are designed to serve *all* unit owners.

¶ 11 Unlike most condominium components, the limited common elements within the Community that are the subject of this action each serve only one unit. That is, no limited common element serves more than one unit. This is because each unit is housed within its own structure. No two units share the same structure.

¶ 12 Petitioners take the position that the outer walls, roof, and gutters of a building and serving a particular unit are limited common elements. As such, under the Declaration, the obligation to repair, maintain, and insure the roof, exterior walls (including siding), and gutters on a particular building falls on the owner whose unit is located within that building.

¶ 13 Respondents (and the Association Board) take the position that these components are common elements which do not fall within the subcategory of limited common elements. As such, the responsibility to repair, maintain, and insure falls on the Association as a whole, with the costs borne by all the unit owners through the payment of dues.

¶ 14 After a hearing on various motions, the trial court entered summary judgment for Respondents, essentially agreeing with the Association Board's position that the Association bears the burden of maintaining the structures. Petitioners appealed.

III. Standard of Review

¶ 15 Summary judgment is proper "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) (2020). We review an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

¶ 16 We have reviewed the record and briefs in this matter, and we conclude as follows:

> (1) the outer walls, roof and gutters on a building housing a unit are limited common elements pursuant to N.C. Gen. Stat. 47C-2-102(4);
>
> (2) the Association is responsible for insuring all limited common elements, including the outer walls, roof and gutters of each building, against "loss or damage by fire, lightning, and such other perils" listed under Article X of the Declaration, and that said insurance shall be "paid for by the Association as a Common Expense," as provided under Article X, Section 1(g);
>
> and

> (3) the responsibility to repair and maintain the walls, roof and gutters of a residential building is borne by the owner of the unit housed in that building. The Association has no responsibility to maintain and repair these components (except to the extent covered by insurance that the Association must maintain under Article X of the Declaration).

We so conclude based on the reasoning below.

A. Limited Common Elements

¶ 17 The outer walls, roof, and gutters do not fall within the definition of unit property as defined by the Declaration. Accordingly, they are common elements. The issue then becomes whether they are within the subset of common elements, known as limited common elements. (We note that there is a strong argument that the gutters are unit property as being a type of "pipe" serving a single unit. However, as explained below, even if they are properly categorized as unit property, the unit owners are still responsible for their maintenance and repair while the Association is responsible for insuring them.)

¶ 18 As it was developed after 1986, the Community is governed by the Condominium Act. *See* N.C. Gen. Stat. § 47C-1-102(a) ("This Chapter applies to all condominiums created within this State after October 1, 1986.") The Condominium Act defines a limited common element as any "portion of the common elements allocated by the declaration or by operation of G.S. 47C-2-102(2) or (4) for the exclusive use of one or more but fewer than all the units." N.C. Gen. Stat. § 47C-1-103.

¶ 19 It is undisputed that the outer walls, roofs, and gutters in question each serve fewer than all the units. In fact, they each serve one unit, as each building houses a single unit. Accordingly, the walls, roof, and gutters are limited common elements if *either* they are defined as such in the Declaration *or* if they are defined as such under N.C. Gen. Stat. § 47C-2-102(2) or (4).

¶ 20 It is not clear from the record that the outer walls, roofs, and gutters fall within the definition of limited common element as set forth in the Declaration. The Declaration does include within the definition of limited common element those "bearing walls" and "fixtures" which lie "partially within and partially outside the designated boundaries of a Unit" and which serve only one unit. However, the gutters, roofs, and siding seem to be located completely outside the boundaries of the unit

and, therefore, do not fall within the Declaration's definition of limited common element.

¶ 21 Nonetheless, the outer walls, roofs, and gutters do fall within the definition of limited common element as defined in Section 47C-2-102(4). That statute includes within the definition of limited common element "all exterior doors and windows *or other fixtures designed to serve a single unit but located outside the unit's boundaries*" unless the declaration provides otherwise. *Id.* (emphasis added). In other words, each exterior fixture[2] serving a single unit is a limited common element unless that fixture is otherwise defined as something else in the declaration. If the declaration is silent regarding the classification of a type of exterior fixture serving a single unit, then the fixture is deemed a limited common element by virtue of Section 47C-2-102(4).

¶ 22 Here, the Declaration does list various components of the real property that are to be regarded as limited common elements. The Declaration, though, does not expressly categorize the exterior walls, roofs, or gutters or otherwise contain language that limits the definition of limited common elements to those components expressly mentioned. Accordingly, they are limited common elements by operation of Section 47C-2-102(4). *See* N.C. Gen. Stat. § 47C-1-103(13) (defining "limited common elements" as those common elements listed in Section 47C-2-102(4)).

B. Insurance Obligations

¶ 23 Since the outer walls, roofs, and gutters are limited common elements, the Declaration puts the onus on the Association to insure them against certain perils. Specifically, Article X of the Declaration[3] states as follows:

---

2. Chapter 2 of *Webster's Real Estate Law in North Carolina* recognizes that fixtures include any chattel affixed to the land, which can include a building or parts thereof. Our Supreme Court has recognized that a building can be a fixture if there was an intent at the time it was built to become part of the land upon which it was erected. *See Lee-Moore v. Cleary*, 295 N.C. 417, 420-21, 245 S.E.2d 720, 722-23 (1978).

3. Appellants reproduced Article X of the Declaration as an exhibit to their brief. Our dissenting colleague correctly notes that only portions of the Declaration – which do not include Article X – were included in the record on appeal that is before us. We note, however, that the Declaration in its entirety is recorded in the Mecklenburg County Register of Deeds. We, therefore, take judicial notice under N.C. Gen. Stat. § 8C-1, Rule 201(b) (2020) of the Declaration, including Article X, as recorded. *See In re Hackley*, 212 N.C. App. 596, 601, 713 S.E.2d 119, 123 (2011) (taking judicial notice of a recorded deed, a copy of which was attached as an exhibit to the appellant's brief).

> Section 1. Fire and Extended Coverage Insurance. The Board shall have the authority and *shall obtain insurance for all buildings*, *structures*, *fixtures* . . . *constituting a part* of the Common Elements, [and] *the Limited Common Elements* . . . against loss of damage by fire, lightning, and such other perils as are ordinarily insured against by standard extended coverage endorsements, and all other perils which are customary covered with respect to projects similar in construction, location and use[.]

(Emphases added.)

¶ 24 Petitioners argue that the gutters are actually Unit Property rather than limited common elements. Specifically, Petitioners point to Article V of the Declaration, which includes within the definition of unit property "pipes" that serve "only one unit" whether "located inside or outside the designated boundaries of a Unit[.]" Petitioner contends that a gutter is a "pipe" as contemplated in this definition. We disagree. However, even if Petitioners are correct, Article X of the Declaration requires that such unit property also be insured by the Association:

> This insurance shall also . . . provide coverage for built-in or installed improvements, fixtures and equipment that are part of a Unit[.]

¶ 25 Further, Section 1(g) of Article X requires that the insurance "be paid for by the Association, as a Common Expense."

¶ 26 The unit owner, though, is not prohibited by the Declaration from obtaining insurance for the same loss, though the insurance purchased by the Association shall "be primary[.]" Article X, Section 1(j).

C. Repair and Maintenance Obligations

¶ 27 Even though the Association has the obligation to provide insurance coverage for the exterior walls, roofs, and gutters against certain perils, the Declaration provides that the unit owners respectively are responsible for their repair and maintenance. Specifically, Article VIII of the Declaration directs that the unit owners respectively are responsible for the repair and maintenance of any limited common element serving his/her unit *except for* the two parking spaces outside each unit serving that unit, each unit's private exterior entrance, and each unit's front porch.

¶ 28 And assuming that the gutters are unit property, it is still the unit owner who is responsible for their repair under Article VIII.

V. Conclusion

¶ 29 We conclude that the exterior walls, roof, and gutters on each residential building are limited common elements. We conclude that the Association must maintain insurance for these elements against certain perils as provided in Article X of the Declaration. As such, the Association may collect dues to pay for this insurance. We also conclude that each unit owner is responsible for the repair and maintenance of these elements serving his/her unit.

¶ 30 We, therefore, affirm in part and reverse in part the trial court's order and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge ZACHARY concurs.

Judge HAMPSON concurs in part and dissents in part.

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

¶ 31 I agree with the majority opinion that this matter must be remanded to the trial court for further proceedings. I also tend to agree with the majority opinion, at least on the limited Record before us, the repair and maintenance obligations for the condominium units fall on the individual unit owners. I dissent in limited part, however, based on the scope of the remand and, specifically, as it relates to the insurance coverage obligations.

¶ 32 The majority opinion hits on what I perceive as the key issue in this case: the interplay of the Condominium Declaration and the Condominium Act. Specifically, the question is whether the Declaration at issue here was intended to supplement the provisions of the Condominium Act or, alternatively, to vary from the provisions of the Condominium Act. My supposition, given the individualized nature of the condominium units here—more in the nature of stand-alone single-family dwellings—is that the original intent was to modify and vary from the Condominium Act's provisions to accommodate the fact these units operate more as single-family residences than as traditionally imagined "condos." The problem, however, is that absent from the Record before us, and thus presumably before the trial court, is a full

version of the Declaration from which to be sure. The parties instead rely only on excerpts (and incomplete ones at that) to argue for their respective positions. For example, we are provided with multiple copies of Article VI titled Common and Limited Common Elements, which simply cuts off in mid-sentence while defining Limited Common Elements. Therefore, I am unsure what the rest of this Article says let alone intends. Thus, any supposition about the intent of the Declaration on the Record before us is just that: supposition.

¶ 33 Relatedly, the parties fail to engage on the underlying legal question: to what extent a Condominium Declaration may vary the terms of the Condominium Act. Ultimately, then there are two central questions left unanswered here: (1) does the Declaration supplement the provisions of the Act or attempt to vary from the provisions of the Act; and (2) if the Declaration varies from the Condominium Act (rather than supplementing the Act), does it do so in a way that is consistent or permissible under the Condominium Act?

¶ 34 In the absence of answers to these two questions, entry of judgment in this matter was premature. Consequently, I would simply vacate the trial court's Judgment in full and remand this matter to permit further proceedings.

JOSEPH R. BAZNIK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALFRED RODRIQUEZ INOA, A DECEASED MINOR, PLAINTIFF

v.

FCA US, LLC, DOZI ULASI, JR., JOSEPH E. HOPKINS, CAROL C. MELNICK, TODD WHITAKER, AND MILLARD S. WHEELER, DEFENDANTS

No. COA20-392

Filed 2 November 2021

Immunity—public official—DOT employees—no statutory basis

Employees of the Department of Transportation (NCDOT) (engineers and a sign supervisor) who were sued individually and in their individual capacities in connection with a fatal automobile accident were not public officials and thus were not entitled to public official immunity. The statutes cited by the NCDOT employees in support of their argument merely granted statutory responsibility to NCDOT and did not create their positions within NCDOT.

Appeal by Defendants from order entered 27 January 2020 by Judge Andrew T. Heath in Wake County Superior Court. Heard in the Court of Appeals 28 April 2021.

Whitley Law Firm, by Ann C. Ochsner; Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams, Margaret S. Abrams, and Melissa N. Abrams, for Plaintiff-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for Defendants-Appellants.

WOOD, Judge.

¶ 1 The sole question upon review is whether the trial court erred in denying Defendants' motions to dismiss. We affirm the order of the trial court.

I. Background

¶ 2 On August 5, 2018, Plaintiff's child Alfred Rodriguez Inoa ("Alfred"), a minor, was traveling as a passenger in a 2007 Chrysler 300 (the "Chrysler") and came upon the intersection of U.S. Highway 401 (Louisburg Road) and Fox Road located in Wake County. Upon reaching an intersection with U.S. Highway 401, eastbound passengers on Fox Road are required to cross a total of seven lanes and a median divider (the "Intersection") to continue to travel on the road. In violation of both national and state sight distance standards, the northwest corner of the Intersection had both manmade and natural objects such that an eastbound driver on Fox Road could not see a southbound vehicle approaching on U.S. Highway 401. While driving through the Intersection, the Chrysler carrying Alfred was struck by another vehicle in the rear driver's side. Though Alfred survived the initial impact of the collision, a defect in the Chrysler's fuel system caused the fuel to ignite and the Chrysler to immediately catch on fire. Alfred was trapped inside the Chrysler during this time resulting in severe injuries and ultimately his death.

¶ 3 On May 28, 2019, Plaintiff brought suit on behalf of Alfred's estate naming the following North Carolina Department of Transportation ("NCDOT") employees as Defendants both individually and in their individual capacities, Carol C. Melnick as a Division Traffic Engineer with NCDOT, Todd Whitaker as a Division Sign Supervisor with NCDOT, and Millard S. Wheeler as an engineer with NCDOT (collectively, the

"Defendants"). Plaintiff alleged Defendants all contributed to the construction of the Intersection. Defendants each filed a motion to dismiss under North Carolina Rules of Civil Procedure Rules 12(b)(1), (2), and (6) "on the grounds of public official immunity and/or qualified immunity, as well as the doctrine of sovereign immunity." The trial court denied Defendants' motions under Rules 12(b)(1), (2), and (6) but did specify the grounds upon which the order is based. Defendants immediately appealed to this Court arguing that they are entitled to public official immunity and the trial court erred in denying their motions to dismiss.

II. Discussion

¶ 4 Defendants argue the trial court erred in denying their motions to dismiss pursuant to 12(b)(6) and 12(b)(2). When reviewing a Rule 12(b)(6) motion, this Court applies a *de novo* standard of review. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999) (quoting *Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994)). A Rule 12(b)(6) motion to dismiss "should not be granted 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' " *Id.* 350 N.C. at 604-605, 517 S.E.2d at 124 (emphasis omitted) (quoting *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970)).

¶ 5 A case is dismissed under Rule 12(b)(2) for lack of personal jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (2021). When a party asserts sovereign immunity, "[t]he defense of sovereign immunity is a matter of personal jurisdiction that falls under Rule 12(b)(2) . . . ." *Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P.*, 160 N.C. App. 626, 629, 586 S.E.2d 812, 815 (2003) (citation omitted). A denial of a "Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable . . . ." *Parker v. Town of Erwin*, 243 N.C. App. 84, 95, 776 S.E.2d 710, 720 (2015) (citation omitted). We review a Rule 12(b)(2) motion for evidence within the record that would support the court's determination of personal jurisdiction. *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 257 (2012).

¶ 6 In this case, Defendants contend they are entitled to public official immunity through their employment with NCDOT. To grant public official immunity, we first must determine whether Defendants are public officials or public employees. "When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993) (quoting *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 236 (1990)). Public employees can be held individually liable for mere negligence in the performance of their duties while public officials "cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties . . . ." *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997). In order to determine whether the Defendants are public officials or public employees, we are guided by our Supreme Court in *Isenhour v. Hutto*,

> [o]ur 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.

350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999). Whomever is asserting public official immunity must show all three factors of the *Isenhour* test exist. *See McCullers v. Lewis*, 265 N.C. App. 216, 222, 828 S.E.2d 524, 532 (2019); *Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017). In addition to this three part test, a public official "is generally required to take an oath of office while an agent or employee is not required to do so." *Leonard*, 254 N.C. App. at 699, 803 S.E.2d at 449 (citation omitted). However, an oath of office "is not absolutely necessary" to be considered a public official. *McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532 (citation and internal quotation marks omitted).

¶ 7 Here, Defendants argue they are public officials because their positions within NCDOT were created pursuant to N.C. Gen. Stat. §§ 143B-345, 143B-346, and 136-18. We disagree. A person occupies a position created by legislation if the position "ha[s] a clear statutory basis or the officer ha[s] been delegated a statutory duty by a person or organization created by statute." *Fraley v. Griffin*, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011) (citation and internal quotation marks omitted). The first cited statute, N.C. Gen. Stat. § 143B-345

is a one sentence statement which operates to establish NCDOT as a department within North Carolina. Similarly, N.C. Gen. Stat. § 143B-346 functions to provide a brief one paragraph overview of the function and purpose of NCDOT. We note that when interpreting a statute "the legislative will is the all-important or controlling factor." *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 368, 250 S.E.2d 271, 273 (1979) (citation omitted). As such, "the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree." *Id.* 296 N.C. at 369, 250 S.E.2d at 273.

¶ 8 A review of Section 143B-345 and Section 143B-346 shows both statutes are void of any created positions and only speak to NCDOT as an entity in and of itself. Thus the texts of N.C. Gen. Stat. § 143B-345 and N.C. Gen. Stat. § 143B-346 illustrate a legislative intent to create and guide NCDOT as an entity, not to legislate employment positions within NCDOT. In other words, Defendants cannot rely on N.C. Gen. Stat. § 143B-345 and N.C. Gen. Stat. § 143B-346 as statutes that clearly establish their positions within NCDOT as these statutes do not establish *any* position within NCDOT.

¶ 9 Turning to the remaining statute cited by Defendants, N.C. Gen. Stat. § 136-18 functions to define and list the powers allotted to NCDOT as a department. The existence within a statute of a "statutory definition does not constitute [the] creating . . . [of a] position." *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696. *See Farrell v. Transylvania Cnty. Bd. of Educ.*, 199 N.C. App. 173, 177, 682 S.E.2d 224, 228 (2009) (holding the defendant's cited statutes do "not create the position of teacher[,] it defines the duty of teacher"). Notably, none of the language of N.C. Gen. Stat. § 136-18 establishes a position within NCDOT but refers to NCDOT as an entity in and of itself. Again, the lack of creation of a position within Section 136-18 indicates the legislature did not intend for Section 136-18 to statutorily create an employment position within NCDOT. Overall, none of statutes cited by Defendants operate to create positions within NCDOT.

¶ 10 Though N.C. Gen. Stat. § 136-18, N.C. Gen. Stat. § 143B-345, and N.C. Gen. Stat. § 143B-346 grant statutory responsibility to NCDOT, these statutes do not in turn delegate such statutory authority to employees of NCDOT. Thus, Defendants have not established a clear statutory basis for their positions within NCDOT and are considered public employees, not public officials.

III. Conclusion

¶ 11 In summary, because no statute creates the positions held by Defendants within NCDOT, Defendants are public employees and, as such, are not entitled to public official immunity. Since the trial court had personal jurisdiction over Defendants and Plaintiff sufficiently stated a claim upon which relief can be granted, we affirm the trail court's denial of Defendants' motions pursuant to North Carolina Rules of Civil Procedure Rules 12(b)(2) and (6).

AFFIRMED.

Judges DILLON and ARROWOOD concur.

GREENBRIER PLACE, LLC, Plaintiff
v.
BALDWIN DESIGN CONSULTANTS, P.A., and MICHAEL W. BALDWIN, Defendants

No. COA20-654

Filed 2 November 2021

Appeal and Error—interlocutory order—substantial right—risk of inconsistent verdicts—claims requiring different proof

In a case where a limited liability company (plaintiff) accused a consulting firm and its owner (defendants) of misrepresenting the costs of developing a residential subdivision project, plaintiff's appeal from an interlocutory order granting partial summary judgment in favor of defendants—on plaintiff's claims for unfair and deceptive trade practices, fraud, and constructive fraud—was dismissed because the order did not affect a substantial right. Specifically, plaintiff's remaining claims for negligence, negligent misrepresentation, and breach of contract required different proof than the claims resolved on summary judgment, and therefore plaintiff would not face a risk of inconsistent verdicts on common factual issues in different trials.

Appeal by plaintiff from order entered 16 March 2020 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 22 September 2021.

Law Office of W. Gregory Duke, by W. Gregory Duke, for plaintiff-appellant.

Cranfill Sumner LLP, by Steven A. Bader and Daniel G. Katzenbach, for defendants-appellees.

ARROWOOD, Judge.

¶ 1 Greenbrier Place, LLC ("plaintiff") appeals from the trial court's order granting partial summary judgment in favor of Baldwin Design Consultants, P.A. and Michael W. Baldwin ("defendants"). Plaintiff contends the trial court erred in granting defendants' motion for summary judgment, specifically arguing that the ruling affects a substantial right and creates a possibility of inconsistent verdicts. Defendant has filed a motion to dismiss plaintiff's appeal, arguing the appeal is interlocutory and does not affect a substantial right. For the following reasons, we dismiss plaintiff's appeal.

I. Background

¶ 2 Plaintiff is a North Carolina limited liability company formed for the purposes of developing a residential subdivision known as Greenbrier Place. Plaintiff filed a complaint against defendants on 12 October 2017, asserting claims of negligence, negligent misrepresentation, breach of contract, unfair and deceptive trade practices, fraud, and constructive fraud. In the complaint, plaintiff alleged that on 20 August 2015, defendants produced and provided a "Probable Development Costs Estimate" to Cherry Construction Company, Inc. ("Cherry Construction") acting as plaintiff's agent. The estimate concerned the development of a forty-three lot Greenbrier Place residential neighborhood and included an estimate in the amount of $1,066,259.84. Plaintiff purchased the land for development on 29 December 2015. Plaintiff alleged that on or around February 2016, defendants provided plaintiffs with an updated "Summary of Development Costs" estimating total costs of $818,337.51 for twenty eight of the forty-three proposed lots, reflecting an increase "by a minimum amount of $190,472.80[.]"

¶ 3 Defendant Michael W. Baldwin ("Baldwin") filed an answer and third-party complaint on 18 December 2017. Defendant Baldwin Design Consultants, P.A. ("Baldwin Design Consultants") filed counterclaims on 15 July 2019.

¶ 4 On 26 July 2019, plaintiff filed a response to Baldwin Design Consultants' counterclaims which included affirmative defenses and a motion to dismiss the counterclaims for failure to state a claim upon which relief could be granted.

¶ 5 On 19 November 2019, defendants filed a motion for partial summary judgment as to plaintiff's claims for unfair and deceptive trade practices, fraud, and constructive fraud. On 27 November 2019, plaintiff filed a motion in opposition seeking summary judgment on all six of plaintiff's claims as well as Baldwin Design Consultant's counterclaims.

¶ 6 The matter came on for hearing on 9 December 2019 in Pitt County Superior Court, Judge Foster presiding.

¶ 7 On 16 March 2020, the trial court entered an order granting defendants' motion for partial summary judgment and denying plaintiff's motion for summary judgment and motion in opposition. The order did not provide certification for appeal pursuant to North Carolina Rules of Civil Procedure Rule 54(b).

¶ 8 Plaintiff filed written notice of appeal on 14 April 2020.

II. Discussion

¶ 9 Plaintiff contends the trial court erred in granting defendants' partial motion for summary judgment. Before addressing plaintiff's arguments, we must address defendants' motion to dismiss plaintiff's appeal as interlocutory.

¶ 10 " '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.' " *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Review of an interlocutory ruling is proper if the trial court certifies the case for appeal pursuant to North Carolina Rules of Civil Procedure Rule 54(b), or if the ruling deprives the appellant of a substantial right that will be lost absent immediate review. N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3) (2019). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

¶ 11 Our Supreme Court has determined that a "substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)).

¶ 12 The inconsistent verdicts doctrine is a subset of the substantial rights doctrine and is "often misunderstood." *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 646, 847 S.E.2d 229, 233 (2020), *disc. review denied*, 377 N.C. 566, 858 S.E.2d 284 (2021). An appellant is required to show "that the same factual issues are present in both trials *and* that [appellants] will be prejudiced by the possibility that inconsistent verdicts may result." *Hien Nguyen v. Taylor*, 200 N.C. App. 387, 391, 684 S.E.2d 470, 473-74 (2009) (citing *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994)). Avoiding separate trials on different issues does not affect a substantial right. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 7, 362 S.E.2d 812, 816 (1987). Additionally, "[t]he mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 80, 711 S.E.2d 185, 190 (2011).

¶ 13 "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (citation omitted). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.* (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

¶ 14 Plaintiff cites *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 684 S.E.2d 41 (2009) to support application of the inconsistent verdict doctrine. In *Carcano*, this Court found that the plaintiffs demonstrated the risk of an inconsistent verdict because two facts—whether "defendants caused plaintiffs' damages by falsely representing that 'JBSS, LLC,' validly existed as an LLC and by inducing plaintiffs to invest in the business"—would likely be determinative of all claims and that two juries could reach different outcomes on these overlapping factual issues. *Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47.

¶ 15 In the case *sub judice*, plaintiff argues that the trial court's order affects a substantial right because there are factual issues common to all claims, including whether defendants caused plaintiff's damages "by falsely representing that all of the costs of developing the residential subdivision project were included in the PDC Estimates[.]" Plaintiff also raises factual issues related to a vegetative buffer required by city code, whether defendants should have included disclaimers or exclusions of

costs not reflected in the PDC estimates, and whether defendants should have obtained updated subcontractor bids for the estimates rather than relying on data from prior projects.

¶ 16 Defendants argue that plaintiff's remaining claims for negligence, negligent misrepresentation, and breach of contract require different proof than the unfair and deceptive trade practices and fraud claims disposed of by the trial court. This Court has held that negligence claims require different proof than claims for unfair and deceptive trade practices or fraud. *See Ausley v. Bishop*, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) (claim of fraud differs from claim of negligence); *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 172, 681 S.E.2d 448, 455 (2009) (unfair and deceptive trade practices violation requires more than negligence). This Court has also recognized "that actions for unfair or deceptive trade practices are distinct from actions for breach of contract and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. [Gen. Stat.] § 75-1.1." *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citations omitted). Additionally, failure to perform under the terms of a contract, standing alone, does not support a claim of fraud. *Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E.2d 760, 762 (1961) ("It is the general rule that an unfulfilled promise cannot be made the basis for an action for fraud.").

¶ 17 Although plaintiff presents several facts from which the claims arise, plaintiff has failed to carry the burden of showing that the inconsistent verdict doctrine applies. Plaintiff's remaining claims require different proof than the claims resolved on summary judgment, and accordingly plaintiff has failed to identify common facts that are determinative of all claims. Because plaintiff has failed to show that a substantial right has been affected, we grant defendants' motion to dismiss plaintiff's appeal.

III. Conclusion

¶ 18 For the foregoing reasons, we dismiss plaintiff's appeal.

DISMISSED.

Judges CARPENTER and GRIFFIN concur.

IN RE A.S.

[280 N.C. App. 149, 2021-NCCOA-585]

IN THE MATTER OF A.S.

No. COA21-149

Filed 2 November 2021

1. Constitutional Law—right to impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses

In an involuntary commitment hearing in which no counsel was present for the State, the trial court did not violate respondent's procedural due process right to an impartial tribunal by questioning witnesses because there is no constitutional right to opposing counsel, there was no statutory requirement for the State to have an attorney present where respondent was being treated at a private facility, and the trial court did not advocate for either side during its questioning.

2. Mental Illness—involuntary commitment—commitment examiner's report—not entered into evidence—not incorporated as findings

In an involuntary commitment proceeding, where the trial court did not enter into evidence a report by the examining doctor (who was not present at the hearing) and did not check box number four on the form written order (which would have indicated that the court found as facts, by clear, cogent, and convincing evidence, all matters set out in the commitment examiner's report and incorporated the report by reference as findings), the trial court did not incorporate the report as findings in its order, despite hand-writing the name of the doctor and date of her report on the written order.

3. Mental Illness—involuntary commitment—danger to others—sufficiency of findings

The trial court's involuntary commitment order contained sufficient findings, though brief, to support its determination that respondent was a danger to others, based on evidence of past behavior (that respondent had been previously hospitalized, had been medication non-compliant, and had burned his furniture) and evidence indicating the probability of future harm absent treatment (that respondent was verbally abusive to facility staff and had to be sequestered from others at the facility and his own testimony that he would not take medicine by injection due to his paranoia about needles).

IN RE A.S.

[280 N.C. App. 149, 2021-NCCOA-585]

Appeal by respondent from involuntary commitment order entered 20 November 2020 by Judge Pat Evans in Durham County District Court. Heard in the Court of Appeals 6 October 2021.

Yoder Law PLLC, by Jason Christopher Yoder, for respondent-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Rachel A. Brunswig, for the State.

ARROWOOD, Judge.

¶ 1 A.S. ("respondent") appeals from an involuntary commitment order committing him to an inpatient 24-hour facility for a period of thirty days. For the following reasons, we affirm.

I. Background

¶ 2 On 6 November 2020, Barbara Persinger, respondent's mother, filed an Affidavit and Petition for Involuntary Commitment in Granville County District Court, which read:

> RESPONDENT IS AGGRESSIVE AND VERBA[L]LY ABUSIVE WITH HIS MOTHER AND ACT[T] TE[AM] MEMBERS. HE HAD A HAMMER IN HIS PANTS, HOWEVER HE DID NOT MAKE ANY MOVEMENTS TO USE IT AS A WEAPON. HE IS TALKING IN MULTIPLE VOICES. HE HAS PRESCRIBED MEDICATION, BUT HIS MOTHER DOES NOT THINK HE IS TAKING IT ON A REGULAR BASIS. MOTHER HAS PETITIONED THE GRANVILLE COUNTY SYSTEM FOR GUARDIANSHIP OF [RESPONDENT] SINCE HIS LAST PETITION.

Respondent was taken into custody on 6 November 2020 and delivered to Duke Regional Hospital ("Duke") in Durham County the next day. After a first-level examination and evaluation were conducted on respondent on 7 November 2020, Doctor Grace C. Thrall ("Dr. Thrall") conducted a second examination on 8 November 2020. After the examination, Dr. Thrall described the following:

> [Respondent] is a 45 y.o. single white male with Brugada syndrome, schizoaffective disorder and past alcohol abuse, complicated by poor insight and medication nonadherence, requiring multiple psychiatric

> hospitalizations and followed by Carolina Outreach ACTT team. He presents to the D[uke] ED on petition by his mother for worsening psychosis characterized by disorganized thinking, growling speech, paranoia (walking around with a hammer in his pants x 2 days), increased verbal agitation with family and ACTT, and delusions about robots and artificial intelligence. His ACTT team believes he has not been compliant with his antipsychotic medications and is concerned he is not safe in the community, having assaulted his mother in the past when mistaking her for a robot and having taken an ax to most of his furniture and electronics and burned them on his grill.

Dr. Thrall concluded respondent was a danger to himself and others, and recommended thirty days of inpatient commitment.

¶ 3 An involuntary commitment hearing was held before the Durham County District Court, Judge Evans presiding, on 20 November 2020 to determine the appropriateness of respondent's involuntary commitment. Respondent, respondent's counsel, and Doctor Leslie Bronner ("Dr. Bronner"), a Duke employee who had been treating respondent, were present at the hearing, while neither the State nor Duke had any counsel present. At the outset, respondent's counsel objected to "proceeding without representation" for the State. The trial court overruled the objection and allowed the hearing to move forward. The trial court examined Dr. Bronner. Dr. Bronner testified, in pertinent part, to the following:

> [T]his is a 45-year-old patient with a history of schizoaffective disorder. He has more than 20 psychiatric hospitalizations. He came to Duke . . . due to medication non-compliance. He dismissed his outpatient treatment team. He was verbally abusive towards his mother. He was burning furniture, and so he was brought in for psychiatric evaluation. I saw him on the second day that he had been admitted to the psychiatric ward. I've been working with him daily since then, except for weekends.
>
> Initially he was very irritable and dismissive. He would barely talk to me. If he talked, he would not allow me to speak. He mainly talked about how he was not -- he was sort of blaming people for not allowing him to live on his own. He said that he has been

> medication compliant. He was dismissive of all of the things that his outpatient treatment team said, as well as his mother. He was medication compliant with his Invega. Initially, however, because of his behaviors, he's had to be sequestered from the rest of the unit. He becomes agitated, he becomes verbally abusive to staff. He starts yelling, he starts pacing. He is refusing medications to help him calm down, and so we still have not been able to allow him to interact with the rest of the ward.
>
> . . . .
>
> And so, because he's not compliant with his oral medications, . . . he needs to be on a long-acting injectable medication. I talked to him about that yesterday. He said that he was not going to do it. He did not need to do it, and that he was going to take me to court to shut me up . . . . And so, he continues to need to be hospitalized because he remains a danger to himself and others.

¶ 4 Throughout this portion of Dr. Bronner's testimony, respondent interrupted multiple times by, among other things, objecting, arguing against Dr. Bronner's testimony, asking whether he would have the opportunity to represent himself, and making references to "stalkers . . . from Raleigh . . . that won't leave me alone."

¶ 5 Once Dr. Bronner was allowed to continue with her testimony, she stated:

> Because it's been very difficult to manage his behaviors on the unit, he remains sequestered from other patients on the unit. He still needs to be hospitalized for further medication management and he also needs to be on a long-acting injectable to prevent further psychiatric hospitalizations due to medication non-compliance.

When asked whether she believed respondent was a danger to others, Dr. Bronner replied that she did, and explained, in pertinent part: "He's been agitated and verbally abusive to the staff and to me, and we're unable to even allow him to interact with other people on the unit." Dr. Bronner asked that he be committed for thirty days.

¶ 6 On cross-examination, Dr. Bronner testified that respondent had not made threats or attempts to harm himself and "ha[d] not physically touched anybody" while at Duke, though "he postures and paces." Regarding respondent's willingness to take his prescribed medication, Dr. Bronner testified: "He's partially compliant. He takes scheduled medication, but when he gets agitated and aggressive towards staff, we want to try to give him other medications to calm him down which he has refused and it just lets me know that he needs more scheduled medication." At this point, respondent interrupted again.[1]

¶ 7 Next, respondent testified as witness. After mentioning his allergy to Lithium, respondent's testimony, in pertinent part, proceeded as follows:

> Q. So, is the reason that you do not want to take some of the as-needed medication, or the long-acting injectable, because you're afraid of allergic reactions?
>
> A. I am scared -- I'm paranoid of the needles. As part of my condition that it's under my belief that there is a robot cybernetic unit, possibly from the International Robo Expo that has manipulated time and uses their plastic injectable disc to write them and lock us in certain discause [sic], where we're punished . . . and our bodies are transported in and out for their amusement and for our punishment, and the needles scare me so bad, I am paranoid schizophrenic and it is because of exactly that injectables [sic].
>
> . . . .
>
> So I don't mind taking the oral alternative. I've been compliant with the oral alternative for over 14 years now.

¶ 8 When asked whether he had ever thought about harming himself in the last month, respondent replied: "Absolutely not. I love myself. I don't want to be harmed at all. I love myself, my family. I don't want anybody else to be harmed." When asked whether, while at Duke, he had "thought about harming anyone on the unit[,]" respondent replied: "I have not. I've actually taken note that there -- that black people from harming me [sic]. I even closed off the back corridors of the unit so that

1. Here, respondent appears to talk about his medication and claims he had been "completely compliant in all cases," though much of his statement is unclear with portions marked in the transcript as indiscernible.

they can't get in to harm me." When asked by his counsel if there was anything else he wanted to share, respondent made a long, incoherent statement in which he made references to his paranoia of "the digital age[,]" "transposing time[,]" the mandate of "an unescapable hell[,]" and an "alien cross-communication virus . . . ."

¶ 9 Respondent's counsel asked the trial court to find respondent was not a danger to himself or others, citing respondent's testimony that he did not think about harming himself or others, that he had not made threats or attempts to harm himself, and that he had not touched others. Respondent interrupted throughout. The trial court concluded: "I do find that [respondent] has a mental illness, he's a danger to himself and to others. He's to be recommitted to the 24-hour in-patient facility for a period not to exceed 30 days."

¶ 10 The trial court filed a written Order on the same day. In this Order, the trial court did not check box number four—"by clear, cogent, and convincing evidence, [the trial court] finds as facts all matters set out in the commitment examiner's report specified below, and the report is incorporated by reference as findings." However, in the designated space below box number four, the trial court provided Dr. Thrall's name—"Dr. Grace Thrall"—and the date of her last report on respondent—"11-18-20[.]" Conversely, the trial court checked box number five, indicating that it found "by clear, cogent, and convincing evidence" "facts supporting involuntary commitment[.]" This was followed by the trial court's handwritten notes:

> Prior to court, [r]espondent insisted Judge recuse herself because unqualified to hear federal matters. He constantly interrupted proceedings; stating he was being stalked. Non-compliant when admitted to hospital and remains medication non-compliant. Has to be sequestered from others on unit because verbally abusive towards staff. Postures and paces. Told Doctor he would take her to court to "shut her up." Dismissed outpatient treatment team. During direct examination, [respondent] babbled about intergalaxial [sic] conspiracies.

Based on these findings, the trial court concluded respondent "has a mental illness" and "is dangerous" to himself and others, and ordered that respondent be committed to Duke for no longer than thirty days.

¶ 11 Defendant filed written notice of appeal on 24 November 2020. Because "[a]n appeal of right lies with this Court from a final judgment of

involuntary commitment[,]" this appeal is properly before us. *In re J.C.D.*, 265 N.C. App. 441, 444, 828 S.E.2d 186, 189 (2019) (citations omitted).

II. Discussion

¶ 12 Respondent contends on appeal that: (A) the trial court violated respondent's due process right to an impartial tribunal because of the absence of a representative for the State during the hearing, and because the trial court asked questions during witness testimony; and (B) the trial court erred in adopting Dr. Thrall's report.

A. Impartial Tribunal

¶ 13 **[1]** "The due process right to an impartial tribunal raises questions of constitutional law that we review de novo." *In re Q.J.*, 2021-NCCOA-346, ¶ 19 (citing *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." *Id.* (quotation marks omitted) (quoting N.C. R. App. P. Rule 10(a)(1) (2021)). Here, respondent's counsel objected to proceeding without opposing counsel at the outset of the hearing. Thus, the issue has been properly preserved for our review. *See id.*

¶ 14 Respondent argues the trial court violated his right to procedural due process and an impartial tribunal because the involuntary commitment hearing proceeded in the absence of opposing counsel and because the trial court "examined witnesses, became a witness itself for events that occurred before the hearing started, and even entered evidence without informing the respondent or allowing the respondent to object." We disagree.

¶ 15 As this Court has noted, there is no constitutional right to opposing counsel. *Id.* ¶ 21 (quoting *In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983)). Additionally, per our statutes:

> [T]he 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). Thus, here, because respondent was being treated at Duke, a private institution, there is no statutory

requirement to have an attorney for the State present at respondent's hearing. *See id.*

¶ 16 Further, for a judge to "preside at an involuntary commitment hearing and also question witnesses at the same proceeding" does not jeopardize a respondent's constitutional rights. *In re Q.J.*, ¶ 21 (quotation marks omitted) (quoting *In re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983)). In fact, in such instances, "[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." *Id.* ¶ 22 (alteration in original). Thus, "[i]t is entirely proper, and sometimes necessary, that they ask questions of a witness[.]" *Id.* (citation omitted; second alteration in original). However, at the same time, trial courts cannot conduct themselves in such ways "that could be construed as advocacy for or against either" party. *Id.* ¶ 23.

¶ 17 Here, the trial court's only substantive questions of Dr. Bronner on direct examination were the following:

> Q. All right, ma'am, whenever you're ready . . . . Whatever it is you want me to know about why we're here today.
>
> . . . .
>
> Q. All right ma'am. If you could start over slowly for me so I can take notes.
>
> . . . .
>
> Q. He was going to take you to court to what? . . . . Shut you up? Okay.
>
> . . . .
>
> Q. Anything else?
>
> . . . .
>
> Q. All right. You testified that you believe he's a danger to himself. Do you believe he's a danger to others?
>
> . . . .
>
> Q. And what do you base that on?
>
> . . . .
>
> Q. All right. And how long are you asking for?

Similarly, during respondent's testimony, the trial court only stated, "Thank you so much for sharing with me[,]" and, "Thank you for sharing with me, [respondent]."

¶ 18 Here, there is nothing from the transcript that indicates the trial court, while asking questions of witnesses, was advocating or intending to advocate for either party. *See id.* (finding no issue with the trial court when it asked on direct examination: "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?"). Accordingly, the trial court did not violate respondent's due process right to an impartial tribunal by allowing the hearing to proceed without opposing counsel and by asking questions itself. *See id.*

B. Adoption of Dr. Thrall's Report and Findings of Fact

¶ 19 Respondent argues the trial court erred in adopting Dr. Thrall's report because it "did not find the report by clear, cogent, and convincing evidence," "the report was entered by the trial court without notice to [respondent] in violation of his right to confront and cross-examine Dr. Thrall[,]" and the report contained inadmissible hearsay.

1. Dr. Thrall's Report

¶ 20 **[2]** As a preliminary matter, we address the fact that the written Order does not check box number four while simultaneously providing pertinent information below it. Respondent argues that, because the trial court did not move to enter Dr. Thrall's report into evidence during the hearing, or otherwise make any other mention of it prior to the issuance of its Order, it was error for the trial court to refer to it in its written Order. Particularly, respondent argues the trial court "considered the report in making its final determination" without "indicat[ing]" in the written Order "that it was finding all of the facts contained in the examiner's report by clear, cogent, and convincing evidence"—in other words, without checking box number four. Conversely, the State argues that, precisely because the trial court did not check box number four, the trial court did not incorporate Dr. Thrall's report as findings at all.

¶ 21 "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). Throughout respondent's hearing, the trial court did not move to admit Dr. Thrall's report into evidence, and neither Dr. Thrall nor her report were ever mentioned in open court. Additionally, at the conclusion of the hearing, the trial

court did not announce that it intended to incorporate Dr. Thrall's report, or any report, when it ordered that respondent be recommitted. *Cf. In re J.C.D.*, 265 N.C. App. at 443, 828 S.E.2d at 189 ("The trial court announced at the conclusion of the hearing . . . it would incorporate by reference as findings in the order the report of Dr. Ijaz and offered by Ms. Motley."). Furthermore, because neither Dr. Thrall nor any other witness were present during the hearing to authenticate the report, any attempt to admit the report into evidence or otherwise incorporate it as findings would have been error. *See* N.C. Gen. Stat. § 122C-268(f).

¶ 22 Thus, here, the Record and the transcript do not reflect that the trial court admitted into evidence Dr. Thrall's report during the hearing—nor do they reflect that the trial court inadvertently failed to check box number four in its written Order. *Cf. State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (concluding, where there were inconsistencies between the hearing transcript and the sentencing form, that the transcript clearly indicated "that the trial court simply misread the sentencing form and checked the wrong box[,]" and thus concluding the trial court had committed a clerical error).

¶ 23 This Court has found that a "trial court's checking of a box" by itself "is insufficient to support th[e] determination" that a respondent is a danger to himself or others. *In re J.C.D.*, 265 N.C. App. at 448, 828 S.E.2d at 192 (quotation marks omitted) (quoting *In re Allison*, 216 N.C. App. 297, 300, 715 S.E.2d 912, 915 (2011)); *see also id.* at 447, 828 S.E.2d at 191 ("Merely placing an 'X' in the boxes of the form order has been disapproved repeatedly[.]" (citation and some quotation marks omitted)). By the same logic, we conclude that a written order that, by virtue of not checking the designated box, does not expressly indicate the trial court "by clear, cogent, and convincing evidence[] finds as facts all matters set out" within a report cannot be construed to mean the inverse. *Cf. id.* at 447-48, 828 S.E.2d at 191-92.

¶ 24 Thus, here, because it did not enter Dr. Thrall's report into evidence and did not check box number four in its written Order, the trial court did not incorporate the report as findings in its Order.[2] *See* N.C. Gen.

2. In this instance, we distinguish this case from our decision in *In re Q.J.*, 2021-NCCOA-346. There, in dicta, the majority opinion described the report at issue as being incorporated as findings, "although the trial court listed the examination [the doctor] completed" without "check[ing] the box expressly incorporating the report as findings of fact." *Id.* ¶ 13. There, the State and the respondent agreed that the doctor's report had been incorporated by reference, and thus the respondent's issues on appeal did not address the propriety of the trial court's written order. *See id.* ¶¶ 14, 30 n. 4. Thus, the majority in *In re Q.J.* did not reach the issue of whether a written order in which box number four is

Stat. § 122C-268(f). Because we determine that the report was not incorporated, the remainder of respondent's arguments regarding the propriety of the trial court's mention of the report on the written Order are no longer properly relevant to our review.

2. Findings of Fact

¶ 25 **[3]** Respondent also argues that, without Dr. Thrall's report, the trial court's remaining findings of fact fail to support the finding that he was dangerous to himself or others. We disagree.

¶ 26 Even if the trial court had actually improperly incorporated Dr. Thrall's report, the hearing testimony and the trial court's findings of fact as listed on the remainder of its written Order, which are not based upon Dr. Thrall's report in any respect, are sufficient to support the involuntary commitment Order.

¶ 27 "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 Q.J.*, ¶ 26 (citation omitted). 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." *Id.* (citation and quotation marks omitted; alteration in original).

¶ 28 Per our statutes,

> [t]o 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 . . . . The court shall record the facts that support its findings.

N.C. Gen. Stat. § 122C-268(j). Additionally,

> the trial court must satisfy two prongs when finding a respondent is a danger to self or others . . . : "A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's history

---

unchecked, but information pertinent to it is provided thereunder, constitutes incorporation. *See id.* ¶ 14. Here, because respondent argues that it was error for the trial court to "consider" Dr. Thrall's report, by writing her name and the date of the report on the written Order, without expressly incorporating the report and without admitting it into evidence, and because the State specifically contends it was not incorporated, we address the issue outright.

> 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 Q.J., ¶ 25 (citation omitted; last three alterations in original). "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.* (citation and some quotations marks omitted).

¶ 29 Here, "[b]ecause we conclude the trial court properly found [r]espondent was a danger to [others], we do not reach the issue of whether he was a danger to [himself]." *See In re C.G.*, 2021-NCCOA-344, ¶ 33.

¶ 30 Our statutes define "danger to others" as follows:

> 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)(b).

¶ 31 In its written Order, the trial court checked box number five, by which it found "by clear, cogent, and convincing evidence" "facts supporting involuntary commitment." The trial court then listed those facts:

> Prior to court, [r]espondent insisted Judge recuse herself because unqualified to hear federal matters. He constantly interrupted proceedings; stating he was being stalked. Non-compliant when admitted to hospital and remains medication non-compliant. Has to be sequestered from others on unit because verbally abusive towards staff. Postures and paces. Told Doctor he would take her to court to "shut her up." Dismissed outpatient treatment team. During direct

> examination, [respondent] babbled about intergal-axial [sic] conspiracies.

¶ 32 These fact findings are drawn directly from the evidence at respondent's hearing. The trial court heard from Dr. Bronner that respondent had been previously hospitalized, had been medication non-compliant, had burned his furniture, had told Dr. Bronner he would take her to court to "shut her up[,]" was verbally abusive, and had had to be kept separated from other people on his unit due to his behavior and medication non-compliance. Dr. Bronner also stated that, because respondent remained medication non-compliant, he would have to remain sequestered from others.

¶ 33 The trial court also observed in open court respondent interrupting Dr. Bronner's testimony repeatedly, stating, during his own testimony, he would not take needed medical injections because he was paranoid about needles and robots "punishing" him through needles, stating he had blocked the corridors of his unit to stop people from harming him, and making many other incoherent statements.

¶ 34 Thus, here, the trial court satisfied the two prongs to support an involuntary commitment order because it made findings of respondent's past behavior and findings indicative to his probability of future harm absent treatment. *See In re Q.J.*, ¶ 25. Accordingly, these findings of fact, while cryptic and bare boned, are sufficient to support the issuance of the Order and are supported by the testimony of respondent's treating physician and the actions of respondent at the hearing. Thus, the trial court did not err in finding respondent was a danger to others.

III. Conclusion

¶ 35 Accordingly, we affirm the trial court's Order.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

IN RE A.W.

[280 N.C. App. 162, 2021-NCCOA-586]

IN THE MATTER OF A.W.

No. COA21-182

Filed 2 November 2021

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparents—fitness of parents—constitutionally protected parental status—insufficient findings

In a neglect and dependency case, a permanency planning order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the trial court made insufficient findings of fact supporting its conclusion that respondents were unfit or had acted inconsistently with their constitutionally protected status as parents. The court's findings focused on respondents' history of domestic violence, but there was no clear, cogent, and convincing evidence that respondents were presently unfit, especially where they had fully participated in services to address domestic violence, there had been no new incidents of domestic violence in the home since the juvenile petition's filing, and the child had a positive bond with respondents. Further, where a juvenile neglect petition regarding respondents' younger child was dismissed before the court entered the permanency planning order, the order failed to address why respondents were unfit to parent one child but not the other.

2. Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—insufficient findings

In a neglect and dependency case, the trial court's order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the court failed to make adequate findings to support ceasing reunification efforts. The court made no finding that respondents had failed to make adequate progress in their family case plans, and all evidence showed the contrary, especially where respondents had fully participated in services to address past domestic violence, they had bonded well with the child during visits, and the department of social services (DSS) had dismissed a juvenile neglect petition as to respondents' infant son after monitoring him and allowing him to remain in respondents' care since birth. Further, the court made no finding that respondents refused to cooperate with DSS or the guardian ad litem (GAL) program, and its finding that respondents had not made themselves readily available to DSS or the GAL was not supported by the evidence.

IN RE A.W.

[280 N.C. App. 162, 2021-NCCOA-586]

Appeal by respondents from orders entered 30 October 2020 and 10 November 2020 by Judge Jason H. Coats in Johnston County District Court. Heard in the Court of Appeals 5 October 2021.

Holland & O'Connor, PLLC, by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services.

Kimberly Connor Benton for respondent-appellant mother.

Benjamin J. Kull for respondent-appellant father.

Mobley Law Office, P.A., by Marie H. Mobley, for guardian ad litem.

TYSON, Judge.

¶ 1 Respondent-mother and Respondent-father, collectively "Respondents," appeal the trial court's order awarding permanent guardianship of their daughter to her foster parents. We vacate and remand.

I. Factual and Procedural Background

¶ 2 Johnston County Department of Social Services ("JCDSS") became involved with A.W. ("Andrea"), and her family after law enforcement responded to a 911 call to their home following an incident of domestic violence between Respondents in March 2018. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the juvenile). JCDSS alleged Respondent-father had assaulted Respondent-mother by attempting to stab her with a steak knife in February 2018 while ten-month-old Andrea and her stepsiblings were present. JCDSS implemented a safety assessment plan at this time. Respondent-father was arrested and charged. This charge was later dismissed.

¶ 3 On 24 April 2018, JCDSS removed Andrea and her stepsiblings from the home due to alleged violations of the safety plan by Respondent-father. One month later, JCDSS removed Andrea and her stepsiblings from the temporary safety provider's home. Respondent-father had refused to leave, which triggered a police escort of him from the property. Andrea and her stepsiblings were placed with the stepsiblings' father in South Carolina on 27 May 2018.

¶ 4 JCDSS filed its juvenile petition alleging neglect and dependency on 29 May 2018 after Respondents had removed Andrea from the placement in South Carolina and secreted Andrea's whereabouts for two days.

Respondents returned Andrea to JCDSS' care the same day. Andrea was placed into a nonfamily-member-licensed foster care where she has remained for the pendency of this case.

¶ 5 The adjudication hearing was held on 27 June 2018. The court issued its order adjudicating Andrea as neglected and dependent on 6 December 2018. The order contains 20 findings of fact and indicates, "parents by and through counsel, consent to an Adjudication of neglect and dependency based upon the foregoing findings of fact."

¶ 6 The trial court's disposition order was entered 6 February 2019 and continued Andrea in JCDSS' legal custody. The court ordered Respondents to cooperate with JCDSS and for JCDSS to continue to work towards reunification. In its permanency planning order filed 6 March 2019, the court ordered the primary permanent plan to be reunification with the parents, with a secondary plan of custody or guardianship with an approved caregiver.

¶ 7 In January 2019, the parents engaged in an argument during which Respondent-father allegedly struck Respondent-mother repeatedly. Law enforcement officers responded. Respondent-mother sought a Domestic Violence Protective Order ("DVPO"), alerted JCDSS, provided photos of her injuries, and copies of text messages and other social media posts sent by Respondent-father. Respondent-mother subsequently voluntarily dismissed the DVPO and reunited with Respondent-father. Since January 2019, no other incidents of domestic violence between Respondent-mother and Respondent-father have been reported.

¶ 8 Prior to the permanency planning hearing that is the subject of this appeal, and at the outset to the hearing, Respondent-father moved for the trial judge to recuse himself based upon the trial judge's relationship with Andrea's foster father and proposed guardian. The proposed guardian is a Johnston County Sheriff's deputy and serves as a bailiff in the county courthouse. Respondent-father also moved the court to delay the disposition hearing on Andrea until after an adjudication hearing was held on her younger brother, G.W., who was born after the present case began. The trial court denied both oral motions.

¶ 9 The court determined JCDSS would be relieved of reunification efforts, the permanent plan of guardianship had been achieved and ordered further reviews be suspended. On 30 October 2020, the court issued a permanency planning order awarding guardianship to Andrea's foster parents. Respondents appeal.

II. Jurisdiction

¶ 10 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a) (2019).

III. Analysis

¶ 11 On appeal, both parents filed separate briefs and arguments. Both argue the trial court failed to make the required findings to support ceasing reunification and that they were either unfit or had acted inconsistently with their constitutionally protected status as parents before granting guardianship to nonfamily members or nonparents and waiving further court review. We agree.

A. Constitutionally Protected Status

1. Standard of Review

¶ 12 "Our review of whether conduct constitutes conduct inconsistent with the parents' constitutionally protected status is *de novo*. Under this review, we consider the matter anew and freely substitute our judgment for that of the lower tribunal." *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018) (alterations, citations and internal quotation marks omitted).

¶ 13 This Court has mandated that 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" prior to considering granting custody or a guardianship to a nonparent. *In re N.Z.B.*, 278 N.C. App. 445, 450, 863 S.E.2d 232, 236, 2021-NCCOA-345, ¶ 19.

2. Parental Fitness

¶ 14 **[1]** Respondents argue the trial court's finding that they were not fit and proper parents was not supported by clear, cogent, and convincing evidence and violated their constitutional rights to parent.

¶ 15 Our Supreme Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted). The Supreme Court of North Carolina has also recognized the parents' "constitutionally-protected paramount right to custody, care, and control of their child." *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994).

¶ 16 The Supreme Court of North Carolina has held, "a natural parent may lose his constitutionally protected right to the control of his

children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). "[T]he decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted).

¶ 17 No "bright line" exists beyond which the parents' conduct amounts to unfitness or actions inconsistent with the parents' constitutionally protected paramount status. *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010). "Determining whether a parent has forfeited their constitutionally protected status is a fact specific inquiry. 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." *In re N.Z.B.*, 278 N.C. App. at 450, 863 S.E.2d at 236-37, ¶ 20 (citations and internal quotation marks omitted).

¶ 18 Here, the court's finding of fact 3f provides:

> f. The Court finds by clear, cogent, and convincing evidence that neither parent is a fit and proper parent. The Court finds that the parents are acting inconsistent with the child's health and welfare. Furthermore, the parents have not made themselves readily available to JCDSS or the GAL program.

¶ 19 JCDSS and the guardian *ad litem* ("GAL") argue the above conclusory finding is supported by the trial court's findings of fact 3 a-e set forth in section B below. JCDSS and the GAL conflate the parties' arguments. The trial court's conclusion to cease reunification efforts does not satisfy the requirement that before a court may award permanent custody of a child to foster parents and waive further review, the court must determine whether the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents. *David N.*, 359 N.C. at 307, 608 S.E.2d at 753.

¶ 20 In *D.A.*, the trial court as here, "awarded *de facto* permanent custody of D.A. to the foster parents and waived further review." *In re D.A.*, 258 N.C. App. at 250, 811 S.E.2d at 732. The trial court found:

> neither respondent parent has taken responsibility or provided a plausible explanation for the injuries

> that occurred to the juvenile while he was in their care. That while respondent father's charges were dismissed, and despite pleading guilty to the charges imposed upon her for harming her child, respondent mother continues to maintain that she did not inflict the juvenile's injuries, and this remains a barrier to reunification as the home remains an injurious environment.

Id. at 251, 811 S.E.2d at 732.

¶ 21 This Court held "the trial court's findings [were] insufficient to support a conclusion that Respondent-father was unfit or had acted inconsistently with his constitutionally protected status as a parent." *Id.*

¶ 22 Here, the trial court's order has very few findings of fact, mostly addressing the parties' history of domestic violence. Although the trial court found "there has not been any reports of domestic violence since the last hearing," and that the parties "have completed and/or are participating in services," the trial court also focused on the general characteristics of domestic violence and the fact that "both parents come from prior domestic violence relationships." The trial court states, "neither parent is fit or proper," but this assertion, whether a finding or a conclusion, is not based upon clear and convincing evidence of how either parent was presently "unfit" to exercise their constitutional right to parent Andrea. Further, the court's order contains no mention of how either parent acted inconsistently with their constitutionally protected status as parents. The court's findings must reflect how the parents were unfit or acted inconsistently "*vis-à-vis* the child." *In re N.Z.B.*, 278 N.C. at 450, 863 S.E.2d at 237, ¶ 20.

¶ 23 JCDSS presented the testimony of four social workers who had been involved with the family during the pendency of the case. Juliet Hylton testified she had difficulty engaging the parents' therapists to determine how they were progressing in therapy and to determine their investment in the same. She speculated the parties had not fully acknowledged what had happened and could not move forward.

¶ 24 Deborah Ellis testified she had reviewed the notes from Respondent father's therapy sessions and believed he continued to fail to accept responsibility for Andrea's removal, even after completing the required services on the case plan.

¶ 25 Susan Ahaus expressed concerns that the parents lacked true insight into what has occurred in their relationship and that they were

just "checking the box." Ahaus pointed to Respondent-father "externalizing blame" and Respondent-mother stating the domestic violence was "all her fault." Ahaus acknowledged this was a "hard case" because the Respondents had been participating in their required services, and both parents were receiving therapy and couples' counseling.

¶ 26 Heidi Clay, who was the social worker for G.W.'s case, testified Respondents' home was outfitted with security cameras and she had concerns of power and control by Respondent-father with regards to the cameras. No testimony showed any misuse of the security cameras whatsoever.

¶ 27 The record reflects absolutely no evidence that Respondents placed Andrea in harm's way after their argument that had prompted JCDSS' juvenile petition alleging neglect and dependency. No testimony showed her needs were ignored due to the parents' behaviors. No testimony showed their ongoing neglect or dependency of Andrea. Testimony showed their visitation with Andrea was positive and appropriate, and that she knew and had established bonds to her parents. The four social workers were not qualified as experts on domestic violence. Their lay beliefs that Respondents did not understand the seriousness of domestic violence is not clear, cogent, or convincing evidence that the Respondents are unfit or had continued to engage in conduct inconsistent to parent Andrea, particularly considering the parents' full participation in services, the lack of any additional incidents, and the presence of another child in the home.

¶ 28 We also note that although there was a petition pending regarding the younger child at the time of the hearing, JCDSS dismissed that petition prior to the entry of the order. Thus, when the trial court entered the order, there was no petition concerning the younger child, who had lived with the parents since birth. The trial court's findings that "JCDSS is involved with that minor child and a juvenile petition is pending" is thus not supported by the record. The order does not explain how the Respondents can be fit and proper parents for the younger child but not for Andrea. No evidence tends to show either child had unique needs or circumstances which would render the Respondents unfit to have custody of one child but fit to have custody of the other child. The only basis for the trial court's determination was the existence of a prior history of domestic violence in the home, and prior domestic violence would have the same effect on any child in the home.

¶ 29 The trial court's insistence for Respondents to admit blame to prevent ceasing reunification efforts has no lawful basis without the

threshold finding of unfitness or conduct inconsistent with their constitutionally protected status as parents. "[A] finding that a parent is unfit or acted inconsistent with his or her constitutionally protected status is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017).

¶ 30 Nothing in the trial court's permanency planning order or its the rulings pronounced in open court supports the trial court's conclusory finding that the biological parents are unfit to parent Andrea or that their conduct is inconsistent with their constitutionally protected status. Absent such clear findings, based upon clear, cogent, and convincing evidence, demonstrating how Respondents are unfit or acted inconsistently with their constitutionally protected status, the trial court erred in awarding guardianship of Andrea to the foster parents.

B. Ceasing Reunification Efforts

¶ 31 **[2]** Respondents contend the trial court erred when it ceased reunification efforts because its findings of fact supporting ceasing efforts were not supported by the evidence.

1. Standard of Review

¶ 32 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re P.T.W.*, 250 N.C. App. 589, 594, 794 S.E.2d 843, 848 (2016) (citations omitted).

2. N.C. Gen. Stat. § 7B-906.2

¶ 33 Before a trial court may cease reunification efforts following any permanency planning hearing, it shall "make[] 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). To demonstrate efforts would be unsuccessful or contrary with the juvenile's well-being, the trial court is mandated to make written findings as to each of the following:

> (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).

¶ 34 With regard to its determination regarding reasonable efforts, the trial court made the following findings:

> It is futile and inconsistent with the juvenile's health, safety, and need for a permanent home within a reasonable period of time because: the Court finds that although the parents have completed and/or are participating in services, they cannot provide a home free of safety and protective issues. The Court acknowledges that the mother has given birth to another child since the last hearing and that child remains in the home of the parents; however, the Court finds that JCDSS is involved with that minor child and a juvenile petition is pending.
>
> . . .
>
> a. The Court finds that both parents continue to be inconsistent with their testimony concerning the domestic violence history in their relationship. While [Respondents] will in one moment acknowledge domestic violence in their relationship, they will thereafter deny the particular events previously found to have occurred by this Court. Additionally, the parents will indicate that they have a better understanding of domestic violence and their relationship, have not been able to fully articulate the same.
>
> b. The parents had been engaged in individual and couples counseling but have been discharged from the same as the practice does not wish to participate in legal actions. The parents have completed most of the services on their case plan; however, it was more of an action of "checking boxes" versus showing a change in behavior.
>
> c. The parents continue to lack an insight into the seriousness of this matter and the past domestic

violence. The parents, particularly the father, continue to externalize blame, especially towards JCDSS. Both parents come from prior domestic violence relationships. The Court finds that [Respondent-father] continues, with his therapist and other service providers, including JCDSS and this court, to attempt to rewrite the history.

d. The Court recognizes that a characteristic of domestic violence is the attempt to gain or maintain control over the other individual and the situation. In this case, the Court heard from four separate social workers who have had previous and current involvement with the parents concerning not only this child but the newest child, and all of the social workers expressed concerns regarding the ongoing controlling behavior of [Respondent-father]. [Respondent-father] continues to dominate conversations and situations, and further responds to questions that are addressed to [Respondent-mother] and she allows the same. [Respondent-father] continues to attempt to exert power and control over the various social workers with JCDSS. JCDSS has had repeated difficulty in attempting to meet with [Respondent-mother], separate and apart from [Respondent-father]. Although [Respondent-father] is not in the home, he monitors and controls the doorbell camera in the home to address visitors that come to the residence, including but not limited to the social workers attempting to meet with [Respondent-mother] alone. Additionally, the home has cameras inside the residence as well.

e. The Court recognizes that there has not been any reports of domestic violence since the last hearing; however, the Court continues to express concern as to whether or not the parents would in fact contact outside authorities if domestic violence did occur as a result of JCDSS involvement in this case and the Court's prior orders. The Court finds from a review of the court file, that the parents have been found by the Court to not be truthful or forthcoming by prior orders.

¶ 35 As discussed above, the district court's findings focused on the underlying issue in this case: domestic violence. Respondents consented to the initial adjudication of Andrea as neglected and dependent based upon domestic violence in the home. It is undisputed that the Respondents both engaged in services aimed toward addressing their history of domestic violence. JCDSS acknowledged there had been no reports of any new domestic violence incidents between the parents in 580 days at the time of the permanency planning hearing. JCDSS and the court were aware of G.W.'s birth and that JCDSS had allowed Respondents to take their infant son home from the hospital and to continue to live in their home.

¶ 36 JCDSS bears the burden of showing the futility of reunification efforts. As discussed above, JCDSS presented the testimony of four social workers. Not one single worker could identify a situation within the last twelve months where Respondents had engaged in domestic violence nor a situation where the police had to be called to respond or to break up an argument between the parties. No testimony contradicted Respondents' assertion that the security cameras were installed to provide home security and ability to monitor their newborn son, G.W.

¶ 37 Social worker Hylton's undisputed testimony was that Respondents had bonded with Andrea, that they loved her, that the visits went well and that they were engaged at visitations and continued to express their desire to be able to reunify with her and parent her. Hylton, who supervised the visits between Respondents and Andrea, testified she never saw anything in the visits that gave her any cause for concern.

¶ 38 The order contains no finding indicating the parents failed to make adequate progress within a reasonable period of time under the plan. The evidence presented shows the contrary, particularly considering JCDSS' dismissal of the petition regarding the younger child, G.W., who had lived with Respondents since his birth.

¶ 39 The trial court's 23 October 2019 permanency planning order documents the last incidence of domestic violence between Respondents eight months earlier in January 2019 and finds the parents failed to take responsibility for their actions. At the permanency planning hearing subject of this appeal, held over a year later, both Respondents testified to what treatment they had completed and how that treatment had resulted in changes in their relationship.

¶ 40 Record evidence shows despite filing an initial petition to have G.W. adjudicated neglected, JCDSS did not remove him from Respondents' care. In fact, JCDSS reduced the perceived risks in the home to moderate and G.W. remained in Respondents' care. All parties acknowledged in their briefs that JCDSS dismissed the juvenile neglect petition

concerning Andrea's sibling a *month before* the trial court entered its order here.

¶ 41 The trial court's insistence something more must be shown where Respondents have completed their case plan and where there have been no further allegations of domestic violence for more than a year is not clear, cogent, or convincing evidence to support the court's findings and conclusions. Here, hearings were significantly delayed due to COVID-19 related court closures and multiple continuances. During all that time, Respondents continued to remain engaged with JCDSS and Andrea. Respondents conceived a second child together. JCDSS began monitoring this child from birth and allowed this child to remain in the home with Respondents. It is wholly inconsistent and inexplicable for an infant to be left in the care of Respondents, but for Andrea to remain in a placement with the foster parents.

¶ 42 To cease reunification, the trial court's findings must include not only finding a lack of reasonable progress, but a lack of participation or cooperation with the plan, JCDSS and GAL. *See* N.C. Gen. Stat. § 7B-906.2(d)(2). The court made no finding indicating Respondents had refused to meet with or cooperate with JCDSS or the GAL. Evidence before the court reflected that the therapists, not Respondents, had refused to provide information to JCDSS. Evidence showed Respondents attempted to mediate this, but JCDSS had refused. Undisputed evidence showed Respondent-father repeatedly emailed JCDSS seeking guidance on what else they needed to do to be reunited with their daughter.

¶ 43 The court found Respondents "have not made themselves readily available to JCDSS or the GAL program." In fact, all evidence, and the trial court's other findings, showed Respondents had attended court sessions, visitations, and had allowed home visits by JCDSS. Testimony and other evidence showed Respondents emailed and contacted JCDSS repeatedly. Further, no evidence presented showed DSS had difficulty meeting with Respondent-mother separate from Respondent-father. This finding is wholly unsupported by evidence in the record and is stricken.

¶ 44 The trial court failed to make statutorily required findings of fact related to whether the parents demonstrated the degree of failure towards reunification necessary to support ceasing reunification efforts.

IV. Respondent-mother's Separate Arguments on Appeal

¶ 45 Respondent-mother also challenges the trial court's failure to allow a continuance pending adjudication of G.W.'s petition, refusal to recuse

itself and failure to verify the guardianship. Based upon our holdings, it is unnecessary to reach these issues.

V. Conclusion

¶ 46 The trial court's order does not contain findings supported by clear, cogent, and convincing evidence to support the conclusion the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents. Adequate findings do not support the conclusion to cease reunification efforts with Respondents. The court's order ceasing reunification efforts and awarding guardianship to nonparent foster parents is vacated. This matter is remanded for a prompt permanency planning hearing consistent with the parents' constitutionally protected rights to the care, custody, and control of their children and this opinion. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge STROUD and Judge INMAN concur.

LOST FOREST DEVELOPMENT, L.L.C. AND ITS SUCCESSORS, PETITIONER
v.
COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA20-860

Filed 2 November 2021

Administrative Law—OSHA citation—notice of contest—timeliness

An email communication by a workplace principal (petitioner) seeking to contest an OSHA citation was not timely where it was sent fifteen months after petitioner participated in an informal conference and then received a proposed settlement agreement from a health compliance officer. Petitioner was given multiple notices of a fifteen-day window in which he could declare in writing that he was contesting the citation but took no steps to submit a written contest or to seek legal advice and he admitted that he did not read the notices carefully. The Commissioner of Labor (respondent) neither waived nor forfeited the defense of untimeliness where a district supervisor for the Department of Labor called petitioner a year later to ask about the status of the citation, and where respondent docketed the late email as a "notice of contestment."

Appeal by petitioner from order entered 19 August 2020 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 5 October 2021.

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

Attorney General Joshua H. Stein, by Assistant Attorney General Stacey A. Phipps, for respondent-appellee.

TYSON, Judge.

¶ 1 Lost Forest Development LLC, ("Lost Forest") appeals from the superior court's order affirming the Order of the Review Commission dismissing Lost Forest's "Notice of Contest" for lack of timeliness. We affirm.

I. Background

¶ 2 Petitioner, Lost Forest is a limited liability company which operates a worksite in Henderson, North Carolina.

¶ 3 The North Carolina Commissioner of Labor ("Commissioner" or "NCDOL") enforces the Occupational Safety and Health Act of North Carolina ("OSHA"). *See* N.C. Gen. Stat. §§ 95-1, 126(m) (2019). The Commissioner enforces OSHA through compliance inspections. N.C. Gen. Stat. § 95-126(g) (2019).

¶ 4 The Commissioner conducted an inspection of Lost Forest's Henderson worksite on 20 April 2017. Lost Forest's principal/operator, Greg Sveinsson received at the time of the inspection, and signed a copy of the Employer and Employee Rights and Responsibilities Form (OSHA 59). This form provides in relevant part: "**Contestment of Citation and/or Penalty** – The employer may contest the citation by notifying the Occupational Safety and Health Division *in writing* within 15 working days following receipt of citation." (emphasis bold original and italics supplied). Lost Forest had no previous OSHA citations.

¶ 5 The Commissioner issued a Citation and Notification of Penalty ("Citation") on 15 June 2017. The Citation alleged five serious violations, which were immediately repaired, and carried a total proposed penalty of $7,800. Lost Forest received the Citation on 19 June 2017. The Citation provides in bold letters:

> 15 working days after you receive this Citation and Notification of Penalty . . . or 15 working days after

> you receive the results of the informal conference, the citation(s) and/or proposed penalty(ies) will become a final order of the North Carolina Occupational Safety and Health Review Commission and may not be reviewed by any court or agency, *unless you file a notice of contestment.* (emphasis supplied).

¶ 6 Lost Forest timely requested an informal conference as the first step in "contestment" of the Citation. A health compliance officer held the conference by phone with Sveinsson on 27 June 2017. Sveinsson verbally contested the Citation at the conclusion of the informal conference. No written "notice of contestment" followed this settlement meeting.

¶ 7 The health compliance officer sent Sveinsson a letter dated 28 June 2017 which included the proposed Settlement Agreement. The letter notified Sveinsson he needed "to submit your letter of contest" within 15 working days, if he did not accept the settlement offer. The letter further stated, it "shall serve as your notice of no change" and gave the contact information for NCDOL District Supervisor Bruce Miles for questions. Sveinsson took no further action upon receipt of the Commissioner's formal settlement offer for over a year.

¶ 8 NCDOL Supervisor Miles called Sveinsson on 22 October 2018 about the Citation. Sveinsson verbally reiterated Lost Forest wished to contest the Citation and confirmed his statements *via* email. The following day, Supervisor Miles forwarded the email chain with Sveinsson to the OSHA Review Commission ("Review Commission"). The Review Commission docketed it and deemed the communication to be a "Notice of Contest."

¶ 9 The Commissioner took no action on any procedural deficiency. In the interim, Lost Forest timely filed its Statement of Position with the Review Commission.

II. Procedural History

¶ 10 On 16 May 2019, the Commissioner moved to dismiss the notice of contest as untimely before the OSHA Review Commission. The Administrative Law Judge ("ALJ") denied the Commissioner's motion after an evidentiary hearing in an Order entered 11 July 2019.

¶ 11 The Commissioner appealed the ALJ's Order to the Review Commission in August 2019. The Review Commission reversed the ALJ's decision by Order of the Commissioners in November 2019 and dismissed Lost Forest's "notice of contestment" as untimely.

¶ 12 Lost Forest filed a Petition for Judicial Review in the Wake County Superior Court in December 2019. The trial court overruled Lost Forest's exceptions and affirmed the Order of the Review Commission. Lost Forest timely filed this appeal on 17 September 2020.

III. Jurisdiction

¶ 13 Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(l) (2019).

IV. Issues

¶ 14 Lost Forest argues: (1) its notice of contest is timely; (2) alternatively if not timely, the Commissioner forfeited the right to claim that Lost Forest did not properly contest the citation; and, (3) alternatively, good cause exists for Lost Forest to have its day in court.

¶ 15 Lost Forest also lists five other issues on appeal but fails to argue or provide authority for those issues in its brief.

> The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a) (2019). Those five unsupported and unargued issues "are deemed abandoned" on appeal. *Id.*

V. Standard of Review

¶ 16 "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." *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-581, 281 S.E.2d 24, 29 (2012).

VI. Analysis

A. Timeliness of Notice of Contest

¶ 17 Lost Forest argues its "notice of contestment" is timely because on 27 June 2017 Sveinsson verbally notified the Commissioner's representative of its desire to contest during an irregular informal conference. Lost Forest argues verbal notice is sufficient because N.C. Gen. Stat. § 95-137(b)(1) (2019) does not require written notice:

> [T]he employer has *15 working days within which to notify the Director* that the employer wishes to:
>
> a. Contest the citation or proposed assessment of penalty; *or*
>
> b. Request an informal conference.
>
> Following an informal conference, unless the employer and Department have entered into a settlement agreement, the Director shall send the employer an amended citation or notice of no change. The employer has 15 working days from the receipt of the amended citation or notice of no change to notify the Director that the employer wishes to contest the citation or proposed assessment of penalty, whether or not amended. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that the employer requires an informal conference to be held or intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court. (emphasis supplied).

¶ 18 The North Carolina Administrative Code provides:

> An employer has 15 working days from receipt of a citation to notify the Director *in writing* that the employer wishes to either contest under the provisions of G.S. 95-137(b)(1) or request an informal conference.

13 N.C. Admin. Code 7A.0802 (2020) (emphasis supplied). "[S]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Brisson v. Santoriello*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000).

> In order to ensure "the orderly transaction of its proceedings", the Board is authorized to make Rules of Procedure and to follow the Rules of Civil Procedure when a situation arises that is not covered by its own Rules of Procedure. N.C.G.S. 95-135(d). The Board

> like any other court cannot function unless its Rules of Procedure are followed.

Master Woodcraft, Inc. OSHANC 2002-4109.

¶ 19 Here, Lost Forest received the Citation which contained two paragraphs explaining the right to contest:

> Right to Contest – You have the right to contest this Citation and Notification of Penalty now or after an informal conference.
>
> . . . .
>
> 15 working days after you received this Citation and Notification of Penalty (if you do not request an informal conference) or 15 working days after you receive the results of the informal conference, the citation(s) and/or proposed penalty(ies) will become a final order of the North Carolina Occupational Safety and Health Review Commission and may not be reviewed by any court or agency, unless *you file a notice of contestment*. (emphasis supplied).

¶ 20 Lost Forest requested and participated in an informal conference on 27 June 2017 and received a proposed settlement agreement on 8 July 2017. Lost Forest was given another 15 days to file "a notice of contestment" providing, "If this agreement is not signed and returned with three (3) working days, this letter shall serve as your notice of no change and you shall have fifteen (15) working days, from the receipt of this letter to *submit your letter of contest*." (emphasis supplied).

¶ 21 At the initial hearing, the hearing examiner inquired of Sveinsson, the principal of Lost Forest, whether he recalled reading the various notices sent to him. Sveinsson testified he, "called someone to help me fill it out because I really didn't understand it;" "I probably didn't go into great detail reading this;" and "I probably went straight to the numbers. I apologize. I just - - you know, I kind of skimmed through it, and signed it, and sent it back."

¶ 22 The North Carolina Administrative Code requires written notice of contest, and the Commissioner supplied reasonable notice to Lost Forest twice within the allotted time for the notice to be filed, and even complied with an extension request, once Lost Forest had received the settlement agreement. Sveinsson admitted he did not read the notices thoroughly and took no further actions. This argument is overruled.

B. Commissioner Accepting Notice of Contest

¶ 23 Lost Forest argues because Supervisor Miles called Sveinsson to confirm Lost Forest wanted to contest the Citation, and because the Commissioner docketed Lost Forest's email response as "a notice of contestment" in October 2018, the Commissioner waived or forfeited the procedural defense of untimeliness.

¶ 24 The NCDOL Field Operations Manual advises that a supervisor should not make further contact once notification is mailed to the employer. NCDOL is an agency with respect to the Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-1(c) (2019). "The APA defines "Rule" as "any agency regulation, standard, or statement of *general applicability* that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency." *Wal-Mart Stores E., Inc. v. Hinton*, 197 N.C. App. 30, 56, 676 S.E.2d 634, 652 (2009). A rule is not a statement "concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies." *N.C. Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 28–29, 609 S.E.2d 407, 416 (2005) (citation omitted).

¶ 25 Supervisor Miles' notifying Lost Forest regarding the notice of contest more than a year after last contact was an action contrary to an administrative precaution provided in the NCDOL Field Operations Manual and is not a rule by which the Commissioner, the Review Commission, or this Court is bound. *See Weekley Homes, L.P.*, 169 N.C. App. at 31, 609 S.E.2d at 416 (holding "the Operations Manual is a non-binding interpretive statement, not a rule requiring formal rule-making procedures . . . the Operations Manual merely established guidelines that directed OSHA[.]").

¶ 26 The record clearly shows after Lost Forest received notice of the Citation it had 15 working days to provide a written contestment. The Commissioner received the "contestment" email *15 months after* Lost Forest's time to file notice of contest had ended. Lost Forest references N.C. Gen. Stat. § 150B-51(b)(5) (2019) (stating "The court . . . may . . . reverse . . . if . . . decisions are: unsupported by substantial evidence[.]"). Overwhelming evidence in the record supports the contention that Lost Forest was on notice of the deadlines to contest the Citation.

¶ 27 Lost Forest provides no applicable case law, statute, or rule to show the Commissioner's acceptance of the notice of contest or Supervisor

Miles' late contact is fatal to Commissioner's Motion to Dismiss. The Commissioner, within the authority granted by the legislature, provided multiple notices to Lost Forest. Lost Forest's argument that N.C. Gen. Stat. § 95-137(b)(1) does not require written notice is without merit when considered with the other North Carolina Administrative Code and statutory requirements. The trial court properly affirmed the Review Commission's conclusion that Lost Forest did not file a timely notice of contest. Petitioner's argument is overruled.

C. Good Cause for Lost Forest's Day in Court

¶ 28 Lost Forest argues good cause exists to allow its notice of contest, and it should be permitted pursuant to N.C. Gen. Stat. § 1A-1, Rule 60.

¶ 29 If Lost Forest had filed a Rule 60(b) Motion, the Rule potentially provides relief from a judgment or order only in limited circumstances, including for mistake, inadvertence or excusable neglect. The Supreme Court of the United States supplies a test for excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 123 L. Ed. 2d. 74, 89-90 (1993).

> [W]hat sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission . . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id.

¶ 30 In *Best Rate Tree & Lawn Serv.*, the employer failed to comply with OSHA reporting requirements. *Best Rate Tree & Lawn Serv.*, OSHANC 2006-4672. The safety compliance officer attempted to contact the employer many times. Finally, the officer and the employer met on 19 September 2006 and the employer received his OSHA 59 form with instructions to file his notice of contest. The citation was issued 16 October 2006. The employer filed a notice of extension to contest on 9 November, two days after the deadline. The employer did not contest until 14 December 2006. The Review Commission found:

> The [employer] has failed to prove by the greater weight of the evidence that it should be allowed to contest the citations . . . There is no evidence that [the

> employer] conducted the handing (sic) of this matter with the degree of care that a business person gives his or her important business matters.

Id.

¶ 31 Sveinsson did not act as a reasonable business person. He neither paid the penalty he sought to contest nor contacted the NCDOL for more than a year. Lost Forest never contacted the NCDOL to ask questions, to discuss payment, or to seek additional time to respond or to verify his notice of contest was timely received.

¶ 32 Lost Forest's made no efforts to submit any written contest and admittedly did not give the Citation the attention it deserved. Supervisor Miles' late contact with Lost Forest is not determinative of the facts before us. Petitioner's notice of contest was officially filed on 22 October 2018, 15 months after the settlement agreement. Lost Forest has failed to show by greater weight of the evidence it had acted in good faith.

VII. Legal Inadequacy

¶ 33 Lost Forest failed to respond to the Motion to Dismiss within ten days from service as is required by OSHRC Rule .0308(a): "parties upon whom a motion is served shall have 10 days from service to file a response." 24 N.C. Admin. Code 3.0308 (2020).

¶ 34 Lost Forest argues it was originally *pro se*, a small business without a legal department, had no frame of reference to contest OSHA, believed it had satisfied the requirements, and was prejudiced by the trial court's order. Being fully cognizant of these asserted disadvantages, Lost Forest did not obtain counsel until receiving the Notice of Appearance to OSHA Review Commission on 31 May 2019.

¶ 35 Evidence shows Sveinsson "was not a prudent business person in the handling of this matter, which he admitted during the hearing." *Best Rate Tree & Lawn Serv*, OSHANC 2006-4672. Petitioner's argument is overruled.

VIII. Finding of Fact 6

¶ 36 Lost Forest argues the trial court failed to comply with N.C. Gen. Stat. § 150B-51(b)(5) because none of the notices specifically said its failure to respond would result in a final order. That language is *verbatim* on the Citation and on the cover letter to the proposed Settlement Agreement. The Citation provided in bold letters if Lost Forest did not file a notice of contest in 15 days the Citation "will become a final order." Further, the settlement letter notified Sveinsson that if he did not accept the proposed settlement offer, he needed "to submit your

letter of contest" within 15 working days. The letter further provided, it "shall serve as your notice of no change." This argument has no merit.

IX. Inconsistencies in Statute & Rules of Required Form of Notices

¶ 37 Several of Lost Forest's arguments center upon ambiguities and inconsistencies of the unspecified and varying type of notices required, whether verbal or written, in the statutes and rules governing and, forms from the Commissioner, it is bound by as a small *pro se* business. The OSHA 59 Form Sveinsson signed provides the employer may contest the citation by notifying the Occupational Safety and Health Division *in writing* within 15 working days following receipt of the citation. The Commissioner received Lost Forest's "Contestment" email *15 months after* Lost Forest's time to file notice of contest had ended.

¶ 38 The judicial branch and governmental agencies at all levels are transitioning away from requiring written "hard" copies and service documents to electronic notices and filing in the trial and appellate divisions. Agencies are encouraged to review their controlling statutes, rules, and forms for consistency of notice and service requirements prevalent in electronic communications and interactions with constituents and consumers. *See* N.C. Gen. Stat. § 1A-1, Rule 5 (b)(1)(a) ("Service may also be made on the attorney by electronic mail (e-mail) to an e-mail address of record with the court in the case. Such e-mail must be sent by 5:00 P.M. Eastern Time"); N.C. Gen. Stat. § 1A-1, Rule 5(e)(2) ("If electronic filing is available in the county of filing, filing shall be made in accordance with Rule 5 of the General Rules of Practice for the Superior and District Courts.").

X. Conclusion

¶ 39 The matters of timeliness are the only issues argued in Lost Forest's brief and before this Court. Under *de novo* review, substantial evidence supports the trial court's findings and conclusions to affirm the Review Commission's decision concluding Lost Forest's written notice of contest filed 15-16 months after the deadline should be dismissed as untimely. Lost Forest has failed to show the Commissioner's docketing of Lost Forest's notice of contest is a procedural forfeiture or waiver to challenge. Good cause has not been shown to entitle Lost Forest to a Rule 60(b) review. We affirm the trial court's order. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

PHILLIPS v. MacRAE

[280 N.C. App. 184, 2021-NCCOA-588]

T. ALAN PHILLIPS AND ROBERT WARWICK, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE MARITAL TRUST CREATED UNDER SECTION 2 OF ARTICLE IV OF THE HUGH MACRAE II REVOCABLE DECLARATION OF TRUST; AND ROBERT WARWICK, HUGH MACRAE III, AND NELSON MACRAE, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE FAMILY TRUST CREATED UNDER SECTION 3 OF ARTICLE IV OF THE HUGH MACRAE II REVOCABLE DECLARATION OF TRUST WHICH FAMILY TRUST IS THE SOLE REMAINDER BENEFICIARY OF THE MARITAL TRUST, PLAINTIFFS

v.

EUNICE TAYLOR MACRAE AND MARGUERITE BELLAMY MACRAE, IN HER CAPACITY AS A BENEFICIARY OF THE FAMILY TRUST, DEFENDANTS

No. COA20-903

Filed 2 November 2021

1. Civil Procedure—denial of motion to dismiss—subsequent motion for summary judgment allowed—permissible due to different standards

The denial of motions to dismiss did not preclude a judge—whether the same or a different judge—from later allowing the same party's motion for summary judgment, because the two types of motions are evaluated under different standards and present separate legal questions.

2. Trusts—marital trust—100% fully countable trust—statutory requirements

A marital trust set up to provide for decedent's spouse qualified as a 100% fully countable trust under N.C.G.S. § 30-3.3A(e)(1) where the trust was currently controlled by nonadverse trustees and the trust's grant of permissive power to the trustees regarding distributions of the principal was allowed under a plain reading of the statute. Therefore, the trial court erred by granting summary judgment to the spouse in the trustees' declaratory judgment action, which they filed after the spouse filed an elective share claim and challenged the extent to which the marital trust affected her claim.

Appeal by plaintiffs from order entered 25 August 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 21 September 2021.

Womble Bond Dickinson (US) LLP, by Lawrence A. Moye, IV and Elizabeth K. Arias, and Hogue Hill LLP, by Patricia C. Jenkins, for plaintiffs-appellants.

Johnston, Allison & Hord, P.A., by Kimberly J. Kirk and David T. Lewis, and Law Office of Susan M. Keelin, PLLC, by Susan M. Keelin, for defendants-appellees.

TYSON, Judge.

¶ 1 T. Alan Phillips ("Phillips") and Robert Warwick ("Warwick") in their capacities as co-Trustees of the Marital Trust created under section 2 of Article IV of the Hugh MacRae II Revocable Declaration of Trust; and Warwick, Hugh MacRae, III, and Nelson MacRae, in their capacities as co-Trustees of the Family Trust created under Section 3 of Article IV of the Hugh MacRae II Revocable Declaration of Trust which Family Trust is the sole remainder beneficiary of the Marital Trust (collectively "Plaintiffs") appeal from an order entered 26 August 2020 granting summary judgment in favor of Eunice Taylor MacRae and Marguerite Bellamy MacRae in their capacities as beneficiaries of the Family Trust (collectively "Defendants"). We reverse summary judgment and remand.

I. Background

¶ 2 Hugh MacRae II ("Decedent") died on 8 October 2018. Decedent was survived by his second wife, Eunice Taylor MacRae ("Eunice"); his three adult children from his first marriage: Hugh MacRae III ("Hugh"), Nelson MacRae ("Nelson"), Rachel Cameron MacRae Gray ("Rachel"); and his adult child from his second marriage to Eunice, Marguerite Bellamy MacRae ("Marguerite").

¶ 3 Decedent's Last Will and Testament dated 31 January 2014 bequeathed his residuary estate to the Trustees of his Revocable Trust. The Revocable Trust was created under an Amended Revocable Declaration of Trust dated 31 January 2014. Decedent created this Revocable Trust that upon his death was to be divided into two testamentary trusts: a Marital Trust and a Family Trust. The Marital Trust was to be administered under Section 2 of Article IV of the Revocable Trust Agreement for the benefit of Eunice during her lifetime. The Marital Trust terminates upon Eunice's death. The Trustees of the Marital Trust are Phillips and Warwick.

¶ 4 The Trustees of the Family Trust are Hugh, Nelson, and Warwick. The Family Trust was to be administered under Section 3 of Article IV for the equal benefit of Decedent's four children and their descendants. The Family Trust for the benefit of the four children is the sole remainder beneficiary of the Marital Trust.

¶ 5 Plaintiffs assert Decedent articulated and established two estate planning goals: (1) to ensure Eunice was well provided for upon his death; and, (2) to ensure all four of his children were treated equally following his death. Decedent's stated fear was that any of his assets left outright to Eunice would be left solely to her daughter, Marguerite, upon her death, to the exclusion of his other three children from his first marriage. Decedent also believed Eunice would challenge his estate plan, if any legal basis existed to do so.

¶ 6 Decedent along with his accountant, Warwick, and estate planning attorney, Talmage Jones, sought to accomplish his testamentary plan and intent and to prevent this eventuality from occurring. Jones drafted the Marital Trust to be a 100% fully countable trust to satisfy a spousal share pursuant to N.C. Gen. Stat. § 30-3.3A(e)(1) (2019).

¶ 7 Decedent informed Warwick that Jones "is checking results to be certain the will exceeds N.C. laws for spouses['] share and would not be likely to be contested." Jones later informed Decedent that Eunice's statutory spouse's share could be satisfied by a devise into a marital trust. After Decedent's death, Eunice challenged the Decedent's estate plan. She filed an elective share claim against the estate to challenge the value assigned to the Marital Trust in calculating the amount of any elective share to which she may be entitled. Eunice asserted the Marital Trust did not meet the requirements to be counted at 100% of its value towards her elective share.

¶ 8 Plaintiffs filed a claim for a declaratory judgment: (1) seeking a declaration that the terms of the Marital Trust met the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% countable trust as property passing to the surviving spouse under N.C. Gen. Stat. § 30-3.2(3c) (2019) for calculation of an elective share; (2) seeking an order pursuant to N.C. Gen. Stat. § 36C-4-412 (2019) to modify the terms of the Marital Trust to be a 100% fully countable trust due to circumstances not anticipated by Decedent; and, (3) seeking an order pursuant to N.C. Gen. Stat. § 36C-4-415 (2019) modifying the terms of the Marital Trust to be a 100% fully countable trust to conform to Decedent's intent.

¶ 9 On 8 July 2019, Eunice filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(6), and 12(b)(7) (2019). The trial court denied the motions but ordered Marguerite to be added as a party to the litigation. Upon cross motions for summary judgment, the trial court granted Defendants' motion for summary judgment on all claims on 26 August 2020. Plaintiffs appealed.

II. Jurisdiction

¶ 10 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 11 Plaintiffs argue the trial court erred by granting Defendants' motion for summary judgment on all claims.

IV. Motion for Summary Judgment

A. Standard of Review

¶ 12 North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show they are "entitled to a judgment as a matter of law" and "there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

¶ 13 A material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). When reviewing the evidence at summary judgment: "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted).

¶ 14 "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

¶ 15 On appeal, "[t]he 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).

B. 9 September 2019 Order

¶ 16 **[1]** In the 9 September 2019 order, the trial court denied Defendants' Rules 12(b)(1), 12(b)(6), and 12(b)(7) motions. Plaintiffs argue this order finds the terms of the Marital Trust are ambiguous. Plaintiffs assert the 26 August 2020 order granting summary judgment to Defendants improperly overrules the legal conclusion of another judge.

¶ 17 Our Supreme Court has held: "no appeal lies from one Superior Court judge to another, that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge, previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003).

¶ 18 The trial court's standards to rule upon a Rule 12(b)(6) motion to dismiss and a Rule 56 motion for summary judgment are different and present separate legal questions. *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 255 (1978). "The test on a motion to dismiss under Rule 12(b)(6) is whether the pleading is legally sufficient." *Id.* at 692, 247 S.E.2d at 256. The test for a Rule 56 motion for summary judgment that is "supported by matters outside the pleadings is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Id.*

¶ 19 In *Barbour*, this Court held: "the denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as is provided in Rule 56." *Id.*

¶ 20 The subsequent allowing of a motion for summary judgment where a prior Rule 12(b)(6) motion was denied by the same or by a different judge is permitted by our longstanding precedents. One superior court judge did not overrule another superior court judge in this ruling. Plaintiffs' argument is overruled.

C. N.C. Gen. Stat. § 30-3.3A(e)(1) Requirements

¶ 21 **[2]** Plaintiffs argue the trial court improperly found the Marital Trust was not a 100% fully countable trust within the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1). N.C. Gen. Stat. § 30-3.3A(e)(1) provides when valuing a partial and contingent interest passing to the surviving spouse:

> The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's lifetime, and if the terms of the trust meet the following requirements:
>
> a. During the lifetime of the surviving spouse, the trust is controlled by one or more nonadverse trustees.
>
> b. The trustee shall distribute to or for the benefit of the surviving spouse either (i) the entire net income of the trust at least annually or (ii) the income of the trust in such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
>
> c. The trustee shall distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse.
>
> d. In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.

N.C. Gen. Stat. § 30-3.3A(e)(1) (2019). Decedent was the settlor of the trust. The terms of the Marital Trust are for the exclusive benefit of his surviving spouse, Eunice, during her lifetime.

1. Nonadverse Trustees

¶ 22 Decedent appointed Phillips and Warwick as trustees of the Marital Trust. N.C. Gen. Stat. § 30-3.3A(e)(1)a provides and requires, "During the lifetime of the surviving spouse, the trust is controlled by one or more nonadverse trustees." The Marital Trust currently has nonadverse trustees in Phillips and Warwick. Defendants argue the trustees of the Marital Trust could become adverse in the future and asserts no requirement in the trust documents requires nonadverse trustees. Plaintiffs

argue Phillips and Warwick could serve until Eunice's death, but if they should resign or die, a successor trustee could be substituted, who is also nonadverse to comply with the statute. N.C. Gen. Stat. § 30-3.3A(e)(1)a. Speculation about a purported future adverse trustee violation does not prevent the Marital Trust with its current trustees from qualifying under this statutory requirement. Defendants' argument on this issue is without merit.

2. Trustee Discretion Over Principal Distributions

¶ 23 Defendants argue the Marital Trust does not require principal distributions pursuant to N.C. Gen. Stat. § 30-3.3A(e)(1)c. The statute provides: "The trustee shall distribute to *or for the benefit of* the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, *in its discretion*, determines necessary for the health, maintenance, and support of the surviving spouse." N.C. Gen. Stat. § 30-3.3A(e)(1)c (emphasis supplied).

¶ 24 The Marital Trust provides:

> My Trustees may distribute all or any portion of the principal of the trust to my wife in such amounts and at such times as my Trustees may determine to be necessary and prudent. I admonish my wife's trustees to make all reasonable efforts to preserve the principal of her trust, invading principal only when absolutely necessary for essential things, but not for unusual or unnecessary luxury items.

N.C. Gen. Stat. § 30-3.3A(e)(1)c reads "shall make", while the terms of the Marital Trust state "may make." Plaintiffs concede the Marital Trust provides the Trustees with discretion for permissive and not mandatory distributions of the principal, but assert this language satisfies the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1)c, citing *First Nat'l Bank of Catawba Cty. v. Edens*, 55 N.C. App. 697, 286 S.E.2d 818 (1982) for support.

¶ 25 To resolve the parties' arguments, we must first determine whether invasion of principal distributions is mandatory or permissive under N.C. Gen. Stat. § 30-3.3A(e)(1)c. In reviewing this statute, we are guided by several well-established principles of statutory construction.

¶ 26 "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297,

507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

¶ 27 "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks and ellipses omitted) (citations omitted).

¶ 28 The plain meaning of the statute is clear and unambigious. N.C. Gen. Stat. § 30-3.3A(e)(1) contains permissive language giving the trustee discretion how and when to make distributions of principal and the amount of the distribution. This is consistent with this Court's holding in *First Nat'l Bank*, where this Court held the word "shall" plus trustee discretion creates a permissive power. *First Nat'l Bank*, 55 N.C. App. at 702, 286 S.E.2d 821.

¶ 29 N.C. Gen. Stat. § 30-3.3A(e)(1)c provides for permissive or discretionary distributions and the terms of the Marital Trust permit permissive distributions. The sub-sections b and c of the statute also limit and provide the Trustee "in its discretion," to "determine [what is] necessary for the health, maintenance, and support of the surviving spouse." *Id.* The trial court erred in awarding summary judgment to Defendants and holding as a matter of law the trust did not meet the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% fully countable trust against a surviving spouse's elective share.

3. Distributions for Surviving Spouse's Benefit

¶ 30 N.C. Gen. Stat. § 30-3.3A(e)(1)b provides the trustees "shall make" distributions for the surviving spouse's benefit when "in its discretion, determines necessary for the health, maintenance, and support of the surviving spouse." The Trustees' obligations thereunder are compliant with N.C. Gen. Stat. § 30-3.3A(e)(1)b. The Marital Trust required the net income of the trust to be distributed to Eunice at least quarter annually. As consistent with the Decedent's and settlor of the Marital Trust's expressed intent, the Trustees of the Marital Trust have the discretion to make distributions for Eunice's benefit so long as the distributions are "necessary for the health, maintenance, and support of the surviving spouse." *Id.*

4. Other Means of Support

¶ 31 N.C. Gen. Stat. § 30-3.3A(e)(1)d provides the trustee can in their discretion take into consideration other income assets and other means of support of the surviving spouse. Here, the terms of the Marital Trust provide the Trustees have the discretion to consider "any other means of support available to my wife." The Marital Trust meets the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% fully countable trust. Because we reach this conclusion, it is unnecessary to and we do not reach Plaintiffs' arguments under N.C. Gen. Stat. § 36C-4-412 for modification or under N.C. Gen. Stat. § 36C-4-415 for reformation.

V. Conclusion

¶ 32 The trial court erred in granting summary judgment for Defendants. The Marital Trust meets all statutory requirements and named nonadverse trustees presently and in perpetuity because of the Trustee's rights to appoint another nonadverse trustee. N.C. Gen. Stat. § 30-3.3A(e)(1)c provides for permissive distributions of principal, while the terms of the Marital Trust also provide for permissive distributions. The Marital Trust meets the requirements of N.C. Gen. Stat. § 30-3.3A(e)(1) to be a 100% fully countable trust. The order of the trial court is reversed and the cause is remanded for further proceedings as are consistent with this opinion. *It is so ordered.*

REVERSED AND REMANDED.

Judges GORE and JACKSON concur.

POYTHRESS v. POYTHRESS

[280 N.C. App. 193, 2021-NCCOA-589]

MICHAEL BRANDON POYTHRESS, PLAINTIFF
v.
LISSETE R. POYTHRESS, DEFENDANT

No. COA20-137-2

Filed 2 November 2021

Supersedes 275 N.C. App. 651, 854 S.E.2d. 27 (2020)

1. Divorce—premarital agreement—real estate—consideration for acquisition

In a dispute over real property subject to a premarital agreement, the trial court erred in finding that the husband had provided all the consideration for the acquisition of the real property in the couple's holding company for investment real estate (POGO, which the husband and wife held in equal shares), where three properties had been originally titled to the husband and wife personally, two more were acquired directly by POGO through lines of credit and loans guaranteed by both the husband and wife, and another was contributed to POGO by the husband and then used to secure a cash-out mortgage guaranteed by both the husband and wife.

2. Divorce—premarital agreement—real estate—gift to marriage

In a dispute over real property subject to a premarital agreement, the trial court erred in finding that clear, cogent, and convincing evidence existed showing that the husband did not intend to gift to the marriage his separate assets that were used to acquire the three properties that were used to initially capitalize the couple's holding company for investment real estate (POGO, which the husband and wife held in equal shares). The only evidence that the husband did not intend a gift was his self-serving testimony that he did not subjectively intend to do so, and overwhelming evidence supported the opposite conclusion.

3. Divorce—premarital agreement—real estate—presumption of gift to marriage

The trial court's order in a dispute over real property subject to a premarital agreement was vacated and remanded for further findings as to a beach house that the husband had acquired in his own name with his own assets and later re-titled to both himself and his wife as tenants by the entirety. While there was a presumption that the husband intended a gift to the marriage, other evidence in the record might overcome the presumption.

4. Divorce—premarital agreement—real estate—factual findings

The trial court's order in a dispute over real property subject to a premarital agreement was vacated and remanded for further findings as to several companies and parcels of real estate in Peru, where the findings were unclear as to the ownership of the assets.

Appeal by Defendant from judgment entered 8 August 2019 by the Honorable Ned Mangum in Wake County District Court. Heard in the Court of Appeals 21 October 2020. Opinion filed 31 December 2020. Motion for Reconsideration allowed 12 February 2021.

Fox Rothschild LLP, by Michelle D. Connell, for Plaintiff-Appellee.

John M. Kirby for Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant Lissete R. Poythress ("Wife") appeals portions of a judgment in favor of Plaintiff Michael Brandon Poythress ("Husband"), declaring certain real estate, a real estate-owning limited liability company, and other assets to be his sole property based on the terms of their premarital agreement (the "Premarital Agreement" or "Agreement"). We filed an opinion on 31 December 2020. Having allowed Defendant's Motion to Reconsider, we hereby file this opinion to replace our 31 December 2020 opinion. Judge Carpenter participated in the reconsideration of our prior opinion as Judge Young's term ended on 31 December 2020.

I. Background

¶ 2 Husband and Wife were married in 2010. Husband had recently divorced his first wife, a marriage which produced three children. Though he had significant assets, he lost much of his wealth in that divorce. This experience prompted Husband to seek the Agreement with Wife to protect his assets should his second marriage also end in divorce. Accordingly, just prior their marriage, Husband and Wife entered into the Premarital Agreement.

¶ 3 Wife was also previously married and had two children of her own. She, however, did not have significant assets when she married Husband.

¶ 4 During their marriage, Husband and Wife acquired several properties which, at the time of their separation, were titled *either* to Wife, to Husband and Wife jointly, or to an entity which they jointly owned. The consideration paid to acquire these properties came either from

Husband's separate property or from loans guaranteed by both Husband and Wife.

¶ 5 Husband and Wife separated in 2017.

¶ 6 Husband brought this action claiming that, based on the Agreement, certain assets acquired during the marriage are solely his, notwithstanding how the ownership of the assets may be titled/documented. Wife, though, claims that the assets are marital and should be divided equally, as the Agreement provides that all marital property is to be split equally upon separation/divorce.

¶ 7 After a hearing on the matter, the trial court entered an order declaring Husband as the sole owner of the assets and directing Wife to execute documents to transfer her legal interest therein. The trial court also awarded Husband attorneys' fees, based on its finding that Wife had breached the Agreement by not previously executing the documents. Wife appealed.

II. Argument

¶ 8 The trial court's order covered all property owned by Husband and/or Wife. Wife's brief on appeal takes issue with how the trial court distributed *most* of these assets. As to the assets about which Wife makes no argument, the order of the trial court is affirmed. The assets about which Wife does make an argument on appeal (the "disputed assets") are as follows:

> Ownership Interest in Pogo, LLC- POGO, LLC, ("POGO") is a limited liability company that Husband and Wife set up during the marriage. The parties established POGO to serve as the holding entity for certain investment real estate acquired during their marriage. All documentation in evidence, including POGO tax returns, show that POGO was established and owned during the marriage by both Husband and Wife in equal shares.
>
> Beach House- Husband purchased this property in his own name, using his separate assets to do so. However, sometime prior to separation, Husband re-titled the beach house to himself and Wife as tenants by the entirety.
>
> Peru Assets- Husband purchased various assets in Peru, Wife's home country, during the marriage. Wife

> challenges the trial court's order concerning some of the Peruvian assets, specifically the assets in which either she or both she and Husband are listed as the owner(s). Wife does not challenge the trial court's determination regarding Peruvian assets where she was not listed as an owner.

¶ 9 We hold that the trial court erred in its order in two important respects. First, the trial court erred in finding that Husband had provided all the consideration for the acquisition of many of the disputed assets. The trial court relied on this finding in its determination that the assets were Husband's alone. Second, the trial court erred in finding clear, cogent, and convincing evidence that Husband did not intend to gift to the marriage his separate assets used to acquire the disputed assets. We address each argument in turn.

A. Consideration Provided by Wife

¶ 10 **[1]** The trial court erroneously found that Husband provided *all* consideration to acquire the disputed properties. This is simply not true, at least with respect with POGO, as explained below.

¶ 11 The POGO assets were acquired as follows:

¶ 12 As of the parties' date of separation, POGO owned six investment real estate properties, all located in North Carolina.

¶ 13 Three of these six properties were acquired early in the marriage and originally titled to Husband and Wife, personally. All three properties were acquired with consideration provided by Husband from his separate property. Sometime after these three properties were acquired, Husband and Wife set up POGO, after which *they executed deeds*, re-titling these properties to POGO.

¶ 14 The fourth and fifth properties were acquired directly by POGO through lines and loans *guaranteed by both Husband and Wife*. POGO first obtained a line of credit, secured by the original three properties and *guaranteed by both Husband and Wife*. POGO then purchased the fourth and fifth properties with proceeds from this line and from a mortgage *guaranteed by both parties*.

¶ 15 The sixth property was contributed to POGO by Husband. Husband came to own this sixth property, a single-family residence, in his own name in resolution of claims from his first divorce. He re-titled that home to POGO. POGO then obtained a cash-out mortgage loan secured by this property and *guaranteed by both parties*.

¶ 16 The trial court failed to recognize that Wife provided consideration for the POGO assets in two ways. First, the trial court failed to recognize that the act of personally guaranteeing a loan used to acquire an asset is, itself, consideration. Here, Wife personally guaranteed the lines/loans used to acquire several of the POGO properties. Under the Agreement, Wife had no obligation to personally guarantee any loan concerning Husband's separate property. Rather, Wife was only required under the Agreement to pledge her marital interest, if any, in Husband's separate properties for such loans. However, by personally guaranteeing POGO loans, *Wife's* separate property interests were put at risk. Though the risk to her separate assets may have been slight, said risk *is* consideration. *Young v. Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been said, is for the parties to consider at the time of making the contract, and not for the court when it is sought to be enforced.").

¶ 17 And, second, the three properties used to initially capitalize POGO were owned by Husband and Wife. Wife signed her tenancy by the entirety interest in said properties to POGO. Though Husband may have provided the consideration to acquire these three properties prior to the establishment of POGO, said properties were jointly owned by Husband and Wife at the time they were deeded over to POGO and constitute some consideration.

B. Gifts to Marital Estate by Husband

¶ 18 To the extent that the disputed properties were acquired with Husband's separate property, the trial court found that "clear, cogent, and convincing" evidence existed to rebut any presumption that Husband intended to gift these separate assets to the marital estate. In so finding, the trial court relied largely on the terms of the Agreement. We conclude that the trial court erred in relying on the terms of the Agreement as evidence to rebut the gift presumption, as explained below.

¶ 19 The ownership of property upon separation/divorce is typically resolved through application of our equitable distribution statute, codified in Section 50-20 of our General Statutes. However, parties may contractually agree for the mechanics of our equitable distribution statute to not apply. N.C. Gen. Stat. § 50-20(c) (2017).

¶ 20 Here, by executing the Agreement, Husband and Wife contractually agreed that our equitable distribution statute would not apply. Indeed, the Agreement expressly provides how all their property would be distributed upon separation and that the equitable distribution statute

would not apply to determine the distribution. *See Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (recognizing that "[o]ur statutes also contain a mechanism whereby the parties to a marriage may forego equitable distribution and decide themselves how their marital estate will be divided upon divorce").

¶ 21 The evidence showed and the trial court found that, *on paper*, all the disputed assets were owned by Husband and Wife jointly. Specifically, the POGO tax returns and company documents reflect that Husband and Wife are both members of POGO, with each owning a 50% interest therein; the recorded deed for the beach house lists Husband and Wife as owners as tenants by the entirety; and the documentation for the Peru properties show that they are all jointly owned by Husband and Wife. *See Davis v. R.R.*, 227 N.C. 561, 566, 42 S.E.2d 905, 909 (1947) (holding that income tax return is competent evidence); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 443, 278 S.E.2d 897, 907 (1981) (holding that information reported on tax returns are "highly relevant" evidence of a fact to be proved).

¶ 22 We note that the equitable distribution statute and the cases decided thereunder are not directly on point to resolve the "gift" question, as the parties have agreed that the matter is not to be subject to that statute.

¶ 23 Under our common law, a valid gift (whether conditional or unconditional) occurs when there is (1) donative intent and (2) actual or constructive delivery. *Halloway v. Wachovia*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992).

¶ 24 Our Supreme Court has held that—as a matter of common law, apart from our equitable distribution statute—where a spouse allows his separate assets to be used to acquire property titled to both spouses as tenants by the entirety or to the other spouse, it is presumed that the spouse supplying the consideration has made a gift to the marriage; it is not presumed that the transaction creates a resulting trust in favor of the spouse supplying the consideration. *Mims v. Mims*, 305 N.C. 41, 53-54, 286 S.E.2d 779, 788 (1982). Our Supreme Court further held that this gift presumption may only be overcome by "clear, cogent, and convincing" evidence. *Id.* at 57, 286 S.E.2d at 790.

¶ 25 We are aware that our equitable distribution statute provides that the gift presumption may be overcome by "the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1). But, again, this present dispute is not governed by that statute.

¶ 26 The trial court erroneously relied on the Agreement as evidence to rebut the marital gift presumption, finding that Husband's "procurement

of and reliance on the definitions of separate property in the Premarital Agreement is clear, cogent, and convincing evidence sufficient to rebut any such presumption."

¶ 27 The Agreement provides that property acquired during the marriage by Husband with his separate assets would be solely his upon separation. That is, the Agreement provides that if Husband and Wife divorce, the property owned by Husband prior to marriage and any property he acquired during marriage using his separate property would be his separate property. Wife waived all marital interest in Husband's property, whether the marriage ended in divorce or Husband's death.

¶ 28 However, Paragraph 21 of the Agreement provides that Husband could make gifts to Wife or to the marital estate during the marriage:

> 21. VOLUNTARY TRANSFERS PERMITTED. The purpose of this Agreement is to limit the rights of each party in the assets of his or her spouse in the event of death, separation or divorce, but this Agreement shall not be construed as placing any limitation on the rights of either party to make voluntary *inter vivos* and/or testamentary transfers of his or her assets to his or her spouse.
>
> In the event that [Husband] shall create [ ] tenancies by the entirety, or otherwise so establish assets that upon [his] death[,] it shall be presumed that [Husband] presumed that [he] intended such passage and [that Wife] shall then become the sole and uncontested owner of such asset or assets, anything herein contained to the contrary notwithstanding.
>
> . . . [It is] the wish of each party that any affirmative action taken by either after the signing of this Agreement, whether it be testamentary or in the creation of joint assets, shall override the releases and renunciations herein set forth.
>
> [T]he parties acknowledge that no representation or promises of any kind whatsoever have been made by either of them to the other with respect to any such transfers, gifts, contracts, conveyances, or fiduciary relationships.

The language in this Paragraph 21 is unambiguous: The first section recognizes that Husband may make gifts of his separate property during the marriage to Wife.

¶ 29 The second and third sections indicate that Husband could transfer property to the marital estate, which would then become "solely" Wife's property upon his death, notwithstanding her waiver of her marital interests in his estate provided by North Carolina law. These sections, however, do *not* state that such transfers to the marital estate by Husband were not otherwise to be deemed a present, unconditional gift to the marital estate. Rather, the third section of Paragraph 21 expressly provides that any affirmative action by Husband to create joint assets during the marriage "shall override [Wife's] releases and renunciations" in the Agreement.

¶ 30 And the fourth section affirms there was no understanding at the time the Agreement was executed between the parties with respect to any transfers that might be made during the marriage.

¶ 31 In sum, there is nothing in the Agreement stating that property titled to the parties jointly was to be deemed Husband's separate property upon their separation/divorce. It may be that Husband misunderstood the terms of the Agreement. But we must look to the terms of the Agreement and the actions of the parties concerning the Agreement to determine its meaning. We now consider the evidence concerning each asset category.

¶ 32 **[2]** POGO-The tax returns and other documentation concerning POGO indicated that each party owned a 50% interest. Indeed, Husband testified to this fact. He also testified that he told his accountant on one occasion during the marriage that he wanted to change the ownership interests in POGO to reflect him as owning a 70% interest and Wife owning only a 30% interest, though he and Wife never followed through on any such amendment. In any event, assuming Husband provided all the initial capital for POGO, the documentation creates a presumption that Husband intended the contribution to be a gift.

¶ 33 We conclude that the evidence was not "clear, cogent, and convincing" to overcome the gift presumption as a matter of law. Indeed, the only evidence that Husband did *not* intend a gift was a few lines in Husband's self-serving testimony that he did not *subjectively* intend gifts to Wife when he allowed properties to be titled to POGO, an intent that he never shared with anyone prior to the separation.

¶ 34 We are aware of a case in which our Court held that testimony by a spouse concerning a lack of intent to make a gift when titling separate property to the marriage, without other evidence, is not necessarily insufficient to constitute clear, cogent, and convincing evidence to overcome the marital gift presumption. *Romulus v. Romulus*, 215 N.C. App.

495, 506, 715 S.E.2d 308, 316 (2011) ("Yet, arguably the only evidence which could potentially support findings of fact to rebut the marital presumption is plaintiff's testimony as to her intent. Herein lies the issue which the trial court must resolve on remand.") *Romulus*, however, is distinguishable from the present case. In *Romulus*, there was not much in evidence from which it could be determined *either way* whether a wife intended to gift a house to the marriage when she titled it to her and her spouse. Accordingly, in that case, we held that the wife's testimony alone might be enough to constitute evidence sufficient to rebut the marital presumption. *Id.* at 515-16, 715 S.E.2d at 322.

¶ 35 Here, though, there is substantial evidence *from Husband* through his words and actions that he *did intend* POGO and the three properties used to initially capitalize POGO to be joint assets, in addition his conversation with his accountant about changing his ownership interest from 50% to 70%. For instance, Husband testified that he wanted Wife to be involved in real estate investing and that the first property was originally titled to her only and was purchased to get her started. He testified that Wife was active in locating properties, that she participated in managing them, that she helped in negotiating for some of the purchases, and that she found a property and the tenant for one of the properties that they acquired through POGO. He testified that POGO was so named based on a combination of their last names and that their goal was to acquire ten properties through POGO so that their combined five children (from their respective prior marriages) would each one day have two rental properties apiece. Further, Husband participated with Wife in the acquisition of several POGO properties with the proceeds from loans guaranteed by both of them, never telling Wife that she was guaranteeing loans to buy property he considered to be his separate property.

¶ 36 In sum, all this evidence, overwhelmingly demonstrates that Husband and Wife jointly own POGO.

¶ 37 It may be that Husband thought that POGO would revert to him if the marriage ended in divorce. However, this belief would still indicate that he intended gifts, though perhaps *conditional* gifts. Indeed, such belief does not indicate a resulting trust, whereby he thought that Wife was merely holding her 50% interest in POGO in trust for him.

¶ 38 But the evidence is lacking to show even a gift, conditioned on the marriage not ending in divorce. Our Court has held as follows with *conditional* gifts generally:

> A person has the right to give away his or her property as he or she chooses and may limit a gift to a

> particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it. . . .
>
> The intention of the donor to condition the gift must be measured at the time the gift is made, as any undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expression and excludes all questions in regard to his unexpressed intention.

Courts v. Annie Penn, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866-67 (1993) (quotation marks omitted). The record here, though, does not disclose any evidence regarding Husband's words or actions that Wife's POGO interests would revert to him if the marriage ended in divorce.

¶ 39 **[3]** The Beach House-The beach house was never titled to POGO. Rather, Husband acquired this property in his own name with his own assets. He later re-titled it to both himself and Wife as tenants by the entirety. This act created a rebuttable presumption that he intended a gift of the beach house to the marriage. As with POGO, the trial court erroneously found that the gift presumption was overcome, in part, by the terms of the Agreement. But, regarding the beach house, the trial court also relied on a conversation that Husband and Wife had when he made the transfer to rebut the presumption. In this conversation, Wife indicated that she was afraid that Husband's ex-wife would kick her out of the beach house were he to die as the sole owner. The trial court found that Husband, therefore, re-titled the property to the marital estate *so that it would become Wife's if he were to die*. This conversation is *some* evidence as to what the parties, especially Husband, was thinking when the property was re-titled. This finding *could* alone support an ultimate finding that Husband intended only a resulting trust, that the property be held by the marital estate for his benefit, whereby Wife would only acquire any interest upon his death. We, therefore, vacate the portion of the order concerning the beach house and remand for further findings on this issue. On remand, the trial court must determine whether the conversation and other competent evidence in the record, apart from the Agreement, constitute "clear, cogent, and convincing" evidence to overcome the presumption that Husband gifted his beach house to himself and Wife jointly.

¶ 40 **[4]** Peru Assets-Wife challenges the trial court's order concerning interests in four Peruvian companies and several parcels of real estate in Peru.

¶ 41 She argues that the trial court erred by exercising jurisdiction over these Peruvian properties. We disagree. The trial court had *in personam* jurisdiction over the parties, as they were married in North Carolina, entered the Agreement in North Carolina, and subjected themselves to the jurisdiction of the court. And the trial court had subject matter jurisdiction to resolve the contract claim. Of course, whether Peru will honor a judgment from North Carolina concerning property located in Peru is not before us.

¶ 42 Alternatively, Wife argues that the trial court erred by declaring Husband the sole owner of these Peruvian assets. It is unclear from the findings in whose name(s) these properties are actually held in Peru or how they came to be so held. We vacate the portion of the order declaring that these properties are Husband's properties and remand for the trial court to make further findings with respect to these properties. The trial court, in its discretion, may hear additional evidence concerning these properties and consider legal arguments from the parties, including the effect of Peruvian property law, if any, on our marital gift presumption.

III. Conclusion

¶ 43 We reverse the trial court's order concerning POGO and the assets owned by POGO. We conclude that POGO is owned 50/50 by Husband and Wife.

¶ 44 We vacate and remand the trial court's order concerning the beach house. There is a presumption that Husband intended a gift of the beach house to the marriage when he executed a deed retitling the beach house to himself and Wife as tenants by the entirety. On remand, the trial court must determine whether there is "clear, cogent, and convincing" evidence in the record, apart from the terms of the Agreement, to overcome the gift presumption.

¶ 45 We vacate and remand the trial court's order concerning any Peruvian assets where the record owner is either Husband and Wife jointly or Wife solely. The trial court did not err in finding that Husband provided the only consideration to acquire these assets, as Wife does not challenge these findings. On remand, the trial court shall determine whether North Carolina or Peruvian law controls concerning the

ownership of said assets and apply the appropriate law to determine how these assets are to be distributed.

¶ 46 We conclude that the trial court erred in its award of attorneys' fees.

¶ 47 We affirm the trial court's order in all other respects.

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

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
DOMINIQUE JAWANN EDDINGS, DEFENDANT

No. COA20-758

Filed 2 November 2021

Search and Seizure—search warrant—probable cause—supporting affidavit—insufficient factual allegations

The trial court erred in a drug prosecution by denying defendant's motion to suppress evidence obtained from his house through a search warrant, where the affidavit in the warrant application did not allege sufficient facts to establish probable cause for the search. The affidavit alleged that police had previously observed a suspected drug dealer visiting defendant's house, followed the dealer's car after one of these visits, conducted a traffic stop, and found the dealer ingesting a white powdery substance; however, the affidavit did not state how long the dealer was inside the house, how much time had passed between when the dealer left the house and when law enforcement began following him, why law enforcement believed the dealer obtained his drug supply at defendant's house (as opposed to already having drugs in his possession before going there), or any other information linking defendant's house to illegal drug activity.

Chief Judge STROUD dissenting.

Appeal by Defendant from judgments entered 20 September 2019 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan R. Marx for the State.

W. Michael Spivey for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Dominique Jawann Eddings ("Defendant") appeals convictions of possession with intent to sell or deliver fentanyl, possession of fentanyl, possession of a firearm by a felon, and intentionally keeping or maintaining a building for keeping or selling a controlled substance. Prior to trial, Defendant moved to suppress evidence obtained during a search of his residence. The trial court denied the motion, finding probable cause. On appeal, Defendant challenges the denial of his motion to suppress; the denial of his motion to dismiss the charge of possession of a firearm by a felon; jury instructions given regarding the distinction between actual and constructive possession; and an alleged sentencing error. After careful review, we reverse the order denying Defendant's motion to suppress and grant Defendant a new trial.

I. Factual and Procedural Background

¶ 2 In 2018, the Buncombe County Sherriff's Office believed Robert Jones ("Jones") was selling narcotics in Leicester, North Carolina. Law enforcement had a confidential informant make a controlled purchase of narcotics from Jones at Jones's residence.

¶ 3 When the confidential informant successfully purchased fentanyl from Jones, law enforcement asked the informant to complete a second controlled purchase. Jones told the informant that "[h]e didn't have narcotics. He would have to go get narcotics." Law enforcement began surveilling Jones and observed Jones travel to a residence located at 92 Gillespie Drive. Jones remained at 92 Gillespie Drive for less than thirty minutes before meeting the informant at a nearby convenience store and providing narcotics to the informant. After observing this, law enforcement formed an opinion that Jones was procuring narcotics from 92 Gillespie Drive.

¶ 4 On April 19, 2018, Buncombe law enforcement officers arranged for the informant to purchase drugs from Jones for a third time. Prior to the scheduled controlled purchase, a surveillance team followed Jones as he traveled to 92 Gillespie Drive. Jones[1] remained at the residence

1. There is no evidence in the record that Jones lived at 92 Gillespie Drive.

for approximately ten minutes. Approximately two minutes after Jones left the residence, law enforcement attempted to perform a traffic stop. However, Jones did not stop his vehicle when law enforcement officers activated their emergency lights. While pursuing Jones, law enforcement officers "could see him eating something." Officers "finally got him stopped at [a] gas station" and noticed "that there was something in his beard that looked like white powder." It was determined later that Jones ingested narcotics.

¶ 5 Once law enforcement detained Jones, Detective Jason Sales ("Detective Sales") of the Buncombe County Sherriff's Office "wrote a search warrant" for the residence Jones had recently left. At the time, law enforcement did not know who resided at 92 Gillespie Drive, but Detective Sales "believe[ed] that [the house] [was] where [] Jones purchased his narcotics from, that this was, in fact, his source of supply." "[A] search warrant was drafted, approved by a supervisor, [and] taken to a magistrate."[2]

¶ 6 The search warrant application was comprised of six pages, and included: a broad description of items to be seized, including "any and all weapons," "any and all items of personal property," and any item that "could show information related to the manufacture, sale or distribution of controlled substances"; a list of three statutes law enforcement believed were violated; a description of the residence and directions from the Buncombe County Sheriff's Office to 92 Gillespie Drive; and an one-and-a-half page affidavit prepared by Detective Sales. The search warrant affidavit provided, in relevant parts,

> While surveilling Jones, BCAT Agents were also able to follow him to 92 Gillespie Drive . . . , also believed to be the Source of Supply for Jones. On this date . . . BCAT Agents were able to once again surveille Jones and follow him to the 92 Gillespie Drive address. With the help of the Buncombe County Sheriff's Community Enforcement Team (SCET), BCAT Agents were able to advise SCET when Jones would be leaving the residence of 92 Gillespie Drive and advised them the direction Jones would be traveling. . . . Jones was

2. A review of the transcript does not reveal that Detective Sales spoke with the magistrate. The transcript does not reveal who took the search warrant to the magistrate or if the officer who did so detailed law enforcement's surveillance of Jones to the issuing magistrate. Thus, we presume that the issuing magistrate only considered the search warrant affidavit in determining probable cause existed.

> placed under arrest and a subsequent search for suspected heroin/fentanyl was conducted. In the search of the vehicle Deputies were able to locate [drugs]. . . . Based on my training and experience, and the facts as set forth in this affidavit, I believe that in the residence of 92 Gillespie Drive, there exists evidence of a crime and contraband or fruits of that crime, to include the use and sale of illegal narcotics. With the information of the officers and confidential sources involved in this case, the affiant respectfully requests of the court that a search warrant be issued.

The search warrant was executed that same day.

¶ 7 At the time the search warrant was executed, several individuals — including Defendant's cousin, Defendant's fiancé, an infant, and a teenaged girl — appeared to be either living at or visiting the residence. The search revealed digital scales, fentanyl, inositol powder, and a safe containing money and documents belonging to Defendant. Officers recovered a handgun with a holster and magazine from Defendant's bedroom. Officers further recovered magazines and ammunition from various places inside the residence. The following day, Detective Sales obtained a second search warrant for the residence. During the second search, officers found a coffee can in the backyard containing packages of fentanyl.

¶ 8 Subsequently, on January 7, 2019, Defendant was indicted for possession with the intent to sell or deliver a Schedule II controlled substance, possession of fentanyl, possession of a firearm by a felon, and intentionally keeping or maintaining a dwelling for keeping or selling a controlled substance. On September 16, 2019, Defendant moved to suppress all evidence obtained during the searches of 92 Gillespie Drive, arguing the issuing magistrate "erred in finding probable cause to issue the search warrant to search Defendant's residence located at 92 Gillespie Drive." Defendant argued that the search warrant lacked sufficient probable cause and violated Defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution. Defendant's motion was denied. In its order denying Defendant's motion to suppress, the trial court made findings of fact which Defendant challenges. The relevant findings of fact are as follows:

> 2. The affidavit attached to the warrant is signed by Detective Jason B. Sales. In the affidavit he among other things asserts . . . [t]hat the task force with the

> aid of a confidential source of information recently purchased heroin/fentanyl from . . . Jones; [t]hat agents with task force were able to conduct surveillance of Mr. Jones on several occasions . . .; [t]hat during the surveillance they were also able to follow Mr. Jones to 92 Gillespie Drive, Leicester, NC, and based on their observations it was concluded that the source of supply of narcotics to Mr. Jones was coming from the property located at 92 Gillespie Drive . . .; [t]hat on April 19, 2018 the day of the application for the search warrant agents were again conducting surveillance on Mr. Jones and he again went to the property located at 92 Gillespie Drive; [t]hat immediately upon Mr. Jones leaving this property law enforcement followed Mr. Jones and based on other probable cause they quickly pulled Mr. Jones over and stopped him; [u]pon stopping Mr. Jones it was noted that he was ingesting a white powdery substance; . . . and [t]hat based on the training and experience of the detective he opined that there existed at the residence at 92 Gillespie Drive from which Mr. Jones had just left evidence of crime indicating the use and sale of illegal narcotics. This Court finds, as the magistrate did, the foregoing facts based on the affidavit attached to the search warrant.
>
> 5. . . . The affidavit supports a drug dealer frequenting the particular residence to be searched, and that the drug dealer was found with a substantial amount of drugs immediately upon leaving that residence. . . . The affidavit attached to the search warrant is sufficient to establish probable cause for the issuance of the warrant.
>
> 6. Based on the totality of the circumstances, the magistrate in this case had a substantial basis to conclude that probable cause existed to search . . . [D]efendant's home at 92 Gillespie Drive . . . .

¶ 9 Defendant's trial began on September 17, 2019, in the Buncombe County Superior Court. On September 20, 2019, a jury convicted Defendant on all counts: possession with intent to sell or deliver fentanyl, possession of fentanyl, possession of a firearm by a felon, and intentionally keeping or maintaining a dwelling for keeping or selling a

controlled substance. Judgments were entered upon the jury's verdicts. Defendant timely gave notice of appeal in open court.

¶ 10 On appeal, Defendant argues the trial court erred in denying his motion to suppress and his motion to dismiss the charge of possession of a firearm by a felon. Defendant further contends the trial court erred in failing to instruct the jury on constructive possession of a firearm and in sentencing Defendant as a Class I felon.

II. Discussion

¶ 11 Defendant first contends the trial court erred in denying his motion to suppress the evidence obtained through the search warrant, as the search warrant affidavit lacked probable cause for its issuance. After careful review, we agree and reverse the order denying Defendant's motion to suppress, as the application affidavit is fatally defective.

¶ 12 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. review denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

¶ 13 Pursuant to N.C. Gen. Stat. § 15A-244, an application for a search warrant must contain a statement of probable cause and "[a]llegations of fact supporting the statement [of probable cause]. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause . . . ." N.C. Gen. Stat. § 15A-244(2)-(3) (2020); *see also State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015). The supporting affidavit "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. Campbell*, 282 N.C. 125, 132, 191 S.E.2d 752, 757 (1972) (quoting *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971)). "Probable cause 'does not mean actual and positive cause,' nor does it import absolute certainty." *Id.* at 129, 191 S.E.2d at 755 (quoting 47 Am. Jur., Searches and Seizures, § 22). We review whether the issuing magistrate had "a 'substantial basis for . . . conclud[ing]' that probable cause existed." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citation omitted).

¶ 14 Whether the search warrant "affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the Fourth Amendment." *Campbell*, 282 N.C. at 129, 191 S.E.2d at 756 (citing *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948)). The Fourth 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; *see also State v. McKinney*, 361 N.C. 53, 57-58, 637 S.E.2d 868, 871-72 (2006) (citations omitted); *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citations omitted). 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; *see also State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302-03 (2016); N.C. Const. art. I, § 20. The issuing magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)) (quotation marks omitted). A magistrate may make such determination upon "the totality of the circumstances," drawing "reasonable inferences" from the facts in an affidavit to support a finding of probable cause. *Id.*; *see also State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991).

¶ 15 Factors "taken into account in the probable cause determination" include "[t]he experience and the expertise of the affiant officer . . . so long as the officer can justify his belief to an objective third party." *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 462 (1988) (citation omitted). "The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances" to support the affiant's belief that probable cause existed. *Campbell*, 282 N.C. at 129, 191 S.E.2d at 755. The issuing magistrate may not rely on an affiant's mere belief that probable cause existed, as such "purely conclusory" affidavits are inappropriate to further the impartial objective of the magistrate. *Id.* at 131, 191 S.E.2d at 756 (citation omitted).

¶ 16 An affidavit "must establish a nexus between the objects sought and the place to be search[ed]." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citation omitted). "The existence . . . of a nexus is subject to the same totality of the circumstances inquiry as any other

evidence establishing probable cause." *State v. Lovett*, No. COA20-539, 2021-NCCOA-171, 2021 WL 1541478, at ¶ 25 (N.C. Ct. App. April 20, 2021) (unpublished) (citing *McCoy*, 100 N.C. App. at 577-78, 397 S.E.2d at 357-58). Probable cause to search one location can be obtained from evidence at another location; however, such evidence must "implicate the premises to be searched." *State v. Washburn*, 201 N.C. App. 93, 101, 685 S.E.2d 555, 561 (2009) (quoting *State v. Goforth*, 65 N.C. App. 302, 308, 309 S.E.2d 488, 493 (1983)).

¶ 17 In determining "whether the search warrant affidavit at issue established probable cause," we are guided by our Supreme Court's decision in *State v. Lewis*, 372 N.C. 576, 831 S.E.2d 37 (2019). In *Lewis*, the affidavit requested a search of a residence where a robber was arrested. *Id.* at 588, 831 S.E.2d at 45. However, the affidavit failed to properly implicate the residence when it did not detail the circumstances explaining law enforcement's presence at the residence; did not include a conversation between a deputy and the defendant's family member that would have revealed to the magistrate that the defendant lived at the residence; and did not mention that the defendant's car was seen at the front of the house. *Id.* Though the affidavit listed a thorough account of the defendant's incriminating behavior and law enforcement's activities in apprehending him, the affidavit was found to be fatally defective. *Id.* at 588, 831 S.E.2d at 45-46. In holding the defendant's motion to suppress should have been allowed, our Supreme Court reasoned the

> [d]efendant could have been present at [the residence] at the time of his arrest for any number of reasons. Absent additional information linking him to the residence or connecting the house with criminal activity, no basis existed for the magistrate to infer that evidence of the robberies would likely be found inside the home.

Id. at 588, 831 S.E.2d at 45-46.

¶ 18 In the present appeal, no evidence was presented at the suppression hearing[3] and the trial court's order states it made its findings of fact "after review of the Court file and after review of the contested search warrant." Moreover, "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. Logan*,

3. "[I]t is axiomatic that arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

278 N.C. App. 319, 2021-NCCOA-311, ¶ 27 (quoting *State v. Benters*, 367 N.C. 660, 673-74, 766 S.E.2d 593, 603 (2014)). The search warrant affidavit is the only document contained in the record on appeal containing allegations of fact to support a statement of probable cause. The trial court found that law enforcement officers "immediately" followed Jones from the residence and "quickly pulled . . . Jones over and stopped him." The affidavit attached to the search warrant does not reveal how much time passed once Jones left Defendant's residence and the time Jones was apprehended with narcotics during a traffic stop. In fact, the affidavit is devoid of any facts regarding when or how Jones obtained narcotics or whether he had narcotics in his possession prior to traveling to Defendant's residence. The affidavit merely states "Buncombe County Anti-Crime Taskforce Agents were able to advise SCET when Jones would be leaving the residence . . . and advised them the direction Jones would be traveling." It is not clear whether SCET members observed Jones leave 92 Gillespie Drive, nor how much time passed between when Jones left the residence and when law enforcement officers began following his vehicle. The remaining pages of the search warrant application do not detail why law enforcement believed the enumerated statutes were violated or why law enforcement believed 92 Gillespie Drive was Jones's source of supply. Therefore, we hold that the trial court's finding that law enforcement officers "immediately" followed Jones is unsupported.

¶ 19 Likewise, the trial court's finding that "the drug dealer was found with a substantial amount of drugs immediately upon leaving that residence," is not supported by the four corners of the affidavit. Although the affidavit states law enforcement officers stopped Jones and observed him "attempting to ingest an unknown substance," the affidavit does not provide any details as to how long law enforcement officers followed Jones, nor how long it took SCET officers to locate Jones's vehicle after BCAT agents informed SCET of the direction of travel. "Before 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).

¶ 20 Detective Sales believed the residence "to be the Source of Supply for Jones," but he did not provide the factual reason for his belief in the affidavit. While law enforcement officers observed Jones at the property at least twice before, the affidavit does not detail how long Jones was inside the residence. Although the affidavit revealed a confidential informant purchased narcotics from Jones "in recent days" and that Jones

was later observed at 92 Gillespie Drive, it is not clear how much time passed between the controlled purchase and when Jones was observed at Defendant's residence. The affidavit is devoid of facts detailing the confidential informant's conversation with Jones in which Jones stated he would need to obtain narcotics for the third controlled purchase. Thus, the trial court's finding that "[t]he residence to be searched is thereby linked to the drug activity" remains uncorroborated.

¶ 21 The trial court included the following as a conclusion of law: "[t]he affidavit attached to the search warrant is sufficient to establish probable cause for the issuance of the warrant." While Detective Sales's expertise and belief that 92 Gillespie Drive was Jones's source of supply bears weight, the affidavit application must state facts sufficient to support a finding probable cause existed. *See Barnhardt*, 92 N.C. App. at 98, 373 S.E.2d at 462; *see also Campbell*, 282 N.C. at 131, 191 S.E.2d at 756. As the trial court noted, all that can be discerned from the plain language of the affidavit is that law enforcement observed Jones at 92 Gillespie Drive and apprehended Jones with narcotics "on the same date." Notwithstanding the fact that Jones had visited the residence at least twice before, the record before this Court tends to show that Detective Sales did not provide any facts or circumstances that would lead an objective magistrate to reasonably conclude that drugs or other illegal items could potentially be found at 92 Gillespie Drive. Jones "could have been present at [the residence] . . . for any number of reasons." *Lewis*, 372 N.C. at 588, 831 S.E.2d at 45-46. Probable cause cannot be shown by affidavits which are purely conclusory without detailing any of the underlying circumstances upon which the conclusion is based. Thus, we hold the affidavit, as stated in this case, does not provide sufficient facts and circumstances to supply a magistrate with a substantial basis to infer probable cause. Because we conclude the trial court erred in denying Defendant's motion to suppress, we do not need to address his remaining arguments on appeal.

III. Conclusion

¶ 22 After careful review, we hold the search warrant affidavit did not provide a sufficient basis for a finding of probable cause to search Defendant's residence. We reverse the order denying Defendant's motion to suppress and grant Defendant a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

Judge COLLINS concurs.

Chief Judge STROUD dissents by separate opinion.

STROUD, Chief Judge, dissenting.

¶ 23 Because I conclude the search warrant affidavit provides a sufficient basis for probable cause to search defendant's residence, I would affirm the order denying defendant's motion to suppress; therefore, I dissent.

¶ 24 I agree with the majority that the question before us is whether there was probable cause for the issuance of the search warrant.

> With regard to a search warrant directed at a residence, 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. Bailey, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020) (citation and quotation marks omitted). *Bailey* further explains,

> This standard for determining probable cause is flexible, permitting the magistrate to draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant. That evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience. Probable cause requires not certainty, but only *a probability or substantial chance of criminal activity*. The magistrate's determination of probable cause is given great deference and after-the-fact scrutiny should not take the form of a *de novo* review.

Id. (emphasis in original) (citation, quotation marks, and ellipses omitted).

¶ 25 Here, the search warrant application included six pages of attachments detailing what was to be seized, the crimes Detective Sales believed were taking place, a specific description of the location to be searched which included a picture of a map with street names, and Detective Sales's affidavit. The affidavit stated in part:

> The applicant swears or affirms to the following facts to establish probable cause for the issuance of a search warrant

I, the affiant Jason B. Sales, am a sworn law enforcement officer with the Buncombe County Sheriff's Office. I am an Agent assigned to the Buncombe County Anti-Crime Task Force Division, tasked with investigating violations of criminal law and narcotic investigations. I have been a sworn Deputy for 16 years. I am currently a member of the Sheriff's Special Response Team (SRT) and a member of the Buncombe County Sheriff's Office Crisis Intervention Team (CIT). Prior assignments with this agency have included duties within the Special Investigations Division (Sexual Related Crimes), Property Crimes Division, Patrol Division, Court Security Division, Transportation Division, and in the Detention Center. I have had over 1,800 hours training in Law Enforcement related courses. I have had training in investigative processes, legal updates, execution of search warrants, resolution of barricaded suspects, and currently certified through LELA for Clandestine Labs related to, but not limited to Methamphetamine, LSD, MDMA, and Fentanyl. I hold a vocational diploma in Criminal Justice with AB-Tech.

The information set forth in this affidavit is the result of my own investigation or has been communicated to me by others involved in this investigation.

In recent days the Buncombe County Anti-Crime Taskforce (BCAT) with the aid of a confidential source of information (CSI) have purchased an amount of heroin/fentanyl from Robert Mitchell Jones (12/31/1959).

With information received from the CSI, BCAT Agents were able to surveille Jones on several occasions and observe him make what were believed to be narcotics transactions in the Leicester Community of Buncombe County. While surveilling Jones, BCAT Agents were also able to follow him to 92 Gillespie Drive, Leicester NC 28748, also believed to be the Source of Supply for Jones.

On this date, Thursday, April 19, 2018 BCAT Agents were able to once again surveille Jones and follow him

> to the 92 Gillespie Drive address. With the help of the Buncombe County Sheriff's Community Enforcement Team (SCET), BCAT Agents were able to advise SCET when Jones would be leaving the residence of 92 Gillespie Drive and advised them the direction Jones would be traveling. With the SCET team in place, BCAT Agents observed Jones leave 92 Gillespie Drive and turn right onto New Leicester Hwy. BCAT Agent informed SCET the direction of travel and the type of vehicle Jones was operating (Maroon/Red Nissan extra cab 2wd pick-up). SCET was able to locate the vehicle and form their own basis for probable cause to effect a vehicle stop for Jones. SCET was able to determine their own probable cause for the stop and initiate said stop. Once the blue lights were activated, Jones was observed attempting to ingest an unknown white powdery substance. The traffic stop was conducted in the parking lot area of 3148 New Leicester Hwy, BP Service Station. At the traffic stop Jones exited his vehicle and [was] approached by Deputies. Deputies observed a plastic baggie sticking out of Jones['s] rear pocket and was motioning to the baggie. Deputies went to retrieve the baggie and some of the white powdery substance went airborne into the Deputies['s] face. Jones was placed under arrest and a subsequent search for suspected heroin/fentanyl was conducted. In the search of the vehicle Deputies were able to locate three (3) individual wrapped foil packs containing approx. two (2) grams of suspected heroin/fentanyl each inside the vehicle. EMS was called to the traffic stop and were able to observe Jones and the Deputy exposed to the suspected heroin/fentanyl.
>
> Based on my training and experience, and the facts as set forth in this affidavit, I believe that in the residence of 92 Gillespie Drive, there exists evidence of a crime and contraband or fruits of that crime, to include the use and sale of illegal narcotics. With the information of the officers and confidential sources involved in this case, the affiant respectfully requests of the court that a search warrant be issued.

According to the majority opinion, the main deficiency in the affidavit appears to be the passage of time both (1) in the prior days when law

enforcement had observed what they believed to be illegal drug transactions and (2) from the time Jones left defendant's house until he was stopped and apprehended with narcotics.

¶ 26 The affidavit notes that the prior purchases from Jones were made "[i]n recent days[,]" and it is sufficiently specific enough to note the transactions as "recent[.]" I am not aware of any case law requiring search warrants to provide more specific details than noting "in recent days[,]" particularly when as here, there are many other specific details in the affidavit to test its veracity. *See generally State v. Ellington*, 18 N.C. App. 273, 196 S.E.2d 629, *aff'd*, 284 N.C. 198, 200 S.E.2d 177 (1973) (determining that an affidavit provided reasonable cause to search luggage where it noted information had been obtained "recently"). In later interpreting *Ellington*, this Court stated in *State v. Brown*,

> In *State v. Ellington*, 284 N.C. 198, 200 S.E.2d 177 (filed 14 November 1973), the Supreme Court refused to hold that the following language in an affidavit was insufficient under *Aguilar v. Texas*, *supra*, to establish the reliability of a confidential informant:
>
> > "Deputy Simmons advises that his informer is 100% reliable, and that information obtained from this same informant recently led to the confiscation of 120,000 Barbituates recently in New York City."
>
> The obvious distinction between the affidavit in *Ellington*, *supra*, and the affidavit before us is that the former refers—although generally—to a specific instance of information whereas the latter refers only to a general pattern of information. Nevertheless, we hold that this affidavit is sufficient under *Aguilar v. Texas*, *supra*, and *State v. Ellington*, *supra*.
>
> > "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. *If the teaching of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical*

> *requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before* acting." *State v. Ellington*, *supra*, at 204, 200 S.E.2d at 181 [quoting *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)].

State v. Brown, 20 N.C. App. 413, 415, 201 S.E.2d 527, 529 (1974) (emphasis added).

¶ 27 As to the timing of when Jones was stopped, a plain reading of the affidavit indicates Jones was stopped very quickly after driving away from defendant's home. In denying the motion to suppress, the trial court fairly summarized the affidavit in finding "[t]hat immediately upon Mr. Jones leaving this property law enforcement followed Mr. Jones and based on other probable cause they *quickly* pulled Mr. Jones over and stopped him[.]" (Emphasis added). The majority's own summary of the facts indicates that it was approximately two minutes from when Jones left defendant's residence until law enforcement attempted to stop him.

¶ 28 Further, the affidavit notes that law enforcement was in place already aware of "the direction Jones would be traveling" so that they could quickly stop him, and Jones had only made one right turn before the stop. While the local magistrate was likely aware of the proximity of the locales mentioned in the affidavit, I take judicial notice that defendant's house is 2.8 miles from the address where Jones was stopped, and thus assuming normal driving speeds, the time to travel the distance would be at most a few minutes. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . A court may take judicial notice, whether requested or not."); *see generally State v. Brown*, 221 N.C. App. 383, 387, 732 S.E.2d 584, 587 (2012) (taking "judicial notice of the driving distance between White's residence and defendant's girlfriend's apartment as being in excess of 27 miles. In *State v. Saunders*, 245 N.C. 338, 342, 95 S.E.2d 876, 879 (1957), our Supreme Court held that it was appropriate for the trial

court to take judicial notice of the distance in miles between cities in Virginia and North Carolina."). I believe the trial court's characterization of the stop as "immediat[e]" was accurate given "a commonsense and realistic" interpretation rather than the "[t]echnical [interpretation of the] requirements [with] elaborate specificity" which is discouraged. *Brown*, 20 N.C. App. at 415, 201 S.E.2d at 529.

¶ 29 A "commonsense" reading of the search warrant affidavit, *Bailey*, 374 N.C. at 335, 841 S.E.2d at 280, indicates that due to his extensive training and experience as a law enforcement officer Detective Sales was familiar with the circumstances generally surrounding illegal drug sales; via a confidential informant Detective Sales was aware Jones had recently been dealing in illegal drugs; other law enforcement officers surveilled Jones "on several occasions" conducting what they believed were narcotic transactions, including at defendant's home; law enforcement observed Jones enter defendant's home; immediately after leaving defendant's home, law enforcement officers, based on other established probable cause attempted to stop Jones and saw him ingesting a white substance; a search of Jones's vehicle revealed many illegal drugs. The affidavit establishes, "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." *Id.*

¶ 30 Accordingly, I would affirm the trial court's order determining there was probable cause for issuance of the search warrant. Thus, I dissent.

STATE v. GARRETT

[280 N.C. App. 220, 2021-NCCOA-591]

STATE OF NORTH CAROLINA
v.
HALO GARRETT, DEFENDANT

No. COA19-1171

Filed 2 November 2021

Constitutional Law—juvenile tried as adult—prior to change in law—new law not retroactive—no flagrant violation of rights

Defendant was not entitled to dismissal of criminal charges under N.C.G.S. § 15A-954(a)(4) where he was prosecuted as an adult for acts committed when he was sixteen years old but a subsequently-enacted law—applied prospectively—raised the age at which offenders could be automatically tried as adults. Defendant could not show that his constitutional rights were violated, much less flagrantly violated, because the statute changes did not create a classification between different groups of people to trigger an equal protection violation, his prosecution as an adult did not criminalize a status which could implicate the Eighth Amendment prohibition against cruel and unusual punishment, and neither his substantive nor procedural due process rights were violated where being tried as a juvenile did not involve a protected interest and the State had a rational basis for updating statutes based on evolving standards of fairness.

Appeal by the State from order entered 19 September 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellee.

MURPHY, Judge.

¶ 1 On a motion to dismiss pursuant to N.C.G.S. § 15A-954(a)(4), a defendant bears the burden of showing his constitutional rights were flagrantly violated, causing irreparable prejudice to the preparation of his case that can only be remedied by dismissal of the prosecution. Here, Defendant cannot show that he experienced any flagrant violation of

his constitutional rights, and as such he was not irreparably prejudiced. We reverse the trial court's order dismissing Defendant's charges and remand to the trial court.

BACKGROUND

¶ 2 Defendant Halo Garrett was born on 24 September 1999. On 13 December 2015, Defendant, at sixteen years old, allegedly broke into a home and stole several items.

¶ 3 On 24 October 2016, Defendant was charged in Mecklenburg County Superior Court as an adult pursuant to the then effective version of N.C.G.S. § 7B-1604(a) with felonious breaking or entering and larceny after breaking or entering, both Class H felonies. *See* N.C.G.S. § 7B-1604(a) (2015) ("Any juvenile, including a juvenile who is under the jurisdiction of the court, who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). In 2017, after Defendant was charged, the General Assembly passed the Juvenile Justice Reinvestment Act, which changed how and when a juvenile could be prosecuted as an adult in Superior Court.[1] *See* 2017 S.L. 57 § 16D.4(c)-(e). The Juvenile Justice Reinvestment Act became effective on 1 December 2019 and does not apply retroactively. *See* 2017 S.L. 57 § 16D.4(tt). Had Defendant's offense date for the same Class H felonies occurred after 1 December 2019, Defendant would have initially been within the jurisdiction of the Juvenile Court[2] and an assessment would have been made to determine if he should be sentenced as an

---

1. Most relevant to the facts of this case, the Juvenile Justice Reinvestment Act changed how sixteen-year-old and seventeen-year-old juveniles charged with Class H and Class I felonies could be prosecuted. *Compare* N.C.G.S. § 7B-1604(a) (2015), *with* N.C.G.S. § 7B-2200.5(b) (2019). Prior to the enactment of the Juvenile Justice Reinvestment Act, any juvenile who was sixteen or older when committing an alleged criminal offense was automatically prosecuted as an adult. *See* N.C.G.S. § 7B-1604(a) (2015) ("Any juvenile, including a juvenile who is under the jurisdiction of the court, who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). After the enactment of the Juvenile Justice Reinvestment Act, the same juveniles are under the jurisdiction of Juvenile Court, and an assessment must be made prior to transferring jurisdiction to Superior Court. *See* N.C.G.S. § 7B-2200.5(b) (2019) ("If the juvenile was 16 years of age or older at the time the juvenile allegedly committed an offense that would be a Class H or I felony if committed by an adult, after notice, hearing, and a finding of probable cause, the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to [S]uperior [C]ourt pursuant to [N.C.G.S. §] 7B-2203."). N.C.G.S. § 7B-2203(b) includes eight factors for the Juvenile Court to consider in determining "whether the protection of the public and the needs of the juvenile will be served by transfer of the case to [S]uperior [C]ourt[.]" *See* N.C.G.S. § 7B-2203(b) (2019).

2. For ease of reading, we refer to the District Court as "Juvenile Court."

adult in Superior Court. *See* N.C.G.S. §§ 7B-2200.5(b); 7B-2203 (2019). Pursuant to the law at the time of his alleged offense in 2015, Defendant must be tried and potentially sentenced as an adult in Superior Court. *See* N.C.G.S. § 7B-1604(a) (2015).

¶ 4 The case was set for trial in late 2017, but Defendant failed to appear for trial on that date. Due to Defendant's failure to appear, he was arrested in 2019 and his case proceeded towards trial. At a pretrial hearing, Defendant was heard on a *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4), alleging flagrant violations of his constitutional rights to equal protection, due process, and protection from cruel and unusual punishment under the United States Constitution and the North Carolina Constitution as a result of being prosecuted as an adult in Superior Court.

¶ 5 After analyzing the constitutionality of Defendant's prosecution as an adult for crimes he allegedly committed while sixteen years old, the trial court granted Defendant's *Motion to Dismiss* and memorialized its ruling in its *Order Granting Defendant's Motion to Dismiss* ("Order"). The Order included the following "findings of fact":

> 1. Halo Garrett, hereinafter Defendant, is charged with Breaking and/or Entering and Larceny after Breaking and/or Entering in 15CRS245691 and 15CRS245692.
>
> 2. Breaking and/or Entering is a class H felony and Larceny after Breaking and/or Entering is a class H felony.
>
> 3. The State alleges that on [13 December 2015], Defendant broke into the apartment of [the alleged victim] and stole items from within.
>
> 4. Defendant was born on [24 September 1999] and was sixteen at the time of this alleged offense.
>
> 5. Defendant's cases were originally scheduled for trial during the fall of 2017, but Defendant failed to appear for calendar call. The State called the case for trial on [14 August 2019], after Defendant had been arrested on the Order for Arrest from the missed court date.
>
> 6. North Carolina is currently the last state in the country to automatically prosecute sixteen- and seventeen- year-olds as adults.

7. In 2017, the Juvenile Justice Reinvestment Act passed with bipartisan support. In N.C.G.S. [§] 7B-1601, The Juvenile Justice Reinvestment Act increased the age of [J]uvenile [C]ourt jurisdiction to eighteen effective [1 December 2019]. For class H and I felonies committed by sixteen-year-olds, the court must affirmatively find after hearing that "the protection of the public and the needs of the juvenile will be served by transfer to [S]uperior [C]ourt;" otherwise the [J]uvenile [C]ourt retains exclusive jurisdiction.

8. Despite Defendant's age at the time of the alleged offense, he is not eligible for [J]uvenile [C]ourt under N.C.G.S. [§] 7B-1601 because the law does not go into effect until [1 December 2019].

9. In juvenile transfer hearings, the court must consider eight factors in determining whether a case should remain in [J]uvenile [C]ourt or be transferred to adult court. Those eight factors are the age of the juvenile, the maturity of the juvenile, the intellectual functioning of the juvenile, the prior record of the juvenile, prior attempts to rehabilitate the juvenile, facilities or programs available to the court prior to the expiration of the court's jurisdiction and the potential benefit to the juvenile of treatment or rehabilitation, the manner in which the offense was committed, and the seriousness of the offense and protection of the public.

10. In a 2015 report issued by the North Carolina Commission on the Administration of Law, the Commission compared adult and juvenile criminal proceedings. Juveniles prosecuted in adult court face detention in jail and the heightened risk of sexual violence posed to youthful inmates, no requirement of parental notice or involvement, active time in adult prison, risk of physical violence, public records of arrest, prosecution and conviction, and collateral consequences imposed by a conviction. Juvenile [C]ourt, on the other hand, requires an evaluation of a complaint that includes interviews with juveniles and parents, mandatory parental involvement, individualized consequences, treatment, training and

rehabilitation, monthly progress meetings, and a confidential record of delinquency proceedings.

11. Defendant alleged that his constitutional rights have been flagrantly violated and that there is such irreparable prejudice to Defendant's preparation of his case that there is no remedy but to dismiss the prosecution under N.C.G.S. [§] 15A-954(a)(4).

12. Defendant alleged three grounds under which his constitutional rights have been violated. Each ground would be sufficient for dismissal under N.C.G.S. [§] 15A-954(a)(4). The three grounds are cruel and unusual punishment under the [Eighth] Amendment, violation of Defendant's due process rights, and a violation of Defendant's equal protection rights. Defendant asserted his rights under the corresponding provisions of the North Carolina Constitution as stated in his Motion.

13. Defendant alleged that his [Eighth] Amendment rights have been violated in that his prosecution in adult court for an offense allegedly committed when he was sixteen constitutes cruel and unusual punishment.

14. The [Eighth] Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.

15. The [United States] Supreme Court has addressed the treatment of juveniles in the criminal justice system in a recent line of cases.

16. In its analysis in this line of cases, the Court looked to the consensus of legislative action in states around the country because consistency in the direction of change is powerful evidence of evolving standards of decency.

17. Every state in the country to have addressed the age of juvenile prosecution has raised the age, not lowered it or left it the same.

18. The Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005) that American society views

juveniles as categorically less culpable than adult offenders due to their lack of maturity and underdeveloped sense of responsibility, vulnerability to negative influences and outside pressures, and malleable character.

19. In *Roper*, the Court held that in regard to juveniles, the death penalty did not serve its intended aims of deterrence or retribution.

20. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that juveniles convicted of non-homicidal offenses should not be sentenced to life without parole.

21. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that sentencing juvenile defendants to mandatory life in prison without parole violated the [Eighth] Amendment.

22. In *Montgomery v. Louisiana*, 577 U.S. ___ (2016), the Supreme Court held that *Miller* applied retroactively to defendants sentenced to life without parole prior to 2012 and that hearings could be conducted in these cases to consider eligibility for parole status.

23. The [caselaw] discussed in the Report and in the cases cited heavily on scientific research. The scientific research indicates that the development of neurobiological systems in the adolescent brain cause teens to engage in greater risk-taking behavior; that teenage brains are not mature enough to adequately govern self-regulation and impulse control; that teens are more susceptible to peer influence than adults; that teens have a lesser capacity to assess long-term consequences; that as teens mature, they become more able to think to the future; and that teens are less responsive to the threat of criminal sanctions.

24. Defendant alleges that his due process rights have been violated in that he has been automatically prosecuted in adult criminal court without a hearing and findings in support of transfer.

25. As of [1 December 2019], North Carolina will no longer permit a sixteen-year-old charged with class

H felonies to be automatically prosecuted, tried and sentenced as an adult.

26. In *Kent v. United States*, 383 U.S. 541 (1966), the Supreme Court held that the process of transferring a juvenile to adult court is one with such tremendous consequences that it should require attendant ceremony such as a hearing, assistance of counsel, and a statement of reasons.

27. Defendant alleges that his right to equal protection under the Constitution has been violated.

28. The Equal Protection clause of the Constitution protects against disparity in treatment by a State between classes of individuals with largely indistinguishable circumstances.

29. Legislation is presumed valid and will be sustained if classification is rationally related to a legitimate state interest.

30. A criminal statute is invalid under the NC Constitution if it provides different punishment for the same acts committed under the same circumstances by persons in like situations.

31. There is no rational basis for distinguishing between automatic prosecution and punishment of Defendant in adult court now and punishment of a sixteen-year-old after [1 December 2019].

32. Each of the constitutional violations raised by Defendant and found by the [trial court] have caused irreparable prejudice to Defendant in that the State has denied Defendant the age-appropriate procedures of [J]uvenile [C]ourt and, correspondingly, exposed him to the more punitive direct and collateral consequences of adult court.

¶ 6 The Order included the following "conclusions of law":

1. The holding in *State v. Wilkerson*, [232 N.C. App. 482, 753 S.E.2d 829] (2014), is not controlling and the underlying rationale is not applicable to the case at bar.

> 2. That Defendant is not covered by the [Juvenile Justice Reinvestment Act] in North Carolina; however, based upon the same reasoning that went into the [Juvenile Justice Reinvestment Act], "evolving standards of decency," and the reasoning contained in the cases cited by [] Defendant, that his prosecution in adult court violates his rights.
>
> 3. By his being prosecuted as an adult in this case, Defendant's [Eighth] Amendment right against cruel and unusual punishment is being violated.
>
> 4. By his being prosecuted as an adult in this case, Defendant's right to due process is being violated.
>
> 5. By his being prosecuted as an adult in this case, Defendant's right to equal protection under the laws is being violated.
>
> 6. Once an equal protection violation has been established, the burden shifts to the State to demonstrate an inability to remedy the violation in a timely fashion.
>
> 7. The State did not meet its burden in this case.
>
> 8. As a result of the continuing attempts to prosecute [] Defendant as an adult in these cases, Defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to [] Defendant's preparation of his case that there is no remedy but to dismiss the prosecution pursuant to N.C.G.S. [§] 15A-954.
>
> 9. Defendant is being deprived of his right to be treated as a juvenile, which he was at the time he allegedly committed these crimes, with all of the attendant benefits granted to juveniles to reform their lives.
>
> 10. That Assistant District Attorney, on behalf of the State, has had an opportunity to review these FINDINGS OF FACT[], CONCLUSIONS OF LAW AND ORDER.

¶ 7 In the Order, the trial court concluded Defendant's constitutional rights to equal protection, protection from cruel and unusual punishment, and due process were violated by the prosecution of Defendant as an

adult. The trial court went on to conclude the loss of the benefits of Juvenile Court irreparably prejudiced the preparation of his case such that dismissal was the only remedy. The State timely appealed in accordance with N.C.G.S. § 15A-1445(a)(1). *See* N.C.G.S. § 15A-1445(a)(1) (2019) (permitting the State to appeal from the Superior Court to the appellate division when "there has been a decision or judgment dismissing criminal charges as to one or more counts").

ANALYSIS

¶ 8 On appeal, the State challenges the trial court's grant of Defendant's *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4), contending there were no flagrant violations of Defendant's constitutional rights and no irreparable prejudice to the preparation of his case requiring dismissal. The State challenges Findings of Fact 14-31 and Conclusions of Law 3-9. Some of these challenged findings of fact may be erroneous, or more properly characterized as conclusions of law. However, for the purposes of our analysis we assume, without deciding, that all findings of fact properly characterized as such were supported by competent evidence. Additionally, we treat any findings of fact that are more properly characterized as conclusions of law as such, rather than as binding findings of fact. *See State v. Campola*, 258 N.C. App. 292, 298, 812 S.E.2d 681, 687 (2018) ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*.").[3] We reverse the Order as Defendant's constitutional rights were not violated, let alone flagrantly violated.

¶ 9 Defendant's *Motion to Dismiss* was made pursuant to N.C.G.S. § 15A-954(a)(4), which reads:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . . .
>
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

3. While other findings of fact in the Order may be properly characterized as conclusions of law, we specifically note that Finding of Fact 31 is more properly characterized as a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted) (holding "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law").

N.C.G.S. § 15A-954(a)(4) (2019). "As the movant, [D]efendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision 'contemplates drastic relief,' such that 'a motion to dismiss under its terms should be granted sparingly.' " *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (quoting *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978)).

¶ 10 In reviewing motions to dismiss made pursuant to N.C.G.S. § 15A-954(a)(4), our Supreme Court has applied the following relevant principles:

> The decision that [a] defendant has met the statutory requirements of N.C.G.S. § 15A-954(a)(4) and is entitled to a dismissal of the charge against him is a conclusion of law. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Williams, 362 N.C. at 632-33, 669 S.E.2d at 294 (marks and citations omitted).

¶ 11 In terms of flagrant constitutional violations, the trial court concluded:

> 3. By his being prosecuted as an adult in this case, Defendant's [Eighth] Amendment right against cruel and unusual punishment is being violated.
>
> 4. By his being prosecuted as an adult in this case, Defendant's right to due process is being violated.
>
> 5. By his being prosecuted as an adult in this case, Defendant's right to equal protection under the laws is being violated.

The trial court specifically found that "[e]ach of the constitutional violations raised by Defendant and found by the [trial court] have caused irreparable prejudice to Defendant in that the State has denied Defendant the age-appropriate procedures of [J]uvenile [C]ourt and, correspondingly, exposed him to the more punitive direct and collateral consequences of adult court." As a result, each of the constitutional violations independently supported the trial court's ruling, and each constitutional violation must be addressed.

A. Equal Protection

¶ 12 Here, the trial court found an equal protection violation based on the lack of a rational basis for treating sixteen-year-old juveniles differently depending on the date of the alleged Class H felony. Sixteen-year-old juveniles alleged to have committed a Class H felony before the effective date of the Juvenile Justice Reinvestment Act, like Defendant, are automatically prosecuted as adults in Superior Court; whereas, sixteen-year-old juveniles alleged to have committed a Class H felony after the effective date of the Juvenile Justice Reinvestment Act are initially prosecuted in Juvenile Court, and then a determination is made as to whether the juvenile should be prosecuted as an adult in Superior Court.

¶ 13 "[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505, 55 L. Ed. 561, 563 (1911).

¶ 14 The basis of the alleged equal protection violation here is unpersuasive. In *State v. Howren*, our Supreme Court addressed a claimed equal protection violation based on "the fact that after 1 January 1985 an individual charged with driving while impaired must [have been] given two chemical breath analyses[,]" whereas at the time of the appeal "only one analysis [was] required, and [the] defendant was only given one breathalyzer test." *State v. Howren*, 312 N.C. 454, 457, 323 S.E.2d 335, 337 (1984). Our Supreme Court held:

> A statute is not subject to the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment of the United States Constitution or [A]rticle I § 19 of the North Carolina Constitution unless it creates a classification between different groups of people. In this case no classification between different groups has been created. All individuals charged with driving while impaired before 1 January 1985 will be treated in exactly the same way as will all individuals charged after 1 January 1985. The statute merely treats the same group of people in different ways at different times. It is applied uniformly to all members of the public and does not discriminate against any group. If [the] defendant's argument were accepted the State would never be able to create new safeguards against error in criminal prosecutions without invalidating

> prosecutions conducted under prior less protective laws. Article I § 19 and the [E]qual [P]rotection [C]lause do not require such an absurd result.

Id. at 457-58, 323 S.E.2d at 337-38.

¶ 15 Defendant's claimed equal protection violation here is based on the same principle as the claimed equal protection violation our Supreme Court rejected in *Howren*—that treating the same group of people differently at different times constitutes an equal protection violation. Defendant's equal protection rights were not violated where no classification was created between different groups of people, and we reverse the Order as to the equal protection violation.

B. Cruel and Unusual Punishment

¶ 16 Here, the trial court concluded "[b]y his being prosecuted as an adult in this case, Defendant's [Eighth] Amendment right against cruel and unusual punishment is being violated." Defendant's *Motion to Dismiss* contended his right to be protected from cruel and/or unusual punishment was violated under the North Carolina Constitution and the United States Constitution and stated "our Court 'historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the [F]ederal and [S]tate Constitutions.' " In a footnote in his *Motion to Dismiss*, Defendant contended "North Carolina's 'cruel or unusual' clause is broader than the federal 'cruel and unusual' one[,]" but then stated "[Defendant] is entitled to relief under the narrower 'cruel and unusual' punishment formulation and will focus his arguments there."

¶ 17 We have held:

> Article I, Section 27 of the North Carolina Constitution prohibits the infliction of "cruel *or* unusual punishments." N.C. Const. art. I, § 27. The wording of this provision differs from the language of the Eighth Amendment, which prohibits the infliction of "cruel *and* unusual punishments." U.S. Const. amend. VIII.
>
> Despite this difference in the wording of the two provisions, however, our Supreme Court historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the [F]ederal and [S]tate Constitutions. Thus, because we have determined that [the] [d]efendant's sentence does not violate the Eighth Amendment, we likewise

> conclude it passes muster under Article I, Section 27 of the North Carolina Constitution.

State v. Seam, 263 N.C. App. 355, 365, 823 S.E.2d 605, 612 (2018) (marks and citations omitted), *aff'd per curiam*, 373 N.C. 529, 837 S.E.2d 870 (2020). Accordingly, we only analyze this issue under the United States Constitution as it applies with equal force to the North Carolina Constitution.

¶ 18 As an initial matter, the State argues the trial court should not have applied the Eighth Amendment to the present case because Defendant had not been punished at the time of the motion.

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. Thus, in *Trop v. Dulles*, [356 U.S. 86, 2 L. Ed. 2d 630] (1958), the plurality appropriately took the view that denationalization was an impermissible punishment for wartime desertion under the Eighth Amendment, because desertion already had been established at a criminal trial. But in *Kennedy v. Mendoza-Martinez*, [372 U.S. 144, 9 L. Ed. 2d 44] (1963), where the Court considered denationalization as a punishment for evading the draft, the Court refused to reach the Eighth Amendment issue, holding instead that the punishment could be imposed only through the criminal process. As these cases demonstrate, *the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.* Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

Ingraham v. Wright, 430 U.S. 651, 671 n.40, 51 L. Ed. 2d 711, 730 n.40 (1977) (emphasis added) (citations omitted); *see also Moore v. Evans*, 124 N.C. App. 35, 51, 476 S.E.2d 415, 426-27 (1996) (citation omitted) ("In a related argument, [the plaintiff] further contends that [the] defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. The United States Supreme Court stated in *Ingraham v. Wright*, 'An examination of the history of the [Eighth]

Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.' Therefore, we find that the Eighth Amendment is inapplicable to the present case, as [the plaintiff] was never formally adjudicated guilty of any crime.").

¶ 19 Defendant contends, however, that being automatically tried as an adult is covered by the Eighth Amendment, which in part "imposes substantive limits on what can be made criminal and punished as such[.]" *See Ingraham*, 430 U.S. at 667, 51 L. Ed. 2d at 728. *Ingraham* stated:

> [T]he Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and *third*, *it imposes substantive limits on what can be made criminal and punished as such*. We have recognized the last limitation as one to be applied sparingly. The primary purpose of the Cruel and Unusual Punishments Clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes.

Id. at 667, 51 L. Ed. 2d at 727-28 (citations and marks omitted) (emphasis added). The United States Supreme Court then referred to *Robinson v. California* as an example of the third category. *Id.* at 667, 51 L. Ed. 2d at 728 (citing *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758 (1962)).

¶ 20 In *Robinson*, the United States Supreme Court held that a statute, making the illness of being addicted to narcotics a criminal offense, violated the Eighth Amendment, reasoning:

> This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that

> a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.
>
> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Robinson, 370 U.S. at 666-67, 8 L. Ed. 2d at 762-63 (citation and footnotes omitted).

¶ 21 We do not identify Defendant being tried as an adult, pursuant to N.C.G.S. § 7B-1604(a) (2015), to be of the same character as a person's illness being criminalized, and it does not trigger the Eighth Amendment's "[imposition of] substantive limits on what can be made criminal and punished as such[.]" *Ingraham*, 430 U.S. at 667, 51 L. Ed. 2d at 728. As an initial matter, our research has not revealed any North Carolina or

United States Supreme Court decision applying the above principle from *Robinson* outside of the status of addiction to drugs or alcohol. *See*, *e.g.*, *Powell v. Texas*, 392 U.S. 514, 532, 20 L. Ed. 2d 1254, 1267 (holding a conviction for being drunk in public was not in the same category discussed in *Robinson*, as "[t]he State of Texas [] [did] not [seek] to punish a mere status, as California did in *Robinson*; nor [did] it attempt[] to regulate [the] appellant's behavior in the privacy of his own home. Rather, it has imposed upon [the] appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for [the] appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community"), *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 185 (1968). Further, the prosecution of juveniles as adults does not involve the substance of what is made criminal, and instead involves the procedure taken regarding a criminal offense alleged against juveniles. Here, the substance is properly criminally punished as Defendant was charged with felonious breaking and entering and larceny after breaking or entering, offenses that are undoubtedly within the police powers of North Carolina. The situation Defendant faces here cannot be said to be analogous to *Robinson* because his prosecution as an adult does not criminalize a status, but instead punishes criminal behavior by juveniles according to the procedures in place at the time of the offense.

¶ 22 Defendant has no claim under the Eighth Amendment. Instead, to the extent Defendant claims the State punished him prior to a conviction, this claim properly falls under due process.[4] On this basis, we reverse the Order as to the cruel and unusual punishment violation.

C. Due Process

¶ 23 Relying on *Kent v. United States*, 383 U.S. 541, 16 L. Ed. 2d 84 (1966), the trial court concluded Defendant's due process rights were violated because he was automatically prosecuted as an adult in this case "without a hearing and findings in support of transfer." As it was unclear whether the trial court's conclusion included both procedural and substantive due process, we analyze both.

> Our courts have long held that the law of the land clause has the same meaning as due process of law under the Federal Constitution. Due process provides two types of protection for individuals against

4. We note Defendant did not make an argument recognizing this distinction at the trial court or on appeal.

> improper governmental action. Substantive due process protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty. Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner.
>
> Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained. Thus, substantive due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.
>
> The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be at a meaningful time and in a meaningful manner.
>
> In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.

State v. Fowler, 197 N.C. App. 1, 20-21, 676 S.E.2d 523, 540-41 (2009) (marks and citations omitted), *disc. rev. denied*, *appeal dismissed*, 364 N.C. 129, 696 S.E.2d 695 (2010). "The requirements of procedural due process apply only to the *deprivation* of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Johnston v. State*, 224 N.C. App. 282, 305, 735 S.E.2d 859, 875 (2012), *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013). "Once a protected life, liberty, or property interest has been demonstrated, the Court must

inquire further and determine exactly what procedure or 'process' is due." *State v. Stines*, 200 N.C. App. 193, 196, 683 S.E.2d 411, 413 (2009) (marks omitted).

¶ 24 Here, the trial court did not clearly find the existence of a fundamental right or a protected interest; however, it did cite *Kent v. United States* in its discussion of due process. *See Kent*, 383 U.S. at 544, 16 L. Ed. 2d at 88. To the extent that the trial court concluded a fundamental right to or a protected interest in being prosecuted as a juvenile existed, it erred. Defendant does not present, and our research does not reveal, any case that holds there is a protected interest in, or fundamental right related to, being tried as a juvenile in criminal cases, as opposed to being tried as an adult. We decline to create such a right under the veil of the penumbra of due process.

¶ 25 Further, *Kent*, which the trial court and Defendant cite, is not controlling or instructive on the issues raised by Defendant. In *Kent*, a sixteen-year-old boy was charged with housebreaking, robbery, and rape. *Id.* at 543-44, 16 L. Ed. 2d at 87-88. At that time, according to the applicable statutes in Washington, D.C., the juvenile court had exclusive jurisdiction over the petitioner due to his age; however, the juvenile court could elect to waive jurisdiction and transfer jurisdiction to the district court after a full investigation. *Id.* at 547-48, 16 L. Ed. 2d at 90. After the petitioner's attorney filed a motion in opposition to the juvenile court's waiver of jurisdiction, the juvenile court, without ruling on the motion, holding a hearing, or conferring with the petitioner, entered an order transferring jurisdiction to the district court that contained no findings or reasoning. *Id.* at 545-46, 16 L. Ed. 2d at 88-89. The United States Supreme Court held:

> [The] petitioner–then a boy of 16–was *by statute* entitled to certain procedures and benefits as a consequence of his *statutory right* to the "exclusive" jurisdiction of the [j]uvenile [c]ourt. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the [d]istrict [c]ourt was potentially as important to [the] petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, [the] petitioner [was] entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the

> [j]uvenile [c]ourt's decision. *We believe that this result is required by the statute read in the context of constitutional principles relating to due process* and the assistance of counsel.

Id. at 557, 16 L. Ed. 2d at 95 (emphases added).

¶ 26 Based on this language, in the context of the facts of *Kent*, we conclude *Kent* involved a completely distinct factual situation at the outset—there, the petitioner was statutorily entitled to begin his proceedings within the exclusive jurisdiction of the juvenile court; whereas, here, under N.C.G.S. § 7B-1604(a) (2015), Defendant's proceedings began in Superior Court. This statutory distinction is critical because the United States Supreme Court in *Kent* explicitly based its holding on due process's interaction with the requirements of the applicable statute. *Id.* Furthermore, it is clear *Kent* does not require a hearing and findings to support trying *any* juvenile as an adult; instead, *Kent* requires hearings and findings to support the *transfer* of a juvenile from juvenile court to adult court when that is the existing statutory scheme. *Id. Kent* did not create a fundamental constitutional right or constitutionally protected interest to a juvenile hearing or being tried as a juvenile. Furthermore, our Supreme Court, in interpreting *Kent*, has stated:

> In *Kent*, the Supreme Court enunciated a list of factors for the Juvenile Court of the District of Columbia to consider in making transfer decisions. . . . [I]t is important to note that the Supreme Court *nowhere stated in Kent that the above factors were constitutionally required.* In appending this list of factors [to consider in making transfer determinations] to its opinion, *the Kent Court was merely exercising its supervisory role over the inferior court created by Congress for the District of Columbia.* Thus, the factors in the Appendix to *Kent* have no binding effect on this Court.

State v. Green, 348 N.C. 588, 600-01, 502 S.E.2d 819, 826-27 (1998) (emphases added), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999), *superseded by statute on other ground as stated in In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000). Our Supreme Court's interpretation of *Kent* in *Green*, as not concerning constitutionally required factors for the transfer of juveniles from juvenile court to adult court, further supports our conclusion that *Kent* was not concerned with constitutional requirements. *Id.*

¶ 27 The trial court clearly considered *Kent* in concluding that Defendant's due process rights were violated. The only other finding of fact that the trial court used to support the conclusion of law related to due process stated "[a]s of [1 December 2019], North Carolina will no longer permit a sixteen-year-old charged with class H Felonies to be automatically prosecuted, tried and sentenced as an adult." This finding alone does not support concluding that Defendant's due process rights were violated. Further, the Order does not otherwise conduct the required steps of a due process analysis, as there was no finding or conclusion that the statute impacted a fundamental right, implicating enhanced scrutiny under substantive due process, or deprived Defendant of "a protected life, liberty, or property interest[,]" implicating procedural due process protections. *Stines*, 200 N.C. App. at 196, 683 S.E.2d at 413.

¶ 28 There was not a protected interest at issue before the trial court and Defendant's procedural due process protections were not implicated. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). Additionally, turning to substantive due process, as there is not a fundamental right at issue here, we apply the rational basis test. *See Fowler*, 197 N.C. App. at 21, 676 S.E.2d at 540-41. "The 'rational basis' standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government." *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983).

> [U]nless legislation involves a suspect classification or impinges upon fundamental personal rights, the mere rationality standard applies and the law in question will be upheld if it has any conceivable rational basis. Moreover, the deference afforded to the government under the rational basis test is so deferential that a court can uphold the regulation if the court can *envision* some rational basis for the classification.

Clayton v. Branson, 170 N.C. App. 438, 455, 613 S.E.2d 259, 271 (marks omitted), *disc. rev. denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).

¶ 29 Here, there is a rational basis for the statute, despite the trial court's finding otherwise in Finding of Fact 31.[5] North Carolina has a

5. The State challenges Finding of Fact 31 in its brief. Additionally, Finding of Fact 31 is more properly classified as a conclusion of law because it requires the application of legal principles. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (citations omitted)

legitimate interest in promoting the permanency of a sentence, and also has a legitimate interest in updating statutes to reflect changing ideals of fairness. *See Engle v. Isaac*, 456 U.S. 107, 127, 71 L. Ed. 2d 783, 800, *reh'g denied*, 456 U.S. 1001, 73 L. Ed. 2d 1296 (1982). The change the General Assembly made to increase the age at which a person is treated as a juvenile is rationally related to the State's legitimate interests in having statutes that reflect current ideals of fairness, as the statute directly effectuates the legitimate interest in having fair sentencing statutes. The decision to prosecute and sentence juveniles under the statutory scheme in place at the time they commit their offense is rationally related to the State's legitimate interest in having clear criminal statutes that are enforced consistently with their contemporaneous statutory scheme.[6] Prosecuting Defendant as an adult within the jurisdiction of the Superior Court was not a violation of substantive or procedural due process based simply upon the findings of fact regarding an impending change in how juveniles are prosecuted under the law and *Kent*, which held that a violation of due process occurred when a juvenile's statutory right to the juvenile court having exclusive jurisdiction was violated without any hearing, findings, or reasoning. To the extent the trial court relied on *Kent* and due process generally to support its conclusion that Defendant's due process rights were violated, the trial court erred and we reverse the Order to the extent that it is based on this perceived constitutional violation.

¶ 30 Defendant's constitutional rights were not violated, much less flagrantly so, as required for the grant of his *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4). As there were no flagrant violations of Defendant's constitutional rights, we need not address whether Defendant was irreparably prejudiced. We reverse the Order granting Defendant's *Motion to Dismiss* pursuant to N.C.G.S. § 15A-954(a)(4).

CONCLUSION

¶ 31 The challenged and unchallenged findings of fact do not support concluding there was any violation of Defendant's constitutional rights

---

(holding "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law"). As a conclusion of law, we review whether there was a rational basis for this statute de novo. *See Williams*, 362 N.C. at 632, 669 S.E.2d at 294 ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

6. Our appellate courts have consistently required this approach in the context of sentencing. *See, e.g.*, *State v. Whitehead*, 365 N.C. 444, 447, 722 S.E.2d 492, 495 (2012) ("Trial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense.").

to equal protection, to be protected from cruel and unusual punishment, or to substantive or procedural due process. The trial court erred in granting Defendant's *Motion to Dismiss* under N.C.G.S. § 15A-954(a)(4).

REVERSED AND REMANDED.

Chief Judge STROUD and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
DEVONTE GLENN JONES, DEFENDANT

No. COA20-173

Filed 2 November 2021

1. Evidence—present recollection refreshed testimony—admissibility—not recitation of letter

In a prosecution arising from a shooting into an occupied vehicle, the trial court did not abuse its discretion by allowing a State witness, who was a jailhouse informant, to testify after reviewing a letter he had written to the district attorney with information inculpating defendant. It was not clear that the witness was merely reciting the letter or using it as a testimonial crutch; rather, the witness testified to the subject matter of the letter before he reviewed it to refresh his recollection, and he testified to additional details that were not contained in the letter.

2. Evidence—prior consistent statement—admissibility—letter written by witness

In a prosecution arising from a shooting into an occupied vehicle, the trial court did not err by admitting into evidence a letter that a jailhouse informant witness used during his testimony to refresh his memory, where the letter was admissible as a prior consistent statement to corroborate the informant's testimony.

3. Criminal Law—jury instructions—attempted first-degree murder—prejudice analysis

There was no plain error in the trial court's jury instructions on attempted first-degree murder in defendant's prosecution arising from a shooting into an occupied vehicle. In the first place, the trial court was not required to repeat the same jury instructions

for each count of the charge at issue. As for defendant's argument that the trial court plainly erred by using the general attempt and first-degree murder pattern jury instructions instead of the pattern jury instructions specifically on attempted first-degree murder, the appellate court concluded that, even assuming the trial court erred, defendant could not show prejudice under the plain error standard, where the jury found the necessary elements as to other charges for which defendant did not challenge the instructions and the challenged portion of the instructions did not go toward the crux of his defense (an alibi).

4. Judgments—criminal—clerical errors—felony class

Where the amended judgment entered in defendant's criminal case contained a clerical error—incorrectly listing the attempted first-degree murder conviction as a class B1 felony—the case was remanded for correction of the error.

Appeal by defendant from judgment entered on or about 18 June 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.

Daniel J. Dolan for defendant.

STROUD, Chief Judge.

¶ 1 Devonte G. Jones ("Defendant") appeals from an amended judgment[1] entered following a jury trial. The judgment included two counts of each of the following offenses: attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a weapon into occupied property resulting in serious bodily

1. The date on the amended judgment is 18 June 2019, but that date is likely an error. The original judgment was dated 18 June 2019 as well. The motion to amend the judgment—arguing the attempted first degree murder counts were imposed as class B1 / level 1 felonies when they should have been class B2 / level 1 felonies—was filed on 25 June 2019. The order on the motion to amend the judgment and a handwritten note from the judge explaining his reasoning are dated 26 June 2019. Thus, the amended judgment likely was from 26 June 2019 rather than the 18 June 2019 date on the amended judgment itself. Because Defendant has filed a petition for writ of certiorari that we grant—which highlighted this issue— the date discrepancy does not impact our analysis.

injury. Defendant argues the trial court erred in admitting testimony of a witness for the State who refreshed his recollection using a letter he had previously written because the witness used the letter as a testimonial crutch rather than a mere aid. Defendant also argues the trial court erred by admitting the letter into evidence as a prior consistent statement that corroborated the witness's testimony. Because the witness was not merely reciting from the refreshing aid and the letter was properly independently admitted as a prior consistent statement, we find no error as to the letter. In addition to the letter, Defendant argues the trial court plainly erred when instructing the jury on attempted first degree murder. Because Defendant has not shown the alleged errors probably impacted the jury verdict, we also find no error as to the jury instructions. Thus, we conclude there was no error on substantive matters in this case. However, because Defendant correctly indicates the amended judgment contains a clerical error that lists attempted first degree murder as a class B1 felony rather than class B2 felony, we remand to the trial court for correction of this error.

I. Background

¶ 2 The State's evidence tended to show that on the night of 9 September and the early morning hours of 10 September 2017, Leroy Brickhouse, his cousin Marlon Taylor, his co-worker Mike Jeffreys, and others were going out in downtown Raleigh to celebrate Taylor's upcoming birthday. During the night out, the group got into a verbal altercation with another group of people that included Defendant. Police in the area quickly intervened and broke up the altercation. About 45 minutes after the altercation, Brickhouse and Taylor returned to their cars. As Brickhouse's coworker was saying goodnight, another car came and obstructed their cars. Defendant exited the other car and began shooting with a semi-automatic rifle at the vehicle with Brickhouse and Taylor inside, as well as at the co-worker's vehicle. The co-worker returned to his vehicle and escaped. While Brickhouse drove away, Defendant continued to fire at his vehicle, and both Brickhouse and Taylor were shot. Brickhouse was shot in the chest, and Taylor was shot in the head. Defendant was arrested for the shootings and charged with two counts each—one set for Brickhouse and one set for Taylor—of: Attempted First Degree Murder, Assault with a Deadly Weapon with the Intent to Kill Inflicting Serious Injury (AWDWIKISI), Discharging a Firearm into an Occupied Vehicle Resulting in Serious Bodily Injury, Conspiracy to Commit Attempted First Degree Murder, Conspiracy to Commit AWDWIKISI, and Conspiracy to Commit Discharging a Firearm into an Occupied Vehicle Resulting in Serious Bodily Injury.

¶ 3 While in jail awaiting trial, Defendant shared a cell block with Ronald Cameron. Defendant and Cameron talked about Defendant's case, and Cameron wrote a letter to the district attorney detailing their conversations. In the letter, Cameron recounted how he knew Defendant as well as that Defendant told him Defendant was involved with a shooting in Raleigh with an AK-47, Defendant had God with him or he would be facing two murder charges, and that Defendant had asked Cameron to dispose of the weapon for him if Cameron was able to get released on bond.

¶ 4 At trial, Cameron initially testified Defendant told him Defendant was charged with shooting two guys, one in the head and one in the chest, and that God was with him or Defendant would be charged with murder. At that point, Cameron initially said, "I don't think so, sir" when asked if Defendant had mentioned further details. Cameron then mentioned he had written a letter to the district attorney's office detailing his conversations with Defendant. Over Defendant's objections, including that Cameron did not "remember anything else about this" and therefore could not use the letter to refresh his recollection, the trial court allowed the State to use the letter to refresh Cameron's memory. After reading the letter, Cameron said it had refreshed his recollection "[q]uite a bit" such that he "remember[ed] the things [in the letter] from the conversation that me and him [Defendant] had." Cameron then testified he recalled Defendant had said Defendant used an AK-47 in the shooting. Following that, Cameron twice started answers by referencing that he wrote in the letter certain information, was told not to just say what was written, and then said, "I can't say then" when asked if there was any other information that he independently remembered apart from the letter. Following that exchange, Cameron testified further about his conversations with Defendant without additional reference to the letter. The further testimony included Cameron recounting the street name—and later on cross examination a building landmark—where Defendant told him the gun used in the shooting could be found, details which were not included in the letter to the district attorney.

¶ 5 After Cameron finished testifying, the trial court found the letter was properly used to refresh Cameron's recollection. The trial court also admitted the letter itself into evidence, over Defendant's objections, on the grounds that the letter was a prior consistent statement that could be admitted to corroborate Cameron's testimony.

¶ 6 Defendant presented an alibi defense at trial. Defendant admitted he had been in the verbal altercation earlier in the night with the group that included Brickhouse and Taylor. Following the police dispersing the groups involved in the altercation, Defendant spent time searching

for his cell phone after discovering it was lost. Defendant testified he then went to his sister's house and did not know any details about the shooting in downtown Raleigh until he was arrested. Defendant also specifically denied that he told Cameron that he used an AK-47 in the shooting and denied that he asked Cameron to get rid of the gun for him. Defendant's sister and her friend also testified Defendant left Raleigh and went to his other sister's house, and the other sister testified Defendant came and slept at her house.

¶ 7 Following Defendant's case and closing arguments, the trial court instructed the jury. The trial judge primarily relied on the pattern jury instructions when crafting the instructions used in this case. He also explained to the parties that his plan was to give each instruction only once even though there were two counts of each charge, although he made clear he was "glad to hear your [the parties'] suggestions on this." Aside from asking to have language relating to an alibi defense read during the instructions on each substantive offense rather than only the first one, which the trial court rejected, Defendant did not offer any suggestions, corrections, or objections to the instructions. Defendant also did not object after the instructions were read to the jurors.

¶ 8 The jury returned verdicts finding Defendant guilty of all charges. The trial judge arrested judgment as to all six conspiracy counts and entered judgment on the remaining counts. The trial judge amended the initial judgment to correct the classification of attempted first degree murder from a Class B1 / Level One judgment to a Class B2 / Level One judgment, and Defendant was sentenced to 140 to 180 months imprisonment. However, while the first page of the amended judgment covering 17CRS221514 reflects attempted first degree murder as a class B2 felony, the last page lists the attempted first degree murder conviction in 17CRS221515 as a class B1 felony.

¶ 9 Defendant gave oral notice of appeal following the announcement of the judgment and filed written notice of appeal following entry of the written judgment. However, Defendant did not file any additional notice of appeal following the entry of the amended judgment. *See supra* footnote 1 (explaining likely date of amended judgment, which is after written notice of appeal was filed on 25 June 2019). Defendant filed a petition for writ of certiorari "[o]ut of an abundance of caution" should we "determine that he has lost his appeal of right."

II. Petition for Writ of Certiorari

¶ 10 Petitions for writs of certiorari can be issued "in appropriate circumstances" to permit review of judgments "when the right to prosecute

an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1); *see also* N.C. Gen. Stat. § 15A-1448 (2019) (indicating the rules of appellate procedure govern issues regarding notice of appeal and petitions for writs of certiorari). In turn, an appeal in a criminal action may be taken by giving oral notice of appeal at trial or by filing a written notice of appeal within fourteen days after entry of the judgment being appealed. N.C. R. App. P. 4(a). Here, Defendant did not renew an oral notice of appeal nor file a written notice of appeal following the entry of the amended judgment, and his petition highlights that absence as the reason a writ of certiorari may be necessary.

¶ 11 To the extent a petition for writ of certiorari is necessary, we grant it in our discretion. In *State v. Briggs*, this Court faced a similar issue where the defendant failed to give notice of appeal from an amended judgment. 249 N.C. App. 95, 97, 790 S.E.2d 671, 673 (2016). The State did not address the issue, and the defendant did not file a separate petition for a writ of certiorari, but this Court decided to treat the defendant's appellate brief as a petition and granted it. *Id.* Here, the State similarly did not file any response to Defendant's petition or raise the issue in its brief. Unlike in *Briggs*, Defendant here went further and filed a petition. As in *Briggs*, we grant the petition for a writ of certiorari to the extent it is necessary.

III. Issues Related to the Letter to the District Attorney

¶ 12 Defendant argues the trial court erred in admitting the testimony of Ronald Cameron, a witness for the State. Defendant contends the trial court erred in allowing Cameron to testify after reviewing a letter he had written to the district attorney with information inculpating Defendant. The trial court then also erred, Defendant argues, by admitting the letter into evidence as a prior consistent statement to corroborate the testimony Cameron had given after he reviewed the letter.

¶ 13 Specifically, Defendant relies on *State v. York*, 347 N.C. 79, 489 S.E.2d 380 (1997), to argue the trial court erred by allowing Cameron to testify while using the letter as a testimonial crutch rather than merely as a means to presently refresh Cameron's recollection. Defendant argues that by having Cameron use the letter as a testimonial crutch, the State was able to "get the information before the jury despite Mr. Cameron's lack of knowledge as to its content." Defendant then contends the trial court "compounded" the error by admitting the letter into evidence alongside Cameron's testimony. Defendant argues this sequence of events ultimately created a situation where "[t]he prosecutor was permitted to bootstrap the evidence in through the letter and the

letter in through the bootstrapped evidence." Defendant finally argues the use of the letter as a testimonial crutch and subsequent introduction of the letter into evidence prejudiced him, thereby entitling him to a new trial.

A. Admissibility of Witness's Testimony After Refreshing Recollection

¶ 14 **[1]** The letter was admitted into evidence as a prior consistent statement to corroborate Cameron's testimony, and Cameron's testimony in part came after reviewing the letter on the grounds of refreshing his recollection. Therefore, the first issue to address is whether the letter was properly used to aid Cameron's testimony by refreshing his recollection or whether it was impermissibly used as a testimonial crutch.

1. Standard of Review

¶ 15 Defendant states, and the State agrees, this issue should be reviewed *de novo*. But cases involving a witness's use of a memory aid to refresh his recollection are reviewed for abuse of discretion. *State v. Black*, 197 N.C. App. 731, 733, 678 S.E.2d 689, 691 (2009) (citing *State v. Smith*, 291 N.C. 505, 518, 231 S.E.2d 663, 672 (1977)).[2] "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.*, 197 N.C. App. at 733, 678 S.E.2d at 691 (citation and quotation marks omitted).

2. Analysis

¶ 16 In *Smith*, our Supreme Court addressed the legal rules regarding present recollection refreshed testimony. First, *Smith* distinguished use of an item to aid a witness to refresh recollection from a writing or recording used as a past recollection recorded, which is now done pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5) (2019). 291 N.C. at 516, 231 S.E.2d at 670. Present recollection refreshed involves witnesses with a "sufficiently clear recollection" such that writings, memoranda or other aids " 'jog[]' " their memories so that they can testify from their own recollection. *Id.* Because the testimony comes from the witness's own independent recollection, present recollection refreshed does not involve "fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *Id.*, 291 N.C. at 516, 231 S.E.2d at 670–71. However, because the standards around

---

2. As *Black* explains, *York*, upon which Defendant relies, is "a later case which applied *Smith*." 197 N.C. App. at 735, 678 S.E.2d at 692.

present recollection refreshed are looser, the aid must also "actually 'refresh' " the witness's memory. *Id.*, 291 N.C. at 517–18, 231 S.E.2d at 671. "Where the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge." *Id.*, 291 N.C. at 518, 231 S.E.2d at 671 (emphasis in original). If there is "doubt as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury." *Id.*, 291 N.C. at 518, 231 S.E.2d at 671–72.

¶ 17 In *Smith*, the evidence was contradictory as to whether a transcript refreshed the witness's memory or gave her a script to recite at trial. *Id.*, 291 N.C. at 517, 231 S.E.2d at 671. At times the witness said the testimony was from her own memory, but at other times she said some of it was from her memory and some of it was not. *Id.* Because the witness did not clearly merely recite the refreshing transcript, the Supreme Court found no abuse of discretion in the trial judge's decision not to strike the testimony. *Id.*, 291 N.C. at 518, 231 S.E.2d at 671–672.

¶ 18 In *York*, the Supreme Court then further explained the test of admissibility of testimony based upon refreshed recollection. First, the Supreme Court explained that it would "elevate form above substance" to focus on whether a witness appears to read from a refreshing aid. *See York*, 347 N.C. at 89, 489 S.E.2d at 386 (explaining a witness appearing to read from a refreshing memorandum is not a per se violation). Rather, the reviewing court examines "whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *Id.* Using that test, the court found the notes were used to refresh recollection permissibly. *Id.* The court noted the witness testified from memory and in detail about the events surrounding the interview with the defendant, spoke in the second person—i.e. the defendant stated—throughout his testimony, and answered the prosecutor's questions independent of the notes. *Id.*

¶ 19 This Court has since applied *York* in two published opinions, *Black* and *State v. Harrison*, 218 N.C. App. 546, 721 S.E.2d 371 (2012). In *Black*, the defendant argued a witness for the State "merely parroted" the information in the transcript from his interview with police. 197 N.C. App. at 733, 678 S.E.2d at 691. This Court concluded the trial court did not abuse its discretion where the witness "testified to some of the events of the night in question before being shown the transcript . . . was equivocal

about whether or not he remembered making the statements found [in the transcript]" until after hearing the audio recording of the interview, and where the witness "then testified in detail to the events of the night in question, apparently without further reference to the interview transcript." *Id.*, 197 N.C. App. at 736, 678 S.E.2d at 692. This Court ultimately concluded it was "not a case where the witness' testimony was '*clearly* a mere recitation of the refreshing memorandum.' " *Id.* (quoting *Smith*, 291 N.C. App. at 518, 231 S.E.2d at 671 (emphasis in original)).

¶ 20 In *Harrison*, the defendant argued the trial court committed plain error by allowing a witness for the State to read her prior police statement about a conversation with the defendant to the jury as a past recollection recorded, and the State argued the trial court properly admitted the testimony as present recollection refreshed. 218 N.C. App. at 548–50, 721 S.E.2d at 374–75. This Court concluded the statement was used to refresh the witness's recollection. *Id.*, 218 N.C. App. at 552, 721 S.E.2d at 376. This Court also concluded that the witness "was not using her prior statement as a testimonial crutch for something beyond her recall" because the witness "had an independent recollection of her conversation with defendant as well as of making her statement to the investigator . . . affirmed that her recollection had been refreshed . . . testified from memory, and that testimony included some details that were not contained in the statement." *Id.*

¶ 21 Here, this case is "not a case where the witness' testimony was '*clearly* a mere recitation of the refreshing memorandum.' " *Black*, 197 N.C. App. at 736, 678 S.E.2d at 692 (quoting *Smith*, 291 N.C. App. at 518, 231 S.E.2d at 671 (emphasis in original)). First, as in *Black*, Cameron testified to part of his conversation with Defendant before using the letter to refresh his recollection. *Id.* Specifically, Cameron recounted how Defendant had told him that God was with him or Defendant would be in jail for murder. Second, as in *Harrison*, Cameron had independent recollection of sending the letter to the district attorney, testifying about how he wrote the letter before then being handed the letter. *Harrison*, 218 N.C. App. at 552, 721 S.E.2d at 376. Finally, as in *Harrison*, Cameron's testimony included some details that were not contained in the letter. *Id.* Specifically, Cameron twice, once on direct examination and once on cross examination, gave the location of the firearm down to the street where it was located and the nearby building whereas in the letter he only stated that Defendant had told him how to find the weapon. Based on these facts, it is not *clear* that Cameron merely recited the letter after it was used to refresh his recollection and as such the trial judge did not abuse his discretion in allowing Cameron to use the letter to refresh his recollection.

¶ 22 Defendant asserts several reasons we should conclude otherwise, but none of them persuade us that the trial judge abused his discretion. First, Defendant argues Cameron's testimony indicated "he had no other recollection of any alleged conversation's [sic] between him and [Defendant]" before being shown the letter to refresh his recollection. While Cameron did say he did not think Defendant had told him any more facts of the case before being shown the letter, Cameron also testified that he wrote the letter to the district attorney's office, which was an important factor in allowing the witness's testimony in *Harrison*. 218 N.C. App. at 552, 721 S.E.2d at 376. Further, a witness's lack of ability to recall additional information is the very reason the present recollection refreshed doctrine exists. *See Smith*, 291 N.C. at 516, 231 S.E.2d at 670 (recounting how the ability to recall is "subject to obvious limitations" and present recollection refreshed evolved as a way to address the issue).

¶ 23 Second, Defendant notes "Mr. Cameron had talked with the prosecutor's [sic] twice before he testified. Then the prosecutor spoke with Mr. Cameron about the letter despite Mr. Cameron still being a witness." The trial judge inquired into the time when the prosecutor spoke with Cameron during a recess in the middle of his testimony. The prosecutor said he asked, "Did it refresh your recollection?" and then did not provide Cameron with any information or "coach him in any way other than ask the question." The trial judge found it was a discovery issue resolved by putting "on the record the substance of the conversation" and found that nothing further needed to be done. Given that record and the fact that no authority we have found suggests this is a relevant consideration for allowing testimony based on a refreshed recollection, we still find the trial judge did not abuse his discretion in allowing Cameron's testimony.

¶ 24 Third, Defendant points out that "the prosecutor asked Mr. Cameron many leading questions about things stated in the letter." The prosecutor did ask Cameron some leading questions, but Defendant's attorney did not object to the questions. Further, as Defendant points out in a footnote in his own brief, the Supreme Court has ruled that leading questions may be allowed when "aid[ing] the witness's recollection." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 236 (1974).

¶ 25 Fourth, Defendant alleges evidence of error in that Cameron "gave generalized details about a shooting" and initially testified about details "not even included in the letter." The generalized statements indicate the lack of ability to recall that present recollection refreshed aims to address. *See Smith*, 291 N.C. at 516, 231 S.E.2d at 670 (recounting the reason for present recollection refreshed doctrine). Further, as laid

out above, Cameron's testimony about details not included in the letter refutes rather than supports Defendant's position because it indicates a witness did not clearly give a mere recitation of the refreshing aid. *See Harrison*, 218 N.C. App. at 552, 721 S.E.2d at 376 (finding no error in part because witness recalled events outside the refreshing aid).

¶ 26 Fifth, Defendant argues the Court "should also factor in the circumstances surrounding the witness in determining if the letter was used as a testimonial crutch" before pointing out "Mr. Cameron's credibility was very questionable." We first note Defendant cites no support for the proposition that we should consider the witness's circumstances in this analysis. Even if Cameron's circumstances may call his credibility into question, the credibility of the witness is a question for the jury, including the consideration of whether the witness purporting to have a refreshed recollection is testifying from such recollection. *Smith*, 291 N.C. at 518, 231 S.E.2d at 671–72.

¶ 27 Finally, Defendant notes "Mr. Cameron specifically tried to testify about what was written in the letter rather than from his own independent recollection. Mr. Cameron readily acknowledged that he could not answer if there was other information that he independently remembered apart from the letter." Defendant later discusses this same point in the trial proceedings when trying to distinguish *Black*. According to Defendant, unlike the witness in *Black*, Cameron allegedly "needed to further refer to State's Exhibit 152 [the letter] in order to testify." Defendant is correct that a couple of times Cameron started answers by saying that he wrote in the letter certain information and that he responded, "I can't say then" when asked if there was any other information that he independently remembered apart from the letter. However, immediately after that statement, Cameron then said he remembered Defendant telling him an AK-47 assault rifle was used in the shooting and that his cell phone "was dropped." Additionally, before that part of the testimony, Cameron made clear the letter independently refreshed his recollection:

> Q. Now, having reviewed that letter, does that aid you in your testimony at all?
>
> A. Yes, it does.
>
> Q. Does it refresh any recollection about conversations and contents of conversations that you may or may not have had with the defendant.
>
> A. Quite a bit, sir.
>
> Q. Why does it quite a bit refresh your recollection?

> A. There are some things that I left out that after re-reading what I wrote the first time when it was fresh in my head that I put when I first put it down on paper that it brought it back.
>
> Q. Now that you have read it and brought it back, *does it bring it back only because you read it or do you have an independent recollection, remember those things?*
>
> A. *No, I remember the things from the conversation that me and him had.*

(Emphasis added.) Thus, at some times, Cameron said he was testifying from memory. In *Smith*, the court faced a similar situation where at times the witness said she was testifying from her own memory and at other times acknowledged some of the testimony was not from her memory. *Smith*, 291 N.C. at 517, 231 S.E.2d at 671. There, the court found the trial judge did not abuse his discretion in allowing the testimony because the witness did not clearly provide a mere recitation of the refreshing memorandum. *Id.*, 291 N.C. at 518, 231 S.E.2d at 671–72. Likewise here, it is not *clear* Cameron was merely reciting the letter at trial or using it as a testimonial crutch, so we find that the trial judge's decision to allow the testimony does not amount to an abuse of discretion.

B. Admissibility of the Letter

¶ 28 **[2]** Having concluded the letter was properly used to refresh Cameron's recollection, we now turn to the second issue Defendant raises in relation to the letter, whether it was error to admit the letter into evidence.

1. Standard of Review

¶ 29 "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). Here, Defendant objected that the letter was an out-of-court statement—and therefore inadmissible hearsay—when the State made a motion to get a ruling on the letter's admissibility outside of the presence of the jury and later renewed his objection when the State moved in front of the jury to admit the letter. Therefore, we review *de novo* the admission of the letter into evidence.

2. Analysis

¶ 30 "[A] writing used to refresh recollection is not admissible because it was used to refresh the witness's recollection, but it may be admissible

for independent reasons." *Harrison*, 218 N.C. App. at 551, 721 S.E.2d at 375; *see also State v. Spinks*, 136 N.C. App. 153, 160, 523 S.E.2d 129, 134 (1999) ("The use of a document in order to refresh a witness' recollection does not make it admissible if offered by the party calling the witness, although it may be admissible for other reasons."). Thus, the question is whether there was an independent basis to admit the letter into evidence.

¶ 31 In admitting the letter into evidence, the trial court made clear the independent basis upon which its ruling relied. Specifically, the trial court found the letter was admissible as a "prior consistent statement[] to corroborate the person's testimony." The trial court made this ruling over the objections of Defendant that the letter was not a prior recorded recollection under North Carolina General Statute § 8C-1, Rule 803(5) (2019) and was an out of court statement to the extent it was used to refresh Cameron's recollection. As the trial court's ruling already contains a potential independent ground of admission, we rely on that potential ground. Thus, the question is whether the trial court erred in ruling the letter was admissible as a prior consistent statement.

¶ 32 Admission of prior consistent statements is "[o]ne of the most widely used and well-recognized methods of strengthening the credibility of a witness." *State v. Locklear*, 320 N.C. 754, 761–62, 360 S.E.2d 682, 686 (1987). The idea behind the method "rests upon the obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen [the witness'] credit before the jury." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990) (quoting *Jones v. Jones*, 80 N.C. 246, 249 (1879)) (alteration in original).

¶ 33 Prior consistent statements are admissible because they are "not offered for their substantive truth and consequently [are] not hearsay." *Id.* "To be admissible, the prior consistent statement must first [ ] corroborate the testimony of the witness." *State v. Lee*, 348 N.C. 474, 484, 501 S.E.2d 334, 341 (1998). Corroborating statements "strengthen" and "add weight or credibility to a thing by additional and confirming facts or evidence." *Levan*, 326 N.C. at 166, 388 S.E.2d at 435 (internal quotations omitted). Still, the statements offered as prior consistent statements need not align precisely with the testimony of the witness whose credibility will be strengthened. The prior statement "may contain new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Ligon*, 332 N.C. 224, 237, 420 S.E2d 136, 143 (1992) (internal quotations omitted); *see also Locklear*, 320 N.C. at 762, 360 S.E.2d at 686 ("If previous statements offered in corroboration are generally consistent with the

witness' testimony, slight variations between them will not render the statements inadmissible."). But a past statement that "actually directly contradict[s] . . . sworn testimony" is not admissible as a prior consistent statement. *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) (quoting *State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988)) (ellipses in original).

¶ 34 The letter at issue here qualifies as a prior consistent statement under those standards. The letter corroborates Cameron's testimony both as to how he came to have the information about Defendant's crime as well as the information about Defendant's crime to which Cameron testified. The letter reinforces Cameron's testimony that he knew Defendant as "Jones" or "Rage" and that they shared a cell block together. Further, the letter corroborates Cameron's testimony regarding the location of the shooting on Glenwood Avenue, that Defendant used an AK-47 in the shooting, that Defendant lost his cell phone at the scene of the shooting, and that Defendant told Cameron God was with Defendant or he would be facing a murder charge. The letter is thus exactly the type of confirming evidence that defines corroboration. *Levan*, 326 N.C. at 166, 388 S.E.2d at 435.

¶ 35 Cameron's testimony only diverged from the letter on one occasion, and that instance does not undermine the letter's status as a prior consistent statement. In the letter, Cameron wrote that Defendant's co-defendant was "his sister [sic] baby daddy." (Capitalization altered.) At trial, Cameron initially testified Defendant said his co-defendant was "his baby mama's brother or something like that" before admitting on cross, "I don't remember exactly." Cameron's testimony indicates he failed to remember something he wrote in the letter. Since the letter did not "actually directly contradict[]" Cameron's testimony, this difference does not undermine the letter's status as a prior consistent statement. *See McDowell*, 329 N.C. at 384, 407 S.E.2d at 212 (explaining an actual direct contradiction prevents evidence from being a prior consistent statement) (internal quotations omitted).

¶ 36 Defendant's own prior challenge to Cameron's use of the letter to refresh his recollection reinforces how the letter is a prior consistent statement. Defendant argues on the refreshed recollection issue that the State was able to "get the information before the jury despite Mr. Cameron's lack of knowledge as to its content." In other words, Defendant argues Cameron only testified to the contents of the letter itself because he did not remember anything independently of the letter. While above we found Cameron independently recalled the conversations to which he testified, that ruling does not change the similarity

between Cameron's testimony and the letter that Defendant highlights. That parallel between the testimony and letter makes the letter a prior consistent statement. *See Levan*, 326 N.C. at 166, 388 S.E.2d at 435 (defining corroboration to include "confirming facts or evidence" (internal quotations omitted)).

¶ 37 Defendant makes two arguments as to why we should conclude the letter is not a prior consistent statement, but neither argument persuades us. First, Defendant argues "the jury was not provided with a limiting instruction that State's Exhibit 152 [the letter] was only to be used for corroborative purposes." However, Defendant did not request a limiting instruction when the letter was introduced into evidence. By failing to request the instruction, Defendant waived the issue on appeal. *State v. Joyce*, 97 N.C. App. 464, 469–70, 389 S.E.2d 136, 140 (1990) (ruling the defendant waived his argument about the lack of limiting instruction as to a statement "for the purpose of corroborating" the out-of-court declarant's in-court testimony because the defendant failed to request such instruction). Additionally, the trial court gave a general jury instruction about "Impeachment or Corroboration by Prior Statement" that made clear the prior statement could only be used for corroborative purposes. (Capitalization altered.)

¶ 38 Second, Defendant notes the "prosecutor did not provide the same rationale for admission" as the trial court, i.e. that the letter was admissible as a prior consistent statement. While the prosecutor did not use the words prior consistent statement, his explanation to the trial court made clear that was the basis. In relevant part, the discussion occurred as follows:

> THE COURT: This is – it was used to do refresh his recollection. It's not a memorandum of a matter which a witness once had knowledge, but now has insufficient recollection.
>
> This was used to refresh his recollection and *it's being offered as a prior consistent statement is my understanding.*
>
> So, Mr. Latour.
>
> MR. LATOUR: In part, that is why it was used then. *Now I am introducing it as the letter that he wrote that was testified about* and that the defendant, through his attorney, asked very specific questions about things that were written in that letter, and therefore I would say it opens the door for that.

> The letter has been authenticated ad nauseam by him that it is something that he wrote. Now whether the contents of it -- I would submit to you none of the contents of it are hearsay and would therefore fall under none of those issues that the defendant is objecting about it being admitted under.

(Emphasis added.) Two parts of this discussion are especially relevant. First, the attorney for the State indicated he was introducing the letter in part based on the fact that Cameron testified about it. Second, the trial judge did not offer the prior consistent statement rationale to the State, rather he believed that is why the State itself had offered the letter into evidence. This distinction makes clear the prior consistent statement reasoning originated with the State rather than the trial court.

¶ 39 Having rejected Defendant's counter arguments, we conclude after *de novo* review that the letter was admissible as a prior consistent statement. Therefore, we conclude the trial court did not err on either issue related to the letter.

IV. Jury Instructions

¶ 40 **[3]** In addition to the arguments related to the letter, Defendant also argues the trial court plainly erred when instructing the jury on attempted first degree murder. Specifically, Defendant first argues the trial court plainly erred when, rather than using the pattern jury instruction for attempted first degree murder, it "fashioned its own instruction[s]" combining the pattern jury instructions on general attempt and on first degree murder. Defendant also contends the trial court should have included the elements of attempted first degree murder in the final mandates. Finally, Defendant asserts plain error on the basis that the trial court only provided instructions on the first count of attempted first degree murder and did not repeat the instructions for the second count. Defendant then argues the erroneous instructions "resulted in fundamental error that had a probable impact on the jury's verdict" because there was not "overwhelming evidence of guilt" in this case, thereby addressing the prejudice prong of plain error. As a result, Defendant asserts he is entitled to a new trial.

A. Standard of Review

¶ 41 Defendant admits he did not object to the allegedly erroneous jury instructions at trial and therefore argues plain error should apply. While the State also says plain error should apply, it argues in a footnote that in the past this would have been invited error under *State v. White*,

349 N.C. 535, 508 S.E.2d 253 (1998). The State contends this standard was only recently modified by this Court in *State v. Chavez*, 270 N.C. App. 748, 842 S.E.2d 128 (2020). As the State notes, the North Carolina Supreme Court reviewed *Chavez*. *State v. Chavez*, 2021-NCSC-86. While the Supreme Court did not address the invited error versus plain error issue directly, it applied plain error review in a case where the defendant did not object to an allegedly erroneous jury instruction on conspiracy to commit murder. *Id.* ¶¶ 10–11. Based on that ruling and the fact that plain error review typically applies to instructional error, we will apply plain error review, rather than review for invited error.[3] *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

¶ 42 In the definitive case on plain error, our Supreme Court explained:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

Id., 365 N.C. at 518, 723 S.E.2d at 334 (internal quotations, citations, and alterations omitted). Put another way, if a defendant cannot show the alleged error prejudiced him, he cannot meet the plain error standard. *See id.*, 365 N.C. at 518–19, 723 S.E.2d at 334–35 (finding the defendant failed to meet his burden to show plain error when he could not show the jury probably would have reached a different verdict even when the erroneous nature of the jury instruction was "uncontested"); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) ("The adoption of the 'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial.").

B. Analysis

¶ 43 Defendant asserts plain error as to the trial court's jury instructions on attempted first degree murder. First, Defendant argues the trial court

---

3. The standard of review also does not impact our decision because regardless, as explained below, Defendant cannot show prejudice.

plainly erred when it "did not provide any substantive instruction as to the second count of attempted first degree murder" but rather "merely told the jury that it had previously provided the instruction and they applied there as well." Defendant does not explain how repeating the same instruction he alleges was erroneous would have helped the jury. Further, the trial court allowed the jury to take the written instructions to the jury room during deliberation, so if they needed to review the instructions again, they could have read them rather than hear them for a second time. Finally, Defendant cites no authority requiring repeating the same jury instruction twice when a defendant faces multiple counts. For those reasons, it is not clear the trial court erred, let alone plainly erred, with respect to not giving the attempted first degree murder instructions again for the second count.

¶ 44 Defendant's main argument centers on a dispute over the use of the general attempt and first degree murder pattern jury instructions, N.C.P.I. – Criminal 201.10 (2011) (general attempt charge) and 206.10 (2019) (first degree murder), rather than the pattern jury instruction specifically on attempted first degree murder, N.C.P.I. – Criminal 206.17A (2003). Defendant at one point even argues the trial court used its "own instructions," implying the pattern instructions were not used at all. The State asserts the trial court's instructions "reveal adherence to the 2019 supplement" to the North Carolina pattern jury instructions on first degree murder, which was then combined with the general attempt charge.[4] The conflict centers on pattern jury instructions because the Supreme Court has "encouraged" using them, although it is not required. *State v. Haire*, 205 N.C. App. 436, 441, 697 S.E.2d 396, 400 (2010) (citing *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004)).

¶ 45 For clarity, we briefly review how the jury instructions in this case relate to those pattern jury instructions. Except for the sentence discussed below, the State is correct that the trial court's instructions follow the pattern jury instructions in N.C.P.I – Criminal 201.10 and 206.10 as those appeared at the time of Defendant's trial, with relevant additions on subjects such as alibi and acting in concert.

¶ 46 We further note that the instructions given conform in large part to the instruction which Defendant now claims was legally required, N.C.P.I. – Criminal 206.17A (2003). Specifically, the jury instructions given at Defendant's trial track the instructions in 206.17A in language—except

4. Footnote 2 in the State's brief cites to N.C.P.I – Criminal 206.17. This citation appears to be a clerical error given the State cited to 206.10, which is the correct cite, in the main text of its brief.

as to the sentence discussed below—as to both elements of attempted murder and as to the definitions of malice, premeditation, and deliberation within the definition of first degree murder. The order of the instructions slightly differs—with the definition of first degree murder coming immediately after the first element (intent to commit first degree murder) in the instructions at trial rather than after both elements—and the definition of first degree murder at trial added instructions on the definitions of proximate cause and intent. The other difference between the instructions given based on 201.10 and 206.10 versus Defendant's preferred instruction on appeal, 206.17A, is the final mandate. The instructions at trial used language about whether Defendant "intended to commit first degree murder" rather than including language that Defendant "attempted to kill the victim" while acting "with malice, with premeditation and with deliberation," a difference about which Defendant separately claims error.

¶ 47 The major difference in the instructions as given and the pattern jury instructions, both the trial court's combination of 201.10 with 206.10 and Defendant's preferred 206.17A, is part of a sentence in the definition of malice. Both 206.10 and 206.17A define "malice" in relevant part as "the condition of mind which prompts a person to [intentionally] take the life of another [intentionally] or *to intentionally inflict serious bodily harm* that[/which] proximately results in another person's[/his] death without just cause, excuse[,] or justification." N.C.P.I. – Criminal 206.10 (2019), 206.17A (2003) (emphasis added) (alteration to reflect difference between 206.10 and 206.17A with intentionally appearing in the first spot in 206.10 and in the second spot in 206.17A). By contrast, the jury instructions in relevant part defined malice as "that condition of mind which prompts a person to take the life of another intentionally or *to intentionally inflict a wound with a deadly weapon upon another* which proximately results in his death, without just cause, excuse or justification." (Emphasis added.)

¶ 48 As Defendant indicates, a wound is not the same as serious bodily harm. Defendant relies on case law defining wound as "an injury to the person by which the skin is broken," *State v. Butts*, 92 N.C. 784, 786 (1885), and serious bodily harm as "such physical injury as causes great pain or suffering." *See State v. Bonilla*, 209 N.C. App. 576, 585, 706 S.E.2d 288, 295 (2011) (so defining while equating serious bodily harm and serious bodily injury). Further, as Defendant highlights, the statutory definition of serious bodily injury in the context of assault requires "substantial risk of death," "serious permanent" harm, or harm that "results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4(a) (2019). These

definitions from statute and case law align with the general legal definitions of the words. *See generally Wounding* and *Serious Bodily Harm*, Black's Law Dictionary (11th ed. 2019).

¶ 49 While the language in that sentence differed, the trial court, in accordance with the pattern jury instructions, then instructed the jury it could infer malice if the State proved beyond a reasonable doubt that Defendant "intentionally inflicted a wound upon the deceased [/victim] with a deadly weapon" that proximately caused the victim's death. N.C.P.I. – Criminal 206.10 (2019), 206.17A (2003) (alteration to demonstrate difference between the two versions of the pattern jury instructions). To the extent this unchallenged part of the pattern jury instructions is in accordance with the law—which we do not address—the difference in language above may not even be error. If intentionally inflicting a wound can lead to an inference of malice, then defining malice to include such an action may not be error.

¶ 50 Regardless, we need not reach a firm conclusion on whether the instruction was an error because assuming arguendo the trial court erred, it was not a plain error; Defendant cannot show prejudice. *See State v. Mumma*, 372 N.C. 226, 241, 827 S.E.2d 288, 298 (2019) (stating the court "need not decide" whether an instruction was improper when the defendant could not show prejudice (internal quotations omitted)); *see also State v. Turner*, 237 N.C. App. 388, 392, 765 S.E.2d 77, 82 (2014) (assuming arguendo instructional error before finding no plain error due to lack of prejudice). To find prejudice a court must conclude that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotations and citations omitted). Here, absent the alleged instructional errors as to the attempted first degree murder charges, Defendant cannot show the jury probably would have reached a different verdict.

¶ 51 First, the jury found the necessary elements as to the other charges for which Defendant does not challenge the jury instructions. Even under Defendant's preferred instruction, N.C.P.I – Criminal 206.17A, malice includes "the condition of mind which prompts a person to take the life of another intentionally," i.e. the intent to kill. The jury separately convicted Defendant of two counts of "assault with a deadly weapon *with intent to kill* inflicting serious injury." (Capitalization altered; emphasis added.) This charge was based on the same action, shooting at Taylor and Brickhouse, as the attempted first degree murder charge, so the jury would have found intent to kill and thus malice even with Defendant's requested jury instruction or any jury instruction that was not erroneous.

¶ 52 Faced with a similar situation in *State v. Allen*, this Court likewise found the defendant could not show prejudice and therefore did not carry his plain error burden. 233 N.C. App. 507, 515, 756 S.E.2d 852, 860 (2014). In that case, the defendant claimed plain error in failing to instruct the jury on self-defense on the charge of discharging a firearm into an occupied vehicle. *Id.*, 233 N.C. App. at 514, 756 S.E.2d at 859. This Court rejected that argument, ruling it was "unlikely that the jury would have reached a different result" if the jury had been instructed on self-defense as to the discharging a firearm charge because the jury had also convicted defendant on attempted first-degree murder and assault even though the trial court gave a self-defense instruction on each of those charges. *Id.*, 233 N.C. App. at 515, 756 S.E.2d at 860. Here, if the jury had been properly instructed as to malice on the attempted first degree murder charge, the jury probably would not have reached a different result because the jury had also convicted Defendant on the assault charge, which, like malice, required finding intent to kill.

¶ 53 Looking to "the crux of the defense" at trial, we again find Defendant cannot demonstrate prejudice. *See State v. Oliphant*, 228 N.C. App. 692, 702, 747 S.E.2d 117, 124 (2013) (finding no prejudice where defendants argued misidentification of both defendants at trial and then made plain error arguments on appeal claiming the jury instructions failed to make clear the guilt or innocence of one defendant was not dependent upon that of the other). Here, Defendant presented an alibi defense at trial. Yet, his plain error arguments focus on whether the jury was properly instructed on malice for the attempted first degree murder charge. The issues do not align because the jury still could have convicted Defendant even if they had received the malice instructions Defendant claims should have been given. At trial, Defendant did not argue he lacked malice but rather that he was not involved at all. Put another way, in convicting Defendant of other charges tied to the shooting the jury rejected Defendant's alibi defense, and even with different instructions on malice, they would have rejected the defense as to attempted first degree murder as well. Thus, Defendant again fails to carry his burden to show the alleged instructional "error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotations and citations omitted).

¶ 54 Defendant's prejudice argument does not convince us otherwise. Defendant argues the allegedly erroneous instructions "had a probable impact on the jury's verdict" because "[t]his is not a case where there was overwhelming evidence of guilt." Overwhelming evidence of guilt can defeat a plain error claim on prejudice grounds. *See id.*, 365 N.C. at

519, 723 S.E.2d at 335 ("In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict."). But the inverse, which Defendant argues, is not true. The "lack of overwhelming and uncontroverted evidence against defendant" does not require "the conclusion that a jury probably would have reached a different result." *State v. Maddux*, 371 N.C. 558, 565, 819 S.E.2d 367, 372 (2018). Thus, even though this case was close, we can still find no prejudice for the reasons laid out above.

¶ 55 Finally, we quickly note an issue with the State's view of prejudice. The State argued Defendant was satisfied with the jury instructions and thus "[u]nder these circumstances, even had the trial court erred, there should can [sic] be no conclusion that the error" resulted in prejudice. The State's argument amounts to an attempt to create invited error by claiming if Defendant did not object to the instructions, there can be no prejudice ever and thus no plain error. We have already concluded plain error is the appropriate standard here. We will not undermine that standard by concluding there can be no prejudice whenever a defendant fails to object to jury instructions and thus must resort to plain error review on appeal. We find no plain error based upon the totality of the jury instructions and the facts of this particular case.

¶ 56 Because we conclude Defendant cannot demonstrate prejudice as to any of the alleged instructional errors, we find that the trial court did not plainly err when instructing the jury on attempted first degree murder.

V. Clerical Error

¶ 57 **[4]** Defendant finally argues the case should be remanded for correction of clerical errors. Specifically, Defendant contends attempted first degree murder is a class B2 felony, but part of the amended judgment lists it as a class B1 felony. To the extent a clerical error exists, the State agrees that the case should be remanded to correct it.

¶ 58 "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (internal quotations and citations omitted). A clerical error is "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Id.* (internal quotations and citations omitted). The Supreme Court has previously recognized that erroneously assigning the wrong

class of felony to a crime is a clerical error. *State v. Hammond*, 307 N.C. 662, 669, 300 S.E.2d 361, 365 (1983).

¶ 59 Here, Defendant correctly states attempted first degree murder is a class B2 felony. *See* N.C. Gen. Stat. § 14-17 (stating first degree murder is a class A felony) and § 14-2.5 (stating an attempt to commit a class A felony is a class B2 felony). Defendant is also correct that the last page of the amended judgment, listing "Additional File No.(s) and Offense(s)" lists the attempted first degree murder conviction in 17CRS221515 as a class B1 felony. (Capitalization altered.) This error happened even though the trial judge in a signed order pursuant to a handwritten note indicated he was amending the original judgment to properly reflect attempted first degree murder as a class B2 felony. Further, the first page of the amended judgment lists the conviction in 17CRS221514 as a class B2 felony. These facts indicate the listing of attempted first degree murder as a class B1 felony in the amended judgment is a clerical error, not an error based on judicial reasoning or determination. *Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696. Therefore, we remand to the trial court for correction of this error.

VI. Conclusion

¶ 60 We find no error as to the substantive issues raised by Defendant. We conclude the trial court did not abuse its discretion in ruling the letter refreshed the witness's testimony. Further, we find after *de novo* review that the letter itself was admissible. We also do not find plain error with regard to the jury instructions on attempted first degree murder.

¶ 61 However, we find the amended judgment contains a clerical error incorrectly listing the attempted first degree murder conviction in 17CRS221515 as a class B1 felony. We remand to the trial court for correction of this error. On remand, the trial court shall amend the judgment to correctly reflect that attempted first degree murder is a class B2 felony.

NO ERROR AND REMANDED.

Judges DIETZ and CARPENTER concur.

STATE v. LANE

[280 N.C. App. 264, 2021-NCCOA-593]

STATE OF NORTH CAROLINA
v.
MATTHEW LANE, JR.

No. COA20-764

Filed 2 November 2021

1. Search and Seizure—motion to suppress—GPS tracking device on car—standing to challenge—common law trespass theory

The trial court in a heroin trafficking case properly denied defendant's motion to suppress because defendant lacked standing, under a common law trespass theory, to challenge the placement of a GPS tracking device on a car he drove for a trip to conduct a heroin transaction. Defendant did not own the car, but rather a potential drug buyer (the original target of law enforcement's investigation) had borrowed it from someone else and then allowed defendant to drive it—with the buyer riding as a passenger—to a source that sold heroin, and defendant could not claim rights in the car as a bailee where he offered no evidence of a bailment. Furthermore, the car's movements were tracked pursuant to a court order—which was supported by probable cause—within the time frame and geographical area authorized by the order.

2. Search and Seizure—motion to suppress—GPS tracking device on car—standing to challenge—reasonable expectation of privacy

The trial court in a heroin trafficking case properly denied defendant's motion to suppress because defendant lacked standing to challenge a court order, supported by probable cause, allowing the placement of a GPS tracking device on a car he drove for a trip to facilitate a heroin sale. Specifically, defendant could not claim a reasonable expectation of privacy—as an overnight guest or regular visitor of a dwelling could assert a reasonable expectation of privacy in that dwelling—in a moving car on a public highway that he occupied only temporarily and for the limited purpose of conducting a single drug transaction.

Appeal by defendant from judgment entered 5 September 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

TYSON, Judge.

¶ 1 Matthew Lane, Jr. ("Defendant") appeals from the judgments entered upon his guilty pleas to attempted trafficking heroin by possession and trafficking heroin by transportation. We affirm.

I. Background

¶ 2 On 5 February 2016, Raleigh Police Detective M.K. Mitchell submitted to the superior court an application under seal for authorization to surreptitiously install and monitor a GPS tracking device for 45 days on a 2006 Acura MDX vehicle owned and registered to Sherry Harris and driven by Ronald Lee Evans, who lived with Harris. In a sworn affidavit accompanying the application, Detective Mitchell explained that he had obtained information through surveillance and a confidential informant that Evans was selling and "trafficking amount[s] of heroin throughout the Raleigh area." Detective Mitchell also requested that police be permitted to use the device to track the vehicle's location throughout the United States during the 45-day period.

¶ 3 That day, Superior Court Judge Brian Collins granted the application, issued the order, and the trafficking device was installed on the Acura. Judge Collins' order found that Detective Mitchell's affidavit provided specific and articulable facts showing probable cause that the vehicle was being used in the commission of criminal offenses and tracking the vehicle's location would provide information relevant and material to the ongoing investigation. The order specifically authorized the device to be installed surreptitiously on Harris' vehicle and that it be "operated and monitored continuously throughout the period of this order including when the subject vehicle is located in a place where there is a reasonable expectation of privacy." Because the vehicle was mobile and due to "the nature of the offenses being committed," Judge Collins' order also requested for officers to be allowed to continue monitoring the device in other jurisdictions within the United States.

¶ 4 The device would text message the Acura's location to Detective Mitchell when the vehicle would start and stop. On the evening of 25 February 2016, Detective Mitchell received a text message the Acura was in Raleigh around 11:40 p.m. The Acura traveled through Virginia and reached New Jersey by 6:05 a.m. the next day. Detective Mitchell then began manually monitoring the Acura's position as it continued to

New York and stopped at an address for a Walgreens drug store. The Acura made another stop for fifteen minutes at a nearby location, and then it left New York traveling south.

¶ 5 Detective Mitchell along with other Raleigh police officers prepared to intercept the vehicle as it entered Wake County. The Acura was observed by officers, who measured its speed with a radar device and through pacing and determined the Acura was speeding approximately 81 miles per hour in a 70 mile per hour zone. The officers initiated a traffic stop of the Acura for speeding.

¶ 6 Officers approached the Acura, smelled the odor of marijuana, determined the vehicle was being driven by Defendant and was occupied by Evans, Aretha Lyles-Awuona, and Douglas Cooley. Officers searched the vehicle and its occupants and recovered 121 grams of heroin. Lyles-Awuona told investigators Evans was included on the trip for him to be introduced by Defendant to the selling source of the heroin in New York, to return for future trips to purchase heroin, and to contribute currency to the purchase of the heroin.

¶ 7 Defendant was indicted on charges of trafficking heroin by possession, trafficking heroin by transportation, and conspiracy to traffic heroin on 4 April 2016. Defendant filed a motion to suppress to challenge the use of the GPS tracking device installed on the vehicle by court order. The State asserted Defendant lacked standing to challenge the GPS tracking device on the Acura because among other things, Defendant was not in possession of the vehicle when the device was installed and Defendant did not have a close relationship to the registered owner of the vehicle. Superior Court Judge Reuben Young concluded that Defendant lacked standing and denied the motion to suppress on that basis. Defendant filed a motion to reconsider the motion to suppress which the trial court denied. Defendant was tried by a jury on 5 September 2019, which resulted in a hung jury.

¶ 8 Rather than to be retried, Defendant pleaded guilty pursuant to a plea agreement to one count of trafficking heroin by transportation and one count of attempted trafficking by possession. Pursuant to the plea agreement, the State dismissed the conspiracy to traffic heroin charge. Defendant preserved his right to appeal the denial of the motion to suppress. Defendant was sentenced to an active term of 90 to 120 months for the trafficking heroin by transportation. Defendant was sentenced to an active term of 35 to 54 months for attempted trafficking heroin by possession to run consecutive to Defendant's sentence for trafficking heroin by transportation. Defendant was fined $100,000. Defendant appeals.

II. Jurisdiction

¶ 9 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(4) and 15A-979(b) (2019).

III. Issue

¶ 10 Defendant argues the trial court improperly denied his motion to suppress evidence from the traffic stop.

IV. Standard of Review

¶ 11 "The standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted). "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation and internal quotation marks omitted).

¶ 12 Findings of fact that "are not challenged on appeal are . . . deemed to be supported by competent evidence and are binding" upon this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal" *de novo*. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

V. Motion to Suppress

¶ 13 Defendant argues the trial court erred in denying his motion to suppress and asserts he has standing to challenge the court-ordered installation of the GPS tracking device on Harris' Acura.

¶ 14 The Fourth Amendment to the Constitution of the United States, as made applicable to the sovereign states through the Fourteenth Amendment, provides:

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

U.S. Const. amend. IV.

¶ 15 Subject "to a few specifically established and well-delineated exceptions," the Fourth Amendment protects an individual's privacy interests by prohibiting officers from conducting a search without a valid warrant based on probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 29 L. Ed. 2d 564, 576 (1971).

¶ 16 A "search" under the Fourth Amendment occurs in one of two circumstances. First, under the common law trespass theory, a search occurs upon a physical intrusion by government agents into a constitutionally protected area in order to obtain information. *See United States v. Jones*, 565 U.S. 400, 404-05, 181 L. Ed. 2d 911, 918 (2012).

¶ 17 Secondly, under a reasonable expectation of privacy theory, a search occurs without a physical trespass, but the government invades a space to obtain information where an individual holds a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582 (1967). The test under the reasonable expectation of privacy theory requires: (1) "the individual manifested a subjective expectation of privacy in the object of the challenged search[;]" and, (2) "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001).

¶ 18 Our Supreme Court has held: "Before [a] defendant can assert the protection afforded by the Fourth Amendment, however, he must demonstrate that any rights alleged to have been violated were his rights, not someone else's." *State v. Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110 (1994) (citations omitted). Our Supreme Court further held: "A person's right to be free from unreasonable searches and seizures is a personal right, and only those persons whose rights have been infringed may assert the protection of the Fourth Amendment." *Id.* (citations omitted).

¶ 19 "It is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981) (citations omitted).

¶ 20 "Standing requires *both* an ownership or possessory interest and a reasonable expectation of privacy." *State v. Stitt*, 201 N.C. App. 233, 240, 689 S.E.2d 539, 547 (2009) (internal quotation and citation omitted). "A defendant has standing to contest a search if he or she has a reasonable expectation of privacy in the property to be searched." *State v. McKinney*, 361 N.C. 53, 56, 637 S.E.2d 868, 871 (2006).

> [T]he lack of property rights in an invaded area is not necessarily determinative of whether an individual's

> Fourth Amendment rights have been infringed. Nonetheless, there are many instances in which the presence or absence of property rights in an invaded area are the best determinants of an individual's reasonable expectations of privacy.

State v. Alford, 298 N.C. 465, 471, 259 S.E.2d 242, 246 (1979) (internal citations omitted).

¶ 21 Defendant asserts he has standing to challenge the search of a moving motor vehicle on a public highway both under a common law trespass theory established under *Jones* and under a reasonable expectation of privacy theory under *Katz*.

A. Common Law Trespass

¶ 22 **[1]** Here, Detective Mitchell monitored the vehicle's location. In *Jones*, the Supreme Court of the United States held the physical attachment of a GPS tracking device to *the defendant's vehicle* is a trespass. *Jones*, 565 U.S. at 404-05, 181 L. Ed. 2d at 918. The majority utilized a trespass-based rationale holding "the Government's installation of a GPS device on a target's vehicle and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " *Id*. While Defendant here has shown the use of real time GPS tracking is a search, the GPS tracking device in *Jones* was planted on the defendant's vehicle *after* a court's allowance and *outside* of the approved area authorized by the court order. *Id*. at 403, 181 L. Ed. 2d at 917. The asserted intrusion before us was based on probable cause conducted within the time frame and geographic area authorized by the court order. *See also State v. Perry*, 243 N.C. App. 156, 163-64, 776 S.E.2d 528, 534 (2015) ("A court order compelling disclosure pursuant to 18 U.S.C. § 2703(d) [(2018)] 'shall issue only if the governmental entity offers specific and articulatable facts showing there are reasonable grounds to believe that the contents of a wire or electronic communication, or in the records or other information sought, are relevant and material to an ongoing criminal investigation.' ").

¶ 23 Unlike in *Jones*, Defendant's status in the vehicle is not clear. Defendant is not the owner of the Acura and was not an individual authorized by the owner. The owner of the vehicle allowed Evans, the original target of the narcotics investigation to use her vehicle. Defendant asserts he has rights in the Acura, consistent with a bailee of the vehicle, to support standing. Defendant further asserts he was in control of the trip, he knew what location to go, and who to meet to purchase the heroin. Evans was included in the trip for money to purchase the heroin and to meet the contact in New York for future buying

trips. The State concedes Defendant had permission to drive the Acura from Evans, "any driving that was taking place was going on with the permission of Mr. Evans."

¶ 24 A bailment has traditionally been defined as: "A delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu. under an express or implied-in-fact contract. Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title." *Bailment*, Black's Law Dictionary (11th ed. 2019).

¶ 25 "A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee. Delivery by the bailor relinquishing exclusive possession, custody, and control to the bailee is sufficient." *Fabrics, Inc. v. Delivery Service*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 726 (1979) (citations omitted). "[T]he obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract." *Hanes v. Shapiro*, 168 N.C. 24, 31, 84 S.E. 33, 36 (1915).

¶ 26 Here, Defendant offered no evidence of delivery of possession and acceptance to establish a bailment. There is no evidence Defendant had exercised possession and exclusive control of Harris' vehicle. While Defendant knew the route and may have done the majority of the driving, it was in a vehicle Harris owned and that Evans supplied and remained within during the entire trip. Under the common law trespass theory, the trial court properly ruled Defendant does not have standing to challenge the GPS tracking device. Defendant drove Harris' vehicle for the trip at the discretion of Evans, who was present in the vehicle throughout the trip. Defendant's argument is overruled.

B. Reasonable Expectation of Privacy

¶ 27 **[2]** In *Katz*, the Supreme Court of the United States held the installation of a listening device into a public telephone booth *without a warrant* was an unconstitutional search. *Katz*, 389 U.S. at 351, 19 L. Ed. 2d at 582. "It must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." *State v. Scott*, 343 N.C. 313, 328, 471 S.E.2d 605, 614 (1996) (citation omitted). The State argues Defendant cannot assert any reasonable expectation of privacy in Harris' Acura. This Court stated: "temporary occupancy or temporary use of property does not automatically create an expectation of privacy in that property." *State v. Boyd*, 169 N.C. App. 204, 207, 609 S.E.2d 785, 787 (2005).

¶ 28 In *Carpenter v. United States*, __ U.S. __, __, 201 L. Ed. 2d 507, 515-16 (2018), where agents investigating a string of robberies obtained cell phone records of cell site data under a third-party communications order for a 127-day period and a separate 7-day period, the Supreme Court of the United States held it was "an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Id.* at __, 201 L. Ed. 2d at 517-18 (citation and internal quotation marks omitted).

¶ 29 Here, officers were monitoring the travel of a suspected heroin trafficker based upon a court order issued specifically for this vehicle for a limited duration issued on a showing of probable cause. While Defendant may have rested between stints driving the Acura, he has pled no facts to establish a heightened level of privacy while riding in a moving vehicle on a public highway, as a regular visitor or occupant of a dwelling. *See Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 93 (1990) (holding "that [a defendant's] status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable."); *Minnesota v. Carter*, 525 U.S. 83, 90, 142 L. Ed. 2d 373, 393 (1998) ("[The defendants] were . . . not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with [tenant of the apartment], or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household. While the apartment was a dwelling place for [the tenant of the apartment], it was for [the defendants] simply a place to do business.").

¶ 30 "A person traveling in an automobile on public throughfares has *no reasonable expectation of privacy* in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281, 75 L. Ed. 2d 55, 62 (1983) (emphasis supplied). For Defendant, the Acura was a vehicle for a trip to conduct a heroin transaction. Defendant did not have a reasonable expectation of privacy to confer standing to challenge the court order issued on probable cause. *See Stitt*, 201 N.C. App. at 240, 689 S.E.2d at 547. Defendant's argument is overruled.

VI. Conclusion

¶ 31 The trial court correctly concluded Defendant did not have standing to challenge the placement of the GPS tracking device on a vehicle he did not own under a court order based upon probable cause. Defendant has no recognizable legal interests in a vehicle he did not own and was not given authority by the owner to use.

¶ 32 The order of the trial court is affirmed. The judgments and sentences entered upon Defendant's guilty plea remain undisturbed. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
JIMMY BROWN RODRIGUEZ, II

No. COA20-850

Filed 2 November 2021

1. Evidence—prior bad acts—prior rape—relevance—force and consent

In a trial for second-degree forcible rape based on allegations that the victim was physically helpless when defendant engaged in intercourse with her, the trial court did not err by admitting testimony—for the limited purposes of showing absence of mistake, intent to commit the crime, and lack of consent—from a witness who stated that defendant previously raped her. The evidence was still relevant to issues of force and consent, even though the force involved in the alleged rape related by the witness was different than the implied force at issue (given the State's theory that the victim was unable to resist or give consent), and to prove defendant did not mistake the victim's actions and inactions as consent.

2. Evidence—prior bad acts—prior rape—more probative than prejudicial

In a trial for second-degree forcible rape based on allegations that the victim was physically helpless when defendant engaged in intercourse with her, the trial court did not abuse its discretion by finding more probative than prejudicial a witness's testimony that defendant previously raped her, where the court heard the proposed testimony on voir dire, conducted a balancing test pursuant to Evidence Rule 403, and included the testimony only for the purposes of showing absence of mistake, intent to commit the crime, and lack of consent.

STATE v. RODRIGUEZ

[280 N.C. App. 272, 2021-NCCOA-594]

Appeal by Defendant from Judgment entered 1 November 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 21 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Drew Nelson for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Jimmy Brown Rodriguez, Jr. (Defendant) appeals from a Judgment and Commitment entered upon a jury verdict finding him guilty of Second-Degree Rape. The Record tends to reflect the following:

¶ 2 On 3 April 2018, a Wake County Grand Jury indicted Defendant on one count of Second-Degree Forcible Rape against a victim "who was at the time physically helpless" in violation of N.C. Gen. Stat. § 14-27.22 and one count of Incest in violation of N.C. Gen. Stat. § 14-178. On 22 October 2019, prior to trial, Defendant filed a Motion *in Limine* seeking to exclude expected testimony—under Rule of Evidence 404(b)—from a State's witness alleging Defendant had previously forcibly raped the witness. Defendant's case came on for trial on 28 October 2019 in Wake County Superior Court.

¶ 3 At the outset, the trial court heard arguments regarding Defendant's various Motions to exclude certain evidence including the testimony of Brittany Mack (Mack). Defendant's counsel explained that Mack would likely testify Mack and Defendant had been in a three-year relationship and that Defendant had "forced sex" on Mack numerous times including five days prior to the acts giving rise to Defendant's charges in this case. The trial court heard Mack's testimony on *voir dire* that on numerous occasions, while Mack brought her and Defendant's son to visit Defendant, Defendant would direct Mack to his bedroom, lock the door, and force Mack to have intercourse with him. The trial court reserved its ruling on the admissibility of this testimony for later in the proceedings.

¶ 4 Prior to opening arguments and the jury being impaneled, Defendant pled guilty to the charge of Incest. The State gave its opening remarks in which the State explained the evidence would show on 5 March 2018, Defendant engaged in intercourse with his niece, K.F.,[1] after inviting her

1. We use the victim's initials to protect her privacy.

to his residence and drinking alcohol, and the intercourse was "by force and against [K.F.'s] will because she was unable to consent." The State also explained to the jury that Defendant had already pled guilty to a charge of Incest for the acts in question in this case.

¶ 5 The State called K.F. as its first witness. K.F. testified that in January of 2018, she came to North Carolina from Texas to visit family. On the date in question, Defendant asked K.F. to come over to his apartment so that K.F. could "drive him around," and Defendant would "pay [K.F.] to drive him around." Defendant wanted K.F. to drive him around because he had been drinking. K.F. drove Defendant to a liquor store where Defendant bought "a fifth of Jack" and numerous "airplane bottles" of other liquors. Defendant and K.F. went back to Defendant's apartment, and Defendant asked K.F. if she "wanted to drink." K.F. replied that she did. Defendant then made K.F. a drink in a "red solo cup" that contained "a lot of Jack. More than [K.F.] was used to."

¶ 6 Defendant and K.F. then engaged in arm wrestling, and K.F. asked Defendant if he could show K.F. "moves like fighting wise[.]" After about ten minutes, Defendant and K.F. drank more alcohol, and K.F. "started feeling a little bit uncomfortable." According to K.F., Defendant "grazed [her] butt" twice. Then K.F. drank two "shots" of liquor from the airplane bottles Defendant had purchased before Defendant gave K.F. another cup of alcohol. Defendant started to complain about back pain and asked K.F. to "rub IcyHot" on his back. K.F. agreed to do so because she had done that for her boyfriend when he had hurt his back. K.F. applied IcyHot to Defendant's back, then chest, while Defendant was shirtless on the living room floor. Defendant asked K.F. to "straddle" him while she applied IcyHot to his chest, but K.F. did not because she felt it was "inappropriate." K.F. was "pretty buzzed" as she applied IcyHot to Defendant's back and chest. Defendant then leaned in to try and kiss K.F. K.F. tried to "scoot" away from Defendant and ended up on her back while trying to avoid Defendant's continued advances. K.F. told Defendant "no," but Defendant kept trying to kiss her. At some point, K.F. "froze" and could no longer move. K.F. blacked out momentarily and remembered walking into the bedroom where she blacked out again. When K.F. regained consciousness, Defendant was having intercourse with her.

¶ 7 After hearing K.F.'s testimony, the trial court ruled "that the 404(b) evidence as it relates to alleged sexual assault by the defendant on Brittany Mack will be admissible for the limited purposes of showing absence of mistake, lack of consent and intent." The trial court found "that proximity is not at issue as this is alleged acts that most recently occurred five days prior to the alleged sexual assault" in this case, and

that there were similarities between Defendant's alleged rapes of Mack and the circumstances in this case. As such, the trial court reasoned:

> So recognizing that rule 404(b) is a rule of inclusion, I do find that this proffered testimony should be admitted under 404(b). I have conducted the balancing test required by Rule 403 and do find that the evidence is sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test and that the probative value is not outweighed by the prejudicial effect.

¶ 8 The State called Mack as its second witness. Mack testified she started dating Defendant in 2016, and the couple had a child together. Mack later ended her relationship with Defendant, but Mack and Defendant reached an agreement for Defendant to visit Mack and Defendant's son. Mack testified that on numerous occasions, when Mack brought her children to Defendant's apartment so Defendant could visit his son, Defendant "would tell [Mack's] children that he needed to talk to their mother," and Mack would follow Defendant into his bedroom while the children remained in the living room. According to Mack, Defendant "would tell [Mack] to take [her] clothes off or sometimes he would just start taking them off for [Mack]." Then Defendant would, "pick [Mack] up and throw . . . or toss [Mack] on his bed."

¶ 9 Defense counsel objected to Mack's testimony Defendant threw her on his bed. After a bench conference, the trial court instructed the jury:

> Ladies and gentlemen of the jury, evidence is being elicited tending to show that at an earlier time the defendant sexually assaulted Brittany Mack. This evidence is being received solely for the purpose of showing absence of mistake, that the defendant had the intent to -- I am sorry -- that the defendant had the intent to commit the crime charged in this case, and the lack of consent. If you believe this evidence, you may consider it but only for the limited purpose or purposes for which it was received.

Mack continued: "[Defendant] would either make me give him oral sex or he would continue to insert his penis inside of me." Mack did not consent to these encounters, but she did not scream because her "kids were in the room just ten feet away." Mack explained she had been unable to resist Defendant's sexual advances during their past relationship.

¶ 10 Defendant did not present any evidence at trial. Before the trial court sent the jury to deliberate, the trial court instructed the jury:

> Evidence was [presented] tending to show that at an earlier time the defendant sexually assaulted Brittany Mack. This evidence was received solely for the purpose of showing absence of mistake and/or that the defendant had the intent to commit the crime charged in this case. If you believe this evidence, you may consider it, but only for the limited purpose or purposes for which it was received.

During deliberation, the jury asked the trial court: "In the third element, can you please explain in detail should have reasonably known?" The trial court instructed the jury that it was "to consider what a reasonable person similarly situated would have known or should have known." After the jury informed the trial court that it could not reach a unanimous verdict, the trial court issued the jury an Allen charge instructing the jury to continue to deliberate. The jury eventually found Defendant "guilty of second degree rape." The trial court sentenced Defendant to an active term of 96 to 176 months—including the charge of Incest to which Defendant pled guilty. Defendant gave oral Notice of Appeal in open court.

Issues

¶ 11 The issues on appeal are whether the trial court: (I) erred in allowing testimony regarding Defendant's alleged prior rapes because the alleged prior rapes were not relevant to any material element of the charge of Second-Degree Forcible Rape in this case; and (II) abused its discretion in weighing the testimony's prejudicial effect against its probative value.

Analysis

¶ 12 Defendant argues the trial court erred in admitting Mack's testimony regarding Defendant's alleged forcible rapes against her will because these alleged prior rapes were not relevant under Rule of Evidence 401 as they were not probative of any fact required to find Defendant committed Second-Degree Forcible Rape in this case. Alternatively, Defendant argues the trial court abused its discretion in weighing the probative value of Mack's testimony against its prejudicial effect pursuant to Rule of Evidence 403.

I. Relevant Evidence

¶ 13 **[1]** As a threshold matter, the State contends Defendant has not preserved this specific theory for appeal because Defendant only objected

to this testimony at trial under Rule of Evidence 404(b) as impermissible character evidence showing Defendant's propensity to commit rape. As such, according to the State, Defendant has not preserved the issue on the specific grounds the testimony was relevant pursuant to Rule 401. Thus, the State argues Defendant may only challenge this alleged error under a plain error standard of review.

¶ 14 Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake [.]

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). " 'In fact, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue* other than the character of the accused.' " *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). When determining whether to admit evidence under Rule 404(b), the trial court must determine: (1) if the evidence is being offered for the purposes expressed in the Rule; and (2) whether the evidence is relevant. *State v. Bynum*, 111 N.C. App. 845, 848, 433 S.E.2d 778, 780, *cert. denied*, 335 N.C. 239, 439 S.E.2d 153 (1993). Thus, our courts have reasoned a determination of relevance under Rule 401 is likely subsumed in a trial court's decision to admit or exclude evidence under Rule 404(b). However, even assuming Defendant's Motion to exclude this testimony pursuant to Rule 404(b) preserved his argument on appeal pursuant to Rule 401, the trial court did not err in concluding the testimony was relevant for the following reasons.

¶ 15 Defendant contends testimony regarding the alleged forcible rapes against Mack were not relevant to this case where the State only had to prove K.F. was physically helpless, and Defendant knew or should have reasonably known K.F. was physically helpless. Therefore, according to Defendant, Mack's testimony was "wholly unrelated" to the facts and allegations in this case. Rule 401 defines relevant evidence as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "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." *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570, *appeal dismissed*, *rev. denied*, 373 N.C. 175, 833 S.E.2d 806 (2019) (citation and quotation marks omitted).

¶ 16 Defendant was indicted on one count of Second-Degree Forcible Rape where the Grand Jury found Defendant "engage[d] in vaginal intercourse with [K.F.], who was at the time physically helpless" in violation of N.C. Gen. Stat. § 14-27.22. N.C. Gen. Stat. § 14-27.22(a) provides:

> A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.22(a) (2019). Thus, the statute provides two distinct avenues to prosecute a defendant: for acts committed by force and against the victim's will; or acts committed against a victim who cannot express unwillingness. However:

> The gravamen of the offense of second degree rape is forcible sexual intercourse. N.C. Gen. Stat. § 14–27.3 (2005). Force may be shown in several alternative ways including: (1) actual force, *State v. Hall*, 293 N.C. 559, 562-63, 238 S.E.2d 473, 475 (1977) (defendant grabbed victim's neck and pushed her onto the bed); (2) constructive force, *State v. Parks*, 96 N.C. App. 589, 594, 386 S.E.2d 748, 752 (1989) ("threats and displays of force by defendant for the purpose of compelling the victim's submission to sexual intercourse"); and (3) force implied in law, which includes sexual intercourse with a person who is mentally incapacitated, *State v. Washington*, 131 N.C. App. 156, 167, 506 S.E.2d 283, 290 (1998) ("[O]ne who is mentally defective under the sex offense laws is statutorily deemed incapable of consenting to

> intercourse or other sexual acts. . . . [F]orce is inherent to having sexual intercourse with a person who is deemed by law to be unable to consent." (Citations and quotation marks omitted.)), *disc. review denied and appeal dismissed*, 350 N.C. 105, 533 S.E.2d 477-78 (1999), sleeping, *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987) ("[S]exual intercourse with [a sleeping] victim is *ipso facto* rape because the force and lack of consent are implied in law."), or physically helpless, *State v. Aiken*, 73 N.C. App. 487, 499, 326 S.E.2d 919, 926 ("The physical act of vaginal intercourse with the victim while she is physically helpless is sufficient 'force' for the purpose of second degree rape[.]"), *disc. review denied and appeal dismissed*, 313 N.C. 604, 332 S.E.2d 180 (1985).

State v. Haddock, 191 N.C. App. 474, 480-81, 664 S.E.2d 339, 344-45 (2008).[2]

¶ 17 Therefore, when the State proceeds on a theory the victim was physically helpless, force and lack of consent are implied by law. Thus, at the very least, any mistake as to the victim's consent is relevant to a charge of Second-Degree Rape under such a theory.

¶ 18 Here, the State's theory of the case rested on the fact that K.F. was physically helpless against Defendant's actions. The trial court warned the jury it could only consider Mack's testimony for the purposes of proving intent, consent, and absence of mistake. The trial court again instructed the jury it could only consider Mack's testimony for the purposes of intent and absence of mistake before the jury deliberated. Because force and consent are relevant issues in any Second-Degree Forcible Rape case, the absence of any mistake as to consent was an

---

2. Applying N.C. Gen. Stat. § 14-27.3 which provided:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3 (2005). In 2015, the General Assembly recodified N.C. Gen. Stat. § 14-27.3 as N.C. Gen. Stat. § 14-27.22. An Act To Reorganize, Rename, and Renumber Various Sexual Offenses . . . S.L. 2015-181, § 4(b), 2015 N.C. Sess. Laws 151, 461.

issue relevant to this case. Although the force involved in the alleged rapes to which Mack testified was not the same as the force implied by law in this case, it was relevant to prove Defendant did not mistake K.F.'s actions and inactions as consent in this case where he had allegedly raped Mack by force and without her consent previously. *See id.* at 481, 664 S.E.2d at 345 ("mental incapacity and physical helplessness are but two alternative means by which the force necessary to complete a rape may be shown"). Consequently, the trial court did not err in determining Mack's testimony was relevant pursuant to Rule 401.

II. Abuse of Discretion

¶ 19 **[2]** Defendant further argues, alternatively, the trial court abused its discretion "by improperly applying the Rule 403 balancing test" weighing the probative value of Mack's testimony against the danger of unfair prejudice. "[C]ases decided by [the North Carolina Supreme Court] under Rule 404(b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exceptio*n requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense[.]" *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

¶ 20 After determining evidence is offered for a proper purpose and is relevant under Rule 404(b), the trial court must balance the evidence's probative value against its prejudicial effect pursuant to Rule 403. *Bynum*, 111 N.C. App. at 848-49, 433 S.E.2d at 780 (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2019). "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citation and quotation marks omitted). We review a trial court's decision to admit or exclude evidence under Rule 403 for an abuse of discretion. *Bynum*, 111 N.C. App. at 849, 433 S.E.2d at 781 (citation omitted). The trial court abuses its discretion where its ruling "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002) (citation and quotation marks omitted).

¶ 21 Here, the trial court heard Defendant's pre-trial arguments on his Motion *in Limine* to exclude Mack's testimony. The trial court heard Mack testify on *voir dire* and could forecast the nature of Mack's testimony before Mack testified in front of the jury. The trial court acknowledged Rule 404(b) was a rule of inclusion and that "[Mack's testimony]

was sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test and that the probative value is not outweighed by the prejudicial effect." The trial court limited Mack's testimony to the "purposes of showing absence of mistake, lack of consent and intent." Therefore, the trial court's decision to admit Mack's testimony was the result of a reasoned decision where the trial court heard the testimony on *voir dire*, limited the purpose of the testimony, and acknowledged the testimony's prejudicial effect while conducting the balancing test. Consequently, the trial court did not abuse its discretion.

Conclusion

¶ 22 Accordingly, for the foregoing reasons, there was no error at trial, and we affirm the Judgment.

NO ERROR.

Judges INMAN and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JOSEPH DONALD ROYSTER, III, DEFENDANT

No. COA20-170

Filed 2 November 2021

Search and Seizure—investigatory stop—totality of circumstances—anonymous tip—evasive action—school property

The totality of the circumstances provided law enforcement officers with reasonable articulable suspicion to perform an investigatory stop on defendant where an anonymous caller had reported that a person matching defendant's description had heroin and a gun in his vehicle on school property; officers confirmed the details provided by the anonymous caller; a criminal database search revealed that defendant had a history of drug charges and a firearm charge; and defendant turned off and locked his car when an officer called his name, walked away from the officer, and reached for his waistband.

Appeal by Defendant from judgment entered 30 October 2019 by Judge Casey Viser in Forsyth County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Robert J. Pickett, for the State.

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

MURPHY, Judge.

¶ 1 Before law enforcement officers may perform an investigatory stop on someone without a warrant, the United States Constitution and North Carolina Constitution require that they have reasonable articulable suspicion that criminal activity is afoot. Reasonable articulable suspicion can arise through an anonymous tip if the tip has sufficient indicia of reliability and suggests criminal activity is afoot. Reasonable articulable suspicion may also exist where the totality of the circumstances suggests criminal activity is afoot. Evidence that is illegally obtained as a result of an unconstitutional stop without reasonable articulable suspicion must be suppressed. Here, the totality of the circumstances indicated Defendant unlawfully possessed a weapon, providing law enforcement with reasonable articulable suspicion to stop Defendant. As a result, the stop was constitutional and the trial court did not err in denying Defendant's motion to suppress.

BACKGROUND

¶ 2 On 2 January 2018, a grand jury indicted Defendant Joseph Donald Royster III for possession of a firearm by a felon; trafficking opium or heroin by possession; trafficking cocaine by possession; manufacturing, selling, delivering, or possessing a controlled substance within 1,000 feet of a school; possession of a weapon on school property; possession with intent to sell or deliver cocaine; possession with intent to sell or deliver heroin; and attaining the status of habitual felon. On 29 May 2018, Defendant filed a *Motion to Suppress Evidence*, arguing law enforcement did not have reasonable articulable suspicion to stop Defendant and the trial court should suppress the evidence that was subsequently discovered as a result of the stop. A hearing on the motion to suppress was held on 7 December 2018, and the trial court denied the motion in its *Order Denying Motion to Suppress* ("Order"), filed on 9 October

2019. The Order included the following findings of facts, which are unchallenged on appeal[1]:

> 1. On [2 January 2018], [Defendant] was indicted by a grand jury on charges of: possession of a weapon on school property, possession of cocaine with intent to sell and deliver, and possession of heroin with intent to sell and deliver.
>
> 2. [] Defendant was arrested on [16 September 2017], after officers found him in possession of a firearm, heroin and cocaine on school property.
>
> 3. Earlier that day, the Winston-Salem Police Department . . . received a detailed anonymous report . . . from a caller who stated that a black male named Joseph Royster, who goes by "Gooney," had heroin and a gun in his vehicle, which the caller described as a black Chevrolet Impala with [a specified] license plate number [].
>
> 4. The caller described the black male as wearing a white T-shirt and blue jeans, with gold teeth and a gold necklace. The caller also reported that the heroin and the gun were located in the armrest of the black Chevrolet Impala, which was parked near the premises of South Fork Elementary School . . . .
>
> 5. Based on [the] anonymous report, several officers from the Department responded to the scene at South Fork Elementary, including: Sgt. Ryan Phillips, Officer C.I. Penn, Officer Harrison, and Officer Robertson.
>
> 6. Sgt. Phillips is a patrol [s]upervisor with more than 13 years of experience with the Department, including S.W.A.T., who also previously served as a New York City Police Officer. He has participated in 300-400 drug crime investigations, and participated in 75-100 arrests.

---

1. We note that Defendant explicitly concedes Findings of Fact 3-9 and 11-21 "were supported by the evidence at the suppression hearing[.]" He does not address Findings of Fact 1, 2, or 10, as he only made this statement regarding the "pertinent findings of fact[.]" These unchallenged findings of fact are also binding on appeal. *See State v. Warren*, 242 N.C. App. 496, 498, 775 S.E.2d 362, 364 (2015) (marks omitted) ("Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal."), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016), *cert. denied*, 196 L. Ed. 2d 261 (2016).

7. As the supervising officer on duty, Sgt. Phillips responded first to the call.

8. After receiving the anonymous report on [16 September 2017], and prior to arriving at South Fork Elementary, Sgt. Phillips searched the Department's database, the PISTOL database, for information on [Defendant].

9. Through the PISTOL database, Sgt. Phillips found a picture of [Defendant], which showed him as a black male with gold teeth. The PISTOL database also showed that [Defendant] had a history of drug charges, and a charge for possession of a firearm by a felon.

10. South Fork Elementary is a school located in Forsyth County, North Carolina.

11. When Sgt. Phillips arrived at South Fork Elementary, he exited his vehicle on foot and located a black Chevrolet Impala with the [specified] license plate number [], as described in the anonymous report, backed into a parking spot near the school. A youth football game was in progress at the school.

12. The black Chevrolet Impala was not occupied at the time, and Sgt. Phillips positioned himself approximately 40-50 yards from the black Chevrolet Impala to watch for anyone who approached the vehicle.

13. Meanwhile, as Sgt. Phillips located the Impala, Officer Penn and his supervising officer accompanying him in his vehicle, Officer Robertson, met with Officer Harrison, who was in a separate vehicle.

14. Officer Penn retrieved the same information through the PISTOL database that Sgt. Phillips retrieved, and also verified [Defendant's] identity through his picture in the database.

15. Officers Penn and Robertson, and Officer Harrison, positioned themselves across the street, waiting for instructions from Sgt. Phillips.

16. As Sgt. Phillips watched the black Chevrolet Impala, a black male wearing a white T-shirt and

blue jeans with a gold necklace and gold teeth -- matching the description in the anonymous report -- approached the black Chevrolet Impala and opened the door. Sgt. Phillips then radioed for the other officers to join him on the scene as the black male was getting into the black Chevrolet Impala.

17. Sgt. Phillips then approached the black Chevrolet Impala, and as he did so the black male exited the vehicle. While the black male was standing next to the black Chevrolet Impala, Sgt. Phillips called out [Defendant's] name, whereupon the black male turned around and looked at Sgt. Phillips. The black male then reached inside the black Chevrolet Impala, turned the vehicle off, and shut the door.

18. The black male then began walking away as Sgt. Phillips walked toward him. With his back to Sgt. Phillips, the black male reached for his waistband.

19. Sgt. Phillips warned the black male, "Don't be reaching for your waistband."

20. Based on Sgt. Phillips' training and experience, in addition to the anonymous report that was received and the other corroborated information obtained by Sgt. Phillips regarding prior charges against [Defendant], Sgt. Phillips suspected the potential presence of a firearm.

21. The black male, who Sgt. Phillips identified as [Defendant], was anxious, upset, and "antsy." Sgt. Phillips and Officer Harrison frisked [Defendant] for weapons for the safety of the officers, and informed [Defendant] they were detaining him for a narcotics investigation.

¶ 3 The Order included the following conclusions of law:

1. The [trial court] has jurisdiction over [] Defendant and the subject matter[.]

2. Based on the totality of [the] circumstances, including the detailed anonymous report and the information contained therein that was corroborated by Sgt. Phillips and the other officers, Sgt. Phillips' training

> and experience in investigating drug crimes, and [] Defendant's turning and walking away from the officers upon making eye contact with Sgt. Phillips and then reaching for his waistband, the officers had reasonable suspicion to conduct an investigatory stop of Defendant.
>
> 3. As a result, Defendant's Motion to Suppress based on lack of reasonable suspicion for the stop should be denied.

¶ 4 Defendant pled guilty to all charges on 30 October 2019, reserved his right to appeal the denial of his motion to suppress, and subsequently gave notice of appeal in open court. The trial court sentenced Defendant to an active term of 76-104 months.

ANALYSIS

¶ 5 On appeal, Defendant contends the trial court erred by denying his motion to suppress as "[t]he officers could not lawfully conduct an investigatory stop of [Defendant] without a reasonable articulable suspicion of criminal activity." Defendant contends this rendered the stop illegal and the evidence resulting from it should have been suppressed under the fruit of the poisonous tree doctrine, requiring us to reverse the Order and vacate his convictions premised upon his guilty plea. As noted above, Defendant does not challenge any findings of fact in the Order and instead challenges only the conclusions of law reached by the trial court.

¶ 6 Review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court'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 [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review." *Warren*, 242 N.C. App. at 498, 775 S.E.2d at 364 (marks omitted).

A. Reasonable Articulable Suspicion

¶ 7 The trial court based Conclusion of Law 2, that reasonable articulable suspicion existed for the stop, on

> the totality of [the] circumstances, including the detailed anonymous report and the information

> contained therein that was corroborated by Sgt. Phillips and the other officers, Sgt. Phillips' training and experience in investigating drug crimes, and [] Defendant's turning and walking away from the officers upon making eye contact with Sgt. Phillips and then reaching for his waistband[.]

Although not explicitly discussed in Conclusion of Law 2, the totality of the circumstances here also includes Defendant's PISTOL database records,[2] which showed Defendant's prior drug charges and a prior firearm charge.

¶ 8 The United States and North Carolina Constitutions protect persons from "unreasonable searches and seizures[.]" U.S. Const. amend. IV; N.C. Const. art. 1, § 20.

> Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.

State v. Hendricks, 43 N.C. App. 245, 251-52, 258 S.E.2d 872, 877 (1979), *disc. rev. denied*, 299 N.C. 123, 262 S.E.2d 6 (1980). "In analyzing what constitutes a reasonable seizure, the United States Supreme Court has consistently held that a police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may *be underway*." *State v. Horton*, 264 N.C. App. 711, 715, 826 S.E.2d 770, 773 (2019) (emphasis added) (marks omitted). "Under the reasonable articulable suspicion standard, a stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Harwood*, 221 N.C. App. 451, 458, 727 S.E.2d 891, 898 (2012) (marks omitted). "For that reason, there must be a minimal level of objective justification, something more than an unparticularized suspicion or hunch to justify an investigative detention." *Id.* (marks and citations omitted). "A court

---

2. At the motion to suppress hearing, testimony described the PISTOL database as a searchable police database that provides a person's information, comprised of, in part, their fifteen most recent contacts with law enforcement, including charges.

must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

1. The Anonymous Call

¶ 9 Defendant argues the anonymous call did not demonstrate reliability and, instead, merely described identifying characteristics. The State argues the anonymous call was sufficiently reliable since it was made by phone, identified a specific person with whom the anonymous caller had some demonstrated familiarity, and provided his real-time location.

¶ 10 "Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights." *State v. Johnson*, 204 N.C. App. 259, 263, 693 S.E.2d 711, 715 (2010) (citing *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983)). "If the anonymous tip does not have sufficient indicia of reliability, then there must be sufficient police corroboration of the tip before the stop may be made." *Harwood*, 221 N.C. App. at 459, 727 S.E.2d at 898. "As a result, we must determine (1) whether the anonymous tip provided to [the police], taken as a whole, possessed sufficient indicia of reliability and, if not, (2) whether the anonymous tip could be made sufficiently reliable by independent corroboration in order to uphold the challenged investigative detention." *Id.*; *see also Horton*, 264 N.C. App. at 717, 826 S.E.2d at 775 (quoting *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000)) ("Indices of reliability can come in two forms: (1) the tip itself provides enough detail and information to establish reasonable suspicion, or (2) though the tip lacks independent reliability, it is 'buttressed by sufficient police corroboration.' ").

> The type of detail provided in the tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, . . . confirmation of these details will not legitimize the tip.

Johnson, 204 N.C. App. at 264, 693 S.E.2d at 715. Additionally,

> an accurate description of a subject's readily observable location and appearance is of course reliable in

> [a] limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Hughes, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *Florida v. J.L.*, 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000)). Based on this caselaw, we have found an anonymous tip was insufficient when the caller only "provided identifying information concerning a black male suspect wearing a white shirt in a blue Mitsubishi with a certain license plate number[]" who was selling drugs and guns at a precise location. *Johnson*, 204 N.C. App. at 264, 693 S.E.2d at 715-16.

¶ 11 The Order's Findings of Fact 3 and 4 described the anonymous call as follows:

> 3. . . . [T]he Winston-Salem Police Department . . . received a detailed anonymous report . . . from a caller who stated that a black male named Joseph Royster, who goes by "Gooney," had heroin and a gun in his vehicle, which the caller described as a black Chevrolet Impala with [a specified] license plate number [].
>
> 4. The caller described the black male as wearing a white T-shirt and blue jeans, with gold teeth and a gold necklace. The caller also reported that the heroin and the gun were located in the armrest of the black Chevrolet Impala, which was parked near the premises of South Fork Elementary School . . . .

¶ 12 The anonymous call here was "reliable in [a] limited sense" in providing details that identified Defendant and his car, which were confirmed by Sergeant Phillips. *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632. "The record contains no information about who the caller was, no details about what the caller had seen, and no information even as to where the caller was located." *State v. Peele*, 196 N.C. App. 668, 673, 675 S.E.2d 682, 686, *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 383 (2009). "[W]hile the tip at issue included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator."

Johnson, 204 N.C. App. at 263, 693 S.E.2d at 714-15. As a result, by merely providing identifying information, "there was nothing inherent in the tip itself to allow [the trial] court to deem it reliable and to provide the officers with the reasonable suspicion necessary to effectuate a stop." *Id.* at 264-65, 693 S.E.2d at 716. Even assuming all the identifying details of the anonymous call were corroborated, the call and corroboration alone did not provide the officers with reasonable articulable suspicion that criminal activity was afoot as no details regarding criminal activity were corroborated prior to Defendant's seizure. *See id.* at 264, 693 S.E.2d at 715 ("Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.").

¶ 13 The State argues the anonymous caller's use of a phone to make the tip bolsters the reliability of the anonymous tip. The State relies on *Navarette v. California*, where the United States Supreme Court found an anonymous caller's use of the 911 emergency system was "one of [several] relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." *Navarette v. California*, 572 U.S. 393, 401, 188 L. Ed. 2d 680, 689 (2014). Although the United States Supreme Court stated it was not suggesting "tips in 911 calls are *per se* reliable[,]" the Court held "[g]iven the foregoing technological and regulatory developments, . . . a reasonable officer could conclude that a false tipster would think twice before using such a system." *Id.* However, both parties here recognize it is unclear whether the anonymous caller contacted 911 or a non-emergency number, and there is no finding of fact by the trial court on this issue. Further, there is no evidence or finding of fact concerning whether the anonymous caller may have preserved her anonymity, such as by using a public phone. Finally, while there were other circumstances in *Navarette* suggesting reliability as to the criminal conduct, here there were not. *Id.* at 400-01, 188 L. Ed. 2d at 688. The reasoning from *Navarette* is inapplicable.

¶ 14 Additionally, the State argues the inclusion of Defendant's nickname in the anonymous tip may show the caller's familiarity with Defendant.[3] The State relies on caselaw regarding relevance that held a witness's testimony regarding a defendant's name that "[a]ll they call them (sic) was 'Spook[,]' [t]hat's all I knowed for a long time[]" was not

3. We note that while there was testimony that Defendant's nickname was in the PISTOL database, there was no evidence showing Sergeant Phillips, who stopped and seized Defendant, was aware of Defendant's nickname in the PISTOL database or otherwise. Additionally, the Order contains no findings of fact on this issue.

inadmissible evidence of bad character, since the testimony "was relevant to show the witness's acquaintance and familiarity with the defendant." *State v. Barnett*, 41 N.C. App. 171, 173-74, 254 S.E.2d 199, 200-01 (1979). In the context of the opinion's full analysis, it is not clear that *Barnett* was holding that the use of a nickname, rather than the use of the nickname in the context of the specific witness's testimony, shows acquaintance and familiarity. *Id.* However, even assuming *Barnett* did hold this, it was in the context of the relevance of evidence. *Id.* It is well established that the rules regarding relevance are permissive and favor admission. *See, e.g.*, *State v. Kowalski*, 270 N.C. App. 121, 127, 839 S.E.2d 443, 447 (2020) (emphases added) (citation and marks omitted) ("Relevant evidence is defined as evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence, as a general matter, is considered to be admissible. *Any evidence calculated to throw light upon the crime charged should be admitted by the trial court.*"). Our prior ruling in *Barnett* regarding the use of someone's nickname being at least minimally relevant is a far different context from the use of nicknames in an anonymous tip to provide reasonable articulable suspicion. *See Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990) ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity . . . ."). We decline to blend the two.

¶ 15 Additionally, the State fails to show how the caller knowing Defendant's nickname suggests the caller had any more familiarity with Defendant than she did by virtue of knowing his name, especially in the absence of any evidence indicating how common it was for Defendant to be referred to by his nickname. Even assuming, *arguendo*, that Sergeant Phillips had confirmed Defendant's nickname prior to seizing Defendant, there is no reason to conclude Defendant's nickname should be treated any differently than his name. Accordingly, we treat Defendant's nickname as additional identifying information, which does not make the anonymous call more "reliable in its assertion of illegality[.]" *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632.

¶ 16 The anonymous call identifying Defendant and suggesting there was a firearm and heroin within his vehicle alone was insufficient to provide Sergeant Phillips with reasonable articulable suspicion.

2. Totality of the Circumstances

¶ 17 However, "[a] court must consider the totality of the circumstances —the whole picture in determining whether a reasonable suspicion to

make an investigatory stop exists." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (marks omitted). Here, when considering the totality of the circumstances prior to Defendant's stop, law enforcement had reasonable articulable suspicion that criminal activity was afoot.

¶ 18 In *State v. Malachi*, we held an anonymous tip alone was insufficient to supply law enforcement with reasonable articulable suspicion, but ultimately found reasonable articulable suspicion after looking at the totality of the circumstances. *State v. Malachi*, 264 N.C. App. 233, 237-39, 825 S.E.2d 666, 669-71, *appeal dismissed*, 372 N.C. 702, 830 S.E.2d 830 (2019). We based our conclusion regarding the existence of reasonable articulable suspicion, in part, on the defendant making eye contact with the uniformed police officer, then turning and "blading," and moving away from the officers as they approached. *Id.* at 239, 825 S.E.2d at 671. As in *Malachi*, here there was reasonable articulable suspicion based on the totality of the circumstances.

¶ 19 Similar to the facts of *Malachi*, Sergeant Phillips' testimony and the trial court's findings of fact describe the following chain of events: before Defendant noticed Sergeant Phillips, Defendant got into the car; as Sergeant Phillips approached, but was not yet seen, Defendant exited the vehicle; Sergeant Phillips addressed Defendant by name and, upon seeing Sergeant Phillips, Defendant reached back into the car, turned it off, and locked it;[4] and Defendant then began walking away from Sergeant Phillips and reached for his waistband. Considering prior holdings regarding a defendant's evasive behavior being a factor supporting reasonable articulable suspicion, we conclude this evidence supports finding reasonable articulable suspicion existed for the stop. *See*, *e.g.*, *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (finding reasonable articulable suspicion existed in part based on evidence that "upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight"); *Malachi*, 264 N.C. App. at 237-39, 825 S.E.2d at 669-71; *State v. Garcia*, 197 N.C. App. 522, 529, 677 S.E.2d 555, 559 (2009) ("Factors to determine whether reasonable suspicion existed include . . . unprovoked flight."); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) ("[W]hen an individual's presence at a suspected drug area is *coupled* with evasive

4. Although the Order does not indicate that Defendant locked the door, the evidence at trial unequivocally does. *See State v. Johnson*, 2021-NCSC-85, ¶ 12 (marks omitted) ("[W]hen there is no conflict in the evidence, an appellate court may infer a trial court's findings in support of its decision on a motion to suppress so long as that unconflicted evidence was within the trial court's contemplation.").

actions, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop.").

¶ 20 Defendant cites *State v. Fleming* to support his argument that we cannot rely upon his reaction to the police to support a finding of reasonable articulable suspicion. *See State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). *Fleming* involved two men standing between two apartment buildings. *Id.* at 170, 415 S.E.2d at 785. The two men saw the officers but initially remained in the area talking, and an officer subsequently noticed the men walking out of the open area toward the street and down a public sidewalk, where they were stopped. *Id.* at 170-71, 415 S.E.2d at 785. We found no reasonable articulable suspicion existed as there was only "a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that [the] defendant was unfamiliar to the area." *Id.* at 171, 415 S.E.2d at 785.

¶ 21 Additionally, Defendant cites *In re J.L.B.M.* to support his contention that "an individual's walking away from officers has been held not to give rise to reasonable suspicion absent other evidence that he was engaged in a crime." *See In re J.L.B.M.*, 176 N.C. App. 613, 627 S.E.2d 239 (2006). *In re J.L.B.M.* involved the stop and frisk of a juvenile after a police dispatch regarding a "suspicious person." *Id.* at 616, 627 S.E.2d at 241. We described the additional facts as follows:

> [The police officer] saw a person in the gas station parking lot, later identified as the juvenile, who fit the description of the person. When the juvenile saw [the police officer], he walked over to a vehicle in the parking lot, spoke to someone, and then began walking away from [the police officer's] patrol car. [The police officer] pulled up beside the juvenile in an adjoining restaurant parking lot and stopped the juvenile.

Id. We noted the police dispatch merely stated the juvenile was a "suspicious person" but there was no allegation that he was engaged in any criminal activity. *Id.* at 620, 627 S.E.2d at 244. "There was no approximate age, height, weight or other physical characteristics given as part of the description, nor was there a description of any specific clothing worn by the suspicious person." *Id.* We found the officer only had a "generalized suspicion" and the stop was unjustified since

> [the police officer] relied solely on the dispatch that there was a suspicious person at the Exxon gas

> station, that the juvenile matched the "Hispanic male" description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. [The police officer] was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile's pocket after he stopped the juvenile.

Id. at 622, 627 S.E.2d at 245.

¶ 22 At the outset, we note that the circumstances in the cases relied upon by Defendant are distinct from the circumstances here in that law enforcement officers had received a specified allegation of criminal activity that informed their interactions with Defendant. In addition to the anonymous caller's allegation that Defendant was in possession of controlled substances, there was also an allegation that he was in possession of a firearm. In conjunction with Defendant's presence on school property and his prior charge of felon in possession of a firearm, if law enforcement officers had reasonable articulable suspicion that Defendant was in possession of a firearm, then they had reasonable articulable suspicion he was violating statutes prohibiting the possession of a firearm on school property and the possession of a firearm by a felon. *See* N.C.G.S. § 14-269.2(b) (2019) ("It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school."); N.C.G.S. § 14-415.1(a) (2019) ("It shall be 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 . . . . Every person violating the provisions of this section shall be punished as a Class G felon.").

¶ 23 Additionally, in terms of evasive action, Defendant's actions here show a stronger indication of an altered course of action than the actions of the defendants in *Fleming* and the juvenile in *In re J.L.B.M.* since Defendant's actions here were an immediate reaction to seeing Sergeant Phillips. Rather than simply walking away from Sergeant Phillips, like the defendants in *Fleming* and the juvenile in *In re J.L.B.M.*, Defendant changed his immediate course of action in response to Sergeant Phillips' presence by turning off the car Defendant had just started, closing and locking the car door, and walking away from the car and Sergeant Phillips. We have held similar behavior to be evasive action. *See Malachi*, 264 N.C. App. at 239, 825 S.E.2d at 671 (emphasis added) ("Given [the] [d]efendant's 'blading' after making eye contact with [the arresting

officer] in his marked car and uniform, *[the] [d]efendant's movements away from [the arresting officer] as he was being approached*, [the arresting officer's] training in identifying armed suspects, and [the] [d]efendant's failure to comply with [N.C.G.S. §] 14-415.11(a) when approached by the officers, we hold that the officers had reasonable suspicion under the totality of the circumstances to conduct an investigatory stop of [the] [d]efendant in response to the tip identifying him as possessing a firearm at the gas station.").

¶ 24 Further, Defendant's PISTOL database records showed that he had prior drug charges and a prior firearm charge. *Johnson*, a recent case decided by our Supreme Court, is instructive to the import of this evidence. *See generally Johnson*, 2021-NCSC-85. In *Johnson*,

> the unconflicted evidence introduced by the State at the hearing conducted by the trial court on [the] defendant's motion to suppress—that (1) the traffic stop occurred late at night (2) in a high-crime area, with (3) [the] defendant appearing "very nervous" to the detaining officer to the point that it "seemed like his heart was beating out of his chest a little bit," with (4) [the] defendant "blading his body" as he accessed the Dodge Charger's center console, and *(5) [the] defendant's criminal record indicating a "trend in violent crime" and weapons-related charges*—was sufficient for the trial court to make findings of fact and conclusions of law that the investigating law enforcement officer had reasonable suspicion to conduct a *Terry* search of [the] defendant's person and in areas of [the] defendant's vehicle under [the] defendant's immediate control for the officer's safety.

Id. at ¶ 15 (emphasis added). Our Supreme Court relied on the officer's knowledge of the defendant's charges based on CJLEADS[5] database records, in part, to conclude the totality of circumstances created a reasonable articulable suspicion that the defendant was potentially armed and dangerous, justifying the *Terry* search. *Id.* at ¶¶ 4, 15, 18.

---

5. We note that the CJLEADS database is "a database which details a person's history of contacts with law enforcement in the form of a list of criminal charges filed against the individual[.]" *Id.* at ¶ 4. Here, at the motion to suppress hearing, testimony described the PISTOL database as searchable police database that provides a person's information, comprised of, in part, their fifteen most recent contacts with law enforcement, including charges. For the purposes of this appeal, there is no relevant distinction between the use of the CJLEADS database in *Johnson* and the use of the PISTOL database here.

¶ 25 Here, like in *Johnson*, Sergeant Phillips searched Defendant through the PISTOL database and discovered that Defendant had a history of drug charges and a firearm charge. Based on *Johnson*, Defendant's prior firearm charge is appropriately part of the inquiry into whether reasonable articulable suspicion existed to stop Defendant. *Id.*; *see also Garcia*, 197 N.C. App. at 530-31, 677 S.E.2d at 560 (relying in part on PISTOL database records to find reasonable articulable suspicion). Here, Defendant's PISTOL database records support the trial court's conclusion that reasonable articulable suspicion existed at the time of the stop.

¶ 26 Additionally, Defendant reached for his waistband while he was walking away from Sergeant Phillips. Finding of Fact 18 states:

> The black male then began walking away as Sgt. Phillips walked toward him. With his back to Sgt. Phillips, the black male reached for his waistband.

We have found similar movements to be relevant in finding reasonable articulable suspicion existed. *See State v. Sutton*, 232 N.C. App. 667, 682, 754 S.E.2d 464, 473 (considering, in part, that the defendant grabbed his waistband to clinch an item, which was interpreted as an attempt to conceal something, in concluding reasonable articulable suspicion existed), *disc. rev. denied*, 367 N.C. 507, 759 S.E.2d 91 (2014); *State v. Hamilton*, 125 N.C. App. 396, 401, 481 S.E.2d 98, 101 (finding a pat-down for weapons was justified because the defendant's "hand began to reach toward his left side[,]" which caused the officer to believe the defendant was reaching for a weapon), *disc. rev. denied and appeal dismissed*, 345 N.C. 757, 485 S.E.2d 302 (1997).

¶ 27 Finally, while the anonymous call did not provide reasonable articulable suspicion on its own, or as corroborated, it can be appropriately considered within the totality of the circumstances. *See Malachi*, 264 N.C. App. at 239, 825 S.E.2d at 671 (emphasis added) ("Given [the] [d]efendant's 'blading' after making eye contact with [the arresting officer] in his marked car and uniform, [the] [d]efendant's movements away from [the arresting officer] as he was being approached, [the arresting officer's] training in identifying armed suspects, and [the] [d]efendant's failure to comply with [N.C.G.S. §] 14-415.11(a) when approached by the officers, we hold that the officers had reasonable suspicion under the totality of the circumstances to conduct an investigatory stop of [the] [d]efendant *in response to the tip identifying him as possessing a firearm at the gas station*."). Defendant contends the anonymous tip did not support Defendant having access to a firearm because the firearm was allegedly located in the armrest of the car and

there was no testimony that Sergeant Phillips observed any movements consistent with retrieving the firearm. However, there is also evidence that Sergeant Phillips was forty to fifty yards away from the vehicle when Defendant first approached the vehicle, a distance where movements inside the vehicle could have gone unseen, and Defendant could have retrieved the alleged firearm between the time of the tip and when the law enforcement officers arrived. Although the anonymous tip was not corroborated as to the location of the firearm, it alleged that Defendant had access to a firearm in his car, which he had exited immediately prior to when he was stopped. In light of our caselaw and under these facts, it is appropriate to consider the impact of the anonymous call within the totality of circumstances to determine if law enforcement had a reasonable articulable suspicion that criminal activity was afoot. *See id.*

¶ 28 Altogether, Defendant's attempt to avoid Sergeant Phillips, Defendant's PISTOL database records reflecting a prior firearm charge, Defendant's action of reaching toward his waistband, and the anonymous call suggesting that Defendant potentially had access to a firearm created a reasonable articulable suspicion that Defendant was carrying a firearm. These objective circumstances, in conjunction with unchallenged Finding of Fact 2, which states Defendant was found and arrested "on school property," provided Sergeant Phillips with reasonable articulable suspicion that Defendant was unlawfully in possession of a firearm on school property. *See* N.C.G.S. § 14-269.2(b) (2019) ("It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school.").

¶ 29 Based on the unchallenged findings of fact, the trial court's conclusion of law that Sergeant Phillips had a reasonable articulable suspicion for the stop was proper, as there was reasonable articulable suspicion that Defendant unlawfully possessed a firearm on school property.[6]

---

6. Defendant does not challenge whether there was a proper basis for law enforcement officers to search his vehicle after they stopped him outside his vehicle and a frisk of Defendant revealed nothing improper on his person; Defendant has only challenged the constitutionality of the initial stop on appeal and did not challenge any other issue 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."); *see also State v. Miller*, 228 N.C. App. 496, 499 n.1, 746 S.E.2d 421, 424 n.1 (2013) ("The trial court also denied [the] defendant's motion to suppress with regard to the gun in his car and the marijuana found on the back steps. Specifically, the trial court concluded that [the] defendant was not in custody when he voluntarily told the officer about the gun in his vehicle. Moreover, the trial court held that the marijuana

CONCLUSION

¶ 30 The trial court did not err in concluding the initial investigatory seizure of Defendant was supported by reasonable articulable suspicion based on Defendant's previous criminal charges, an anonymous call suggesting Defendant was armed, Defendant's reaction to Sergeant Phillips' presence, and Defendant reaching for his waistband, in conjunction with Defendant's presence on school property. While none of these circumstances alone would satisfy constitutional requirements, when considered in their totality, these circumstances provided Sergeant Phillips with reasonable articulable suspicion to make a lawful stop. The trial court properly denied Defendant's motion to suppress.

NO ERROR.

Chief Judge STROUD and Judge COLLINS concur.

---

on the back steps was in plain view. On appeal, [the] defendant does not challenge the denial of his motion to suppress with regard to these two pieces of evidence. Thus, these issues are deemed abandoned on appeal, N.C. R. App. P. 28(b)(6) (2012), and we will not determine whether the trial court erred in denying [the] defendant's motion to suppress with regard to them."), *rev'd on other grounds*, 367 N.C. 702, 766 S.E.2d 289 (2014).

Additionally, although Defendant's motion to suppress contended there was no probable cause to search his vehicle, Defendant expressly waived any additional basis to challenge the search of his vehicle at the motion to suppress hearing when Defense Counsel stated "on the motion, we were limiting it to the seizure, the stop of [] [D]efendant . . . ." This renders any other issue, including probable cause for the search of Defendant's vehicle, unpreserved on appeal. *See* N.C. R. App. P. 10(a)(1) (2021) ("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.").

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 NOVEMBER 2021)

COSWALLD, LLC v. NEW HANOVER CNTY. 2021-NCCOA-596 No. 21-37	New Hanover (20CVS1980)	Reversed and Remanded
DU PLESSIS v. DU PLESSIS 2021-NCCOA-597 No. 20-838	Mecklenburg (14CVD2288)	Reversed
GRIER v. ROUNDPOINT MORTG. SERVICING CORP. 2021-NCCOA-598 No. 20-866	Mecklenburg (18CVS24192)	DISMISSED IN PART; AFFIRMED IN PART.
IN RE EST. OF CHAMBERS 2021-NCCOA-599 No. 20-757	Iredell (18E729)	Affirmed
IN RE M.J. 2021-NCCOA-600 No. 21-263	Forsyth (20JA19)	VACATED AND REMANDED WITH INSTRUCTIONS.
IZMACO INVS., LLC v. ROYAL ROOFING & RESTORATION, LLC 2021-NCCOA-601 No. 21-62	Onslow (20CVS1030)	Dismissed
IZMACO INVS., LLC v. ROYAL ROOFING & RESTORATION, LLC 2021-NCCOA-602 No. 21-61	Onslow (20CVS1030)	APPEAL DISMISSED
MADISON ASPHALT, LLC v. MADISON CNTY. 2021-NCCOA-603 No. 21-115	Madison (19CVS340)	Dismissed
STATE v. CAMPBELL 2021-NCCOA-604 No. 20-902	Burke (19CRS50420) (20CRS156)	Vacated
STATE v. CODY 2021-NCCOA-605 No. 20-798	Wake (18CRS213534)	Dismissed

STATE v. FRENCH 2021-NCCOA-606 No. 20-767	Craven (18CRS51178)	Affirmed
STATE v. GIBBS 2021-NCCOA-607 No. 20-591	New Hanover (18CRS56870)	No Error in part; Reversed in part and Remanded.
STATE v. MASON 2021-NCCOA-608 No. 20-833	Wake (19CRS218)	Vacated and Remanded for New Disposition
STATE v. ROJAS 2021-NCCOA-609 No. 20-810	Gaston (16CRS55300)	Vacated and Remanded
STATE v. WHITE 2021-NCCOA-610 No. 20-893	Mecklenburg (17CRS223968) (17CRS223970)	No Error
EST. OF TANG v. N.C. DEP'T OF HEALTH & HUM. SERVS. 2021-NCCOA-611 No. 20-880	N.C. Industrial Commission (TA-21057)	Affirmed

IN RE A.C.

[280 N.C. App. 301, 2021-NCCOA-280]

IN THE MATTER OF A.C.

No. COA20-508

Filed 16 November 2021

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparents—constitutionally protected parental status—evidentiary standard

A permanency planning order awarding guardianship to the child's foster parents in a neglect and dependency case was vacated and remanded because the trial court failed to apply the proper evidentiary standard when concluding that respondent-father acted inconsistently with his constitutionally protected status as a parent, stating that the supporting findings of fact were based on "sufficient and competent evidence" rather than "clear and convincing evidence."

2. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—required statutory findings

After a 2019 amendment to N.C.G.S. § 7B-906.2(b), the trial court in a neglect and dependency case was not required to enter findings showing that reunification efforts clearly would be unsuccessful or inconsistent with the child's health or safety before removing reunification with respondent-father as a concurrent plan, where the primary permanent plan of guardianship had already been achieved. Nevertheless, the court's permanency planning order awarding guardianship to the child's foster parents was vacated and remanded because the court failed to make the required findings of fact regarding the statutory factors under section 7B-906.2(d) to support ceasing reunification efforts.

Appeal by respondent-father from order entered 13 November 2019 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 9 March 2021.

Jennifer G. Cooke for petitioner-appellee New Hanover County Department of Social Services.

Benjamin J. Kull for respondent-appellant father.

Administrative Office of the Courts, by Guardian Ad Litem Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

GORE, Judge.

¶ 1 Respondent-father appeals from an Order concluding he acted inconsistently with his constitutional rights as a parent and granting guardianship of the juvenile to the juvenile's foster parents. Because the trial court erred by applying an improper evidentiary standard and failed to make the statutorily required findings before ceasing reunification efforts toward guardianship, we vacate and remand for a new permanency planning hearing.

I. Background

¶ 2 In its Order on Adjudication and Disposition filed 29 April 2016 ("April 2016 Order"), the trial court adjudicated the juvenile ("Andy")[1] dependent and neglected as defined by N.C. Gen. Stat. §§ 7B-101(9) and (15) based on "the stipulation of the Respondent-Parents, Guardian ad Litem ("GAL") and [New Hanover County Department of Social Services]." N.C. Gen. Stat. §§ 7B-101(9), (15) (2019). Subsequently, respondent-mother voluntarily relinquished her rights, and respondent-father's parental rights were involuntarily terminated in the trial court's Order Terminating Parental Rights filed 11 October 2017 ("October 2017 Order").

¶ 3 Respondent-father appealed the judicial termination of his parental rights. This Court vacated the October 2017 Order due to service deficiencies in an opinion filed on 5 June 2018. *In re A.J.C.*, 259 N.C. App. 804, 817 S.E.2d 475 (2018). Respondent-mother subsequently revoked her voluntary relinquishment of her parental rights. In the Subsequent Permanency Planning Hearing Order filed 15 October 2018 ("October 2018 Order"), the trial court found respondent-father was eagerly pursuing reunification with Andy and had participated in a residential substance abuse treatment program, despite not producing records or signing releases to show his case plan progress. Andy remained in foster care and had been diagnosed with many mental health conditions. In the October 2018 Order, the trial court changed the permanent plan from adoption to a permanent plan of "guardianship with a court approved caretaker with a concurrent plan of reunification."

¶ 4 In its Subsequent Permanency Planning Hearing Order filed 30 April 2019, the trial court found respondent-father continued to cooperate with DSS, receive substance abuse treatment and pass drug tests, maintain safe and appropriate housing, and to attain adequate finances. However,

---

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

the trial court subsequently reviewed a GAL September 2019 report indicating that respondent-father's therapy had not resulted in him modifying his behavior regarding boundaries, consistent action regarding Andy, and displays of physical affection that made Andy uncomfortable. The trial court also considered the following corresponding testimony from a counselor, psychologist, DSS employee, and respondent-father at the 26 September 2019 permanency planning hearing: Andy had negative reactions after visits with respondent-father; respondent-father tested positive for a prescribed medication only once, suggesting he may not have been taking his prescription medications; instances where respondent-father did not adequately supervise Andy during visits; respondent-father was not aware of the medication Andy was taking despite attending doctor visits; respondent-father blamed the foster parents and DSS for Andy's mental health concerns; and respondent-father did not pay attention to the doctor at a doctor's appointment for Andy.

¶ 5 During the 26 September 2019 permanency planning hearing, respondent-father did not raise the issue of his constitutionally protected status as a parent. Respondent-father also did not object to arguments that he had acted contrary to his constitutionally protected status as a parent, or the trial court's award of guardianship to the foster parents. In closing arguments, respondent-father's attorney asked the trial court "to deny the guardianship today[,] . . . [grant] extended visitation to start off at two times a week[,] . . . [and] start family therapy . . . addressing issues related to reunification."

¶ 6 In its final remarks and oral order at the 26 September 2019 permanency planning hearing, the trial court did not specifically mention respondent-father's constitutionally protected parental status, but specifically granted guardianship to the foster parents. The trial court's final remarks and oral order came immediately after the DSS attorney's closing, where she repeatedly argued respondent-father had acted inconsistently with his constitutionally protected right as a parent and guardianship was appropriate.

¶ 7 In its Juvenile Order filed 9 October 2019, the trial court granted guardianship to the foster parents. In its Subsequent Permanency Planning Hearing Order filed 13 November 2019 ("November 2019 Order"), the trial court determined respondent-mother and respondent-father had "acted inconsistently with their constitutional rights to parent" and that "it is in [Andy's] best interest and welfare for guardianship to be granted to [the foster parents]." The trial court made the findings of fact in the November 2019 Order "by sufficient and competent evidence."

¶ 8 Respondent-father appeals the November 2019 Order and argues (1) the trial court applied the incorrect evidentiary standard in its conclusion he acted inconsistently with his constitutional right to parent Andy; (2) even if the trial court applied the correct evidentiary standard in reaching that conclusion, the findings do not support the conclusion; and (3) the findings do not support the trial court's "conclusion that reunification efforts clearly would be unsuccessful or inconsistent with [Andy's] health or safety."

¶ 9 The GAL and DSS argue respondent-father waived appellate review of the trial court's finding he acted inconsistently with his constitutionally protected status as a parent because he did not object on that basis, raise the issue before the trial court, or present any evidence regarding his constitutionally protected parental status. Further, the GAL admits "the [November 2019 Order] mistakenly states that the trial court applied a 'sufficient and competent' standard to the evidence in making its findings of fact rather than the required 'clear and convincing' standard," but DSS and the GAL portray the mistake as harmless.

II. Evidentiary Standard

¶ 10 **[1]** Respondent-father first argues that the trial court failed to apply the proper evidentiary standard when concluding that respondent-father acted inconsistently with his constitutionally protected parental status. Respondent-father asserts the trial court erred by stating in its order that all findings of fact were based on "sufficient and competent evidence" as opposed to clear and convincing evidence.

¶ 11 "Findings in support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence." *In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017) (citing *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001)). Our Supreme Court has held that when a trial court fails to apply the clear and convincing evidence standard when making findings of fact in support of a conclusion that a parent has acted inconsistently with their constitutionally protected status, the case "must be remanded for findings of fact consistent with this standard of evidence." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753-54 (2005).

¶ 12 DSS concedes that the written order lists the wrong standard of evidence. However, DSS argues the error was harmless and the trial court nonetheless applied the proper standard in making the findings. DSS cites no authority for this argument, nor points to any evidence the trial

court applied the proper standard. Similarly, the GAL argues the error was harmless as a mere drafting error and because the order and the evidence satisfy the correct standard, we should not vacate the order. The GAL relied on a footnote found in *In re Pope* to make this argument. 144 N.C. App. 32, 38, n.4, 547 S.E.2d 153, 157, n.4, *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001). However, *In re Pope* involves the termination of parental rights, for which the legal standard is whether there is a probability of repetition of neglect. N.C. Gen. Stat. § 7B-1111(a)(1) (2019). The analysis in *In re Pope* is not controlling because it involves a different standard than the case *sub judice*.

¶ 13 Here, the trial court did not state the standard used in its oral ruling. The trial court's written order states, "the Court makes the following FINDINGS OF FACT by *sufficient and competent evidence*." Based on the record, we cannot conclude the trial court applied the proper clear and convincing evidence standard and thus remand for findings of fact consistent with the proper standard of evidence.

III. Constitutionally Protected Parental Status

¶ 14 Respondent-father argues the trial court erred because the findings do not support the conclusion that he acted inconsistently with his constitutionally protected parental status. Respondent-father asserts that several of the trial court's findings instead acknowledge his progress, participation, involvement, and availability in Andy's life. Respondent-father also contends that in other findings the trial court misconstrued the evidence and the evidence does not support the findings of fact.

¶ 15 "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N.*, 359 N.C. at 307, 608 S.E.2d at 753 (2005). "[T]he decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (2001) (citation omitted).

¶ 16 "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." *In re B.R.W. & B.G.W.*, 2021-NCCOA-343, ¶ 34 (cleaned up).

¶ 17 This Court has issued conflicting rulings on the issue of appellate review of conclusions that a parent has acted inconsistently with their constitutionally protected status. Often panels sitting mere weeks apart have issued opinions taking diverging lines of analysis on this issue. *See In re B.R.W. & B.G.W.*, 2021-NCCOA-343, ¶¶ 36-41; *In re N.Z.B.*, 2021-NCCOA-345, ¶¶ 16-22; *In re M.F.*, 2021-NCCOA-368, ¶¶ 22-23. This Court would 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. However, until our Supreme Court provides much needed clarity, we must proceed and evaluate the cases before us despite conflicting and divergent precedent.

¶ 18 In the case *sub judice*, we decline to address the conflicting analyses in this Court's precedent, because the disposition in the present case is unaffected by the line of analysis utilized.

IV. Reunification Efforts

¶ 19 **[2]** Respondent-father argues the trial court erred in ceasing reunification efforts because the findings do not support the conclusion that reunification efforts clearly would be unsuccessful or inconsistent with Andy's health or safety.

¶ 20 At a permanency planning hearing a trial court must adopt reunification as either a primary or secondary permanent plan unless the requirements of N.C. Gen. Stat. § 7B-906.2(b) are met. Respondent-father argues we should apply the version of § 7B-906.2(b) before the statute's 2019 amendment, because the amendment went into effect on 1 October 2019 and the permanency planning hearing in the case *sub judice* was held on 26 and 30 September 2019, before the amendment went into effect.

¶ 21 Under the version of the statute in effect as of the hearing dates, reunification efforts did not automatically cease upon the achievement of the permanent plan. Respondent-father requested the trial court order family therapy and a trial home placement as part of continuing reunification efforts.

¶ 22 The GAL and DSS argue the amended version of the statute applies. We agree.

¶ 23 "Pending" is defined as "[r]emaining undecided [or] awaiting decision." *In re E.M.*, 249 N.C. App. 44, 51, 790 S.E.2d 863, 870 (2016) (citing *Pending*, Black's Law Dictionary (9th ed. 2009)). *In re E.M.*, involved the same determination of the applicability of requirements from an

amendment to § 7B-906.2(b) as the present case. In *In re E.M.*, this Court concluded the case was no longer pending because the trial court announced its decision to cease reunification efforts at the conclusion of the permanency planning hearing. *Id.* In contrast, while the trial court in the case *sub judice* did announce its award of guardianship at the conclusion of the permanency planning hearing, it did not announce a decision as to reunification efforts. Thus, we conclude the matter remained pending until the order was entered on 13 November 2019, and the 2019 amendment to § 7B-906.2(b) is applicable.

¶ 24 Section 7B-906.2(b), following the 2019 amendment provides:

> At the 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) (2019) (emphasis added). Following the 2019 amendment, findings that reunification clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety are required to cease reunification (*i.e.*, remove reunification as a primary or secondary plan), but are not required if the permanent plan has already been achieved.

¶ 25 The parties' arguments over which version of the statute is applicable is irrelevant. Neither permanent plan could have been achieved until the entry of the court's orders of 9 October 2021 and 13 November 2021.

¶ 26 At every permanency planning hearing, the court shall identify the primary and secondary plan and unless permanence has been achieved,

the court shall order DSS to make efforts towards finalizing both the primary and secondary plans, which here includes reunification. Until entry of the court's permanency planning order, DSS was under the obligation to continue reunification efforts as reunification was one of the two required plans.

¶ 27 Here, Andy's permanent plan of guardianship with his foster parents was not achieved until after the permanency planning hearing subject to this appeal. The court orally announced its intention to award guardianship at the conclusion of the 30 September 2019 hearing. It entered its order awarding legal guardianship to the foster parents on 9 October 2019. DSS' strategic submission of one order ahead of another order does not remove the court's statutory obligation to take evidence and make written findings of fact by clear and convincing evidence of the four statutory factors required before ceasing reunification efforts with respondent-father. N.C. Gen. Stat. § 7B-906.2(b).

¶ 28 We vacate and remand for a new permanency planning hearing to apply all appropriate evidentiary standards. Upon remand if the trial court wishes to remove reunification as a permanent plan, the trial court is bound by statute to make all four findings consistent with N.C. Gen. Stat. § 7B-906.2(d). S*ee In re A.W.*, 2021-NCCOA-182, ¶ 42 (holding to cease reunification the trial court must make the statutorily required findings of fact related to whether parent demonstrated degree of failure necessary to support ceasing reunification efforts).

V. Conclusion

¶ 29 The trial court failed to apply the proper evidentiary standard in making findings of fact to support its conclusion that respondent-father acted inconsistently with his constitutionally protected status as a parent. The court failed to make findings of fact to support its order which ceased reunification efforts and awarded guardianship to foster parents. Thus, we must vacate the 12 November 2019 order and remand for a new permanency planning hearing consistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

CRYAN v. NAT'L COUNCIL OF YOUNG MEN'S CHRISTIAN ASS'NS OF THE U.S.A.

[280 N.C. App. 309, 2021-NCCOA-612]

JOSEPH CRYAN, SAMUEL CRYAN, KERRY HELTON, THOMAS HOLE, RICKEY HUFFMAN, JOSEPH PEREZ, JOSHUA SIZEMORE, DUSTIN SPRINKLE, AND MICHAEL TAYLOR, PLAINTIFFS

v.

NATIONAL COUNCIL OF YOUNG MEN'S CHRISTIAN ASSOCIATIONS OF THE UNITED STATES OF AMERICA; YOUNG MEN'S CHRISTIAN ASSOCIATION OF NORTHWEST NORTH CAROLINA D/B/A KERNERSVILLE FAMILY YMCA AND MICHAEL TODD PEGRAM, RESPONDENT

No. COA20-696

Filed 16 November 2021

1. Appeal and Error—interlocutory order—substantial right—challenge to legislative act—transfer of case to three-judge panel

Where the trial court transferred defendant's motion to dismiss that challenged the constitutionality of recently-enacted N.C.G.S. § 1-17(e) (a statute that allowed plaintiffs to bring a civil action related to sexual offenses that occurred twenty years earlier) to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1), the transfer affected subject matter jurisdiction and not venue as asserted by defendant. Therefore, the interlocutory order transferring the matter did not affect a substantial right and was not immediately reviewable.

2. Appeal and Error—interlocutory order—petition for writ of certiorari—requirements for transfer to three-judge panel—issue of significance

The Court of Appeals granted defendant's petition for writ of certiorari to review an interlocutory order transferring defendant's motion to dismiss a civil case to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1). Defendant raised a significant issue with potential merit regarding whether the transfer of his motion, which challenged the constitutionality of recently-enacted N.C.G.S. § 1-17(e) (a statute that allowed plaintiffs to bring a civil action related to sexual offenses that occurred twenty years earlier), was appropriate.

3. Constitutional Law—North Carolina—challenge to legislative act—transfer to three-judge panel—not a valid facial challenge

The trial court erred by transferring defendant's motion to dismiss to a three-judge panel pursuant to N.C.G.S. § 1-267.1(a1) because the motion—which challenged the recently-enacted statute,

N.C.G.S. § 1-17(e), under which plaintiffs brought a civil action relating to sexual offenses that occurred twenty years earlier—did not raise a facial constitutional challenge but an as-applied challenge, and plaintiffs did not raise a facial challenge of their own in their motion to transfer.

Judge CARPENTER dissenting.

Appeal by respondent from order entered 22 July 2020 by the Honorable Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 26 May 2021.

Lanier Law Group, P.A., by Donald S. Higley, II, for Petitioner-Appellee.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, for Respondent-Appellant.

GORE, Judge.

¶ 1 The claims in the present matter arise from acts of sexual abuse by Defendant Pegram, while he was employed by the YMCA, on Plaintiffs, who were minors at the time of the abuse. The last act of sexual abuse by Pegram occurred approximately twenty years ago.

¶ 2 Based on Plaintiffs' allegations, all claims became time-barred in 2015 under the then-applicable statute of limitations. The youngest Plaintiff turned 18 years of age in 2005. The longest limitations period for any of the claims was ten years. Accordingly, all claims in this action became time-barred by 2015.

¶ 3 Four years later, though, in 2019, our General Assembly enacted Section 1-17(e), which allows a person who was a victim of sexual abuse when (s)he was a minor to bring an action for claims "related to [the] sexual abuse" "within two years of the date of a criminal conviction" of the perpetrator of the sexual abuse. N.C. Gen. Stat. § 1-17(e) (2020). Here, the Complaint alleges that the perpetrator, Defendant Pegram, was convicted of various sex offenses. Defendant challenges the constitutionality of Section 1-17(e) which was enacted in 2019. And Plaintiffs commenced their previous time-barred claims in 2020, within two years of Pegram's conviction pursuant to Section 1-17(e).

I. Factual & Procedural Background

¶ 4 This is a case in which multiple victims allege they were sexually assaulted by Michael Todd Pegram ("Pegram") while he worked as an employee of Defendant-Appellant Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA ("YMCA" or "Defendant"). In 2019, Pegram was convicted for those crimes. On 14 February 2020, Plaintiffs-Appellees Joseph Cryan, Samuel Cryan, Kerry Helton, Thomas Hole, Rickey Huffman, Joseph Perez, and Michael Taylor (collectively, "Plaintiffs") filed a complaint seeking compensatory and punitive damages from Defendant for assault, battery, negligent hiring retention and supervision of Pegram, negligent infliction of emotional distress, and intentional infliction of emotional distress.

¶ 5 On 1 June 2020, Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the basis that Plaintiffs' claims are time barred because the North Carolina General Assembly's amendments to N.C. Gen. Stat. § 1-17(e) (2019) and N.C. Gen. Stat. § 1-52(5), (16) and (19) (2019) (collectively "2019 amendments") were in violation of the North Carolina Constitution. *See* SAFE Child Act, N.C. Session Law 2019-245, S.B. 199 (2019). N.C. Gen. Stat. § 1-17(e) states:

> (e) Notwithstanding the provisions of subsections (a), (b), (c), and (d) of this section, a plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age.

N.C. Gen. Stat. § 1-17(e).

¶ 6 On 18 June 2020, Plaintiffs filed a motion pursuant to N.C. R. Civ. P. 42(b)(4) and N.C. Gen. Stat. § 1-267.1(a1) to transfer Defendant's motion to dismiss to the Wake County Superior Court for the appointment of a three-judge panel to determine the constitutionality of the amendments. N.C. Gen. Stat. § 1-267.1(a1) states:

> (a1) Except as otherwise provided in subsection (a) of this section, any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court

> of Wake County, organized as provided by subsection (b2) of this section.

¶ 7 N.C. Gen. Stat. § 1-267.1(a1) (2019). N.C. R. Civ. P. 42(b)(4) further provides:

> (b) Separate trials
>
> . . .
>
> (4) Pursuant to G.S. 1-267.1, *any facial challenge to the validity of an act of the General Assembly*, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County *if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading*. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court

> in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. R. Civ. P. 42(b)(4) (2019) (emphasis added).

¶ 8 Defendant's motion to dismiss, as well as Plaintiffs' motion to transfer Defendant's motion to dismiss to the three-judge panel in Wake County came on for hearing and oral argument on 17 July 2020 in Forsyth County Superior Court before the Honorable Richard S. Gottlieb. Because Defendant's motion to dismiss was based solely upon Rule 12(b)(6), the trial court declined to rule on the Rule 12(b)(6) motion, and granted Plaintiffs' motion to transfer Defendant's motion to dismiss to Wake County pursuant to N.C. R. Civ. P. 42(b)(4). The trial court entered an order transferring "the action" to the three-judge panel of the Wake County Superior Court on 21 July 2020, and issued an amended order entered 22 July 2020, correcting a typographical error.

¶ 9 On 17 August 2020, Defendant filed a notice of appeal. On 16 December 2020, Plaintiffs filed a motion to dismiss Defendant's appeal, contending Defendant's appeal is interlocutory and does not affect a substantial right. On 4 January 2021, Plaintiffs' motion to dismiss Defendant's appeal was referred to this Panel. Also on 4 January 2021, Defendant petitioned this Court to issue a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure.

II. Jurisdiction

A. Interlocutory Nature of Defendant's Appeal

¶ 10 **[1]** Defendant argues the trial court's order granting Plaintiffs' motion to transfer Defendant's motion to dismiss ("trial court's order") changed the venue of the case. Defendant contends since the right to venue established by statute is a substantial right, Defendant's appeal of the trial court's order is jurisdictionally proper before this Court. Plaintiff contends Defendant's appeal is interlocutory and should be dismissed by this Court.

¶ 11 "An order is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' " *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E. 2d 82, 91 (1961)). "As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 188 (2011) (citations omitted). "Appeals from interlocutory orders are only available in exceptional circumstances." *Hamilton*, 212 N.C.

App. at 77, 711 S.E.2d at 188, (citation and internal quotations omitted). "The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978)).

¶ 12 N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(a)(3)a create an exception to the rule against interlocutory appeals for appeals challenging an interlocutory order affecting a "substantial right." A substantial right is one which will clearly be lost if the order is not reviewed before final judgment, such that the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). The North Carolina Supreme Court defines a substantial right as follows: "A legal right affecting or involving a matter of substance as distinguished from matter of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Am. Nat'l Stores Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (adopting the definition found in Webster's Third New Int'l Dictionary (1971).

¶ 13 Defendant is correct in its contention that the right to venue established by statute is a substantial right. *See Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("There can be no doubt that a right to venue established by statute is a substantial right . . . [and its] grant or denial is immediately appealable.") However, the order did not grant, deny, change, or otherwise affect venue, and therefore did not affect a substantial right. *See La Falce v. Wolcott*, 76 N.C. App. 565, 569, 334 S.E.2d 236, 239 (1985). The order entered addressed and sought to resolve an issue of subject matter jurisdiction, not an issue of venue.

¶ 14 Subject matter jurisdiction and venue are two distinct legal principles. Subject matter jurisdiction has been defined as "[a] court's power to decide a case or issue a decree." *In re M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012) (quoting Black's Law Dictionary 654, 927 (9th ed. 2009)). Venue, on the other hand, concerns "the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Stokes v. Stokes*, 371 N.C. 770, 772, 821 S.E.2d 161, 163 (2018) (cleaned up) (quoting Black's Law Dictionary (10th ed. 2014)).

¶ 15 Plaintiffs' motion to transfer Defendant's motion to dismiss was based on Plaintiffs' contention the three-judge panel in Wake County Superior Court had the statutory right, pursuant to N.C. R. Civ. P. 42(b)(4), to decide the constitutional issue raised by Defendant, not on a contention Wake County was a preferable location in comparison to Forsyth County. *See In re M.I.W.*, 365 N.C. at 377, 722 S.E.2d at 472; *see also Stokes*, 371 N.C. at 772, 821 S.E.2d at 163. The transcript reflects the word "venue" is used once by the trial court, specifically when acknowledging that only the constitutional issue would be transferred, and that venue for the action would remain in Forsyth County. Though the trial court's order stated the "action" was being transferred to the three-judge panel in Wake County Superior Court, the order reflects the venue would remain in Forsyth County. *See Holdstock v. Duke Univ. Health Sys.*, 270 N.C. App. 267, 279, 841 S.E.2d 307, 316 (2020) (citation omitted) (holding when a trial court transfers a facial challenge to a three-judge panel pursuant to N.C. R. Civ. P. 42(b)(4), it "maintain[s] jurisdiction over all matters other than the challenge to the act's facial validity").

¶ 16 Based on the language of the trial court as reflected in the transcript and on the face of its order, as well as the definitions of both "venue" and "subject matter jurisdiction," we conclude that the trial court order transferring Defendant's motion to dismiss to a three-judge panel in Wake County Superior Court was entered in compliance with the subject matter jurisdiction conveyed upon the three-judge panel by the General Assembly. It does not give rise to establishing or depriving Defendant of a substantial right. The trial court retained venue of the case in Forsyth County. Therefore, the trial court's order is not immediately reviewable, and Defendant's appeal is interlocutory.

B. Defendant's Petition for Writ of Certiorari

¶ 17 **[2]** Under N.C. R. App. P. 21(a)(1), "a writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where [*inter alia*] no right to appeal from an interlocutory order exists." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004). Consequently, "[i]t is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where . . . there is merit to an appellant's substantive arguments and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004). This Court has determined that such interests exist when the impact of the lawsuit is "significant," the issues involved are "important," and the case presents a need for the writ in the interest of the "efficient administration of justice," or the granting of the writ would "promote

judicial economy." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79 (granting review of a class action certification based on the "need for efficient administration of justice," the "significance of the issues in dispute," the "significant impact" of the lawsuit, the effect of the order on "numerous individuals and corporations" and the "substantial amount of potential liability" involved); *see also Hill v. Stubhub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (granting review in order to "further the interests of justice").

¶ 18 The issue Defendant raises on appeal presents the central question of what the appropriate requirements for a trial court are to transfer a case to be heard by a three-judge panel. Granting Defendant's petition would afford this Court the opportunity to consider a relatively new statutory scheme which has limited jurisprudence surrounding it. In considering the issues raised by Defendant this Court will have the opportunity to provide guidance and clarity to trial courts across North Carolina when evaluating the merits of a potential transfer of a case to a three-judge panel. For these reasons, we conclude that Defendant's raised issue is "significant" and "important" and that granting the petition for writ of certiorari will "promote judicial economy" by providing trial courts with guidance on a novel and complex statutory scheme. *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79; *see also Stubhub*, 219 N.C. App. at 232, 727 S.E.2d at 554.

C. Trial Court's Finding Plaintiff Raised a Facial Challenge

¶ 19 **[3]** In 2014 the North Carolina General Assembly implemented a statutory scheme which requires certain challenges to its acts be decided by a three-judge panel in the Superior Court of Wake County. *See* N.C. Gen. Stat. §§ 1-81.1 and 1-267.1. These statutes only apply to "facial challenges to the validity of an act of the General Assembly, not as applied challenges." *Holdstock v. Duke Univ. Health Sys.*, 270 N.C. App. at 271, 841 S.E.2d at 311 (2020) (cleaned up); N.C. Gen. Stat. § 1-267.1(a1). Under the North Carolina Rules of Civil Procedure, for a facial challenge to the validity of an act of the General Assembly to be transferred to a three-judge panel the facial challenge must be raised by a claimant in the claimant's complaint or amended complaint or by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 42(b)(4). If the facial challenge is properly raised, "the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel . . . ." *Id.*

¶ 20 In the case *sub judice*, the initial constitutional challenge was raised in Defendant's 1 June 2020 motion to dismiss. However, Defendant specifically stated that they were arguing the General Assembly's 2019 amendments "are unconstitutional only as applied to the Kernersville YMCA on the particular facts of this case . . . ." No mention of a facial challenge was made until Plaintiffs' motion to transfer Defendant's motion to dismiss to a three-judge panel. In their motion to transfer, the Plaintiffs' asserted that Defendant was in fact making a facial challenge to the 2019 amendments. Following Plaintiffs' motion to transfer, Defendant reaffirmed they were making an as applied challenge to the constitutionality of the 2019 amendments by filing an amended motion to dismiss (which maintained the as applied language) and arguing before the trial court at the hearing on the motion to transfer that their challenge was an as applied challenge.

¶ 21 In its order transferring Defendant's motion to dismiss to a three-judge panel, the trial court stated, "[u]nder the provisions of N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), because Plaintiff has asserted facial challenges to the constitutionality of acts of the North Carolina General Assembly, the challenges must be heard and determined by a three-judge panel of the Wake County Superior Court." However, we conclude that Plaintiffs did not make a facial challenge to the constitutionality of the 2019 amendments. In fact, Plaintiffs specifically stated they were not arguing the 2019 amendments were unconstitutional, only that Defendant's challenge was in fact a facial challenge. Further, even if Plaintiffs had made a facial challenge, they did so in a motion to transfer, not in their complaint as required by Rule 42(b)(4). In fact, making any argument the 2019 amendments were unconstitutional would be in direct opposition to Plaintiffs' claims before the trial court. As Defendant made clear they were only making an as applied challenge to the 2019 amendments, and the trial court did not make a determination itself that Defendant's constitutional challenges were in fact a facial challenge, no facial challenge was made in the time prescribed by Rule 42(b)(4) for a court to be able to transfer a facial challenge to a three-judge panel.

¶ 22 Defendant YMCA moved to dismiss all claims, clearly making an "as applied" challenge to Section 1-17(e).[1] Defendant does not challenge the authority of the General Assembly to create disabilities as a

1. I note that Section 1-17(d) provides that a minor who suffers sexual abuse may sue a defendant for claims related to the sexual abuse has until (s)he turns 28 years of age to bring such action. Subsection (d) does not come into play in this present case as all Plaintiffs were over 28 years of age when the present action was commenced.

means of extending the time during which a sufferer of sexual abuse may sue. Rather, Defendant only challenges subsection (e)'s application to claims *that had already become time-barred* prior to its enactment in 2019. Indeed, our Supreme Court has held that "[a] right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly. . . . But the Legislature may [only] extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute." *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949). *See also Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965).

¶ 23 While the trial court is free to transfer an action to a three-judge panel on its own motion based on a facial challenge to an act of the General Assembly, a trial court is not free to impute a facial challenge argument on a party. Nor is a trial court free to transfer a matter to a three-judge panel so that the three-judge panel may decide whether a facial challenge was raised. The plain language of the statutory scheme clearly provides that a party must affirmatively raise a facial challenge, and that facial challenge must be raised in either the claimant's complaint/amended complaint or the defendant's answer, responsive pleading, or within 30 days of the defendant's answer or responsive pleading. N.C. Gen. Stat. §§ 1-81.1, 1-267.1, and 1A-1, Rule 42(b)(4). No such facial challenge was raised here. As a result, we conclude the trial court erred by transferring Defendant's motion to dismiss to a three-judge panel.

VI. Conclusion

¶ 24 We hold the trial court's order transferring Defendant's motion to dismiss to a three-judge panel in Wake County Superior Court was an interlocutory order not affecting a substantial right. We also conclude that this case presents significant and important issues and grant Defendant's petition for writ of certiorari in the interest of judicial economy. As a result, we necessarily deny Plaintiffs' motion to dismiss Defendant's appeal.

¶ 25 We hold neither party raised a facial challenge to the 2019 amendments and that the trial court erred by transferring Defendant's motion to dismiss to a three-judge panel. Thus, we vacate and remand this matter to the trial court for further proceedings not inconsistent with this order.

VACATE AND REMAND.

Judge DILLON concurs.

Judge CARPENTER dissents.

CARPENTER, Judge, dissenting.

¶ 26 Under N.C. R. App. P. 21(a)(1), "a writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where [*inter alia*] no right to appeal from an interlocutory order exists." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004). Consequently, "[i]t is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where . . . there is merit to an appellant's substantive arguments and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004). This Court has determined that such interests exist when the impact of the lawsuit is "significant," the issues involved are "important," and the case presents a need for the writ in the interests of the "efficient administration of justice," or the granting of the writ would "promote judicial economy." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79 (granting review of a class action certification based on the "need for efficient administration of justice," the "significance of the issues in dispute," the "significant impact" of the lawsuit, the effect of the order on "numerous individuals and corporations" and the "substantial amount of potential liability" involved); *see also Hill v. Stubhub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (granting review in order to "further the interests of justice").

¶ 27 The issues Defendant raises on appeal present the central question of whether the constitutional challenge to N.C. Gen. Stat. § 1-17(e) should be heard by a three-judge panel or an individual judge in Forsyth County. Defendant is not asking this Court to decide the constitutionality of the statute—nor is this Court the proper place to do so. Consequently, while Defendant's raised issue is "significant" and "important" to the parties, it does not introduce a matter so pressing that the denial of Defendant's petition would negatively affect the "efficient administration of justice" or work against our judicial economy. *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79; *see also Stubhub*, 219 N.C. App. at 232, 727 S.E.2d at 554.

¶ 28 Rather, Defendant's sub-issue—whether Defendant's constitutional challenge is an as-applied or facial constitutional challenge—is a determination best made by the trial court and filtered through the statutory scheme prescribed by the legislature. *See* N.C. Gen. Stat. § 1-267.1 (2019). The trial court had the benefit of hearing arguments

of counsel and receiving memoranda on the issues. Further, when the constitutional challenge is ultimately decided by the three-judge panel in Wake County Superior Court, the matter may be remanded back to the trial court upon any initial determination by the three-judge panel that it lacks jurisdiction to rule on the challenge because it is not a facial challenge. The legislature has contemplated and incorporated a *de facto* review of the initial determination of the trial judge by the appointed three-judge panel. This Court's grant of a petition for writ of certiorari to consider whether jurisdiction is proper with a three-judge panel in Wake County Superior Court based solely on Defendant's assertion its constitutional challenge is "as-applied" shortcuts the statutory scheme prescribed by the legislature, would be an inappropriate circumvention of the process, and therefore would not "promote judicial economy," but would interfere with the "efficient administration of justice." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79; *see also Stubhub*, 219 N.C. App. at 232, 727 S.E.2d at 554.

¶ 29 The legislature set forth a statutory scheme to address constitutional challenges to statutes. *See* N.C. Gen. Stat. § 1-267.1. In brief, a trial court determines, either by statutory mandate or in its discretion, to transfer subject matter jurisdiction of a constitutional challenge to a three-judge panel in Wake County; upon transfer, the issue is within the jurisdiction of the three-judge panel. In granting Defendant's petition for writ of certiorari, this Court will create precedent for a new procedure whereby a party that disagrees with a trial judge's referral of a constitutional challenge to a three-judge panel can petition this Court for a writ of certiorari. In such an instance, this Court will be tasked with explaining why the raised constitutional challenge in the case currently before it is distinguishable from any future constitutional challenge. The precedent that flows from the majority's opinion will create a dilemma in which any disagreement between the parties as to whether a constitutional challenge is "facial" or "as applied" will be decided by this Court, rather than by the three-judge panel prescribed by statute. The precedent established here therefore has the potential to eliminate the role of the statutory three-judge panel in future constitutional challenges.

¶ 30 This Court, by granting Defendant's petition for writ of certiorari, will also unwittingly decide that multiple classes in fact exist for purposes of the constitutionality of N.C. Gen. Stat. § 1-17(e). To do so is to take a critical step in determining the ultimate outcome of the central issue of the case before the trial court. It would be prudent for this Court to refrain from exercising its jurisdiction to grant Defendant's petition for writ of certiorari in favor of and in deference to the statutory scheme prescribed by the legislature in N.C. Gen. Stat. § 1-267.1.

¶ 31 Lastly, granting Defendant's petition for writ of certiorari creates an avenue for a party to draw out litigation, contrary to our goal of promoting judicial economy. The majority's grant incentivizes parties who wish to delay a trial on the merits of a case to petition this Court for a decision as to whether the referral of an issue to the three-judge panel was proper in every instance. The risk of the emergence of such unnecessary appeals is exaggerated by the majority's declination to identify reasons for this case's unique importance or necessity to the protection of the interests of justice. In the future, this Court should expect petitions for writ of certiorari arising from similar referrals to three-judge panels. When the petitions arrive, this Court will have no precedence on which we may rely to deny granting certiorari to hear a challenge to a superior court judge's order transferring a constitutional challenge of a statute to a three-judge panel.

¶ 32 Because I would determine jurisdiction to decide the constitutional issue is proper before the three-judge panel in Wake County, I would deny Defendant's petition for writ of certiorari. I therefore respectfully dissent.

IN THE MATTER OF J.G.

No. COA21-353

Filed 16 November 2021

Juveniles—transcript of admission—most severe disposition—exceeded by court

Where a juvenile's transcript of admission provided—and the juvenile court informed him—that the most severe disposition on his charge for breaking or entering a motor vehicle would be a Level 2 disposition, the juvenile court erred by adjudicating him to be a Level 3 delinquent juvenile. The adjudication and disposition orders were set aside, placing the parties in the positions they occupied at the beginning of the proceedings.

Appeal by respondent-juvenile by writ of certiorari from adjudication order entered 5 October 2020 by Judge Sam Hamadani in Wake County District Court and amended dispositional order entered 7 April 2021 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 19 October 2021.

IN RE J.G.

[280 N.C. App. 321, 2021-NCCOA-613]

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for respondent-appellant juvenile.

ZACHARY, Judge.

¶ 1 Respondent-juvenile "Jake" appeals from the trial court's orders adjudicating him to be a Level 3 delinquent juvenile and committing him to a Youth Development Center. After careful review, we reverse the adjudication and disposition orders and remand for further proceedings.

Background

¶ 2 The relevant facts are few. On 5 October 2020, Jake appeared in Wake County District Court on four juvenile petitions, one alleging that he had committed the offense of breaking or entering a motor vehicle. Jake, his counsel, and the prosecutor entered into a transcript of admission, in which Jake admitted to one count of breaking or entering a motor vehicle. The juvenile court accepted and signed the transcript of admission. The transcript of admission provided that the "most serious/severe disposition" on the charge was a Level 2 disposition. The juvenile court also informed Jake that the most serious disposition that he could face for the breaking or entering charge was a Level 2 disposition, "which could include, among other things, detention for up to 14 24-hour periods, placement in a wilderness program or a residential treatment facility, or house arrest[.]" The State dismissed the three remaining charges, and the court adjudicated Jake to be delinquent and transferred his case to Cumberland County District Court for disposition.

¶ 3 The disposition hearing was held on 24 February 2021 in Cumberland County District Court. After evaluating Jake's prior history with the juvenile court system, the court concluded that it "ha[d] no other alternative but to recommend and [o]rder a Level [3] Disposition." On 25 February 2021, the court entered its order directing that Jake be committed to a Youth Development Center for a minimum of 6 months, with the term of commitment not to exceed his 20th birthday. On 12 March, 22 March, and 7 April 2021, the juvenile court entered amended orders that continued the Level 3 disposition. On 25 February 2021, Jake gave written notice of appeal.

Grounds for Appellate Review

¶ 4 As a preliminary matter, we address our jurisdiction to consider the merits of Jake's appeal. Although Jake filed a written notice of appeal, his notice was not sufficient to confer jurisdiction on this Court.

¶ 5 First, the notice did not comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. Although the notice included the correct name and juvenile court file number for Jake's case, it did not otherwise properly identify the orders being appealed, specify the court to which the appeal was directed, or include the requisite proof of service of the notice on the State. *See* N.C. R. App. P. 3; N.C. Gen. Stat. § 7B-2602 (2019). Moreover, the juvenile court entered three amended dispositional orders after Jake's notice of appeal was filed on 25 February.

¶ 6 Generally, when a juvenile "has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *In re E.A.*, 267 N.C. App. 396, 397, 833 S.E.2d 630, 631 (2019) (citation omitted). Accordingly, Jake's appeal is subject to dismissal. *In re I.T.P–L.*, 194 N.C. App. 453, 459, 670 S.E.2d 282, 285 (2008), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009).

¶ 7 However, during the pendency of this appeal, Jake's appellate counsel filed a petition for writ of certiorari with this Court. For the reasons explained below, we allow Jake's petition for writ of certiorari.

¶ 8 Pursuant to Rule 21, this Court may allow a petition for writ of certiorari in juvenile cases "to permit consideration of their appeals on the merits so as to avoid penalizing [r]espondents for their attorneys' errors." *Id.* at 460, 670 S.E.2d at 285 (allowing petitions for writ of certiorari where respondent-parents filed "timely, albeit incomplete, notices of appeal").

¶ 9 Here, although not properly perfected, Jake's notice of appeal clearly demonstrated his intent to appeal the adjudication and disposition orders: it was filed the day after the dispositional hearing, it referenced the correct juvenile court file number, and it was titled "Notice of Appeal." Additionally, for reasons more fully explained below, there is no resulting prejudice to the State, which concedes the trial court's error. Thus, pursuant to Rule 21, we allow Jake's petition for writ of certiorari and proceed to the merits of his appeal. N.C. R. App. P. 21(a)(1).

Discussion

¶ 10 Jake asserts that the juvenile court erred in ordering a Level 3 disposition, when the transcript of admission provided, and the juvenile court

informed him, that the most severe disposition that he would receive was a Level 2. Such error, Jake argues, rendered his admission to the relevant offense neither knowing nor voluntary, and consequently requires reversal of the adjudication and disposition orders. The State concedes the juvenile court's error, and after careful review, we agree.

¶ 11 "We have long considered that the acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case." *In re W.H.*, 166 N.C. App. 643, 645, 603 S.E.2d 356, 358 (2004). The record in a juvenile case "must therefore affirmatively show on its face that the admission was entered knowingly and voluntarily." *Id.* at 646, 603 S.E.2d at 358 (citation omitted).

¶ 12 Section 7B-2407 of the Juvenile Code requires that the trial court inform the juvenile, inter alia, "of the most restrictive disposition on the charge" before accepting the juvenile's admission. N.C. Gen. Stat. § 7B-2407(a)(6). "If the face of the record does not affirmatively show the trial court's compliance with N.C. Gen. Stat. § 7B-2407 and the knowing and voluntary nature of the juvenile's admission, the adjudication of delinquency will be set aside." *In re W.H.*, 166 N.C. App. at 646, 603 S.E.2d at 359. "[W]hen a trial court plans to impose a disposition level higher than that set out in the [transcript of admission], the juvenile must be given a chance to withdraw his plea and be granted a continuance." *Id.* at 647, 603 S.E.2d at 359.

¶ 13 In the present case, Jake's "admission was based on a belief that the most restrictive disposition he could receive was a Level 2, and the [juvenile] court, without sufficient notice to him or any accompanying chance to withdraw the admission, raised the most restrictive disposition he could receive to a Level 3." *Id.* Thus, as the State concedes, Jake's admission was not knowing and voluntary, and the adjudication of delinquency, as well as the disposition order, must "be set aside." *Id.* at 646, 603 S.E.2d at 359. The reversal of the orders "places the parties as they were at the beginning of the proceedings." *In re D.A.F.*, 179 N.C. App. 832, 837, 635 S.E.2d 509, 512 (2006).

Conclusion

¶ 14 Accordingly, we vacate the transcript of admission, reverse the juvenile court's adjudication order and amended disposition order, and remand for further proceedings consistent with this opinion.

VACATED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and COLLINS concur.

JACKSON v. JACKSON

[280 N.C. App. 325, 2021-NCCOA-614]

LISA JACKSON, PLAINTIFF
v.
SAMUEL L. JACKSON, DEFENDANT

No. COA20-699

Filed 16 November 2021

1. Child Custody and Support—termination of support—terms of parties' separation agreement—presumption of reasonableness

In a child support action, where the parties previously agreed on a child support amount in a private, unincorporated separation agreement, the trial court properly applied a presumption of reasonableness in awarding the mother the agreed-upon amount and damages for breach of contract based upon the father's nonpayment. Although the father argued that his support obligation terminated when he became the custodial parent for a period of time, that scenario was not one of the enumerated reasons listed in the agreement for terminating support. Therefore, since the agreement remained in force, its terms controlled.

2. Child Custody and Support—amount of support—reasonable needs of child—at time of hearing—sufficiency of findings

In a child support action where the parties had previously agreed to a child support amount in a private, unincorporated separation agreement, the trial court's determination of the father's child support obligation was not based on competent evidence where its findings regarding the reasonable needs of the child did not address present expenses at the time of the hearing. Further, findings on past expenditures were speculative where they detailed the amount of money spent by the mother, but not how much of that money was spent to cover the child's expenses.

3. Attorney Fees—child support action—terms of parties' separation agreement—controlling

In a child support action, where the parties' private, unincorporated separation agreement (which resolved issues of child custody, child support, and attorney fees between the parties) specifically stated that the prevailing party in any civil action brought to enforce the agreement would be entitled to attorney fees, the trial court properly awarded fees to the mother who prevailed in her claim for breach of contract, and not to the father for his attempt to modify the agreement.

4. Child Custody and Support—child support—calculation—imputed income—sufficiency of evidence

In a child support action, a finding by the trial court regarding the father's income was not made in error where there was competent evidence of his base salary and earned commissions, the last of which he was due to receive the week of the hearing. Further, the trial court's finding regarding the mother's income took into account support she received from third parties.

Appeal by defendant from order and judgment entered 10 December 2019 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 24 August 2021.

Fox Rothschild LLP, by Michelle D. Connell and Kip D. Nelson, for plaintiff-appellee.

Sandlin Family Law Group, by Deborah Sandlin, for defendant-appellant.

GORE, Judge.

¶ 1 Samuel L. Jackson ("defendant") appeals from an order in which the trial court established child support at the contractual amount set forth in the parties' separation agreement, and ordered defendant pay $21,505 in damages and $5,000 in attorney fees. Defendant argues that (1) the trial court erred in awarding child support to Lisa Jackson ("plaintiff"); (2) the trial court erred in awarding damages to plaintiff because the parties' contractual obligations had terminated; (3) the trial court erred in awarding attorney fees to plaintiff and not to defendant; and (4) the trial court erred by imputing income to defendant. We affirm in part, vacate in part, and remand.

I. Background

¶ 2 Plaintiff and defendant married in 1992, and three children were born to the marriage.[1] On 17 May 2013, plaintiff and defendant separated and were subsequently divorced. In October 2013, the parties executed a separation agreement and property settlement ("separation agreement"), which resolved, *inter alia*, issues of child custody, child support, and attorneys' fees. The parties agreed to share equal physical

1. At the time of separation all three marital children were minors. However, at the time this action was commenced only one marital child remained a minor.

and legal custody of the minor children. In the separation agreement, the parties agreed that defendant would pay plaintiff $1,150 per month in child support. The parties agreed that the child support payments shall terminate on the first occurrence of:

> (1) The parties' youngest living child reaches the age of 18 or graduates from high school or its equivalent, whichever occurs last, so long as satisfactory progress towards graduation is being made, but no later than age 20;
>
> (2) Emancipation of the children;
>
> (3) Death of the children;
>
> (4) Death of [defendant]; or
>
> (5) A court of competent jurisdiction enters a court order modifying or terminating child support.

The parties further agreed that if either party shall be required to bring a civil action to obtain performance of the separation agreement, the prevailing party shall be entitled to indemnification by the other party for reasonable attorneys' fees. The separation agreement was never incorporated into a court order.

¶ 3 In the summer of 2016, plaintiff moved from Raleigh, North Carolina to Wilmington, North Carolina to live with her fiancé. At this time, the parties' oldest child had reached the age of majority. The parties' second child moved to Wilmington with plaintiff while their youngest child remained in Raleigh with defendant.

¶ 4 On 15 June 2017, defendant filed a motion in the cause for child support alleging plaintiff owed a duty of child support to defendant, because at the time the parties' only remaining minor child was living solely with defendant. Defendant requested the trial court award temporary and permanent child support pursuant to the North Carolina Child Support Guidelines, terminate the child support obligations contained in the separation agreement, and award defendant reasonable attorneys' fees. On 19 January 2018, plaintiff filed a complaint alleging defendant breached the parties' contract by unilaterally lowering, and subsequently ceasing, child support payments. Plaintiff sought specific performance of child support arrearages and reasonable attorneys' fees. Plaintiff also requested the trial court consolidate defendant's and plaintiff's actions.

¶ 5 In August of 2018, the parties' youngest daughter moved to Wilmington to live with plaintiff. On 12 September 2018, defendant voluntarily dismissed his motion for temporary child support, but not his

action for permanent child support. On 2 January 2019, defendant filed his answer to plaintiff's complaint asserting the affirmative defense that the child support obligation under the separation agreement should terminate upon the trial court entering an order in defendant's action.

¶ 6 A hearing was held on 22 April 2019. On 17 September 2019, the Honorable Judge Walczyk sent an email to the parties with a written rendering of her ruling but had yet to enter an order in the matter. On 30 October 2019, following the hearing but before the trial court entered its order, plaintiff filed a motion requesting the trial court enter a temporary restraining order and preliminary injunction against defendant to hold in trust the funds from property sales by defendant, because defendant had previously informed plaintiff of his intent to appeal the trial court's order in her favor. Defendant objected to plaintiff's motion. The trial court denied plaintiff's motion as insufficient to warrant the entry of a temporary restraining order and preliminary injunction.

¶ 7 On 10 December 2019, the trial court entered an order establishing child support in favor of plaintiff in the amount of $1,150 per month, the contractual amount. The trial court concluded plaintiff was not entitled to specific performance but awarded plaintiff $21,505 in damages for defendant's breach of contract and awarded plaintiff $5,000 in attorneys' fees. On 13 January 2020, defendant gave timely notice of appeal from the trial court's 10 December 2019 order.

II. Standard of Review

¶ 8 "Our review of a child support order is limited to determining whether the trial court abused its discretion." *Brind'Amour v. Brind'Amour*, 196 N.C. App. 322, 327, 674 S.E.2d 448, 452 (2009). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Roberts v. McAllister*, 174 N.C. App. 369, 374, 621 S.E.2d 191, 195 (2005) (citation omitted). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.* (citation omitted).

III. Child Support

¶ 9 "A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened."

McKaughn v. McKaughn, 29 N.C. App. 702, 705, 225 S.E.2d 616, 618 (1976) (citation omitted). "[W]here parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963). A party seeking an initial judicial determination of child support, where the parties have previously executed an unincorporated separation agreement, must "show the amount of support necessary to meet the reasonable needs of the children at the time of the hearing." *Boyd v. Boyd*, 81 N.C. App. 71, 76, 343 S.E.2d 581, 585 (1986). The trial court will not alter the amount of child support contractually agreed upon by the parties, unless the amount necessary to meet the reasonable needs of the child substantially differs from the agreed upon amount. *Id.*

¶ 10 This Court in *Pataky v. Pataky* laid out the step-by-step process a trial court must take when analyzing a claim for child support, where the parties previously entered into an unincorporated separation agreement:

> [T]he court should first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be "inappropriate." The court should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate. If, however, the court determines by the greater weight of the evidence, that the presumption of reasonableness afforded the separation agreement allowance has been rebutted, taking into account the needs of the child existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50-13.4(c), the court then looks to the presumptive guidelines established through operation of G.S. § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the guidelines "would not meet or would exceed the needs of the child . . . or would be otherwise unjust or inappropriate."

Pataky v. Pataky, 160 N.C. App. 289, 305, 585 S.E.2d 404, 414-15 (2003), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004).

¶ 11 **[1]** Defendant first contends that the trial court erred by applying the *Pataky* presumption because his child support obligation under the unincorporated separation agreement terminated when he became the custodial parent for the parties' only minor child. Defendant similarly argues that because the child support provisions terminated, the trial court erred by awarding plaintiff damages.

¶ 12 Defendant argues *Rustad v. Rustad*, 68 N.C. App. 58, 314 S.E.2d 275, *disc. rev. denied*, 311 N.C. 763, 321 S.E.2d 145 (1984), stands for the proposition that a change in custody of a minor child, in violation of the child custody provisions of the separation agreement, automatically terminates child support obligations under a separation agreement. However, defendant has an overly broad view of *Rustad*. The separation agreement in *Rustad* contemplated what would happen if custody of the minor children changed. In contrast, the separation agreement in the present matter did not contemplate the effect a possible violation or an agreed upon change in custody would have on child support. While the separation agreement did enumerate five specific events that would terminate child support, a change in custody of the minor children was not included on this list. The facts of the present case are not analogous to the facts of *Rustad*, and therefore, *Rustad* does not control.

¶ 13 The separation agreement at issue here provides specific events that would terminate child support. Those events are:

> (1) The parties' youngest living child reaches the age of 18 or graduates from high school or its equivalent, whichever occurs last, so long as satisfactory progress towards graduation is being made, but no later than age 20;
>
> (2) Emancipation of the children;
>
> (3) Death of the children;
>
> (4) Death of [defendant]; or
>
> (5) A court of competent jurisdiction enters a court order modifying or terminating child support.

At the time defendant filed his action, the parties' youngest child had yet to reach the age of majority and was still enrolled in high school. The order entered by the trial court established child support at the contractual amount under the separation agreement, which does not constitute a modification or termination of child support. Contract principles govern

an unincorporated separation agreement. *See McKaughn*, 29 N.C. App. at 705, 225 S.E.2d at 618. Thus, the only events that could terminate the child support obligation in the present case are those enumerated in the separation agreement, and the parties are subject to damages for breach of contract if they violate the terms of the separation agreement.

¶ 14 Further, the separation agreement included a clause stating, "It is the intention and agreement of the parties that each provision of this Agreement is separate and independent from each other provision contained herein." Thus, any breach by plaintiff of the child custody provisions of the separation agreement, by moving to Wilmington with the parties' middle minor child and leaving their youngest child in the sole care of defendant, would have no effect on the status of the separation agreement's child support provisions. As a result, we conclude the separation agreement remained in force and the trial court did not err by finding as such and applying the *Pataky* presumption of reasonableness to the separation agreement nor by awarding damages for breach of the contract.

¶ 15 **[2]** Defendant next argues that if we find the *Pataky* presumption applied to the separation agreement, the presumption was rebutted. If the amount necessary to meet the needs of the child, at the time of the hearing, "substantially exceeds" the amount of child support provided for in the separation agreement, then the presumption that the amount provided in the separation agreement is reasonable is rebutted. *Pataky*, 160 N.C. App. at 301, 585 S.E.2d at 412; *Boyd*, 81 N.C. App. at 76, 343 S.E.2d at 585 (1986).

¶ 16 "In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of *specific* fact on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E.2d 47, 50 (1985) (emphasis added). "[F]actual findings must be supported by evidence, and not based on speculation." *Id.* at 236-37, 328 S.E.2d at 51. The trial court may not estimate what portion of household expenses are attributable to the minor child, without evidence supporting the attribution. *See id.* at 236, 328 S.E.2d at 51. The trial court must consider competent evidence of the minor child's yearly expenses incurred by both parents, even if the child lived with each parent at different times throughout the year, to determine the minor child's reasonable needs fully and accurately. *Id.*

¶ 17 The trial court's findings of fact as to the reasonable needs of the child are as follows:

33. The Defendant is currently paying health insurance premiums for himself and the children. He pays a total of $251.11 per month in health, dental and vision premiums. A portion of this amount is for the Defendant. The Court finds that the Defendant is paying $83.70 in premiums for Ella each month.

. . .

44. The Plaintiff is engaged to Scott Diggs. The Plaintiff shares expenses with her fiancé. She pays for groceries and the children's expenses, but her fiancé pays the mortgage and expenses associated with the residence.

. . .

58. The Plaintiff went through all of her bank statements and credit card statements for 2017, 2018, and 2019 and cross-referenced those expenses with the times that she had Ella in her care.

59. The Plaintiff testified that she incurred expenses on behalf of both children (Grace and Ella) in the amount of $35,726.77 in 2017. This includes expenses for Plaintiff's home and utilities, the adult child Grace, and the Plaintiff's legal costs relating to child support. After excluding expenses relating to Grace and legal costs, the Court finds that the actual amount of reasonable expenses incurred by Plaintiff for Ella, in 2017, was $13,080.00 or $1,090.00 per month.

60. The Plaintiff testified that she incurred expenses on behalf of both children in the amount of $36,339.31 in 2018. This includes expenses for Plaintiff's home and utilities, the adult child Grace, and the Plaintiff's legal costs relating to child support. The Court finds that the Plaintiff actually incurred reasonable expenses for Ella, in 2018, in the amount of $9,495.00 or $791.00 per month.

61. Although Plaintiff failed to provide expenses paid after January 2019, the Plaintiff incurred costs relating to the child including for groceries and eating out, personal care, and driver's education ($385.00). The

> Plaintiff uses her car, with a $677.00 per month lease payment, to transport Ella to events and school.
>
> . . .
>
> 64. The Defendant incurred tuition payments on behalf of Ella in 2017 in the amount of $7,325.00. The parties are no longer paying for Ravenscroft in Wake County.
>
> 65. In 2017, Ella was living primarily with Defendant and he was also incurring food expenses, health care premium expenses, and unreimbursed medical expenses. . . .
>
> 66. According to the Defendant's Financial Affidavit, he is currently incurring costs on behalf of the "children" including health care premiums, uninsured medical expenses, entertainment, allowances, eating out, etc. The Defendant listed $2,553.98 in expenses per month for the children's individual monthly expenses.
>
> 67. The Court recognizes that Ella has not stayed with the Defendant more than twice since January 2019 and many of the expenses are not actually being incurred by Plaintiff in 2019. It is important to note, however, that even if only half of these individual expenses are for Ella, that the Defendant is acknowledging that her care requires at least $1,276.99 per month. This does not include regular [re]curring expenses such as housing, utilities, and transportation, etc.

The evidence presented at the 22 April 2019 hearing as to the reasonable needs of the minor child included bank and credit card statements by plaintiff, as well as a financial affidavit, a record of payments for the children's expenses, health insurance costs, bank statements, and credit card statements by defendant. Both parties testified as to the minor child's expenses at the hearing. Further, plaintiff provided the trial court with notes regarding children's expenses, but because these notes were partly based on evidence not presented at the hearing, the exhibit was admitted for illustrative purposes only and not as substantive evidence.

¶ 18 We conclude that the trial court's findings of fact as to the minor child's reasonable needs at best made findings as to the minor child's past expenditures but did not make a finding of her reasonable present expenses. Finding of fact 61 states,

> Although Plaintiff failed to provide expenses paid after January 2019, the Plaintiff incurred costs relating to the child including for groceries and eating out, personal care, and driver's education ($385.00). The Plaintiff uses her car, with a $677.00 per month lease payment, to transport [the minor child] to events and school.

This finding of fact establishes that any findings as to the minor child's reasonable expenses at the time of the hearing in April 2019 was not supported by evidence. The trial court previously indicated in its findings of fact that the minor child lived with plaintiff full-time beginning in 2018. Further, finding of fact 61 establishes that plaintiff failed to provide any evidence of expenses incurred after January 2019, thus plaintiff provided no evidence as to the minor child's current reasonable expenses *at the time of the hearing*.

¶ 19 The trial court's findings as to the minor child's past expenses, as incurred by the plaintiff, are also insufficient. For both 2017 and 2018 the trial court made findings as to plaintiff's total expenses for each year and then found the minor child's expenses for each year "[a]fter excluding expenses relating to [the parties' adult child] and legal costs. . . ." However, these findings do not show this Court that the trial court made findings to the minor child's expenses in 2017 and 2018 based on competent evidence and not speculation. The substantive evidence of expenses offered by plaintiff included bank and credit card statements. While these exhibits show how much money was spent by plaintiff, they do not provide information on what proportion of that money was spent to cover the minor child's expenses. The only evidence offered by plaintiff that delineated what costs were incurred specifically for the minor child was Exhibit 13, "notes regarding the children's expenses." However, Exhibit 13 was only admitted for illustrative purposes, thus the trial court could not have relied on this exhibit to determine how much of plaintiff's total expenses for 2017 and 2018 were for the minor child's needs. Because a trial court may not speculate as to what the minor child's expenses were and may not estimate what portion of household expenses are attributable to the minor child, without evidence supporting the attribution, the trial court's findings of the minor child's expenses paid by plaintiff in 2017 and 2018 are insufficient without further evidence. *See Atwell*, 74 N.C. App. at 236-37, 328 S.E.2d at 51.

¶ 20 The trial court's factual findings regarding defendant's expenses for the minor child are also insufficient to establish the minor child's reasonable expenses at the time of the trial. The trial court found that despite

the fact the minor child "has not stayed with Defendant more than twice since January 2019" defendant's financial affidavit "acknowledg[es] that her care requires at least $1,276.99 per month." This finding suffers the inherent flaw that if in 2019 the minor child is not living with defendant for more than brief visits, as the record shows, defendant's financials cannot serve as "competent evidence" to support a finding of the minor child's present expenses *at the time of the hearing*.

¶ 21 The trial court's findings of fact as to the minor child's reasonable needs at the time of the hearing were not supported by competent evidence and, therefore, were insufficient. Thus, the trial court's conclusion that the contractual child support amount was sufficient to meet the minor child's needs and that the *Pataky* presumption had been rebutted were insufficient as a matter of law. *See Thomas v. Thomas*, 233 N.C. App. 736, 738, 757 S.E.2d 375, 378 (2014) ("The trial court's conclusions of law must be supported by adequate findings of fact."). We remand this issue to the trial court for further findings of fact as to the reasonable needs of the minor child and reconsideration of the *Pataky* presumption.

IV. Attorney's Fees

¶ 22 **[3]** Defendant argues the trial court erred in awarding attorney's fees to plaintiff because it could not be found that defendant breached the contract after the child support provision terminated, therefore, plaintiff was not entitled to attorney's fees under the separation agreement. Further, defendant argues that the trial court erred in denying his claim for attorney's fees, because he was statutorily entitled to child support and therefore, also entitled to attorney's fees under the separation agreement. Notably, defendant is not arguing that the amount of attorney's fees awarded was not reasonable, as a result, we only analyze and discuss the award of attorney's fees and not the reasonableness of the amount awarded.

¶ 23 As discussed above, the child support provision in the parties' separation agreement did not terminate and remained in force. Thus, the issue of who is entitled to attorney's fees under the separation agreement is a matter of contract interpretation. "[Q]uestions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

¶ 24 The attorney's fees provision in the separation agreement provides,

> In the event that [either party] shall be required to bring a civil action against the other to obtain any performance by the other of this Agreement, then the

> party bringing such lawsuit shall be indemnified and shall be entitled to receive from the other such reasonable attorney's fees in respect to the action filed as shall be fixed by the Court in the event that the party shall prevail and the action terminated in the moving party's favor. The party who prevails shall be indemnified by the other for attorney's fees and court costs he or she incurred in bringing or defending of a lawsuit as set forth herein. If such civil action is determined adversely to the moving party, the defending party shall be entitled to receive from the moving party such reasonable attorney's fees in respect to defending such action as shall be fixed by the Court.

Under the separation agreement, the prevailing party in a civil action is entitled to attorney's fees. In the instant matter, plaintiff was the prevailing party at the trial court, and as discussed above the trial court properly awarded her damages for breach of contract. Thus, the trial court did not err by awarding plaintiff reasonable attorney's fees in accordance with the separation agreement.

¶ 25 Defendant also contends that he was entitled to attorney's fees, pursuant to N.C. Gen. Stat. § 50-13.6 and the parties' agreement. Under the separation agreement, defendant would only be entitled to attorney's fees if he were the prevailing party in a civil action "to obtain any performance by [plaintiff] of this Agreement . . . ." Here, defendant was not the prevailing party in plaintiff's action, because plaintiff was entitled to damages for defendant's breach of the separation agreement, and defendant's action was brought to obtain a modification in the separation agreement, not to enforce any provisions of the separation agreement. Thus, defendant is not entitled to attorney's fees under the separation agreement.

¶ 26 Under the statute, in child custody or support proceedings, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2019). "The court's discretion in disallowing attorneys' fees is limited only by the abuse of discretion rule." *Puett v. Puett*, 75 N.C. App. 554, 558-59, 331 S.E.2d 287, 291 (1985) (citation omitted). We find no abuse of discretion in the present case.

¶ 27 Thus, the trial court did not err in finding defendant was not entitled to attorney's fees.

V. Determination of Income

¶ 28 **[4]** Defendant's final argument is that the trial court erred in making finding of fact 30, because the trial court imputed income to defendant, and finding of fact 48, because it is not based on competent evidence.

¶ 29 "Normally, a party's ability to pay child support is determined by that party's income at the time the award is made." *Pataky*, 160 N.C. App. at 306, 585 S.E.2d at 415 (cleaned up). A finding of a party's income may be based only on their actual income at the time of the hearing; projected earnings may not be considered. *Atwell*, 74 N.C. App. at 235, 328 S.E.2d at 50. Here, finding of fact 30 states,

> Defendant currently works at Charter Communications (Spectrum). His base salary is $58,000 per year. Although, the Defendant hopes to earn more in the future, with commissions and bonuses, the Court finds Defendant is currently earning $71,000 annually or $5,916.00 per month.

Evidence offered by defendant indicate that his base salary is $58,000 per year and that he expects to earn commissions but has yet to earn any commissions. Additionally, defendant testified he would receive income between $12,000 and $15,000 over three payments during a one-time "ramp-up period." At the time of the hearing, defendant had received two of the three payments from the "ramp-up period" and the third payment was scheduled to be deposited later that week. Thus, we conclude the trial court's finding of defendant's income was supported by competent evidence and not in error.

¶ 30 Defendant also argues that the trial court's finding of plaintiff's income was not supported by competent evidence because plaintiff receives additional income from a family trust and support from her fiancé and mother. The trial court's finding of fact 48 states, "For the purpose of child support, the Court finds that the Plaintiff is earning $4,343.00 per month." For the purpose of child support actions, income includes any "maintenance received from persons other than parties to the instant action." *Spicer v. Spicer*, 168 N.C. App. 283, 288, 607 S.E.2d 678, 682 (2005). Further, the trial court *may* consider support from third parties but is not required to. *See Guilford Cnty. ex rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996). Here, a careful review of the evidence in the record and the trial court's full findings of fact indicate that the $4,343.00 per month attributed to plaintiff includes income from her family's trust and support from her fiancé. Thus, we conclude the trial court did not err in determining plaintiff's income.

VI. Conclusion

¶ 31 For the foregoing reasons we affirm the trial court's order in part and reverse and remand in part for further findings. We affirm the portions of the order in which the trial court awarded damages for breach of contract and attorney's fees to plaintiff. We vacate the portions of the order in which the trial court established child support at the contractual amount, $1,150.00 per month to plaintiff. We therefore remand the case to the trial court for further proceedings consistent with this opinion. The trial court may receive additional evidence for consideration on remand as needed to address the issues discussed in this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and COLLINS concur.

ZAHEER B. MUGHAL, Plaintiff
v.
LALLA R. MESBAHI, Defendant

No. COA20-667

Filed 16 November 2021

Appeal and Error—nonjurisdictional appellate rule—noncompliance—substantial and gross—dismissal warranted

In an appeal from a child support order, the parties' inclusion of unredacted confidential information—including the parties' social security numbers, bank account numbers, credit card numbers, and employer identification numbers, as well as their three minor children's social security numbers—in defendant's opening brief and in certain Rule 9(d) documentary exhibits constituted a substantial failure and gross violation of Appellate Rule 42(e), a nonjurisdictional rule. Consequently, the Court of Appeals dismissed the appeal and taxed double costs to the parties' attorneys, with each attorney being liable for one-half of the costs, and declined to invoke Appellate Rule 2 to reach the merits of the appeal.

Appeal by Defendant from order entered 13 January 2020 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 21 September 2021.

Bryant Duke Paris, III Professional Limited Liability Company, by Bryant Duke Paris III, for plaintiff-appellee.

Linck Harris Law Group, PLLC, by David H. Harris, Jr., for defendant-appellant.

MURPHY, Judge.

¶ 1 When a party fails to comply with our Rules of Appellate Procedure and that noncompliance rises to the level of a substantial failure and/or gross violation, we may exercise our discretion to impose an appropriate sanction under Rule 34. Here, both parties violated Rule 42(e) by repeatedly including unredacted confidential information in the case materials submitted to the Court via our online filing system. These violations constitute both substantial failures and gross violations of a nonjurisdictional rule. We exercise our discretion to impose appropriate sanctions and dismiss the appeal and tax double costs of the appeal to the attorneys for both parties. Defendant-Appellant's attorney shall be individually liable for one-half of the double costs. Plaintiff-Appellee's attorney shall be individually liable for one-half of the double costs. We have thoroughly considered the use of our Rule 2 discretion in this matter to reach the merits, but decline to do so.

BACKGROUND

¶ 2 Defendant-Appellant Lalla R. Mesbahi and Plaintiff-Appellee Zaheer B. Mughal were married on 12 March 2009. Plaintiff and Defendant separated on 1 November 2016 and divorced on 11 January 2019. Plaintiff and Defendant are the parents of three minor children. The parties have equal joint physical custody of the minor children.

¶ 3 Plaintiff commenced this action by filing a complaint on 27 September 2016. In response, on 6 December 2016, Defendant filed an answer and counterclaim for temporary and permanent child support. The trial court held a hearing on Defendant's claim for permanent child support on 2 December 2019. On 13 January 2020, the trial court filed its *Permanent Child Support Order*, and ordered "[e]ffective [1 January 2020], and continuing each month thereafter, Plaintiff shall pay to Defendant $594.00 per month in prospective child support." This amount was calculated using the North Carolina Child Support Guidelines based on Plaintiff's gross monthly income of $4,238.08 and Defendant's gross monthly income of $1,558.00. On 5 February 2020, Defendant timely filed a *Notice of Appeal*. On appeal, Defendant argues the trial court erred in calculating Plaintiff's gross monthly income.

¶ 4 On 8 May 2020, Plaintiff filed a notice that he would be representing himself in the appeal and on 3 June 2020, the trial court allowed Plaintiff's trial counsel to withdraw. Through counsel, Defendant timely served her proposed record on appeal to Plaintiff by United States postal service on 21 July 2020. In the interim, Plaintiff retained counsel and, through counsel, timely served Defendant with amendments to the proposed record on appeal by United States postal service on 24 August 2020. The amendments were received in Defendant's counsel's office on 28 August 2020. Defendant did not request judicial settlement of the proposed record on appeal. *See* N.C. R. App. P. 11(c) (2021) ("Within thirty days . . . after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement."). The proposed record on appeal would have been deemed settled by operation of law on 8 September 2020. *See id.* ("If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).").

¶ 5 On 3 September 2020, Defendant prematurely filed the *Record on Appeal* with this Court, omitting Plaintiff's amendments that were required to be included in the settled record on appeal pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure, as well as omitting Plaintiff's Rule 9(d) documentary exhibits. *See id.* ("If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal."). On 2 October 2020, Plaintiff filed a motion for leave to amend the *Record on Appeal.* We granted the motion, and on 16 October 2020, Defendant filed the *Amended Record on Appeal* and the *Rule 9(d) Documentary Exhibits* requested by Plaintiff. Defendant filed her opening brief on 4 December 2020. However, on 24 February 2021, Defendant filed a motion for leave to amend the

Rule 9(d) Documentary Exhibits because "[t]he submission inadvertently included documents not agreed to by the parties."[1] We granted the motion, and on 1 March 2021, Defendant filed the *Amended Rule 9(d) Documentary Exhibits*.

¶ 6 On 17 September 2021, we *sua sponte* entered the *Amended Order* ("September 2021 Order") striking the Amended Rule 9(d)(2) Supplement and Defendant's opening brief "for inclusion of unredacted identification numbers" in violation of Rule 42 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 42(e) ("Driver license numbers, financial account numbers, social security numbers, and tax identification numbers must be excluded or redacted from all documents that are filed with the appellate courts . . . ."). Both Defendant's appendix to her opening brief and the Rule 9(d) documentary exhibits requested by Plaintiff contained unredacted confidential information, such as the parties' unredacted social security numbers, bank account numbers, credit card numbers, and employer identification numbers, as well as the three minor children's unredacted social security numbers. In our September 2021 Order, we determined these violations of Rule 42

> constitute both substantial failures and gross violations of a nonjurisdictional rule. These failures and violations include, but are not limited to, the exposure to public inspection of identification numbers related not only to the parties, but also to their minor children from 4 December 2020 through this Court's sua sponte removal from the online filing system on 14 September 2021.

Defendant was further ordered to "show cause as to what sanction may be appropriate[.]"

ANALYSIS

¶ 7 Defendant argues "[t]he Rule 9(d) Documentary Exhibits are all [Plaintiff's] documents, submitted at the request of [Plaintiff's] counsel and were provided to [Defendant's counsel] by [Plaintiff's] counsel." As such, Defendant asserts her counsel "only glanced at [Plaintiff's] documents. Having been assured the documents [were] properly redacted, and having seen a couple of redactions, [Defendant's counsel] did not conduct a thorough search of the Rule 9(d) Documentary Exhibits." Defendant suggests "both attorneys are responsible for the nonredacted

1. Plaintiff's counsel notified Defendant's counsel of this error.

information" and concedes "[m]onetary damages may be appropriate." For the reasons discussed below, we have determined that the proper sanctions are to dismiss the appeal and tax double costs to the parties' attorneys, with one-half of the costs to Defendant's attorney, individually, and one-half of the costs to Plaintiff's attorney, individually.

¶ 8 "[R]ules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes. It necessarily follows that failure of the parties to comply with the rules . . . may impede the administration of justice." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (marks and citations omitted). "Compliance with the rules, therefore, is mandatory." *Id.* at 194, 657 S.E.2d at 362. "As a natural corollary, parties who default under the rules ordinarily forfeit their right to review on the merits." *Id.* at 194, 657 S.E.2d at 363.

¶ 9 However, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Id.* Where, as here, a nonjurisdictional default has occurred, "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365 (citations omitted). However, in some instances of nonjurisdictional defaults when the noncompliance rises to the level of a substantial failure or gross violation, dismissal will be an appropriate sanction. *Id.* at 199, 657 S.E.2d at 366. When presented with a nonjurisdictional default, we must perform a three-part analysis:

> [T]he court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Id. at 201, 657 S.E.2d at 367. "'[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules . . . is always a discretionary determination to be made on a case-by-case basis.'" *State v. Ricks*, 2021-NCSC-116, ¶ 5 (quoting *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017)).

¶ 10 In the September 2021 Order, we determined that Defendant's violations of the appellate rules, specifically Rule 42, "constitute both substantial failures and gross violations of a nonjurisdictional rule." As such, the first step of imposing a sanction for a nonjurisdictional default

is met. Rule 34(a)(3) provides, in pertinent part, that "the appellate [court] may . . . impose a sanction . . . when the court determines that . . . a petition, motion, brief, record, or other paper filed in the appeal . . . grossly violated appellate court rules." N.C. R. App. P. 34(a)(3) (2021). Rule 34(b)'s enumerated possible sanctions include dismissal, various types of monetary damages, and "any other sanction deemed just and proper." N.C. R. App. P. 34(b) (2021). "[T]he sanction imposed should reflect the gravity of the violation[,]" and entail this Court's discretionary "authority to promote compliance with the appellate rules[.]" *Dogwood*, 362 N.C. at 199, 200, 657 S.E.2d at 366.

¶ 11 Having considered sanctions permitted under Rule 34(b) other than dismissal, we conclude that, in a case such as this, dismissal is appropriate and justified. While the inclusion of Plaintiff's unredacted social security numbers, bank account numbers, credit card numbers, and employer identification numbers still rises to a level of substantial failure and gross violation of Rule 42, Plaintiff was in a place to protect himself from the disclosure of this information. He chose not to do so. The same cannot be said for the non-party minor children. Defendant included the three minor children's unredacted social security numbers alongside their full names and dates of birth in multiple places throughout Defendant's opening brief and Plaintiff did the same in the Rule 9(d) exhibits he requested. This is more than a mere oversight, as it created an opportunity for outside third parties to use our public records and filing system as a haven for potential identify theft. *See generally* N.C.G.S. § 132-1.10(a)(1) (2019) ("The General Assembly finds the following: The social security number can be used as a tool to perpetrate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual. While the social security number was intended to be used solely for the administration of the federal Social Security System, over time this unique numeric identifier has been used extensively for identity verification purposes and other legitimate consensual purposes."). The minor children were not in a position to protect themselves from this harm, and it was the parties' duty to shield this confidential information from public disclosure. Rule 42, by its very name, is for the purpose of protecting identities, and the parties' failure to comply with this rule created significant risks to the children. Due to the severity of this violation and to "promote compliance with the appellate rules," we conclude dismissal is the appropriate sanction. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Additionally, as both parties' attorneys are at fault for the violations, we tax double costs to the parties' attorneys, with one-half of the costs to Defendant's attorney, individually,

and one-half of the costs to Plaintiff's attorney, individually. N.C. R. App. P. 35(a) (2021) ("[I]f an appeal is dismissed, costs shall be taxed against the appellant unless otherwise . . . ordered by the court.").

¶ 12 Finally, we consider whether to invoke Rule 2 and review the merits of the appeal despite the gross and substantial violations of the appellate rules warranting our decision that dismissal is the appropriate sanction. *See Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367 ("If the court determines that the degree of a party's noncompliance with nonjurisdictional requirements warrants dismissal of the appeal under Rule 34(b), it may consider invoking Rule 2."). "[A]n appellate court may only invoke Rule 2 when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest." *Ricks*, 2021-NCSC-116 at ¶ 1. The order from which Defendant appeals requires Plaintiff to pay Defendant child support in an amount calculated using the North Carolina Child Support Guidelines. On appeal, Defendant argues the numbers used on the North Carolina Child Support Guidelines were incorrect. "[N]othing inherent in these circumstances indicates the exceptionality or manifest injustice necessary to justify suspending the appellate rules in order to reach the merits of [Defendant's] appeal." *Ramsey v. Ramsey*, 264 N.C. App. 431, 437, 826 S.E.2d 459, 464 (2019). Further, there is no merit to Defendant's argument. In the exercise of our discretion, we decline to invoke Rule 2.

CONCLUSION

¶ 13 Due to the severity of the substantial failures and gross violations of a nonjurisdictional rule, we dismiss this appeal. We decline to invoke Rule 2 to reach the merits of the appeal. The attorneys for both parties are responsible, in part, for the substantial failures and gross violations, and as a result, we also tax double costs of the appeal. Defendant's attorney shall be individually liable for one-half of the costs assessed and Plaintiff's attorney shall be individually liable for one-half of the costs assessed.

DISMISSED.

Judges INMAN and HAMPSON concur.

PURVIS v. PURVIS

[280 N.C. App. 345, 2021-NCCOA-616]

EDDIE DWAYNE PURVIS, Plaintiff
v.
CONSTANCE BAKER PURVIS, Defendant

No. COA20-884

Filed 16 November 2021

Divorce—equitable distribution—classification of property—marital—child's student loan debt

The trial court did not err by classifying student loan debt, which was acquired in plaintiff-husband's name during the marriage for the benefit of the parties' adult daughter, as marital property. The parties made a joint decision to incur the debt; defendant-wife actively participated in obtaining the loan, and the loan provided a joint benefit to the parties by covering their daughter's educational expenses.

Appeal by Defendant from order entered 18 September 2019 by Judge Warren McSweeney in Moore County District Court. Heard in the Court of Appeals 7 September 2021.

Van Camp, Meacham, & Newman, PLLC, by Whitney Shea Phillips Foushee, for Plaintiff-Appellee.

Kreider Law, PLLC, by Jonathan G. Kreider for Defendant-Appellant

WOOD, Judge.

¶ 1 Defendant Constance Purvis ("Defendant") appeals an order in which the trial court classified student loans acquired by the parties in the name of the Plaintiff Eddie Purvis ("Plaintiff") for the benefit of their adult daughter as marital property. After careful review of the record and applicable law, we affirm the order of the trial court.

I. Factual and Procedural Background

¶ 2 On September 24, 1988, Plaintiff and Defendant married. The parties separated on February 25, 2017. While the parties were married, they shared one joint bank account. The parties had a daughter who attended Sweet Briar College ("Sweet Briar") from 2009 until 2013. During her time at Sweet Briar, the parties' daughter acquired several student loans in her name, and Plaintiff acquired student loans in his name. The loans

Plaintiff acquired were administered through Great Lakes Educational Loan Services, Inc.[1] ("Great Lakes"). The Great Lakes loans were used by the parties' daughter for tuition, books, and living expenses.

¶ 3 Plaintiff contends that, although the Great Lakes loans were incurred in his sole name, the parties made a joint decision in acquiring the loans in question. According to Plaintiff's affidavit, the parties decided the Great Lakes loans would be in Plaintiff's name only due to a discrepancy in the parties' credit scores. Defendant is the one who completed and submitted the application for the loans and used her personal email address. Plaintiff did not use the Federal Student Aid website through which the loans were acquired. At some point, Defendant's mother co-signed loan documents for one of the Great Lakes loans.

¶ 4 Disbursements for the Great Lakes loans occurred on September 9, 2009 in the amount of $31,433.72; September 8, 2010 in the amount of $34,229.51; September 7, 2011 in the amount of $36,442.61; and September 12, 2012 in the amount of $42,441.84. The outstanding debt of the Great Lakes loans was $164,163.00 on the date of separation in 2017. The disbursements for the Great Lakes loans were made directly to Sweet Briar, and the parties used their joint bank account to make the payments on the Great Lakes loan.

¶ 5 On August 5, 2019, Defendant filed a motion for summary judgment, seeking a declaration that the Great Lakes loans were separate, rather than marital, property. The trial court denied Defendant's motion on September 18, 2019.[2] In its written order, the trial court found "there is no genuine issue of material fact to be resolved . . . and that partial summary judgment should be instead entered in favor of . . . Plaintiff declaring that the Great Lakes Student Loan . . . is marital property as a matter of law."

¶ 6 On March 20, 2020, the trial court entered its equitable distribution order, in which it found the Great Lakes loans were marital property.[3]

---

1. Great Lakes is a student loan servicer chosen by the U.S. Department of Education to service federal student loans. Great Lakes provides federal borrowers with information concerning the repayment of their federal loans and manages the repayment of such loans. *See* Great Lakes Educational Loan Services, Inc., https://mygreatlakes.org/educate/knowledge-center/transferred-loan-questions.html.

2. It is from this order Defendant appeals. Defendant's notice of appeal does not indicate she appeals from the trial court's equitable distribution order entered on March 20, 2020.

3. Defendant does not appeal the trial court's equitable distribution order.

Plaintiff was assigned 75% of the outstanding balance of the loans, and Defendant was assigned 25% of the outstanding balance of the loans. Defendant filed her notice of appeal on June 18, 2020.

II. Discussion

¶ 7 In her sole argument on appeal, Defendant contends the trial court erred in classifying the Great Lakes loans as marital property. We disagree.

¶ 8 As a preliminary matter, we note that Defendant argues in her appellate briefing that she appeals from the trial court's equitable distribution order. Generally, an

> equitable distribution order is a final judgment of a district court in a civil action under N.C. Gen. Stat. § 7A–27(c) (2009). On appeal, when reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact "as long as they are supported by competent evidence." *Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 791 (1992). However, the trial court's conclusions of law are reviewed *de novo*. *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004). Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Mugno v. Mugno, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010). However, Defendant's written notice of appeal does not state she appeals the trial court's equitable distribution order entered on March 20, 2020; rather, Defendant appeals the trial court's summary judgment order entered on September 18, 2019. Accordingly, we review summary judgment orders *de novo*. *Raymond v. Raymond*, 257 N.C. App. 700, 708, 811 S.E.2d 168, 173 (2018) (citation omitted). Summary judgment "is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 708, 811 S.E.2d at 173-74 (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted)); *see also Harroff v. Harroff*, 100 N.C. App. 686, 689, 398 S.E.2d 340, 342-43 (1990) (citing *Ledford v. Ledford*, 49 N.C. App. 226, 228, 271 S.E.2d 393, 396 (1980)). As the parties dispute the trial court's classification of the Great Lakes loans as marital property and do not contend there are any genuine issues of material fact, we limit our review to the trial court's classification of the loans.

¶ 9 In accordance with the North Carolina Equitable Distribution Act, the trial court is statutorily mandated to determine whether property is marital, divisible, or separate property. *See* N.C. Gen. Stat. § 50-20 (2020). When making an equitable distribution determination,

> the trial court is required to follow a three-step analysis: (1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property.

Mugno, 205 N.C. App. at 277, 695 S.E.2d at 498 (citing *Little v. Little*, 74 N.C. App. 12, 16-20, 327 S.E.2d 283, 287-89 (1985)); *see also Turner v. Turner*, 64 N.C. App. 342, 345-46, 307 S.E.2d 407, 408-09 (1983).

¶ 10 In the present appeal, Defendant contends the trial court erred in classifying the Great Lakes loans as marital property because educational degrees are excluded from marital property for the purpose of equitable distribution. While Defendant correctly notes that our legislature excluded educational degrees under the definitions of marital and separate property, the question before this Court is whether the Great Lakes loans are a marital debt.

¶ 11 Notably, N.C. Gen. Stat. § 50-20 does not define "marital debt." N.C. Gen. Stat. § 50-20. However, Section 50-20 defines "marital property" as "property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property." N.C. Gen. Stat. § 50-20(b)(1); *see also Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Separate property, conversely, is "property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(2).

¶ 12 Debt, under North Carolina law, is not treated differently from assets. *Huguelet*, 113 N.C. App. at 536, 439 S.E.2d at 210. Thus, "[a] martial debt . . . is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Id.* (citations omitted). "The party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was 'incurred during the marriage for the joint benefit of the husband and wife.' " *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181,

183 (1990) (quoting *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987)); *see also White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1995). Here, the parties do not dispute that the Great Lakes loans were incurred during the marriage and before the date of separation. The only issue before us is whether the loan was "for the joint benefit of the parties." *See Miller*, 97 N.C. App. at 79, 387 S.E.2d at 183.

¶ 13 While our Court has addressed the classification of a spouse's educational degree and its associated student loans, *see Haywood v. Haywood*, 106 N.C. App. 91, 99, 415 S.E.2d 565, 570 (1992) (holding "educational degrees, like professional degrees and business licenses, are personal to their holders . . . and are not property for the purposes of equitable distribution."), *modified*, 332 N.C. 342, 425 S.E.2d 696 (1993); *see also Baldwin v. Baldwin*, No. COA13-874, 232 N.C. App. 521, 2014 WL 636344 (N.C. Ct. App. Feb. 18, 2014) (unpublished) (holding that student loans incurred to further the plaintiff's education were separate property), no North Carolina court has considered student loan debt on these facts.

¶ 14 Other jurisdictions, however, have examined the issue of student loan debts acquired by one of the parties on behalf of adult children. In *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002), the Nebraskan appellate court held that a student loan incurred for the couple's adult child "was not incurred to satisfy an obligation of either party" and, thus, separate property. 11 Neb. at 449, 652 N.W.2d at 305. Similarly, in *Palin v. Palin*, 41 A.3d 248 (R.I. 2012), the Rhode Island Supreme Court held that student loans incurred by one spouse for the benefit of the parties' adult daughter was not marital debt. Notably, in both *McGuire* and *Palin*, the spouse arguing that student loans for the benefit of an adult child does not constitute marital property lacked prior knowledge of and did not consent to incurring the loans in question. *McGuire*, 11 Neb. at 448-49, 652 N.W. at 305; *Palin*, 41 A.3d at 257.

¶ 15 Conversely, in *Vergitz v. Vergitz*, 2007-Ohio-1395 (Ohio Ct. App. Mar. 23, 2007) (unpublished), an Ohio appellate court affirmed the classification of student loan debt incurred for an adult child as marital property. 2007-Ohio-1395, ¶ 13-16; *see also Cooper v. Cooper*, 2013-Ohio-4433 (Ohio Ct. App. Oct. 7, 2013) (unpublished). In *Vergitz*, the court noted, "The important point is the loans were debt incurred during the marriage" and "the loan agreement . . . could be treated as any other expenditure that married couples make." *Vergitz*, 2007-Ohio-1395, ¶ 13. In *Cooper*, the Ohio Court of Appeals held that student loan debt incurred during the marriage for the benefit of the parties' adult son was presumed marital. 2013-Ohio-443, ¶ 21. In so doing, the court noted "the mere fact

that the debt was in [the] [h]usband's name alone is not enough to establish that the debt was . . . separate debt." *Id.* We find the reasoning in *Vergitz* and *Cooper* persuasive and adopt it herein.

¶ 16 Here, the parties do not dispute that there was a joint agreement to incur the debt. Nor do the parties dispute that Defendant actively participated in obtaining the loans. The parties' affidavits demonstrate there was a joint benefit, in that their daughter's tuition, books, and living expenses were covered by the loan rather than out-of-pocket expenses. Further, "providing [their] daughter with a formal education was something that [they] both wanted and agreed, to do." Although this is not a tangible benefit in that the Great Lakes loans were not deposited in the parties' account, a tangible benefit is not required under North Carolina law. *Warren v. Warren*, 241 N.C. App. 634, 637, 773 S.E.2d 135, 137-38 (2015) ("Although our Courts have not specifically defined what constitutes a joint benefit in the context of marital debt, this Court has never required that the marital unit actually benefited from the debt incurred."). Accordingly, we hold the trial court did not err in classifying the Great Lakes loans as marital property, where the loans were obtained during the marriage for the parties' adult daughter.

III. Conclusion

¶ 17 After careful review of the record and applicable law, we affirm the order of the trial court. It is so ordered.

AFFIRMED.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
ARTHUR VLADIMIR KOCHETKOV, DEFENDANT

No. COA20-774

Filed 16 November 2021

Search and Seizure—search warrant application—affidavit—probable cause—undated screenshots of social media posts

A search warrant application established probable cause to search defendant's house for devices and documentation related to communicating threats and making a false report concerning mass violence on educational property, where the accompanying affidavit included information detailing defendant's past encounters with police and screenshots of defendant's Facebook posts that contained threatening content and references to schools. Further, the social media posts were not stale even though they had no dates or times on them, because the items to be seized included ones that had enduring utility to defendant.

Appeal by defendant from judgments and orders entered 15 July 2020 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson, for the State-appellee.

Appellate Defender Glen G. Gerding, by Assistant Appellate Defender Michele Goldman, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Arthur Vladimir Kochetkov appeals from a plea of guilty to five counts of second-degree sexual exploitation of a child. Defendant challenges the trial court's denial of his motion to suppress evidence. We affirm the trial court's order.

I. Background

¶ 2 This case arises from several posts made on a Facebook account with the name "Kochetkov Arthur." The Wake Forest Police Department ("WFPD") became aware of the relevant Facebook posts after being contacted by Officer Streb with the Town of Greece Police Department

("GPD") in New York. Officer Streb informed Corporal Chilton with the WFPD that Dean Stavalone, an acquaintance of defendant, had contacted the GPD about the Facebook posts. Screenshots of the Facebook posts, which are only viewable to the account owner's "Facebook friends," were sent to Corporal Chilton.

¶ 3 Corporal Chilton used the Facebook posts to obtain a warrant for defendant's arrest for Communicating Threats under N.C. Gen. Stat. § 14-277.1. However, the magistrate judge concluded there was not enough evidence to obtain an involuntary commitment order. The arrest warrant was executed on 17 September 2018; defendant was arrested but his home was not searched.

¶ 4 On 19 September 2018, Detective B.J. High with the WFPD applied for a search warrant of defendant's home. Items to be seized under the warrant were electronic devices including cell phones, computers, tablets, hard drives, USB drives, CDs, and disks; written documentation including any handwritten notes, printed notes, photographs, or documents in which a threat is communicated or which contain information or documentation about schools or other possible targeted areas of mass violence; and weapons to include handguns, long guns, weapons of mass destruction, or explosives. The crimes being investigated in conjunction with the search warrant were Communicating Threats, under N.C. Gen. Stat. § 14-277.1, and Making a False Report Concerning Mass Violence on Educational Property, under N.C. Gen. Stat. § 14-277.5. The search warrant application included screenshots of the Facebook posts obtained from the GPD and outlined defendant's prior encounters with the WFPD. Wake County Superior Court Judge Andrew Heath found the search warrant application demonstrated probable cause and issued a search warrant of defendant's home.

¶ 5 On 19 September 2018, the WFPD executed the search warrant and searched defendant's home. One of the items seized in the search was defendant's cell phone. While conducting a forensic search of the cell phone, images of alleged child pornography were found. These images led to a subsequent search warrant and search of defendant's home, ultimately leading to defendant being charged and indicted with five counts of Second-Degree Sexual Exploitation of a Child.

¶ 6 On 29 July 2019, defendant filed a motion to suppress alleging the information provided in the affidavit supporting the search warrant application was stale, the warrant was insufficient because Mr. Stavalone's veracity was not established, the Facebook posts did not support the crimes alleged, and that there was not a nexus between defendant's

home and potential evidence to be seized. The motion did not come on for hearing until 1 June 2020. Following the hearing on the motion, the trial court denied defendant's motion to dismiss. On 15 July 2020, defendant pled guilty to all five counts of Second-Degree Sexual Exploitation of a Child, having given prior proper notice of his intention to appeal the trial court's order on his motion to dismiss. Defendant filed a written notice of appeal on 27 July 2020.

II. Discussion

¶ 7 "We review an order denying a motion to suppress to determine whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017) (cleaned up).

¶ 8 The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. Generally, the police need a warrant to conduct a search or seizure in a home, and a warrant may be issued only after a showing of probable cause. *See Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639 (1980). Article I, Section 20 of the Constitution of North Carolina similarly prohibits unreasonable searches and seizures and requires a showing of probable cause to issue a warrant. *See State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984).

¶ 9 The totality of the circumstances test is used to determine whether probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527 (1983); *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260-61 (adopting the federal test for evaluating probable cause). "To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw reasonable inferences from the available observations." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) (cleaned up). To support a magistrate's finding of probable cause, the evidence need not be conclusive, so long as all the evidence together "yields a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched." *Id.*

¶ 10 A magistrate's probable cause determination should not be subject to *de novo* review, instead the magistrate's probable cause determination should be given "great deference." *Id.* (citations omitted). The duty of a reviewing court is to ensure that the magistrate had a "substantial basis for concluding that probable cause existed." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (cleaned up).

¶ 11 An application for a search warrant must be accompanied by, among other things, "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items [to be seized] are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(3) (2020). "A supporting affidavit is sufficient when it gives the magistrate reasonable cause to believe that the search will reveal the presence of the items sought on the premises described in the warrant application, and that those items will aid in the apprehension or conviction of the offender." *Allman*, 369 N.C. at 294, 794 S.E.2d at 304. A magistrate cannot lawfully issue a search warrant based on a "purely conclusory" affidavit that does not state the underlying circumstances allegedly giving rise to probable cause. *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980).

¶ 12 The affidavit in this case, which was submitted by Detective High, contained all of the following allegations: screenshots of the Facebook posts allegedly made by defendant, which contained vague threats of violence, references to local schools, and defendant's military training; descriptions of the WFPD's prior encounters with defendant, which over the span of three years includes serving involuntary commitment orders, welfare checks, tips received from the Federal Bureau of Investigation based on Facebook posts defendant made, an arrest for posting threats to law enforcement on Facebook (although no probable cause was found in that case); and the issuance of a warrant for defendant's arrest for Second-Degree Trespassing after defendant was allegedly seen photographing locks on doors at a local elementary school, which is located adjacent to defendant's home.

¶ 13 In addition to stating these allegations, the affidavit recited Detective High's law enforcement training and experience. The affidavit also described how the WFPD became aware of defendant's alleged Facebook posts and obtained screenshots of the posts. Additionally, the affidavit provided information on how and why Detective High knew the address listed on the affidavit was defendant's residence.

¶ 14 Defendant first argues that the trial court erred in denying his motion to suppress evidence, because the affidavit did not establish probable cause he committed the designated offense. Defendant asserts that the Facebook posts did not provide enough evidence to establish the elements of Communicating Threats nor did the Facebook posts directly or indirectly communicate a threat to the person to be threatened. However, defendant mischaracterizes the standard to issue a search warrant. Probable cause does not require evidence of every element of a crime. To find probable cause exists, a magistrate need only "make a

practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002).

¶ 15 As discussed above, the affidavit in this case included screenshots of Facebook posts allegedly made by defendant which contained content relating to threats, violence, and referencing schools, as well as information of defendant's prior encounters with the police, including an arrest for trespassing at a nearby elementary school. We conclude that this information is sufficient to support a magistrate's finding, under the totality of the circumstances test, that evidence of a crime may be found at the place to be searched and in the items to be seized.

¶ 16 Defendant also argues that the information listed in the affidavit was stale because it failed to establish when the Facebook posts were made or discovered. "The general rule is that no more than a 'reasonable' time may have elapsed. 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. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (citations omitted). "Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock." *Id.* at 566, 293 S.E.2d at 834 (cleaned up). "As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant." *Id.* However, courts have expanded these time limits when the items to be seized include items with enduring utility to the defendant beyond criminal activity and the defendant is not likely to dispose of the items, such as computers, computer equipment, camera equipment, etc. *See Pickard*, 178 N.C. App. 330, 336, 631 S.E.2d 203, 207–08 (2006).

¶ 17 Defendant contends that because the screenshots of the Facebook posts do not include dates and times, nor did the affidavit provide information as to when Mr. Stavalone provided the information to the police, we must find the information to be stale because no determination as to how much time has elapsed can be made. In contrast, the State argues that because of the nature of the posts and their inclusion in a "course of conduct" the exact age of the posts is less critical to the validity of probable cause in connection with the specific items subject to a search here. The search warrant provided the items to be seized were electronic devices to include cell phones, computers, tablets, hard drive devices, USB

drives, CDs, and disks; written documentation to include any handwritten notes, printed notes, photographs, or other documents; and weapons to include handguns, long guns, weapons of mass destruction, or explosives. Because the items to be seized included items with enduring utility, like those listed to be seized in cases such as *Pickard* where the time period for staleness was determined to be several months or longer, we conclude the information was not stale, despite the lack of date and time information. *See id.*

¶ 18 Finally, defendant argues that the trial court erred because its order did not find that the affidavit supplied probable cause to believe that the designated crimes had occurred or were about to occur. Instead, the trial court concluded that "the affidavit sufficiently established that the evidence sought was relevant to the investigation of the defendant." Defendant contends that nowhere in its order did the trial court find the affidavit established probable cause. Defendant's argument and contentions lack merit. While the trial court's order did conclude that the evidence sought was relevant to the investigation, the order also explicitly found that the affidavit established probable cause in finding of fact 16 and conclusion of law 2. Therefore, we dismiss this argument.

III. Conclusion

¶ 19 For the foregoing reasons we affirm the trial court's order denying defendant's motion to suppress because the trial court properly found the affidavit supported the magistrate's finding of probable cause and the trial court applied the proper standard in its order.

AFFIRMED.

Judges DIETZ and COLLINS concur.

STATE v. METCALF

[280 N.C. App. 357, 2021-NCCOA-618]

STATE OF NORTH CAROLINA
v.
JESSICA LEA METCALF, DEFENDANT

No. COA20-917

Filed 16 November 2021

1. Constitutional Law—right to impartial jury—motion to strike jury venire—passing remark by trial court

The trial court in a prosecution for involuntary manslaughter properly denied defendant's motion to strike the jury venire where, when addressing the jury pool before jury selection, the court inadvertently mentioned that defendant's attorneys were from the public defender's office. The jury pool could not have reasonably inferred that this single, passing reference was an opinion on a factual issue in the case, defendant's guilt, or the weight or credibility of the evidence, and therefore the court's remark neither violated defendant's right to a fair trial before an impartial jury nor warranted a new trial.

2. Homicide—involuntary manslaughter—culpable negligence—proximate cause—sufficiency of evidence

In a prosecution where defendant was charged with involuntary manslaughter for leaving her boyfriend's three-year-old nephew inside a burning trailer home, the trial court properly denied defendant's motion to dismiss the charge for insufficiency of the evidence. Substantial evidence showed defendant was culpably negligent in her rescue efforts where she admitted that she could have removed the child from the burning trailer when she left to retrieve water but did not and then repeatedly told neighbors and firefighters at the scene that nobody was inside the trailer, and where she engaged in risk-creating behavior by overdosing on Xanax that day despite knowing the child would be in her care. The evidence also showed that defendant's acts proximately caused the child's death where the child was still alive when defendant left the trailer and where any harm resulting from defendant's acts was foreseeable.

3. Indictment and Information—short-form indictment—involuntary manslaughter—sufficiency

A short-form indictment for involuntary manslaughter was not fatally defective where it met the pleading requirements set forth in N.C.G.S. § 15-144—which provides that an indictment for manslaughter is sufficient if it alleges that a defendant feloniously

and willfully killed and slayed the victim—and where the constitutionality of such short-form indictments had been upheld in prior case law.

Appeal by Defendant from judgment entered 23 August 2019 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 September 2021.

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

Anne Bleyman for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Jessica Lea Metcalf appeals from a judgment entered upon a jury verdict finding her guilty of involuntary manslaughter of a three-year-old child, Archie.[1] On appeal, Defendant contends that the trial court erred by (1) denying Defendant's motion to strike the jury venire; (2) failing to grant Defendant's motion to dismiss for insufficient evidence; and (3) failing to dismiss the indictment due to insufficient notice. Upon review, we hold that Defendant received a fair trial, free from error.

I. Factual and Procedural History

¶ 2 In January 2015, Defendant cohabitated in a trailer home with her boyfriend, Brandon Rathbone, in Buncombe County. The trailer home had no running water because the well pump "froze and busted" in the cold. The trailer home also had no house telephone, and Defendant's cell phone had minimal service. Defendant stated that an electric heater was used to heat the trailer when it was cold, and that the trailer's wall would get hot when Defendant and Mr. Rathbone used the heater.

¶ 3 Archie was Mr. Rathbone's nephew. On or around 20 January 2015, Archie came to stay with Mr. Rathbone and Defendant for several days while Archie's mother was hospitalized to give birth to another child. Mr. Rathbone's parents, Wanda and Stephen Neil, lived nearby. Typically, Mr. or Mrs. Neil would pick up Archie between 8:30 and 9:30 a.m. to care for Archie while Mr. Rathbone was at work. Defendant had taken time

1. We use a pseudonym to protect the anonymity of the child and for ease of reading. *See* N.C. R. App. P. 42.

off of work to watch Archie when Mrs. Neil, Mr. Neil, and Mr. Rathbone were unwilling to do so.

¶ 4 At approximately 7:00 p.m. on 27 January 2015, Defendant took four tablets of Xanax, although Defendant stated she was only allowed to take "up to three [tablets] a day." Defendant also stated she could not remember if she had gotten up in the middle of the night to take more Xanax. Between 6:00 and 6:15 a.m. on the following morning, Mr. Rathbone left home for work like he did every day. After Mr. Rathbone left for work, Defendant heard Archie moving around, checked on him, and noticed Archie had wet the bed, so she changed his pants.

¶ 5 At approximately 7:00 a.m., Defendant turned on the heater in the living room. After watching television for some time, Defendant went to the bathroom and "smoked about a half of a cigarette." Defendant stated that she would only smoke outside or in the bathroom. Upon returning to the living room, Defendant observed that sparks were coming from either the heater or the electric outlet and that the sparks were already burning holes in the couch cushions. The couch was already smoking from the sparks.

¶ 6 In an attempt to stop the burning, Defendant grabbed a blanket to smother the fire; however, the blanket caught fire and stuck to Defendant's hands and burned her. Defendant stated that she did not immediately get Archie out of the trailer home because she believed that she could put out the fire. Defendant stated she went to the front door and yelled for help. Defendant then went to the kitchen to look for water to extinguish the fire, but there was no running water in the mobile home. Defendant stated that "usually they keep several gallons [of water] in the kitchen area, but they were empty." After finding a bleach jug on the dryer, Defendant returned to the front door to call for help again. Mr. Rathbone stated there were two fire extinguishers under the kitchen counter. Defendant "tried to use the fire extinguisher but it didn't work [because] [s]he squeezed the trigger, but she didn't pull the pin out."

¶ 7 Defendant stated a neighbor, Tammy Peek, arrived at the burning structure and escorted Defendant down a hall and out of the back door of the trailer home. Ms. Peek claims this occurred around 8:20 a.m. Ms. Peek, however, stated that Defendant was already standing in the yard outside of the burning trailer home when Ms. Peek arrived at the scene, and that Ms. Peek never entered the trailer home. Furthermore, Defendant claimed that she repeatedly mentioned her purse and Archie to Ms. Peek as they exited the trailer home together, but Defendant could not remember if she was speaking out loud or only thinking about the

purse and Archie in her head. Conversely, Ms. Peek stated that she asked Defendant if anyone else was in the home, and Defendant said no, that "her children . . . were with their father[.]" Ms. Peek stated Defendant was asked "numerous times . . . [on] [a]t least four or five" occasions if anyone was in the trailer, and that Defendant replied "there's no one in the home."

¶ 8 Defendant stated that she could have gotten Archie out of the trailer home when she exited, but Defendant did not get Archie out because "she thought she could put the fire out."

¶ 9 Ms. Peek ran back to her house approximately 130 to 150 feet away from the burning trailer home, woke her sleeping boyfriend Billy Boyd, and called 911 with her cell phone. After placing the 911 call, Ms. Peek and Mr. Boyd returned to the burning trailer home where Defendant remained standing in the front yard. Again, Ms. Peek and Mr. Boyd asked Defendant if there was anyone else in the home. Even after being asked "multiple times" if there was anyone in the house, "[Defendant] consistently told [Ms. Peek and Mr. Boyd] no." Ms. Peek stated that Defendant asked for her cell phone and uniforms. Mr. Boyd observed that Defendant's face looked as though something "blew up" on it. Defendant then asked for a cigarette and when Ms. Peek gave her one, Defendant put it in her mouth backward, with the "tobacco part in, [and was] going to light the filter." Mr. Boyd then departed to inform Mr. Neil about the fire.

¶ 10 Mr. Neil and Mr. Boyd met outside the Neil home, and Mr. Boyd told Mr. Neil about the fire. Mrs. Neil informed Mr. Rathbone that his home was burning after Mr. Neil reported the incident. When Mr. Boyd asked Mr. Neil if there were any children in the trailer home, Mr. Neil answered that Archie was there. Mr. Neil then called 911 to inform emergency services that someone was inside the trailer home. Mr. Boyd and Mr. Neil departed the Neil home together to return to the burning trailer home. Mrs. Neil was unable to make it to the burning trailer home. Upon arriving at the trailer home, Mr. Neil asked Defendant where Archie was, and Defendant replied, "his daddy had him."

¶ 11 Shortly after the initial dispatch call, 911 communications dispatched firefighters from the Leceister Fire Department. Jeff Keever and Joshua Reeves were the initial firefighters on the scene. Keever stated he and Reeves were notified by dispatch while en route of a possible child entrapment in the trailer home. Keever estimated he arrived at the fire approximately three to four minutes after receiving the call. Upon arriving at the scene, Keever observed Defendant and Ms. Peek in

the driveway, and the trailer presented "heavy smoke and heavy fire." Although Keever's focus upon arrival was on the entrapment, Keever asked for confirmation from Defendant. When asked if there was anybody still inside, Defendant stated that "[t]he kids are with their daddy." In response, Keever erroneously "notified all dispatch that there was no confirmed entrapment." Despite Defendant's misinformation, Keever stated that with their next help "about 15 minutes away" and "with that much involvement and that much smoke . . . that there is a point of no return." Clarifying, Keever stated that "there wouldn't have been any life in there. . . . [W]e would have been risking our lives to go in there and try to save nothing."

¶ 12 During this time, Reeves attempted to get control of the fire and was interrupted by Mr. Neil, whom Reeves had to wrestle off the porch of the trailer home. According to Reeves, Mr. Neil was adamant that Archie was in the home. Reeves also stated at that time, "[t]here was no hope of going inside" and that "[Reeves] wouldn't have survived going into that room with [his] gear on much less letting [Mr. Neil] go inside without it." Christopher Brown, the Chief of Leicester Volunteer Fire Department, arrived and assumed command of the scene. Chief Brown reported that once the firefighting crews gained access to the structure, they located the deceased child on the bedroom floor of the trailer home.

¶ 13 Breena Williams, an arson investigator with the Asheville-Buncombe Arson Task Force at the time of the incident, obtained a search warrant for the trailer home and obtained approval to move Archie's body. Williams later observed Dr. Jerri McLemore perform an autopsy of Archie's body. Dr. McLemore observed extensive "thermal injuries or thermal changes of the outside of the body" and a carbon monoxide presence in Archie's blood in excess of sixty percent. Dr. McLemore noted that "going over 50 percent" is "basically lethal." Dr. McLemore then made a finding and diagnosis that the ultimate "cause of death was smoke and fume inhalation."

¶ 14 During initial trial proceedings, the trial court judge inadvertently mentioned that Defendant's attorneys were from the public defender's office. The trial judge briefly stated on a single instance, "Ms. McLendon is with the public defender's office also," in front of the jury, but never again made reference to defense counsel's office in front of the jury throughout the remaining proceedings. Defendant's counsel requested the trial court strike the entire jury venire. The trial court denied the motion, unless the parties could show any type of appellate decision showing the identification of public defenders as reversible error. Defendant moved to dismiss the charges against her for insufficient evidence at

the close of the State's evidence and again at the close of Defendant's evidence. The trial court denied both motions.

¶ 15 The jury convicted Defendant on one count of involuntary manslaughter. Because the jury was unable to reach a verdict on Defendant's child abuse charge, the trial court declared a mistrial as to that charge. Defendant orally provided notice of appeal in open court.

II. Analysis

¶ 16 Defendant raises three issues on appeal. First, Defendant contends that the trial court erred in denying her motion to strike the jury venire, because it denied her right to a fair trial before an impartial jury. Second, Defendant argues that her involuntary manslaughter conviction must be vacated because the State did not meet its burden of proving that Defendant's criminally negligent actions proximately caused Archie's death. Third, Defendant asserts that the short-form indictment charging Defendant with involuntary manslaughter was fatally defective for lack of sufficient notice of involuntary manslaughter's essential elements.

A. Jury Venire

¶ 17 **[1]** Defendant challenges the fairness of her trial due to the trial court denying Defendant's motion to strike the jury venire after the trial judge inadvertently mentioned Defendant's counsel was from the public defender's office on a single occurrence prior to jury selection.

¶ 18 "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." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984). The defendant "bears the burden of establishing that the trial judge's remarks were prejudicial." *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990) (citing *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985)). "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

¶ 19 The single passing reference made under these facts does not warrant a new trial. The jury could not reasonably infer the trial court's introduction of the parties to be an opinion on a factual issue in the case, Defendant's guilt, nor the weight of the evidence or a witness's credibility. *See id.* Defendant speculates that the status of a public defender may prejudice a defendant, citing only a single law review article to support

this assumption. Regardless, it is apparent from the Record that the jury participated in reasoned decision-making based on the merits of the case, as the jury convicted Defendant of involuntary manslaughter but failed to convict on felonious negligent child abuse, prompting a mistrial as to the latter charge. Defendant's challenge to the jury venire fails.

B. Sufficiency of the Evidence

¶ 20 **[2]** Next, Defendant claims that the State failed to meet its burden of proof that a criminally negligent act by Defendant was the proximate cause of Archie's death. Claiming the State "failed to meet its burden of proof" is synonymous with, and the foundation of, a motion to dismiss for insufficient evidence. N.C. Gen. Stat. § 15A-1227 (2019); *State v. Scott*, 356 N.C. 591, 594, 573 S.E.2d 866, 868 (2002) (stating that "the State has not met this burden" when announcing its holding under N.C. Gen. Stat. § 15A-1227). "Rule 10(a)(3) [of the North Carolina Rules of Appellate Procedure] provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). A defendant may properly preserve all issues related to the sufficiency of the evidence for appellate review by making a proper motion to dismiss on those issues at the close of the State's evidence, and by subsequently renewing the motion to dismiss at the close of all evidence in accordance with Rule 10(a)(3). N.C. R. App. P. 10(a)(3).

¶ 21 Here, Defendant properly preserved the issue by moving to dismiss at the close of the State's evidence as well as the close of Defendant's evidence in accordance with Rule10(a)(3). We review the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016).

¶ 22 "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[] being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). If substantial evidence exists for each essential element and as to the defendant's identity as the perpetrator, "the motion [to dismiss] is properly denied." *Id.* "'[S]ubstantial evidence' . . . mean[s] that the evidence must be existing and real, not just seeming or imaginary." *Id.* at 99, 261 S.E.2d at 117. Put differently, "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

¶ 23 When the trial court reviews a defendant's motion to dismiss for lack of substantial evidence, the evidence must be viewed "in the light most favorable to the State," giving the State the benefit of all reasonable inferences. *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and internal quotation marks omitted). Contradictions or discrepancies in the evidence "are for the jury to resolve[.]" *Id.* "[T]he trial court is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). The "combination of direct and circumstantial evidence" may be used in reviewing a trial court's assessment of sufficiency of the evidence to survive a defendant's motion to dismiss. *State v. Blagg*, 377 N.C. 482, 490, 858 S.E.2d 268, 274 (2021).

¶ 24 Because Defendant does not contest her identity as the principal actor in the events leading up to Archie's death, we do not review whether there is substantial evidence on the record as to Defendant's identity. This Court's inquiry now turns to the issue of whether there is "such relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion" of guilt for each essential element of involuntary manslaughter. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. McGee*, 234 N.C. App. 285, 289, 758 S.E.2d 661, 664–65 (2014) (citation and internal quotation marks omitted). Culpably negligent acts and culpable omissions to perform a legal duty are both equally sufficient to satisfy the second element of proximate cause. *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977). Defendant concedes Archie's death was unintentional and "tragic," but contests the sufficiency of the State's evidence for element two. For the reasons discussed below, we hold that there is substantial evidence in the Record that Defendant's culpably negligent acts and omissions proximately caused Archie's unintentional death and that the evidence was sufficient to send the case to the jury. The trial court did not err when it denied Defendant's motion to dismiss.

1. Substantial evidence exists to support a reasonable finding that Defendant's acts and omissions were culpably negligent.

¶ 25 "[C]ulpable negligence . . . must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *State v. Debiase*, 211 N.C. App. 497, 505, 711 S.E.2d 436, 442 (2011) (quoting *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977)).

¶ 26 While "citizens generally have no duty to come to the aid of one who is injured" or otherwise in harm's way, "once [a] defendant [makes] efforts to aid the victim, he [is] under a duty to do so with due caution." *In re Z.A.K.*, 189 N.C. App. 354, 358–59, 657 S.E.2d 894, 896–97 (2008). For example, this Court found that an instance when a land owner gave misleading directions to emergency services, thereby delaying possible rescue, was "evidence that [the] defendant[] did not use ordinary care." *Hawkins v. Houser*, 91 N.C. App. 266, 270, 371 S.E.2d 297, 299 (1988). In another case, *In re Z.A.K.*, this Court found a "defendant's actions were even more egregious than [*Hawkins*,]" when, "[a]fter the victim first became ill . . .[,] [the] defendant *lied* to his father, telling him that everything was fine and sending him away." *In re Z.A.K.*, 189 N.C. App. at 360, 657 S.E.2d at 897 (emphasis added). This Court held "[a]t the very least, [the defendant's] affirmative conduct precluded any other rescuer from rendering the aid allegedly necessary to prevent [the victim's] . . . injuries. At the worst, it actively caused her death." *Id.* (citation omitted).

¶ 27 Here, there is substantial evidence sufficient for a reasonable juror to find that Defendant was culpably negligent in her rescue attempts. Specifically, Defendant admitted that she could have removed Archie from the burning home when Defendant exited to retrieve water from outside. Additionally, and similar to *In re Z.A.K.*, there is substantial evidence from which a reasonable juror could conclude that Defendant's omissions to her neighbors and the firefighters regarding Archie's presence in the burning home "[a]t the very least . . . precluded any other rescuer from rendering the aid allegedly necessary to prevent [the victim's] . . . injuries. At the worst, it actively caused [the victim's] death." *Id.* (citation omitted). Defendant stating "[t]he kids are with their daddy" and failing to mention Archie in any way could lead a reasonable juror to conclude Defendant was culpably negligent in her rescue attempts. This Court "is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight." *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925.

¶ 28 In addition to substantial evidence of Defendant's culpably negligent rescue attempts, there is substantial evidence in the Record that Defendant took more Xanax in a day than Defendant's prescription directed. There is also substantial evidence in the Record that Defendant was aware she was designated as the caretaker for Archie the morning of Archie's death, because she took time off from work to do so. Taking a higher than prescribed dose of Xanax in anticipation of serving as Archie's caretaker was a risk-creating behavior. This Court has stated,

> Risk-creation behavior thus triggers duty where the risk is both unreasonable and foreseeable. . . . The orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty. A duty arises based on evidence showing that a defendant should have recognized that [a victim], or anyone similarly situated might be injured by their conduct.

In re Z.A.K., 189 N.C. App. at 359, 657 S.E.2d at 897. As Archie's intended caretaker for the morning of his death, and as a creator of risk by over-consuming Xanax, Defendant had duties to Archie.

¶ 29 It is not this Court's duty to weigh the evidence or pinpoint where a reasonable jury must have concluded culpable negligence was manifest. It is sufficient to say there was substantial evidence to allow the jury to determine the presence of acts or omissions adequate to satisfy the culpable negligence element of involuntary manslaughter.

2. Substantial evidence exists to support a finding that Defendant's culpably negligent acts proximately caused Archie's death.

¶ 30 Proximate cause is a cause "from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *State v. Cole*, 343 N.C. 399, 416, 471 S.E.2d 362, 370 (1996) (quoting *State v. Powell*, 336 N.C. 762, 771, 446 S.E.2d 26, 31 (1994)). "Foreseeability is an essential element of proximate cause." *Id.* The defendant need not actually foresee the precise injurious outcome, but "in the exercise of reasonable care, [if] the defendant might have foreseen . . . [some] consequences of a generally injurious nature" the cause may be deemed sufficiently foreseeable to be a proximate cause. *Id.* Giving the State the benefit of all reasonable inferences, there was substantial evidence from which a reasonable juror could conclude that Defendant's culpably negligent acts proximately caused Archie's death.

¶ 31 The Record tended to show that Archie was alive during the fire. Archie's airway was coated with soot, and his blood contained a lethally high level of carbon monoxide in excess of sixty percent. "That's one indication that [Archie] was alive at the time of the fire" and "there had to have been active breathing [by Archie]." There was evidence that Archie was located "on [his] back on the floor" during the fire, when "the carbon monoxide and the smoke[] fumes tend[] to rise." Further evidence in the Record indicates that "there was at least some period of time . . . that [Archie] would have been alive during the course of the fire."

¶ 32 Assuming all inferences in favor of the State, there is substantial evidence in the Record sufficient for a reasonable juror to conclude that a person "in the exercise of reasonable care" would have foreseen Archie's potential injury or death resulting from Defendant's failure to remove Archie from the burning home with Defendant upon her exiting the home. *Cole*, 343 N.C. at 416, 471 S.E.2d at 370. Additionally, there is substantial evidence that a reasonable person would foresee that stating "[t]he kids are with their daddy" while failing to mention Archie's presence in the fire to anyone would likely stifle potential rescue attempts, thereby causing injury or death. Furthermore, there is substantial evidence that Archie was alive during Defendant's exit from the home and for some time as the fire escalated, due to the soot in Archie's airway and carbon monoxide in Archie's blood. While the specific moment of death is uncertain, there was substantial evidence of foreseeability and causation which was properly weighed by the jury to determine the element of proximate cause.

¶ 33 For the foregoing reasons, the trial court did not err when it denied Defendant's motion to dismiss for insufficient evidence.

C. Indictment Sufficiency

¶ 34 **[3]** Defendant asserts for the first time on appeal that Defendant's short-form indictment for involuntary manslaughter was fatally flawed for insufficiently alleging the essential elements of the offense, thereby denying the trial court jurisdiction to hear the proceeding. Typically, "[a] defendant waives an attack on an indictment when the validity of the indictment is not challenged in the trial court." *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 437 (2000). However, "[w]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Williams*, 368 N.C. 620, 622, 781 S.E.2d 268, 270 (2016) (citation and internal quotation marks omitted). When "[t]he alleged failure of a criminal pleading to charge the essential elements of a stated offense" is made, as Defendant does in this appeal, the alleged failure "is an error of law that this Court reviews de novo." *Id.*

¶ 35 N.C. Gen. Stat. § 15-144 states in pertinent part that "it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay [the alleged victim], and concluding as aforesaid." N.C. Gen Stat. § 15-144 (2019). The constitutionality of this statutory short-form indictment has been upheld by this Court and our Supreme Court, a point which Defendant concedes. *Braxton*, 352 N.C. at 174–75,

531 S.E.2d at 437–38; *State v. Reynolds*, 160 N.C. App. 579, 583, 586 S.E.2d 798, 801 (2003). Accordingly, this Court must sustain the sufficiency of the indictment.

III. Conclusion

¶ 36 For the foregoing reasons, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges ARROWOOD and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 NOVEMBER 2021)

A. MAYNOR HEATING & AIR CONDITIONING, INC. v. GARDNER 2021-NCCOA-619 No. 20-837	Wake (19CVS17121)	Affirmed
AYSCUE v. GRIFFIN 2021-NCCOA-620 No. 20-807	Bertie (14CVS45)	Dismissed
CAMBRE v. REG'L IMAGING, P.A. 2021-NCCOA-621 No. 21-58	Cumberland (20CVS2804)	Dismissed
DAVIS v. VISTA N. CAROLINA LTD. P'SHIP 2021-NCCOA-622 No. 20-791	Rutherford (17CVS442)	Dismissed
FUND 19-MILLER, LLC v. ISBILL 2021-NCCOA-623 No. 21-78	Mecklenburg (19CVS19892)	Affirmed
GINGRAS v. STOKES 2021-NCCOA-624 No. 21-257	Henderson (19CVD243)	Dismissed
GORLESKY v. CABARRUS CNTY. DEP'T OF SOC. SERVS. 2021-NCCOA-625 No. 20-875	Wake (17CVS7610)	Affirmed
IN RE A.L. 2021-NCCOA-626 No. 21-245-2	Robeson (19JA237)	Affirmed.
IN RE C.L.M. 2021-NCCOA-627 No. 21-270	Guilford (20JA39) (20JA43)	Affirmed
IN RE S.C.J. 2021-NCCOA-628 No. 21-240	Durham (20SPC1933)	Affirmed
IN RE T.-N. J.J. 2021-NCCOA-629 No. 21-330	Pitt (20JA200) (20JA201) (20JA202)	Affirmed in part; Vacated in part, and Remanded.

IN RE T.C.M. 2021-NCCOA-630 No. 21-242	Moore (21JA03)	Affirmed
JBL COMMC'NS, INC. v. AMCO INS. CO. 2021-NCCOA-631 No. 20-417	Madison (18CVS60)	Affirmed
JONES v. JONES 2021-NCCOA-632 No. 21-105	Davie (20CVD66)	Vacated and Remanded.
McKOY v. ROBINSON 2021-NCCOA-633 No. 21-53	Cumberland (20CVD50)	Dismissed
PERALES v. KING 2021-NCCOA-634 No. 20-786	Wake (18CVD11748)	AFFIRMED IN PART, VACATED IN PART, AND REMANDED.
ROACH v. ROACH 2021-NCCOA-635 No. 21-279	Forsyth (18CVD5403)	Vacated and Remanded
SCOTT v. SCOTT 2021-NCCOA-636 No. 21-108	Orange (99CVD1586)	Affirmed
SHARPE v. FCFS NC, INC. 2021-NCCOA-637 No. 21-183	Alamance (19CVS1742)	Reversed and Remanded
STATE v. BROOKS 2021-NCCOA-638 No. 20-749	Lincoln (19CRS428-429) (19CRS50711-12)	New Trial
STATE v. CRANDALL 2021-NCCOA-639 No. 20-578	Wake (19CRS204073)	No Error
STATE v. DRIVER 2021-NCCOA-640 No. 20-851	Mecklenburg (17CRS208590-92) (17CRS208594) (17CRS7388)	Vacated and Remanded in Part; No Error in Part.
STATE v. FULLER 2021-NCCOA-641 No. 21-9	Orange (17CRS50340)	Vacated and Remanded

STATE v. LAWSON 2021-NCCOA-642 No. 20-863	Stokes (17CRS50208)	Affirmed.
STATE v. LINDQUIST 2021-NCCOA-643 No. 21-92	Cumberland (17CRS57328-29)	Affirmed.
STATE v. MOORE 2021-NCCOA-644 No. 20-669	Lincoln (17CRS52083) (17CRS52087-92) (19CRS195-196)	Remanded
STATE v. PHILLIPS 2021-NCCOA-645 No. 21-39	Mecklenburg (17CRS203531) (17CRS203533)	No Error
STATE v. RICE 2021-NCCOA-646 No. 21-154	Mecklenburg (07CRS249456)	AFFIRMED IN PART; DENIED IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. SANDERS 2021-NCCOA-647 No. 21-89	Wake (18CRS210299)	Affirmed
STATE v. SIMMONS 2021-NCCOA-648 No. 20-714	Surry (17CRS52306-08) (18CRS17)	No Error
STATE v. STURDIVANT 2021-NCCOA-649 No. 20-444	Onslow (17CRS51435) (17CRS51450) (19CRS211)	No Error
TOWN OF BLOWING ROCK v. CALDWELL CNTY. 2021-NCCOA-650 No. 20-834	Caldwell (19CVS285)	Affirmed

ALDRIDGE v. NOVANT HEALTH, INC.

[280 N.C. App. 372, 2021-NCCOA-651]

JENNIFER ALDRIDGE, EMPLOYEE, PLAINTIFF
v.
NOVANT HEALTH, INC., EMPLOYER (SELF-INSURED), DEFENDANT

No. COA21-70

Filed 7 December 2021

Workers' Compensation—accident—interruption of regular work routine—moving heavy patient—without usual assistance

Plaintiff nurse suffered an injury by accident and therefore was entitled to workers' compensation where competent evidence and the findings supported the conclusion that the injury resulted from an interruption of plaintiff's regular work routine. Plaintiff's injury occurred when she was attempting to change a soiled bed pad for a very heavy patient with only one other person helping, and she had never attempted to do so for a heavy patient without the assistance of more than one person.

Appeal by Defendant from an Opinion and Award entered 30 September 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 October 2021.

Campbell & Associates, by Bradley H. Smith, for plaintiff-appellee.

Jason P. Burton for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Novant Health, Inc., (Defendant) appeals from an Opinion and Award entered by the Full Commission (Commission) of the North Carolina Industrial Commission concluding Jennifer Aldridge (Plaintiff) suffered an injury by accident and granting Plaintiff's claim for compensation under the Workers' Compensation Act. The Record reflects the following:

¶ 2 Plaintiff began working as a registered nurse for Defendant in November 2010. Plaintiff worked at "Stanback Rehabilitation" unit in Rowan Hospital in Salisbury, North Carolina. On 7 March 2018, Plaintiff was assigned to work on the "med-surg unit"—not her usually assigned unit. On that day, Kayla Beeker (Beeker) a certified nursing

assistant (CNA), asked Plaintiff to assist Beeker in changing a pad underneath a patient who had soiled herself. The patient was "very large" weighing between 300 and 400 pounds. While Beeker stood on one side of the patient and pulled the patient's hip toward Beeker, Plaintiff stood on the other side and pushed the patient's hip with Plaintiff's left hand and pulled on the soiled pad with her right hand.

¶ 3 As Plaintiff pulled the pad, she heard a "snapping sound" and felt "a very sharp pain and burning sensation that went from [her] wrist to [her] elbow" and to her shoulder, neck, and back. Plaintiff had to pull with more force than usual because of the patient's size. Moreover, the patient did not help as Plaintiff tried to pull the pad from under the patient. Plaintiff sought medical treatment, including surgery, as a result of her injury. Plaintiff filed a Notice of Accident with Defendant. Defendant denied Plaintiff's workers' compensation claim on the basis that Plaintiff's injury was "not the result of an accident or sudden traumatic event."

¶ 4 On 31 July 2018, Plaintiff filed a request for a hearing with the Industrial Commission on her compensation claim. Plaintiff's compensation claim came on for hearing on 17 January 2019 before a Deputy Commissioner. The Deputy Commissioner heard testimony from both Plaintiff's and Defendant's witnesses. In addition to the factual circumstances leading to Plaintiff's injury, Plaintiff testified that when she changes a patient's pad, the patient typically pulls themselves up on the side of the bed so that Plaintiff can roll the patient to the right and remove the pad. According to Plaintiff, the patient in this instance "wasn't helping . . . at all." When Plaintiff assisted with moving a patient who weighed as much as the patient in the incident in question, Plaintiff would always be part of a team of at least three people moving the patient. Plaintiff estimated she moved a patient of that size twice a month as part of a team of three to four people. Plaintiff also stated she would help others move patients "once a shift" on any given floor of the hospital and that "one out of five" patients were overweight.

¶ 5 Beeker testified as Defendant's witness. Although Beeker could not recall how much the patient in this case weighed, she described the patient as "pretty hefty, but it's not uncommon for two of us to be turning a patient that is overweight and not willing to help." However, Beeker explained when a patient is "extremely obese or they're a difficult patient that we've already tried once to move . . . we'll call for extra help and a lot of times it's maybe three of us, maybe four at the most." Beeker also stated she would have preferred to have three or four people moving the patient she and Plaintiff moved on the day in question. She had also never witnessed Plaintiff attempt to move a patient weighing approximately

350 pounds with only one other person helping in the time Beeker had worked with Plaintiff.

¶ 6 Victoria Tuttle (Tuttle) testified on Plaintiff's behalf. Tuttle was employed by Defendant as a CNA at Rowan Hospital and worked with Plaintiff once or twice a month at the time. Tuttle testified she had to move patients weighing 350 pounds to change their pads as part of her duties with Defendant; but, when she did, "[t]hree to four" people would assist and "[s]ix would be great if they're noncompliant or they can't help themselves." Tuttle stated she had previously tried to move a patient weighing 350 pounds with only one other person assisting but could not do it, and she had to get more help.

¶ 7 Christopher Cook (Cook) testified on Defendant's behalf. Cook testified he was employed as a nurse manager for Defendant at Rowan Hospital on the date in question. According to Cook, nurses and nursing assistants would change pads on patients every day and that he noticed a "trend in the population of obesity [in patients] increasing[.]" Cook testified multiple nurses would work together in teams to move overweight patients "daily." However, Cook was not aware of an official policy or protocol directing nurses or nursing assistants on how many employees should assist in moving patients based on a patient's weight and size. Cook also stated that teams of at least three employees were needed to move patients on a "daily basis[.]"

¶ 8 On 16 October 2019, the Deputy Commissioner entered an Opinion and Award in Plaintiff's favor. Based on the testimony, exhibits, and depositions filed in the claim, the Deputy Commissioner made the following pertinent Findings of Fact:

> 5. In an attempt to change the soiled bed pad, CNA Beeker pulled the patient towards herself, and Plaintiff pushed from the opposite side of the bed, while also pulling on the bed pad with her right arm. The patient did not assist in moving herself. As she was pulling on the bed pad, Plaintiff heard a snap and felt sharp pain and a burning sensation in her right arm. Plaintiff immediately stopped and indicated to CNA Beeker that she had injured herself. . . .
>
> . . . .
>
> 7. It was not unusual for Plaintiff to be asked to work a different unit; this occurred approximately two to three times per month. In general, it was not unusual

for a CNA to ask Plaintiff for help; this occurred regularly. It was also not unusual for Plaintiff to pull a bed pad out from under a patient; she estimated she performed this specific task twice per month.

. . . .

9. It was also not uncommon for patients to be unable or unwilling to help when being moved; this could be due to dementia, being sedated, or being post-surgical.

10. Prior to March 7, 2018, Plaintiff had assisted in moving large patients before, but only as a team of three or four people. Plaintiff estimated she assisted in this fashion approximately twice per month.

11. Prior to March 7, 2018, Plaintiff had never tried to pull out a soiled bed pad from underneath such a large patient who did not assist, with only one other employee helping.

12. . . . As a CNA, Tuttle had removed bed pads from soiled patients weighing 350 pounds as part of a team of three or four people. It was not unusual for a team of 3 or 4 people to perform this task as it occurred daily.

13. CNA Tuttle had also attempted to perform the task of removing a bed pad from a 350-pound patient with one other person, without success. CNA Tuttle had never seen Plaintiff attempt to do so.

. . . .

15. CNA Beeker agreed that with a patient as large as 350 pounds who was unable to assist, you would want a team of three or four people moving the patient, and she would call for extra help.

16. CNA Beeker had also not seen Plaintiff attempt to move a 350 pound patient with the help of just one other person.

17. The undersigned finds that removing the soiled bed pad from underneath an uncooperative patient weighing 350 pounds, with just one other employee's

> assistance, was not part of Plaintiff's normal work routine as a Registered Nurse for Defendant-Employer. Such task was unusually difficult and had not been performed by Plaintiff previously; therefore, it constituted an interruption of Plaintiff['s] usual work routine.

¶ 9 Consequently, the Deputy Commissioner concluded:

> 4. The preponderance of the evidence in this matter demonstrates Plaintiff's injury occurred while she was assisting a CNA with the task of removing a soiled bed pad from underneath an unusually large patient who was either unable or unwilling to assist in lifting herself; said task was typically performed by a team of 3 or more employees; . . . This unusually difficult task was something Plaintiff had never performed before and was not part of her normal work routine.
>
> 5. Accordingly, the undersigned concludes the March 7, 2018, incident constituted an interruption of plaintiff's regular work routine that was neither designed nor expected by plaintiff and is, therefore, compensable as an injury by accident. N.C. Gen. Stat. § 97-2(6).

Therefore, the Deputy Commissioner entered an award in Plaintiff's favor. Defendant filed Notice of Appeal to the Full Commission on 29 October 2019.

¶ 10 On 30 September 2020, "[h]aving reviewed the prior Opinion and Award based upon the record of proceedings before Deputy Commissioner Brown, . . . and the parties' briefs and oral arguments, the Full Commission" entered its Opinion and Award "pursuant to N.C. Gen. Stat. § 97-85." The Commission made the following relevant Findings of Fact:

> 4. While attempting to change the soiled bed pad, CNA Beeker pulled the patient toward herself, and plaintiff pushed from the opposite side of the bed, while also pulling on the bed pad with her right arm. The patient did not assist in moving herself. As she was pulling on the bed pad, plaintiff heard a snap and felt sharp pain and burning sensation in her right arm. Plaintiff immediately stopped and indicated to CNA Beeker that she had injured herself.

. . . .

7. It was not unusual for plaintiff to encounter overweight or obese patients while at work. Mr. Cook estimated that on any given day, 50% of the patients were overweight and 25% of the patients were obese, with on average two patients as large as 350 pounds. It was also not uncommon for patients to be unable or unwilling to help when being moved, which could be due to dementia, being sedated, or being post-surgical.

8. Prior to March 7, 2018, plaintiff assisted in moving large patients, but only as a team of three or four people. Plaintiff estimated she assisted in this fashion approximately twice per month. Also prior to March 7, 2018, plaintiff never attempted to remove a soiled bed pad from underneath such a large uncooperative patient, with only one other employee helping.

¶ 11 Consequently, the Commission concluded:

1. "A plaintiff is entitled to compensation for any injury under the Workers' Compensation Act 'only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment.' " N.C. Gen. Stat. § 97-2(6); *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010) (quoting *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002); N.C. Gen. Stat. § 97-1(6) (2009)). "The plaintiff bears the burden of proving both elements of the claim." *Id.* (quoting *Morrison v. Burlington Industries*, 304 N.C. 1, 13, 282 S.E.2d 458, 467 (1981)).

2. The elements of an "accident" include the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. An "accident" within the meaning of the North Carolina Workers' Compensation Act is "an unlooked for and untoward event which is not expected or designed by the injured employee." *Adams v. Burlington Indus. Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983).

> 3. "The terms 'accident' and 'injury' are separate and distinct concepts, and there must be an 'accident' that produces the complained-of 'injury' in order for the injury to be compensable." N.C. Gen. Stat. § 97-2(6); *Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174; *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964).
>
> 4. In the present case, the preponderance of the evidence in this matter demonstrates plaintiff's injury occurred while she was assisting a CNA with the task of removing a soiled bed pad from beneath an unusually large patient who was either unable or unwilling to assist in lifting herself. This task was typically performed by a team of three or more employees. This unusually difficult task was something plaintiff had never performed before and was not part of her normal work routine. Accordingly, the Full Commission concludes the March 7, 2018, incident constituted an interruption of plaintiff's regular work routine that was neither designed nor expected by plaintiff and is, therefore, compensable as an injury by accident. N.C. Gen. Stat. § 97-2(6); *See Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 519 S.E.2d 61 (1999).

Therefore, the Full Commission entered an award in Plaintiff's favor. Defendant timely filed written Notice of Appeal from the Full Commission's Opinion and Award to this Court on 29 October 2020.

Issue

¶ 12 The issue on appeal is whether the Commission erred in determining Plaintiff suffered an injury by accident, and thus, was entitled to compensation.

Analysis

¶ 13 Defendant argues the Commission erred in awarding Plaintiff's claim because the competent evidence in the Record did not support the Commission's Finding and Conclusion the 7 March 2018 incident was an "accident" under the Workers' Compensation Act. Our standard of review for a Commission's opinion and award is limited to whether the Commission's findings of fact support its conclusions of law. Where the competent evidence supports the Commission's findings, those findings

are binding on appeal. *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 442, 640 S.E.2d 744, 748 (2007) (citation omitted). "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted). We review the Commission's conclusions of law de novo. *McRae v. Toastmaster Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

¶ 14 Although Defendant's brief asserts the competent evidence did not support the Commission's Findings regarding Plaintiff's injury, Defendant really argues the Commission's Findings did not support its Conclusion the 7 March 2018 incident was an "accident" under the statute and, thus, compensable. Here, the Commission found: Plaintiff was injured as a result of moving the patient while trying to change the patient's soiled bed pad; it was not unusual for Plaintiff to assist in moving patients, even obese patients weighing 350 pounds; that it was not unusual for some patients to be unable or unwilling to help as Plaintiff attempted to move them and change their bed pads; but, that Plaintiff had never before attempted to change a bed pad on a patient weighing 350 pounds with only one other person, and Plaintiff had always attempted to move a patient of this size as part of a team of three to four people.

¶ 15 The competent evidence in this case supports these Findings. Plaintiff testified she had never before moved a patient of this size with only one other person helping. Beeker testified the patient involved in this case was a patient she would have preferred to have a team of three to four to move. Moreover, Beeker testified she had never seen Plaintiff move a patient of that size with just one other person before. Similarly, Tuttle testified: she had usually moved a patient of that size as part of a team of three to four; she had previously tried to move a patient of that size with just one other person helping but could not; and Tuttle had never witnessed Plaintiff move a patient of that size with just one person helping. Cook testified that, although he was not aware of any protocols for moving patients of this size, using teams of three to four people to do so occurred on a daily basis. Thus, the Record evidence supports the Commission's Finding Plaintiff had never moved a patient of this size with just one other person helping and that she routinely moved a patient of this size as part of a team of three to four.

¶ 16 The crux of Defendant's argument is that these Findings do not support the Commission's Conclusion Plaintiff's injury was the result of a compensable accident under the Workers' Compensation Act codified

in Chapter 97 of our General Statutes. " 'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6) (2019). "A plaintiff is entitled to compensation for an injury under the Workers' Compensation Act only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't of Envtl. Health & Nat. Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002) (citation and quotation marks omitted). "There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute." *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964) (citation and quotation marks omitted).

¶ 17 An accident is "an unlooked for or untoward event which is not expected or designed by the person who suffers the injury[;] [t]he elements of an accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Shay v. Rowan Salisbury Sch.*, 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (2010) (citations omitted, brackets in original). However: "Once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) (citations omitted).

¶ 18 Here, the Commission concluded:

> This unusually difficult task was something plaintiff had never performed before and was not part of her normal work routine. Accordingly, the Full Commission concludes the March 7, 2018, incident constituted an interruption of plaintiff's regular work routine that was neither designed nor expected by plaintiff and is, therefore, compensable as an injury by accident. N.C. Gen. Stat. § 97-2(6); *See Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 519 S.E.2d 61 (1999).

The Commission's Findings Plaintiff had never moved a patient weighing 350 pounds with only one person helping and that such patients were typically moved by a team of three to four people supports the Commission's Conclusion the incident in question constituted an interruption of Plaintiff's work routine and was not designed or expected by Plaintiff.

¶ 19 *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, the case the Commission cited in its Opinion and Award, supports Plaintiff's assertion this incident was an accident under the Workers' Compensation Act. 135 N.C. App. 112, 519 S.E.2d 61 (1999). In *Calderwood*, the plaintiff was a nurse in a labor and delivery unit. *Id.* at 113, 519 S.E.2d at 62. Plaintiff was injured when she lifted a patient's leg numerous times over a thirty-minute period; however, this patient weighed 263 pounds and was unable to assist in lifting her leg. *Id.* The plaintiff testified she routinely lifted patients' legs during labor and delivery, but that this patient's leg was unusually heavy and the plaintiff had never had to lift a patient's leg without assistance from the patient. *Id.* The Commission found that the plaintiff had conducted her job "in the usual way" and concluded the plaintiff's injury did not occur by accident. *Id.* at 114, 519 S.E.2d at 63.

¶ 20 On appeal, this Court concluded there was no evidence to support the Commission's finding the plaintiff conducted her employment in the usual way where the "undisputed evidence" was that she had never lifted a patient's leg where the patient was unusually large and unable to assist the plaintiff. *Id.* at 115-16, 519 S.E.2d at 63. We reasoned: "The question is whether her regular work routine required lifting the legs of women weighing 263 pounds" and were unable to assist. *Id.* at 116, 519 S.E.2d at 63. Although *Calderwood* addressed whether the evidence supported the Commission's finding the plaintiff conducted her work in the usual way, this Court's reversal of the Commission implied the incident could have been an accident under the statute.

¶ 21 Similarly, here, the question before the Commission was whether Plaintiff's regular work routine required her to help move a patient weighing 350 pounds, and who was unable or unwilling to assist, with only the help of one other person. The Commission's Findings that Plaintiff had never attempted to move a patient of this size with only one other person, and that such patients were usually moved by a team of three to four people supported the Conclusion this incident was unforeseen and was an interruption not designed or expected by Plaintiff. *See Legette*, 181 N.C. App. at 446, 640 S.E.2d at 750-51 (holding plaintiff moving a patient alone was an interruption to her work routine where the plaintiff had to exert more force than usual and where the maneuver was typically a two-person task).

¶ 22 Defendant argues this case is similar to *Evans v. Wilora Lake Healthcare/Hilltopper Holding Corp.*, 180 N.C. App. 337, 637 S.E.2d 194 (2006), and *Landry v. U.S. Airways, Inc.*, 150 N.C. App. 121, 563 S.E.2d 23, *rev'd per curiam*, 356 N.C. 419, 571 S.E.2d 586 (2002), where our

courts held the plaintiffs' injuries were not the result of accidents. In *Evans*, the plaintiff worked for a healthcare facility caring for residents within the facility. *Evans*, 180 N.C. App. at 337, 637 S.E.2d at 194-95. The plaintiff's duties included: "Feeding, passing trays, . . . grooming, dressing, undressing, [and] changing . . . garments[.]" *Id.* at 338, 637 S.E.2d at 195. The plaintiff claimed her left wrist was injured as she was helping a resident—with the assistance of the resident's family member—remove the resident's pants. *Id.* We held although the plaintiff claimed she "exerted unexpected force to move the pad on which the resident lay . . . [n]othing in the record indicates plaintiff was performing unusual or unexpected job duties." *Id.* at 341, 637 S.E.2d at 196.

¶ 23 The plaintiff in *Landry* worked for the airline unloading mail, freight, and luggage. *Landry*, 150 N.C. App. at 121-22, 563 S.E.2d at 24. The plaintiff injured himself as he lifted a mail bag that was heavier than the plaintiff had expected. *Id.* at 122, 563 S.E.2d at 24. The mailbags ranged from one pound to 400 pounds. *Id.* The Commission concluded the plaintiff's injury was not the result of an accident. *Id.* at 123, 563 S.E.2d at 25. This Court held the Commission's finding that "[m]ailbags often . . . were heavier or lighter than anticipated" was unsupported by the evidence where the plaintiff "merely testified mailbags were often overweight, not that this fact was unanticipated by him when he lifted them." *Id.* at 124, 563 S.E.2d at 26. Therefore, this Court reversed the Commission's Opinion and Award. *Id.* at 124-25, 563 S.E.2d at 26.

¶ 24 However, the dissenting opinion concluded that, although the bags were sometimes heavier or lighter than expected, "the evidence as a whole clearly supports the Commission's findings that plaintiff's job required him to lift weights up to 400 pounds"; "that plaintiff never knew prior to lifting mailbags how much they weighed"; and "that it was not unusual for mailbags to be extremely heavy" and for the plaintiff to be unaware of that fact until he moved them. *Id.* at 126, 563 S.E.2d at 27. Consequently, the dissent would have concluded the plaintiff "engaged in his normal duties and using his normal motions when injured." *Id.* The North Carolina Supreme Court reversed this Court for the reasons stated in the dissent. 356 N.C. 419, 571 S.E.2d 586 (2002).

¶ 25 Here, unlike in *Evans*, Plaintiff testified she had never moved a patient of this size without more than one person assisting. The plaintiff in *Evans* did not claim that she would have usually had more help—indeed, the resident's family member was assisting the plaintiff—only that moving the resident required more force than she expected. Similarly, the plaintiff in *Landry* did not claim he would usually lift a heavy bag with more assistance, only that he did not expect the particular bag in

question to be as heavy as it was. However, there was no evidence in either of these cases showing the plaintiffs experienced unexpected circumstances outside the normal course of their employment. In this case, although Plaintiff did have to move large patients as a part of her normal duties, the Commission's Findings reflect she never had to do so in the manner which led to her injury and, unlike in *Evans* and *Landry*, this was outside the usual, normal, and expected job duties. Moreover, the testimony during the hearing supports those Findings, and it is not this Court's place to reweigh the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

¶ 26 Thus, here, we conclude the Commission's Findings support its Conclusion Plaintiff's injury was the result of an accident. Therefore, in turn, the Commission did not err in concluding Plaintiff suffered a compensable injury under the Workers' Compensation Act. Consequently, the Commission did not err in entering its Opinion and Award in favor of Plaintiff.

Conclusion

¶ 27 Accordingly, for the foregoing reasons, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges DILLON and DIETZ concur.

CLARK v. CLARK

[280 N.C. App. 384, 2021-NCCOA-652]

ELIZABETH ANN CLARK, PLAINTIFF
v.
ADAM MATTHEW CLARK AND KIMBERLY RAE BARRETT, DEFENDANTS

No. COA20-447

Filed 7 December 2021

1. Evidence—witness testimony—process of making digital copy of electronic devices—not involving specialized knowledge

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images, there was no error in the admission of testimony by plaintiff's witness regarding how the witness made a digital copy of plaintiff's electronic devices. Although the testimony did not rely on specialized knowledge and was therefore more properly considered to be lay testimony and not expert testimony, plaintiff could not demonstrate prejudice in its admission, since it served to corroborate plaintiff's own testimony about her electronic communications and social media posts.

2. Appeal and Error—preservation of issues—affirmative defense—election of remedies—not raised before trial court

In an action for libel per se, intentional infliction of emotional distress (IIED), and unlawful disclosure of private images, defendant did not preserve for appeal his argument that the IIED claim could not go forward on the basis that it was subsumed by other causes of action, where he failed to raise this affirmative defense of election of remedies either at trial or in his post-trial motions.

3. Emotional Distress—intentional infliction—judgment notwithstanding the verdict—sufficiency of evidence

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict where plaintiff presented more than a scintilla of evidence of each element of IIED, including that plaintiff experienced severe distress in the form of anxiety, frequent hysterical crying, and hyperventilation, for which plaintiff sought counseling, and that her distress was directly caused by defendant's extreme and outrageous conduct consisting not only of conducting an affair with another woman but also of harassing and stalking plaintiff, telling plaintiff he would do

everything he could to make her life miserable, humiliating plaintiff by posting her personal information and photographs of her online, and creating a fake social media profile announcing plaintiff's supposed availability for "no strings attached" sexual intercourse.

4. Libel and Slander—libel per se—publication—authentication—sufficiency of evidence

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images filed by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the per se libel claim. Plaintiff presented more than a scintilla of evidence that defendant published two libelous social media postings where she detailed how she traced the postings to defendant's email address and one of his online profiles. Further, plaintiff's own testimony provided the necessary authentication of the postings through her first-hand observation and knowledge of them as required by Evidence Rule 901(b)(1).

5. Privacy—unlawful disclosure of private images—"intimate parts"—topless photo

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images (pursuant to N.C.G.S. § 14-190.5A(b)) brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the unlawful disclosure claim where plaintiff presented more than a scintilla of evidence that the images of plaintiff that defendant had posted online—including a topless photo—showed "intimate parts" as defined in section 14-190.5A(a)(3).

6. Divorce—separation agreement and property settlement—effect of mutual release provision—conduct occurring after execution

In an action for libel per se, intentional infliction of emotional distress, and unlawful disclosure of private images brought by plaintiff against her husband, defendant's argument that plaintiff waived these claims by signing a separation agreement and property settlement, which included a mutual release provision, had no merit where the conduct forming the basis of the claims took place after the parties executed the agreement.

7. Libel and Slander—damages—compensatory—punitive—no substantial miscarriage of justice

Where a jury awarded plaintiff $1 million in damages after finding defendant responsible for libel per se, the trial court did not err by denying defendant's post-trial motion for judgment notwithstanding the verdict where there was no substantial miscarriage of justice because libel per se allows for presumed damages for pain and suffering without a showing of special damages. Further, there was no error in the punitive damages award because there was no requirement that the jury had to consider all of the factors contained in N.C.G.S. § 1D-35.

Appeal by Defendant from judgment entered 17 September 2019 and order entered 30 October 2019 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 12 May 2021.

The Michael Porter Law Firm, by Michael R. Porter; and The Charleston Law Group, by Jose A. Coker and R. Jonathan Charleston, for Plaintiff-Appellee.

Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On September 17, 2019, a jury found Defendant, Adam Clark, ("Defendant Clark") liable for unlawful disclosure of private images, intentional infliction of emotional distress ("IIED"), and libel. Post-trial, Defendant Clark filed a motion for judgment notwithstanding the verdict ("JNOV"), and in the alternative, motion for new trial, which was denied. On appeal, Defendant Clark contends the trial court erred in admitting expert witness testimony; allowing Plaintiff, Elizabeth Clark, ("Plaintiff") to proceed with an IIED claim; and denying his post-trial motion. After careful review of the record and applicable law, we disagree.

I. Factual and Procedural Background

¶ 2 On April 3, 2010, Plaintiff and Defendant Clark were married. At the time of their marriage, Defendant Clark held the rank of Captain in the United States Army. In or around May 2010, Plaintiff placed a personal advertisement on the website Craigslist. Through this advertisement, Plaintiff met a man with whom she had a sexual affair. According to Plaintiff, her extramarital affair lasted approximately ten months.

¶ 3 The couple remained together and attended several "marriage retreats," through the U.S. Army. During their marriage retreats, Plaintiff and Defendant Clark completed "exercises of trying to open up to your spouse, reconnect[ing] . . . . [T]hey go into forgiveness of things." Thereafter, the couple procreated two children in 2014 and 2015, respectively. In October 2015, Defendant Clark was promoted to Major.

¶ 4 In the spring of 2016, Defendant Clark attended Army training at Fort Belvoir, Virginia. While staying at Fort Belvoir, Defendant Clark met Defendant, Kimberly Barrett, MD ("Defendant Barrett"). Defendant Barrett held the rank of Lieutenant Colonel in the Army and knew Defendant Clark was married at the time. While at Fort Belvoir, Defendants Clark and Barrett stayed in barracks. The barracks were "like a U shape and it was two floors and [Defendants Clark and Barrett] were [in] the same long building, but [Defendant Barrett] was down on the other end." While attending their training, Defendants Clark and Barrett "had been all alone in each other's rooms."

¶ 5 Defendant Barrett testified that her relationship with Defendant Clark started by Defendant Clark "helping [her] with homework or papers. Sometimes [she] had questions. There is a lot of acronyms in the -- field, but in the military, there are a lot of acronyms that [she] wasn't familiar with." While at Fort Belvoir, Defendant Clark told Defendant Barrett "he did not have a good relationship" with his wife.

¶ 6 While Defendant Clark completed his educational program at Fort Belvoir, Plaintiff "notice[d] a little bit of change" in her husband. Defendant Clark did not travel home to North Carolina to visit and "wasn't texting [Plaintiff] as often. One time [Plaintiff] couldn't get ahold of him and [she] tried calling his hotel room, [but he] wouldn't pick up when he was supposed to be in there . . . . He was short with [her] on the telephone."

¶ 7 Plaintiff used her cellphone to "trace or track" Defendant Clark's cellphone, during which time Defendant Clark's phone was "showing a different location from where his room was at." Defendant Clark's phone was "pinging . . . from the other end of the hall," from where Defendant Barrett was staying.

¶ 8 When Defendant Clark came home from Fort Belvoir for Independence Day, Plaintiff discovered he "was texting a female. [She] found a number in his phone." When Plaintiff asked Defendant Clark who the female was, he replied, "I don't know what you're talking about." Finding the phone number caused Plaintiff "a lot of emotional distress." The couple argued about it, and Plaintiff experienced

"stroke-like symptoms." Plaintiff was ultimately diagnosed with "[m]igraines and stress." Defendant Clark returned to Fort Belvoir shortly thereafter.

¶ 9 In September 2016, Plaintiff discovered text messages between Defendants Clark and Barrett, in which Defendant Clark sent Defendant Barrett a picture of his penis taken in Plaintiff and Defendant Clark's home. At the time she discovered the sexually explicit photograph, Defendant Clark had changed Defendant Barrett's name in his cellphone's contact information to "Jane S." Plaintiff knew "Jane S." was Defendant Barrett because she had matched the cellphone number of "Jane S." with that of Defendant Barrett.

¶ 10 On September 11, 2016, Plaintiff asked Defendant Clark if he "still had [Defendant Barrett's] number." Plaintiff threatened to call Defendant Barrett, and Defendant Clark "jumped up really fast and chased after [Plaintiff] as [Plaintiff] was dialing [Defendant Barrett's] number." Plaintiff threatened to ask Defendant Barrett if she and Defendant Clark were having an extramarital affair. Because of this interaction, the couple fought, and Defendant Clark left their marital home.

¶ 11 Although Plaintiff and Defendant Clark separated on September 11, 2016, the couple attempted reconciliation by maintaining an emotionally and sexually intimate relationship. On March 17, 2017, Plaintiff and Defendant Clark executed a separation agreement, in which Defendant Clark agreed to pay $1,850 in monthly child support to Plaintiff. The separation agreement was drafted by Defendant Clark's attorney, and Plaintiff was not represented by independent counsel at the time.

¶ 12 Throughout June and July 2017, Plaintiff and Defendant Clark engaged in sexual intercourse and recorded themselves doing so. Also in July 2017, Defendant Clark and Defendant Barrett conceived a child together through *in vitro* fertilization. Defendant Clark continued to maintain an intimate and sexual relationship with both his wife and with his paramour during this time. In August 2017, Defendant Clark was located in Boston, Massachusetts for additional training. Plaintiff attempted to videocall Defendant Clark through Facetime, but Defendant Clark did not answer. When Defendant Clark did not answer, Plaintiff "sent him a topless photo." Plaintiff did not send the topless photograph to anyone else.

¶ 13 In September 2017, Plaintiff and Defendant Clark stopped having sexual intercourse. Around this time, Defendant Clark began complaining about the amount he paid to Plaintiff in child support. In October 2017, Plaintiff and Defendant Clark exchanged text messages, in which

Plaintiff sent Defendant Clark "a picture of female genitalia." Around that same time, Plaintiff discovered Defendant Barrett was pregnant with Defendant Clark's child.[1]

¶ 14 In January 2018, Plaintiff discovered a Craigslist advertisement and believed it to be about herself. The advertisement stated,

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Plaintiff believed Defendant Clark posted the advertisement, because he "always said [she] had an eating disorder and when [they] started not getting along, he said that [she] didn't take care of [her] children and [she] was a bad mother." Plaintiff responded to the advertisement, stating that she knew Defendant Clark posted it. Whomever posted the advertisement denied being Defendant Clark. However, when Plaintiff sent insulting language to the poster of the advertisement, Defendant Clark sent Plaintiff a text message inquiring as to why he received such language.

¶ 15 In the text message, Defendant Clark included a "screenshot" of the message he received. Plaintiff observed that the message was sent to an email address with the username "elizabethclark0403." Plaintiff did not use an email address with that username but attempted to log into the email account. When Plaintiff attempted to do so, the "recovery email" matched that of Defendant Clark's personal email address.

¶ 16 In March 2018, Plaintiff began interacting with Defendant Clark, who was using the alias "Brian Bragg" on the social networking platform, Kik.[2] The Brian Bragg[3] account sent Plaintiff the photograph of her nude breasts, saying, "Saw this floating around the internet in the Fayetteville chat rooms just letting you know." "Brian Bragg" also stated the image was "all over the place," and that he hoped Plaintiff "[slept] well knowing [her] fun bags [were] hanging out there for the world to see."

---

1. Defendants Clark and Barrett had a child together on March 7, 2018.

2. When asked if Defendant Clark used the alias "Brian Bragg," Defendant Clark pled the Fifth Amendment.

3. Plaintiff believed "Brian Bragg" was Defendant Clark, as the "Brian Bragg" account used a photograph that Plaintiff took of Defendant Clark as a profile picture.

¶ 17 In May 2018, Plaintiff discovered a Facebook "weight loss" advertisement depicting Plaintiff. The advertisement was composed of a post-pregnancy photograph of Plaintiff next to the photograph of Plaintiff's nude breasts. Prior to Plaintiff finding the advertisement, "Brian Bragg" had threatened to find and post Plaintiff's post-pregnancy photographs on Kik.

¶ 18 Throughout 2018, Plaintiff's friends and co-workers contacted her when they saw "Liz Clark" profiles, using a photograph of Plaintiff as a profile picture, in Kik chatrooms soliciting "no strings attached sex." Kik business records revealed that the "Liz Clark" Kik profiles could be traced to an IP address that matched the IP address of Defendants Clark and Barrett's residence.

¶ 19 When Plaintiff's friends and co-workers notified her that they saw the saw "Liz Clark" Kik profiles, she "was extremely embarrassed" and her "heart started racing." Plaintiff also received photographs from "Brian Bragg" depicting herself and her vehicle. Attached to these photographs were messages discussing how people were following Plaintiff. One message from "Brian Bragg" stated, "We are going to continue doing everything in our power to make your life miserable."

¶ 20 In August 2018, Plaintiff brought the instant action, asserting claims against both Defendants Clark and Barrett for libel *per se*; intentional and negligent infliction of emotional distress; and a violation of N.C. Gen. Stat. § 14-190.5A, a statute providing criminal sanctions for what is commonly known as "revenge porn." Plaintiff asserted additional causes of action against Defendant Barrett for alienation of affection and criminal conversation. In April 2019, Defendant Clark was arrested for stalking and cyberstalking Plaintiff in violation of N.C. Gen. Stat. §§ 14-277.3(A)(c) and 14-196.3.

¶ 21 In July 2019, the Cumberland County Superior Court barred the use of expert witness testimony in the civil actions filed by Plaintiff based upon a motion filed by Defendants Clark and Barrett to strike Plaintiff's tardy designation of an expert witness.

¶ 22 The case proceeded to trial in August 2019. During trial, Derek Ellington ("Ellington") was permitted to testify. Ellington is a digital forensics examiner in Cumberland County. During Ellington's testimony, he laid the foundation for the entry of a flash drive containing nearly 32,000 files. Ellington preserved the files from Plaintiff's electronic devices, and social media and email accounts. The data Ellington gathered and saved demonstrated that Plaintiff had only sent the "topless photo" of herself to Defendant Clark.

¶ 23 After a jury trial, the trial court entered judgment against Defendant Clark for libel *per se*, unlawful disclosure of private images/revenge porn, and IIED on September 17, 2019. Plaintiff was awarded $1,510,000.00 in compensatory damages and $500,000.00 in punitive damages. Defendant Clark filed a motion for judgment notwithstanding the verdict ("JNOV"), and in the alternative, a motion for a new trial on September 26, 2019. The trial court denied Defendant Clark's motions on October 30, 2019. Defendant Clark appeals from both the September 17, 2019 judgment and the October 30, 2019 order denying his post-trial motion.

II. Discussion

¶ 24 Defendant Clark raises several arguments on appeal. Each will be addressed in turn.

A. Ellington's Testimony

¶ 25 **[1]** Defendant Clark first contends the trial court erred "by admitting evidence and testimony from an expert witness who was not qualified as such." We disagree.

1. Standard of Review

¶ 26 As a preliminary matter, the parties dispute the proper appellate standard of review. Defendant Clark contends the appropriate standard of review is *de novo*, because "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citations omitted). Conversely, Plaintiff asks this Court to review the admission of Ellington's testimony for an abuse of discretion. Rule 104(a) of our rules of evidence provides that "preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." N.C. Gen. Stat. § 8C-1, Rule 104(a) (2020). Decisions made under Rule 104(a) are addressed to the sound discretion of the trial court. *See State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 554 (1985).

¶ 27 After careful review of the applicable law, we review *de novo* whether Ellington testified as an expert witness. *See State v. Broyhill*, 254 N.C. App. 478, 488, 803 S.E.2d 832, 839 (2017) (citation omitted); *see also State v. Jackson*, 258 N.C. App. 99, 107, 810 S.E.2d 397, 402 (2018) (noting that the Court applied a *de novo* standard of review "because determining whether the State's experts' testimonies

constituted expert opinions . . . was a question" of law.) (citing *State v. Davis*, 368 N.C. 794, 797-98, 785 S.E.2d 312, 314-15 (2015)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). However, whether the trial court erroneously admitted Ellington's testimony is reviewed for an abuse of discretion. *See Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009) (citation omitted); *see also State v. Turbyfill*, 243 N.C. App. 183, 185-86, 776 S.E.2d 249, 252 (2015) (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." *Turbyfill*, 243 N.C. App. at 185-86, 776 S.E.2d at 252 (citation omitted).

2. Whether Ellington's Testimony Constitutes Expert Testimony

¶ 28 The parties next dispute whether Ellington testified as an expert or gave a lay opinion. "Our Supreme Court . . . explained the threshold difference between expert opinion and lay witness testimony." *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (citing *Davis*, 368 N.C. at 798, 785 S.E.2d at 315). "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)). "Ultimately, 'what constitutes expert opinion testimony requires a case-by-case inquiry' through an examination of 'the testimony as a whole and in context.' " *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (quoting *Davis*, 368 N.C. at 798, 785 S.E.2d at 315).

¶ 29 Here, Ellington testified about the general process for making a forensic or digital copy of electronic devices and specifically testified as to how he made a copy of Plaintiff's electronic devices. Ellington's testimony laid the foundation[4] for a flash drive containing files from Plaintiff's devices, demonstrating Plaintiff did not send the "topless photo" to anyone other than Defendant Clark. A review of Ellington's testimony reveals that he testified not as an expert, but as a lay witness. Ellington testified as to what he "saw or experienced" in creating copies of Plaintiff's devices and accounts. He did not interpret or assess

4. Defendant Clark does not argue that the flash drive was improperly authenticated under N.C. Gen. Stat. § 8C-1, Rule 901.

the devices or accounts but explained the process he used for Plaintiff's devices was one that he did daily.

¶ 30 Presuming *arguendo* Ellington testified as an expert, Defendant Clark failed to sufficiently demonstrate prejudice. *See State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017) ("Where it does not appear that the . . . admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless.") (quoting *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001)). Here, Plaintiff testified about the text messages, emails, and social media messages and postings. Ellington's testimony was not "pivotal" in determining whether Defendants Clark and Barrett posted Plaintiff's nude breasts on the internet; rather, it corroborated Plaintiff's testimony that she sent the topless photograph to Defendant Clark. Therefore, we find no error in the trial court's decision to allow Ellington to testify.

B. IIED Claims

¶ 31 Next, Defendant Clark contends the trial court erred by allowing Plaintiff's IIED claim to proceed "when the conduct is subsumed by other causes of action," and by denying Defendant Clark's post-trial motion "because there was insufficient evidence for the claim of IIED to be submitted to the jury." We disagree.

¶ 32 Whether Plaintiff's IIED cause of action is subsumed by her other asserted torts is a question of law reviewed *de novo*. *See Piazza v. Kirkbride*, 246 N.C. App. 576, 579, 785 S.E.2d 695, 698 (2016), *modified*, 372 N.C 137, 827 S.E.2d 479 (2019). "The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is 'whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 148-49, 683 S.E.2d 728, 735 (2009) (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002)). Generally, "[i]f there is more than a scintilla of evidence supporting each element of the nonmoving party's claim, the motion for directed verdict or JNOV should be denied." *Horner v. Byrnett*, 132 N.C. App. 323, 325, 511 S.E.2d 342, 344 (1999) (citation omitted); *see also Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998). "A scintilla of evidence is defined as very slight evidence." *Hayes v. Waltz*, 246 N.C. App. 438, 442-43, 784 S.E.2d 607, 613 (2016).

¶ 33 In determining whether the trial court erred in denying a JNOV, "we must take the plaintiff's evidence as true, and view all of the evidence in the light most favorable to him/her, giving him/her the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Watson v. Dixon*, 130 N.C. App. 47, 52, 502 S.E.2d 15, 19 (1998) (citations and internal quotation marks omitted).

3. Election of Remedies

¶ 34 **[2]** Defendant Clark contends the trial court erred in permitting Plaintiff to pursue her claim for IIED, "when the conduct is subsumed by other causes of action." Defendant Clark specifically contends that Plaintiff cannot recover under both IIED and another tort for the same conduct. Plaintiff argues Defendant Clark failed to preserve this argument for appellate review, as it "was never raised in [Defendant] Clark's post-trial motions."

¶ 35 "One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights." *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989) (citation omitted). "The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong." *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 204, 532 S.E.2d 833, 835 (2000) (citation omitted). The doctrine of "[e]lection of remedies is an affirmative defense which must be pleaded by the party relying on it." *North Carolina Federal Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 856 (1989) (citations omitted).

¶ 36 While Defendant Clark contends Plaintiff's IIED claim should not have been submitted to a jury because it was subsumed by other causes of action, Defendant Clark did not raise the defense of election of remedies at trial or in his post-trial motions. Therefore, he may not raise this argument on appeal. *Id.*; *see also State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 704, 535 S.E.2d 84, 92-93 (2000).

4. Sufficiency

¶ 37 **[3]** Next, Defendant Clark contends the trial court erred in denying his post-trial motions because Plaintiff did not present evidence to support each element of IIED. We disagree.

¶ 38 "To state a claim for intentional infliction of emotional distress, a plaintiff must allege: '(1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." ' *Norton v. Scotland Mem'l Hosp., Inc.*, 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2016) (citation omitted). "Extreme and outrageous

conduct is defined as conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* (citation omitted).

a. Severe Emotional Distress

¶ 39 Defendant Clark first argues Plaintiff failed to present evidence that she suffered from "severe emotional distress." We disagree.

¶ 40 "[T]he term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (citation and emphasis omitted). However, severe emotional distress does not require medical expert testimony. *Williams v. HomEq Serv. Corp.*, 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007). Testimony of a plaintiff's "friends, family, and pastors can be sufficient to support a claim. . . ." *Id.* (citations omitted).

¶ 41 Here, Plaintiff testified at trial that she cried hysterically, hyperventilated, and sought out a counselor at a local clinic in response to the conduct of Defendants Clark and Barrett. One of Plaintiff's friends testified that Plaintiff was "very emotionally distraught and crying" on a weekly basis and that Plaintiff experienced anxiety. Although Plaintiff did not attend counseling for her anxiety on a regular basis, she testified this was out of fear that such treatment would negatively impact her probability of maintaining shared custody of her children. Taking the evidence in the light most favorable to Plaintiff, we hold there was more than a scintilla of evidence she suffered severe emotional distress as a result of the conduct of Defendants Clark and Barrett.

b. Causation

¶ 42 Defendant Clark further contends the trial court erred in denying his post-trial motion because Plaintiff failed to show a causal link between Defendant Clark's conduct and Plaintiff's emotional harm. We disagree.

¶ 43 Intentional infliction of emotional distress requires outrageous conduct that is intended to cause and does cause severe emotional distress. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119-20 (1986) (citation omitted).

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery

> may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

Id. (citation omitted).

¶ 44 Defendant Clark argues Plaintiff failed to show his conduct caused Plaintiff severe emotional distress because Plaintiff experienced "stroke-like symptoms" and was diagnosed with "migraines and stress" prior to the complained of conduct to support her IIED claim. While the trial court noted Plaintiff's emotional distress included "stroke-like symptoms," it did not solely rely on such symptoms in finding Plaintiff produced evidence of severe emotional distress. Specifically, the trial court noted, "that Defendant Clark's conduct did cause severe emotional distress to Plaintiff in the form of anxiety and also physical manifestations, including stroke like symptoms." Plaintiff presented evidence that Defendant Clark acted with a disregard to Plaintiff's emotional state and that there was a high possibility of emotional distress in that, Defendant Clark posed as "Brian Bragg" and engaged in "long-term electronic harassment of . . . Plaintiff to include, inter alia, calling the Plaintiff disparaging names, including 'whore' and 'white trash' "; Defendant Clark created a fake Kik profile and posed as Plaintiff, causing the profile to become a member in various chatrooms intended for "no strings attached sex"; and Defendant Clark posted libelous social media postings about Plaintiff on Craigslist and Facebook.

¶ 45 There is no dispute Plaintiff experienced "stroke-like symptoms" prior to the parties' execution of the separation agreement. Plaintiff experienced anxiety, hyperventilation, and other emotional distress as a result of the conduct of Defendants Clark and Barrett. Plaintiff testified this was caused by Defendants Clark and Barrett messaging her that they would do "everything in [their] power to make [her] life miserable" and by discovering fake "Liz Clark" Kik profiles soliciting "no strings attached" sexual intercourse. Accordingly, we hold there was more than a scintilla of evidence to find a causal link between the complained of conduct and Plaintiff's emotional distress.

c. Outrageous Conduct

¶ 46 Next, Defendant Clark argues Plaintiff failed to present sufficient evidence of extreme and outrageous conduct because trading mere insults does not give rise to a claim of IIED. We disagree.

¶ 47 "[T]he initial determination of whether conduct is extreme and outrageous is a question of law," to be determined by the court. *Johnson*

v. Bollinger, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381 (1987) (citing *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)). Conduct is considered extreme or outrageous "when a defendant's conduct exceeds all bounds usually tolerated by decent society." *Watson*, 130 N.C. App. at 52, 502 S.E.2d at 19 (citation omitted). Conduct has also been deemed "extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chidnese v. Chidnese*, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011) (internal quotation marks and citation omitted).

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion . . . .

Id. (citation omitted). In *Watson v. Dixon*, this Court found sufficient evidence of "extreme and outrageous behavior" where the defendant "harass[ed]" the plaintiff, and "frightened and humiliated [the plaintiff] with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature . . . ." 130 N.C. App. at 53, 502 S.E.2d at 20.

¶ 48 Viewing the evidence in the light most favorable to Plaintiff, and taking that evidence as true, the evidence tends to show that Defendant Clark began harassing and stalking Plaintiff after the date of separation; frightened Plaintiff by stating, "We are going to continue doing everything in our power to make your life miserable"; and humiliated Plaintiff by posting advertisements and photographs of Plaintiff online, containing Plaintiff's personal information. Thus, we hold the trial court did not err in denying Defendant Clark's JNOV, as Plaintiff presented more than a scintilla of evidence of "extreme and outrageous behavior." *See Watson*, 130 N.C. App. at 53, 502 S.E.2d at 20 (citing *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 473 S.E.2d 38 (1996); *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990); *Hogan*, 79 N.C. App. 483, 340 S.E.2d 116).

C. Plaintiff's Libel Claim

¶ 49 **[4]** Next, Defendant Clark contends the trial court erred in denying his post-trial motion with respect to Plaintiff's libel claim. Defendant Clark brings forth two arguments with respect to Plaintiff's claim for libel *per se*; namely, whether Plaintiff failed to prove the libelous statements were published and whether two libelous publications were properly authenticated.

¶ 50 "North Carolina law recognizes three classes of libel . . . . [P]ublications obviously defamatory . . . are called libel *per se*." *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 538, 634 S.E.2d 586, 590 (2006) (citation omitted). Libel *per se* is

> a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt, or disgrace.

Renwick v. News & Observer Pub. Co., 310 N.C. 312, 317-18, 312 S.E.2d 405, 409 (1984) (citation omitted). "It is an elementary principle of law that there can be no libel without a publication of the defamatory matter." *Satterfield v. McLellan Stores Co.*, 215 N.C. 582, 584, 2 S.E.2d 709, 711 (1939). "To constitute a publication, such as will give rise to a civil action, there must be a communication of the defamatory matter to some third person or persons." *Id.* (citation omitted).

a. Publication

¶ 51 Defendant Clark first contends Plaintiff failed to present sufficient "evidence that Defendant Clark publicized the alleged content to Facebook or Craigslist." We disagree.

¶ 52 There are two libelous electronic social media postings at issue: a Craigslist advertisement and the Facebook "weight loss" advertisement. Craigslist itself is a website in which individuals can post personal advertisements for third-party viewing. Plaintiff testified she discovered the Craigslist advertisement, and presumably, other individuals observed the personal advertisement as well. Thus, there was sufficient evidence that the Craigslist advertisement was published.

¶ 53 Plaintiff further testified that she responded to the Craigslist ad online with an insulting message directed at Defendant Clark. Defendant

Clark, in response, text messaged a picture of Plaintiff's message, inquiring as to why she had sent him such a message. From Defendant Clark's response, Plaintiff was able to see that the "poster" of the personal ad used the email "elizabethclark0403." This was not Plaintiff's personal email, but she attempted to log into the email account. Because Plaintiff did not have the login information for "elizabethclark0403," she attempted to "recover" the login information through Google's email system.[5] Upon doing so, Plaintiff discovered the "recovery email" for "elizabethclark0403" was Defendant Clark's personal email address. Therefore, we hold there was more than a scintilla of evidence that Defendant Clark published the Craigslist advertisement.

¶ 54 Defendant Clark further argues there was insufficient evidence that Defendant Clark published the Facebook "weight loss" advertisement. We disagree.

¶ 55 Plaintiff testified a third party sent Plaintiff the Facebook advertisement, establishing that the ad was indeed published. Plaintiff further testified that both photographs used in the advertisement were in the sole possession of Defendant Clark. Further, "Brian Bragg" mentioned Plaintiff's post-pregnancy photographs and that he would "make sure to find" such photographs shortly before the Facebook advertisement was posted. As Plaintiff presented more than a scintilla of evidence that Defendant Clark published the Facebook advertisement, we find no error.

b. Authentication

¶ 56 Defendant Clark next argues the trial court erred by denying his motion for JNOV because Plaintiff did not properly authenticate the libelous postings. We disagree.

¶ 57 Under Rule 901 of our evidentiary rules, "[t]he requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2020). Rule 901(b) provides examples of authentication methods that satisfy the requirements of Subsection (a), including testimony of a witness with knowledge "that a matter is what it is

---

5. If a "gmail" or Google email account holder forgot their password or username, they can recover their Google account by entering certain information such as their username, their "recovery" email address, or a phone number. *See How to recover your Google account or Gmail*, https://support.google.com/accounts/answer/7682439?hl=en.

A "recovery email" is a separate email account Google account holders can use to recover their lost username or password.

claimed to be." N.C. Gen. Stat. § 8C-1, Rule 901(b)(1). Here, Plaintiff authenticated the libelous electronic postings through her own testimony. Plaintiff testified that she personally saw the advertisement, recognized it to be about her, and made a copy of the ad. Likewise, Plaintiff authenticated the Facebook advertisement by testifying the advertisement was sent directly to her by a third party and the advertisement exhibits characteristics of Facebook as a social media site, in that it demonstrates where viewers can interact with the posting. Accordingly, we hold Plaintiff sufficiently authenticated each libelous posting through first-hand knowledge under Rule 901(b)(1).

D. N.C. Gen. Stat. § 14-190.5A

¶ 58 **[5]** Next, Defendant Clark contends the trial court erred by denying his post-trial motion as there was insufficient evidence for the issue of "revenge porn" to be submitted to the jury. Specifically, Defendant Clark argues Plaintiff failed to show that he shared an image of "intimate parts" under N.C. Gen. Stat. § 14-190.5A.

¶ 59 N.C. Gen. Stat. § 14-190.5A prohibits the "disclosure of private images" and is commonly known as the "revenge porn" statute. Section 14-190.5A provides,

> A person is guilty of disclosure of private images if all of the following apply:
>
> (1) The person knowingly discloses an image of another person with the intent to do either of the following:
>
> a. Coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
>
> b. Cause others to coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
>
> (2) The depicted person is identifiable from the disclosed image itself or information offered in connection with the image.
>
> (3) The depicted person's intimate parts are exposed or the depicted person is engaged in sexual conduct in the disclosed image.
>
> (4) The person discloses the image without the affirmative consent of the depicted person.

N.C. Gen. Stat. § 14-190.5A(b) (2020). "Intimate parts" is statutorily defined as "[a]ny of the following naked human parts: (i) male or female genitals, (ii) male or female pubic area, (iii) male or female anus, or (iv) the nipple of a female over the age of 12." N.C. Gen. Stat. § 14-190.5A(a)(3).

¶ 60 Defendant Clark argues in his brief that the issue of revenge porn should not have been submitted to the jury, because the Facebook "weight loss" advertisement had a star emoji[6] covering one of Plaintiff's nipples and did not violate the "revenge porn" statute or Facebook's "Community Standards." However, Defendant Clark ignores that the topless photograph that appeared on Facebook with a star is the same photograph shared through Kik, sans star emoji. We hold that there was sufficient evidence as to each element contained within the "revenge porn" statute such that the trial court did not err in submitting the issue to the jury.

E. Separation Agreement & Property Settlement

¶ 61 **[6]** In his sixth argument on appeal, Defendant Clark contends that "[t]o the extent that the factual basis for any of Plaintiff's claims against Defendant Clark occur prior to March 16, 2017, they are waived by a provision in the parties' separation agreement entitled 'Mutual Release.' "

¶ 62 The "Mutual Release" provision provides,

> [E]ach party does hereby release and discharge the other of and from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, known or unknown, by reason of any matter, cause, or thing up to the date of the execution of this agreement, except the cause of action for divorce based upon the separation of the parties. It is the intention of the parties that henceforth there shall be, as between them, only such rights and obligations as are specifically provided for in this agreement, the right of action for divorce, and such rights and obligations as are specifically provided for in any deed or other instrument executed contemporaneously or in connection herewith.

---

6. The Merriam-Webster dictionary defines an "emoji" as "any of various small images, symbols, or icons used in text fields in electronic communication (such as text messages, email, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc."

However, Plaintiff's claims arise from Defendant Clark's conduct that occurred after the parties executed the agreement in March 2017. Plaintiff's claims arise from Defendant Clark's posting of libelous statements and explicit photographs in 2018. Therefore, this assignment of error is without merit.

F. Damages

¶ 63 **[7]** In Defendant Clark's final argument on appeal, he contends the trial court erred in denying his motion for JNOV "because the damages awarded to Plaintiff were improper and not supported by the evidence." We disagree.

¶ 64 The trial court has discretion to grant a new trial where the jury awards "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C. R. Civ. P. 59(a)(6). However,

> our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Worthington v. Bynum, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). "Consequently, an appellate court should not disturb a Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.*

¶ 65 Here, there is no evidence of a "substantial miscarriage of justice." Although the jury awarded $1,000,0000 in damages for libel *per se*, libel *per se* allows for presumed damages for pain and suffering without a showing of special damages. *See Iadanza v. Harper*, 169 N.C. App. 776, 779-80, 611 S.E.2d 217, 221 (2005).

¶ 66 Defendant Clark also contends that the award of punitive damages was inappropriate as the trial court failed to receive evidence or make findings of fact concerning all of the factors enumerated in N.C. Gen. Stat. § 1D-35. However, the jury is not mandated to consider all factors enumerated in Section 1D-35. The plain language of the statute allows

the trier of fact to consider such factors, but it is not a requirement. Accordingly, we hold the trial court did not err in denying Defendant Clark's post-trial motion with respect to damages.

III. Conclusion

¶ 67 After careful review of the record and applicable law, we conclude there was no error at trial. Additionally, we hold the trial court did not err in denying Defendant Clark's motion for JNOV. Plaintiff presented more than a scintilla of evidence in support of each asserted cause of action. We further hold the trial court did not err in denying Defendant Clark's post-trial motion because the separation agreement is inapplicable to the complained of conduct and the damages awarded to Plaintiff were proper.

NO ERROR AND AFFIRMED.

Judges TYSON and HAMPSON concur.

ELIZABETH ANN CLARK, Plaintiff
v.
ADAM MATTHEW CLARK and KIMBERLY RAE BARRETT, Defendants

No. COA20-446

Filed 7 December 2021

1. Evidence—witness testimony—process of making digital copy of electronic devices—not involving specialized knowledge

In an action for intentional infliction of emotional distress and alienation of affection, there was no error in the admission of testimony by plaintiff's witness regarding how the witness made a digital copy of plaintiff's electronic devices. Although the testimony did not rely on specialized knowledge and was therefore more properly considered to be lay testimony and not expert testimony, plaintiff could not demonstrate prejudice in its admission, since it served to corroborate plaintiff's own testimony about her electronic communications and social media posts.

2. Appeal and Error—preservation of issues—affirmative defense—election of remedies—not raised before trial court

In an action for intentional infliction of emotional distress and alienation of affection, defendant did not preserve for appeal her

argument that the former claim could not go forward on the basis that it was subsumed by other causes of action. Defendant failed to raise this affirmative defense of election of remedies either at trial or in her post-trial motion for judgment notwithstanding the verdict.

3. Emotional Distress—intentional infliction—judgment notwithstanding the verdict—sufficiency of evidence

In an action for intentional infliction of emotional distress (IIED) and alienation of affection based on defendant's affair with plaintiff's husband, defendant was not entitled to relief on her post-trial motion for judgment notwithstanding the verdict, where plaintiff presented more than a scintilla of evidence of each element of IIED, including that plaintiff experienced severe distress in the form of anxiety, frequent hysterical crying, and hyperventilation, for which plaintiff sought counseling, and that her distress was directly caused by defendant's extreme and outrageous conduct consisting not only of having the affair but also of conceiving a child with plaintiff's husband while the couple were attempting a reconciliation, telling plaintiff she would do everything she could to make her life miserable, and creating fake social media profiles announcing plaintiff's supposed availability for "no strings attached" sexual intercourse.

4. Alienation of Affections—subject matter jurisdiction—conduct in North Carolina—text messages

The trial court had subject matter jurisdiction over a claim for alienation of affection where plaintiff presented more than a scintilla of evidence that the injury to the marital relationship occurred in North Carolina, including that she discovered text messages between her husband and defendant during the time when her husband was in the marital home in North Carolina and that her husband sent defendant a sexually explicit photograph from the marital home. Further, defendant's invocation of the Fifth Amendment when asked about her sexual activity with plaintiff's husband in North Carolina could give rise to an inference that her truthful testimony on that subject would not be favorable to her.

5. Alienation of Affections—elements—sufficiency of evidence—sexual affair

In an action for intentional infliction of emotional distress and alienation of affection based on defendant's affair with plaintiff's husband, defendant was not entitled to relief on her post-trial motion for judgment notwithstanding the verdict, where plaintiff presented more than a scintilla of evidence of each element of alienation of

affection, including that plaintiff and her husband had some love and affection between them as shown by their communications and marital relations; that defendant interfered with the marital relationship and caused the loss of affection between the spouses by having a sexual relationship with plaintiff's husband, conceiving a child with him, and sharing texts and at least one sexually explicit photo with him; and that the husband's behavior toward plaintiff changed as a result.

6. Damages and Remedies—alienation of affection—intentional infliction of emotional distress—compensatory—punitive—not excessive

After a jury awarded plaintiff $1,200,000 in damages in her claims for intentional infliction of emotional distress (IIED) and alienation of affection—asserted against the woman who had an affair with plaintiff's husband—the trial court did not err by denying defendant's post-trial motion for judgment notwithstanding the verdict seeking relief from what she contended were excessive damages. Juries have wide latitude in awarding damages for heart balm torts, and the $450,000 compensatory damages were not improper given plaintiff's mental distress, her much lower earning potential than her husband's, the fact that she assumed half the marital debt and cared for their two children, and her loss of benefits as a military spouse. Further, the trial court properly instructed the jury regarding punitive damages as to the IIED claim, and there was no requirement that the jury had to consider all of the factors contained in N.C.G.S. § 1D-35(2).

Appeal by Defendant from judgment entered 17 September 2019 and order entered 30 October 2019 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 12 May 2021.

The Charleston Law Group, by Jose A. Coker and R. Jonathan Charleston; The Michael Porter Law Firm, by Michael Porter, for Plaintiff-Appellee.

Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On September 17, 2019, a jury found Defendant, Kimberly Barrett, ("Defendant Barrett") liable for intentional infliction of emotional distress ("IIED") and alienation of affection. Post-trial, Defendant Barrett filed a motion for judgment notwithstanding the verdict ("JNOV"), which was denied. On appeal, Defendant Barrett contends the trial court erred in admitting expert witness testimony; allowing Plaintiff, Elizabeth Clark, ("Plaintiff") to proceed with her IIED claim; and denying her motion for JNOV. After careful review of the record and applicable law, we conclude there was no error at trial and affirm the trial court.

I. Factual and Procedural Background

¶ 2 Plaintiff married Defendant, Adam Clark, ("Defendant Clark") on April 3, 2010. At the time of their marriage, Defendant Clark held the rank of Captain in the United States Army. In or around May 2010, Plaintiff placed a personal advertisement on the website Craigslist, through which she met a man with whom she had a sexual affair. Plaintiff's extramarital affair lasted approximately ten months.

¶ 3 Plaintiff testified Defendant Clark was unaware of her affair, and the couple remained together and attended several "marriage retreats" provided by the Army. During these retreats, Plaintiff and Defendant Clark completed "exercises of trying to open up to your spouse, reconnect[ing] . . . . [T]hey go into forgiveness of things." The couple "wrote each other letters on trying to put the past behind [them] and move forward, how much [they] really loved each other." Thereafter, the couple procreated two children in 2014 and 2015, respectively.

¶ 4 In the spring of 2016, Defendant Clark attended a training at Fort Belvoir, Virginia. While staying at Fort Belvoir, Defendant Clark met Defendant Barrett, a Lieutenant Colonel in the Army and a staff obstetrics and gynecology physician. At the time Defendants Clark and Barrett met, Defendant Barrett knew Defendant Clark was married, but felt Defendant Clark "did not have a good relationship" with his wife.

¶ 5 While at Fort Belvoir, Defendants Clark and Barrett resided in barracks. The barracks were "like a U shape and it was two floors and [Defendants Clark and Barrett] were [in] the same . . . building, but [Defendant Barrett] was down on the other end." While attending their training, Defendants Clark and Barrett spent time "all alone in each other's rooms."

¶ 6 Defendant Barrett testified that her relationship with Defendant Clark started by Defendant Clark "helping [her] with homework or papers. Sometimes [she] had questions. There is a lot of acronyms in

the—field, but in the military, there are a lot of acronyms that [she] wasn't familiar with." After Defendants Clark and Barrett met each other, Plaintiff "notice[d] a little bit of change" in her husband. Defendant Clark did not travel home to North Carolina to visit and "wasn't texting [Plaintiff] as often. One time [Plaintiff] couldn't get ahold of him and [she] tried calling his hotel room, [but he] wouldn't pick up when he was supposed to be in there . . . . He was short with [her] on the telephone." Because of the changes she noted in Defendant Clark's behavior, Plaintiff used her cellphone to "trace or track" Defendant Clark's cellphone, during which time Defendant Clark's phone was "showing a different location from where his room was at." Defendant Clark's phone was "pinging . . . from the other end of the hall," from where Defendant Barrett's room was located.

¶ 7 On or around July 4, 2016, Defendant Clark traveled home to North Carolina for Independence Day. While he was home, Plaintiff discovered he "was texting a female. [She] found a number in his phone." When Plaintiff asked Defendant Clark who the female was, he replied, "I don't know what you're talking about." Finding the phone number caused Plaintiff "a lot of emotional distress." The couple argued, and Plaintiff experienced "stroke-like symptoms" and went to the hospital for treatment. Plaintiff was ultimately diagnosed with "[m]igraines and stress." Defendant Clark returned to Fort Belvoir the same day Plaintiff was hospitalized.

¶ 8 In September 2016, Plaintiff discovered text messages between Defendants Clark and Barrett, in which Defendant Clark sent Defendant Barrett a picture of his penis. The picture sent was taken in a bathroom in Plaintiff and Defendant Clark's home. At the time Plaintiff discovered the sexually explicit photograph, Defendant Clark had changed Defendant Barrett's name in his cellphone's contact information to "Jane S." Plaintiff knew "Jane S." was Defendant Barrett because she had matched the cellphone number of "Jane S." with that of Defendant Barrett.

¶ 9 On September 11, 2016, Plaintiff confronted Defendant Clark and asked if he "still had [Defendant Barrett's] number." Plaintiff threatened to call Defendant Barrett, and Defendant Clark "jumped up really fast and chased after [Plaintiff] as [Plaintiff] was dialing [Defendant Barrett's] number." Plaintiff threatened to ask Defendant Barrett if she and Defendant Clark were having an extramarital affair. Because of this interaction, the couple fought, and Defendant Clark left their marital home.

¶ 10 Although Defendant Clark left the marital home in September 2016, the couple maintained an emotionally and sexually intimate relationship. Plaintiff testified, "It was very complicated, because he would keep coming over . . . . And he was holding me and we had sex a couple of times." In January 2017, Plaintiff and Defendant Clark purchased real property together. The property the couple purchased was owned by a close family friend of Plaintiff's, whom she knew through her father. Ultimately, the loan obtained to purchase the land was put in Defendant Clark's sole name, because Plaintiff "didn't really have any kind of credit or anything like that." At the time the real property was purchased, Defendant Clark and Plaintiff "were actually reconciling at that time. And [Defendant Clark] told Plaintiff that . . . [they were] going to still build a house on it." At the time of trial, Defendants Clark and Barrett had built a house on the land and were residing on this property together.[1]

¶ 11 In March 2017, Plaintiff and Defendant Clark executed a separation agreement, in which Defendant Clark agreed to pay $1,850 in monthly child support. The separation agreement was drafted by Defendant Clark's attorney, and Plaintiff was not represented by independent counsel at the time of its execution.

¶ 12 Throughout June and July 2017, Plaintiff and Defendant Clark engaged in sexual intercourse and recorded videos of themselves doing so. Also in July 2017, Defendant Clark and Defendant Barrett conceived a child together through *in vitro* fertilization. Defendant Clark continued to maintain an intimate and sexual relationship with both his wife and with his paramour during this time. In August 2017, Defendant Clark traveled to Boston, Massachusetts for additional training. Plaintiff attempted to videocall Defendant Clark through Facetime, but Defendant Clark did not answer. When Defendant Clark did not answer, Plaintiff "sent him a topless photo," in which Plaintiff's naked breasts were exposed. Plaintiff did not send the topless photograph to anyone else.

¶ 13 In September 2017, Plaintiff and Defendant Clark stopped having sexual intercourse. Around this time, Defendant Clark began complaining about the amount he paid to Plaintiff in child support. In October 2017, Plaintiff and Defendant Clark were still texting one another, and Plaintiff sent Defendant Clark "a picture of female genitalia." It was

---

1. Defendant Barrett testified she moved into the house built on the property in "November or December of 2018." Testimony at trial further suggests Defendants Clark and Barrett began living together in 2017. Specifically, Defendant Barrett stated she lived independently for approximately four months beginning in August 2017. When asked where she resided afterwards, Defendant Barrett utilized her Fifth Amendment privilege.

around this time that Plaintiff discovered Defendant Barrett was pregnant with Defendant Clark's child.[2]

¶ 14 In January 2018, Plaintiff discovered a Craigslist advertisement and believed it to be about herself. The advertisement stated,

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

¶ 15 Plaintiff believed Defendant Clark posted the advertisement, because he "always said [she] had an eating disorder and when [they] started not getting along, he said that [she] didn't take care of [her] children and [she] was a bad mother."

¶ 16 In March 2018, Plaintiff began interacting with Defendant Clark, who was using the alias "Brian Bragg" on the social networking platform, Kik.[3] The Brian Bragg[4] account sent Plaintiff the "topless photo," with a message saying, "Saw this floating around the internet in the Fayetteville chat rooms just letting you know." Brian Bragg also informed Plaintiff that the image was "all over the place," and that he hoped Plaintiff "[slept] well knowing [her] fun bags [were] hanging out there for the world to see."

¶ 17 In May 2018, Plaintiff discovered a Facebook "weight loss" advertisement depicting Plaintiff. The advertisement was composed of a post-pregnancy photograph of Plaintiff next to the photograph of Plaintiff's nude breasts. Prior to Plaintiff finding the advertisement, "Brian Bragg" had threatened to find and post Plaintiff's post-pregnancy photographs on Kik.

¶ 18 Throughout 2018, Plaintiff's friends and co-workers contacted her when they saw "Liz Clark" profiles, using a photograph of Plaintiff as a profile picture, in Kik chatrooms soliciting "no strings attached sex." Kik business records revealed that the "Liz Clark" Kik profiles could be

---

2. Defendants Clark and Barrett had a child together on March 7, 2018. Defendant Clark is listed as the child's father on the birth certificate, and the child bears his last name.

3. When asked if Defendant Clark used the alias "Brian Bragg," Defendant Clark pled the Fifth Amendment.

4. Plaintiff believed "Brian Bragg" was Defendant Clark, as the "Brian Bragg" account used a photograph that Plaintiff took of Defendant Clark as a profile picture.

traced to an IP address that matched the IP address of Defendants Clark and Barrett's residence.

¶ 19 When Plaintiff's friends and co-workers notified her that they saw the "Liz Clark" Kik profiles, she "was extremely embarrassed" and her "heart started racing." Plaintiff also received photographs from "Brian Bragg" depicting herself and her vehicle. Attached to these photographs were messages discussing how people were following Plaintiff. One message from "Brian Bragg" stated, "We are going to continue doing everything in our power to make your life miserable."

¶ 20 In August 2018, Plaintiff brought the instant action, asserting claims against both Defendants Clark and Barrett for libel *per se*; intentional and negligent infliction of emotional distress; and a violation of N.C. Gen. Stat. § 14-190.5A, a statute providing criminal sanctions for what is commonly known as "revenge porn." Plaintiff asserted additional causes of action against Defendant Barrett for alienation of affection and criminal conversation. In April 2019, Defendant Clark was arrested for stalking and cyberstalking Plaintiff in violation of N.C. Gen. Stat. §§ 14-277.3(A)(c) and 14-196.3.

¶ 21 In July 2019, the Cumberland County Superior Court barred the use of expert witness testimony in the civil actions filed by Plaintiff based upon a motion filed by Defendants Clark and Barrett to strike Plaintiff's tardy designation of an expert witness. The case proceeded to trial in August 2019. During trial, Derek Ellington ("Ellington") was permitted to testify. Ellington is a digital forensics examiner in Cumberland County. During Ellington's testimony, he laid the foundation for the entry of a flash drive containing nearly 32,000 files that he preserved from Plaintiff's electronic devices, and social media and email accounts. The data Ellington gathered and saved demonstrated that Plaintiff had only sent the "topless photo" of herself to Defendant Clark.

¶ 22 The jury found Defendant Barrett responsible for alienation of affection and IIED. The trial court entered judgment against Defendant Barrett for alienation of affection and IIED on September 17, 2019. Plaintiff was awarded $1,200,000 in damages. On September 25, 2019, Defendant Barrett filed a motion for judgment notwithstanding the verdict ("JNOV") and, in the alternative, motion for new trial. The court denied Defendant Barrett's motion on October 30, 2019. Defendant Barrett appeals from both the September 17, 2019 judgment and the October 30, 2019 order denying her post-trial motion.

II. Discussion

¶ 23 Defendant Barrett raises several issues on appeal. Each will be addressed in turn.

A. Ellington's Testimony

¶ 24 **[1]** Defendant Barrett contends the trial court erred "by admitting evidence and testimony from an expert witness who was not qualified as such." We disagree.

1. Standard of Review

¶ 25 As a preliminary matter, the parties dispute the proper appellate standard of review. Defendant Barrett asks this Court to review the admission of Ellington's testimony *de novo*, because "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citations omitted). Conversely, Plaintiff contends the appropriate standard of review is one of an abuse of discretion. Rule 104(a) of our rules of evidence provides that "preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." N.C. Gen. Stat. § 8C-1, Rule 104(a) (2020). Decisions made under Rule 104(a) are addressed to the sound discretion of the trial court. *See State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 554 (1985).

¶ 26 After careful review of the applicable law, we review *de novo* whether Ellington testified as an expert witness. *See State v. Broyhill*, 254 N.C. App. 478, 488, 803 S.E.2d 832, 839 (2017) (citation omitted); *see also State v. Jackson*, 258 N.C. App. 99, 107, 810 S.E.2d 397, 402 (2018) (noting that the Court applied a *de novo* standard of review "because determining whether the State's experts' testimonies constituted expert opinions . . . was a question" of law.) (citing *State v. Davis*, 368 N.C. 794, 797-98, 785 S.E.2d 312, 314-15 (2015)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). However, whether the trial court erroneously admitted Ellington's testimony is reviewed for an abuse of discretion. *See Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009) (citation omitted); *see also State v. Turbyfill*, 243 N.C. App. 183, 185-86, 776 S.E.2d 249, 252 (2015) (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." *Turbyfill*, 243 N.C. App. at 185-86, 776 S.E.2d at 252 (citation omitted).

2. Whether Ellington's Testimony Constitutes Expert Testimony

¶ 27 The parties next dispute whether Ellington testified as an expert or gave a lay opinion. "Our Supreme Court . . . explained the threshold difference between expert opinion and lay witness testimony." *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (citing *Davis*, 368 N.C. at 798, 785 S.E.2d at 315). "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)). "Ultimately, 'what constitutes expert opinion testimony requires a case-by-case inquiry' through an examination of 'the testimony as a whole and in context.' " *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (quoting *Davis*, 368 N.C. at 798, 785 S.E.2d at 315).

¶ 28 Here, Ellington testified about the general process for making a forensic or digital copy of electronic devices and specifically testified as to how he made a copy of Plaintiff's electronic devices. Ellington's testimony laid the foundation[5] for a flash drive containing files from Plaintiff's devices, demonstrating Plaintiff did not send the "topless photo" to anyone other than Defendant Clark. A review of Ellington's testimony reveals that he testified not as an expert, but as a lay witness. Ellington testified as to what he "saw or experienced" in creating copies of Plaintiff's devices and accounts. He did not interpret or assess the devices or accounts but explained the process he used for Plaintiff's devices was one that he did daily.

¶ 29 Presuming *arguendo* Ellington testified as an expert, Defendant Barrett failed to demonstrate how this was prejudicial. *See State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017) ("Where it does not appear that the . . . admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless.") (quoting *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001)). Here, Plaintiff testified about the text messages, emails, and social media messages and postings. Ellington's testimony was not "pivotal" in determining whether Defendants Clark and Barrett posted Plaintiff's

5. Defendant Barrett does not argue that the flash drive was improperly authenticated under N.C. Gen. Stat. § 8C-1, Rule 901.

nude breasts on the internet; rather, it corroborated Plaintiff's testimony that she sent the topless photograph to Defendant Clark. Therefore, we find no error in the trial court's decision to allow Ellington to testify.

B. Plaintiff's IIED Claim

¶ 30 Next, Defendant Barrett contends the trial court erred by allowing Plaintiff's claim for IIED to proceed "when the conduct is subsumed by other causes of action," and by denying Defendant Barrett's post-trial motion "because there was insufficient evidence for the claim of IIED to be submitted to the jury." We disagree.

¶ 31 Whether Plaintiff's IIED cause of action is subsumed by her other asserted torts is a question of law reviewed *de novo*. *See Piazza v. Kirkbride*, 246 N.C. App. 576, 579, 785 S.E.2d 695, 698 (2016), *modified*, 372 N.C 137, 827 S.E.2d 479 (2019). "The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is 'whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 148-49, 683 S.E.2d 728, 735 (2009) (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002)). Generally, "[i]f there is more than a scintilla of evidence supporting each element of the nonmoving party's claim, the motion for directed verdict or JNOV should be denied." *Horner v. Byrnett*, 132 N.C. App. 323, 325, 511 S.E.2d 342, 344 (1999) (citation omitted); *see also Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998). "A scintilla of evidence is defined as very slight evidence." *Hayes v. Waltz*, 246 N.C. App. 438, 442-43, 784 S.E.2d 607, 613 (2016) (citation omitted).

¶ 32 In determining whether the trial court erred in denying a JNOV, "we must take the plaintiff's evidence as true, and view all of the evidence in the light most favorable to him/her, giving him/her the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Watson v. Dixon*, 130 N.C. App. 47, 52, 502 S.E.2d 15, 19 (1998) (citations and internal quotation marks omitted).

3. Election of Remedies

¶ 33 **[2]** Defendant Barrett first contends the trial court erred in permitting Plaintiff to pursue her claim for IIED, "when the conduct is subsumed by other causes of action." Defendant Barrett specifically contends that

Plaintiff cannot recover under both IIED and another tort for the same conduct. Plaintiff argues Defendant Barrett failed to preserve this argument for appellate review, as Defendant "Barrett failed to plead election of remedies as an affirmative defense and raise this issue at trial."

¶ 34 "One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights." *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989) (citation omitted). "The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong." *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 204, 532 S.E.2d 833, 835 (2000) (citation omitted). The doctrine of "[e]lection of remedies is an affirmative defense which must be pleaded by the party relying on it." *North Carolina Federal Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 856 (1989) (citations omitted).

¶ 35 While Defendant Barrett contends Plaintiff's IIED claim should not have been submitted to a jury because it was subsumed by other causes of action, Defendant Barrett did not raise the defense of election of remedies at trial or in her post-trial motion. Therefore, she may not raise this argument on appeal. *Id.*; *see also State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 704, 535 S.E.2d 84, 92-93 (2000).

4. Sufficiency

¶ 36 **[3]** Next, Defendant Barrett argues the trial court erred in denying her post-trial motion because Plaintiff did not present evidence to support each element of IIED. We disagree.

¶ 37 To state a claim for intentional infliction of emotional distress, a plaintiff must allege: "(1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." *Norton v. Scotland Mem'l Hosp., Inc.*, 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2017) (citation omitted). "Extreme and outrageous conduct is defined as conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* (citation omitted).

a. Severe Emotional Distress

¶ 38 Defendant Barrett contends Plaintiff failed to present evidence that she suffered from "severe emotional distress." We disagree.

¶ 39 "[T]he term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic

depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (citation and emphasis omitted). However, severe emotional distress does not require medical expert testimony. *Williams v. HomEq Serv. Corp.*, 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007). Testimony of a plaintiff's "friends, family, and pastors can be sufficient to support a claim. . . ." *Id.* (citations omitted).

¶ 40 Here, Plaintiff testified at trial that she cried hysterically, hyperventilated, and sought out a counselor at a local clinic in response to the conduct of Defendants Clark and Barrett. One of Plaintiff's friends testified that Plaintiff was "very emotionally distraught and crying" on a weekly basis and that Plaintiff experienced anxiety. Although Plaintiff did not attend counseling for her anxiety on a regular basis, she testified this was out of fear that such treatment would negatively impact her probability of maintaining shared custody of her children. Taking the evidence in the light most favorable to Plaintiff, we hold there was more than a scintilla of evidence she suffered severe emotional distress as a result of the conduct of Defendants Clark and Barrett.

b. Causation

¶ 41 Defendant Barrett further contends the trial court erred in denying her JNOV because Plaintiff failed to show a causal link between Defendant Barrett's conduct and Plaintiff's emotional harm.

¶ 42 Intentional infliction of emotional distress requires outrageous conduct that is intended to cause and does cause severe emotional distress. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119-20 (1986) (citation omitted).

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

Id. (citation omitted). Stated differently, a defendant is liable for IIED when,

> he desires to inflict serious severe emotional distress or knows that such distress is certain, or substantially certain, to result from his conduct or where he acts recklessly in deliberate disregard of a high degree of

> probability that the emotional distress will follow and the mental distress does in fact follow.

Dickens v. Puryear, 302 N.C. 437, 449, 276 S.E.2d 325, 333 (1981) (cleaned up).

¶ 43 Defendant Barrett specifically contends Plaintiff failed to show her conduct caused severe emotional distress because Plaintiff experienced "stroke-like symptoms" and was diagnosed with "migraines and stress" prior to the complained of conduct – "posing as Brian Bragg, posting a Craigslist ad, posting a Facebook ad, posting a picture on Kik," all occurred after Plaintiff was hospitalized.

¶ 44 While the trial court noted Plaintiff's emotional distress included "stroke-like symptoms," it did not solely rely on such symptoms in finding Plaintiff produced evidence of severe emotional distress. Specifically, the trial court noted, "That Defendant Barrett's conduct did cause severe emotional distress to Plaintiff in the form of anxiety, sleeplessness, and severe depression and physical manifestations, including stroke-like symptoms." Plaintiff presented evidence that Defendant Barrett acted with a disregard to Plaintiff's emotional state and that there was a high possibility of emotional distress in that, while Plaintiff and Defendant Clark were attempting reconciliation, Defendant Barrett asked Defendant Clark to partake in *in vitro* fertilization; Defendant Barrett had an affair with Defendant Clark while Plaintiff and Defendant Clark were still married; and Defendant Barrett allowed and potentially encouraged Plaintiff's daughter to call her "Mommy."

¶ 45 There is no dispute that Plaintiff experienced "stroke-like symptoms" prior to the complained of conduct; however, Plaintiff experienced anxiety, hyperventilation, and other emotional distress as a result of the conduct of Defendants Clark and Barrett. Plaintiff testified her emotional distress was caused by Defendants Clark and Barrett messaging her that they would do "everything in [their] power to make [her] life miserable" and by discovering fake "Liz Clark" Kik profiles soliciting "no strings attached" sexual intercourse. Thus, we hold there was more than a scintilla of evidence to find a causal link between the complained of conduct and Plaintiff's emotional distress.

c. Outrageous Conduct

¶ 46 Next, Defendant Barrett contends Plaintiff failed to present sufficient evidence of extreme and outrageous conduct by Defendant Barrett, because "[t]he evidence showed that Defendant Barrett did not engage with Plaintiff at all." We disagree.

¶ 47 "[T]he initial determination of whether conduct is extreme and outrageous is a question of law," to be determined by the court. *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381 (1987) (citing *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)). Conduct is considered extreme or outrageous "when a defendant's conduct exceeds all bounds usually tolerated by decent society." *Watson*, 130 N.C. App. at 52, 502 S.E.2d at 19 (citation omitted). Conduct has also been deemed "extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chidnese v. Chidnese*, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011) (internal quotation marks and citation omitted).

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion . . . .

Id. (citation omitted). In *Watson v. Dixon*, this Court found sufficient evidence of "extreme and outrageous behavior" where the defendant "harass[ed]" the plaintiff, and "frightened and humiliated [the plaintiff] with cruel practical jokes, which escalated to obscene comments and behavior of a sexual nature . . . ." 130 N.C. App. at 53, 502 S.E.2d at 20.

¶ 48 Viewing the evidence in the light most favorable to Plaintiff, and taking that evidence as true, the evidence tends to show that Defendant Barrett began a sexual relationship with Defendant Clark while he was married to Plaintiff; conceived a child with Defendant Clark while Plaintiff and Defendant Clark were attempting reconciliation; and sent at least one email to Plaintiff in which Defendant Barrett told Plaintiff she "was a bad mother, that [she was] uneducated . . . [she] was a bad wife," and that Plaintiff came "from an unsuccessful family." Further, both Defendant Barrett and Plaintiff testified Defendant Barrett resided with Defendant Clark and had access to the computer from which degrading messages were sent to Plaintiff. As Plaintiff presented more than a scintilla of evidence of "extreme and outrageous behavior," we hold the trial court did not err in denying Defendant Barrett's JNOV.

C. Alienation of Affection

¶ 49 Next, Defendant Barrett contends the trial court lacked subject matter jurisdiction over the claim of alienation of affection and erred in denying her motion for JNOV because there was insufficient evidence of the claim.

1. Subject Matter Jurisdiction

¶ 50 **[4]** Defendant Barrett contends the trial court lacked subject matter jurisdiction to hear Plaintiff's alienation of affection claim "[b]ecause alienation of affection is a transitory tort" and Plaintiff failed to show that the injury occurred in North Carolina. We disagree.

¶ 51 "Subject matter jurisdiction is conferred upon the courts by either the North Carolina constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Id.* (citation omitted); *see also Farquhar v. Farquhar*, 254 N.C. App. 243, 245, 802 S.E.2d 585, 587 (2017) (citation omitted). Whether a trial court is vested with subject matter jurisdiction is a question of law, reviewed *de novo*. *Farquhar*, 254 N.C. App. at 245, 802 S.E.2d at 587 (citations omitted).

¶ 52 Alienation of affection is "a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship." *Hayes*, 246 N.C. App. at 443, 784 S.E.2d at 613 (quoting *Jones v. Skelley*, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009)). "Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort." *Id.* (citing *Darnell v. Rupplin*, 91 N.C. App. 349, 353-54, 371 S.E.2d 743, 746-47 (1988)). However, "even if it is difficult to discern where the tortious injury occurred, the issue is generally one for the jury." *Id.* (quoting *Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390); *see also Darnell*, 91 N.C. App. at 354, 371 S.E.2d at 747.

¶ 53 In *Hayes*, the plaintiff's wife had an extramarital affair with the defendant in Cancun, Mexico. *Id.* at 440, 784 S.E.2d at 611. Thereafter, the plaintiff's wife returned to the marital home in North Carolina, and the defendant returned to his residence in Indiana. *Id.* Thereafter, the plaintiff's wife and the defendant "communicated . . . via email, telephone, and text messaging." *Id.* The defendant later came to North Carolina and took the plaintiff's wife to Indiana with him. *Id.* at 441, 784

S.E.2d at 612. The defendant was found liable for alienation of affection and appealed. *Id.* On appeal, the defendant argued the trial court improperly denied his motion for JNOV, because "all of the sexual conduct [between the defendant and the plaintiff's wife] occurred outside North Carolina." *Id.* at 443, 784 S.E.2d at 613. This Court held, however, that there was more than a scintilla of evidence that "a wrongful and malicious act" causing the alienation of the plaintiff and his wife's affection occurred in North Carolina. *Id.* at 444, 784 S.E.2d at 614-15.

¶ 54 Here, Plaintiff presented more than a scintilla of evidence that the alienation of Defendant Clark's affection occurred in North Carolina. At the time Defendants Clark and Barrett met, Plaintiff resided in the couple's marital home in North Carolina; Plaintiff discovered text messages between Defendants Clark and Barrett while Defendant Clark was in the couple's marital home; and Plaintiff testified to a sexually explicit photograph Defendant Clark sent Defendant Barrett from the couple's marital home. Further, although Defendant Barrett invoked her Fifth Amendment right whenever questioned about her sexual activity with Defendant Clark in North Carolina, "the finder of fact in a civil case may use a witness's invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 97, 902 (1991) (citing *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984)). Therefore, we hold Plaintiff presented more than a scintilla of evidence that the tortious injury occurred in North Carolina.

¶ 55 Defendant Barrett further contends the aforementioned messages and photographs remain unauthenticated, and thus are not sufficient evidence to show the tortious conduct occurred in our State. However, this assignment of error is without merit as N.C. R. Evid. 901(b) permits the authentication of exhibits through testimony of a witness with personal knowledge. Here, Plaintiff testified she observed the text messages on Defendant Clark's telephone, took a picture of said messages using her cellphone, and matched the phone number of "Jane S." with that of Defendant Barrett. Accordingly, the trial court was vested with subject matter jurisdiction to hear Plaintiff's alienation of affection cause of action.

2. Sufficiency

¶ 56 **[5]** Next, Defendant Barrett contends the trial court erred in denying her motion for JNOV, because there was insufficient evidence to support each element of alienation of affection. We disagree.

¶ 57 As discussed *supra*, "[a] motion for JNOV 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Hayes*, 246 N.C. App. at 442, 784 S.E.2d at 613 (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491, *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009)). To succeed on an alienation of affection claim, a plaintiff must present evidence demonstrating "(1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage's love and affection; and (3) a showing that defendant's wrongful and malicious acts brought about the alienation of such love and affection." *Heller v. Somdahl*, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010) (citation omitted); *see also Hayes*, 246 N.C. App. at 443, 784 S.E.2d at 613 (citation omitted).

a. Love and Affection

¶ 58 Defendant Barrett specifically argues that "[t]here was no genuine love and affection in Plaintiff's marriage," because "from the very beginning of their marriage, the parties had an unhappy marriage, full of infidelity and arguments."

¶ 59 To succeed on an alienation of affection cause of action, "the plaintiff need not prove that he and his spouse had a marriage free from discord, only that some affection existed between them." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 42 (2002) (citing *Brown v. Hurley*, 124 N.C. App. 377, 477 S.E.2d 234 (1996)). "The marriage need not be a perfect one, but plaintiff's spouse must have had '*some* genuine love and affection for him' before the marriage's disruption." *Heller*, 206 N.C. App. at 315, 696 S.E.2d at 860 (emphasis in original) (quoting *Brown*, 124 N.C. App. at 381, 477 S.E.2d at 23). "Even if a plaintiff's spouse retains feelings and affections for a plaintiff, an alienation of affections claim can succeed." *Id.* at 316, 696 S.E.2d at 861 (citation omitted).

¶ 60 Here, Plaintiff testified the couple would "try to keep intimacy alive even though" the couple often would be separated by distance due to Defendant Clark's Military assignments. While married, Defendant Clark would visit Plaintiff on weekends, and the couple would text message and call each other often. Defendant Clark "would constantly say, I love you; are you coming over," and the couple continued to have sexual intercourse after their separation. The couple had sexual relations when Defendant Clark visited North Carolina while studying at Fort Belvoir and continued to have sexual relations after Defendant Clark left the marital home. Defendant Clark texted Plaintiff, "I love you" when Plaintiff requested a copy of the video of the couple engaged in sexual intercourse.

¶ 61 Although Defendant Clark testified that he did not love his wife or that there were "problems with that love," Plaintiff need only present "very slight evidence" of some love and affection to survive a motion for JNOV. *See Hayes*, 246 N.C. App. at 442-43, 784 S.E.2d at 613 ("A scintilla of evidence is defined as very slight evidence." (citation omitted)). Accordingly, we hold Plaintiff presented more than a scintilla of evidence of a genuine love and affection between Plaintiff and Defendant Clark.

b. Alienation of Affection

¶ 62 Defendant Barrett further contends the trial court erred in denying her motion for JNOV because "Plaintiff failed to produce evidence that Defendant Barrett engaged in actionable unlawful conduct."

¶ 63 "The alienation and destruction element [of alienation of affection] is proved by showing 'interference with one spouse's mental attitude toward the other, and the conjugal kindness of the marital relation." ' *Heller*, 206 N.C. App. at 315-16, 696 S.E.2d at 860-61 (quoting *Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390 (citation omitted)). "The loss" of affection "can be full or partial and can be accomplished through one act or a series of acts." *Id.* at 316, 696 S.E.2d at 861 (citing *Darnell*, 91 N.C. App. at 354, 371 S.E.2d at 747). "In the context of an alienation of affections claim, a wrongful and malicious act has been 'loosely defined to include any intentional conduct that would probably affect the marital relationship.' " *Hayes*, 246 N.C. at 444, 784 S.E.2d at 613 (quoting *Jones*, 195 N.C. App. at 508, 673 S.E.2d at 391 (citation omitted)).

¶ 64 Here, Plaintiff testified Defendant Clark's behavior began to change after he met Defendant Barrett in that he did not travel home to North Carolina as often; he was short with her on the telephone; and he did answer his phone or text Plaintiff as often. When Plaintiff could not reach Defendant Clark over the phone, she "traced or tracked" his cellphone to Defendant Barrett's room. Upon confronting Defendant Clark about the extramarital affair, Defendant Clark moved out of the couple's marital home and the couple separated.

¶ 65 Plaintiff presented further evidence that Defendant Barrett knew Defendant Clark was married at the time the Defendants met. Regardless of this knowledge, Defendant Barrett chose to carry on a sexual relationship and conceive a child through *in vitro* fertilization with Defendant Clark. Defendants Barrett and Clark spoke on the phone, text messaged, and sent at least one sexually explicit photograph. Thus, we hold Plaintiff presented more than a scintilla of evidence regarding the malicious or wrongful alienation of affection.

c. Wrongful and Malicious Causation

¶ 66 Defendant Barrett argues that her conduct did not cause the loss of affection between spouses because the couple's extramarital affairs and arguments caused the couple to separate. "However, it is well established that while the defendant's conduct must proximately cause the alienation of affections, this does not mean that the 'defendant's acts [must] be the sole cause of the alienation, as long as they were the controlling or effective cause.' " *Hayes*, 246 N.C. App. at 446, 784 S.E.2d at 615 (citation omitted) (alteration in original); *see also Nunn*, 154 N.C. App. at 533, 574 S.E.2d at 42 (citation omitted).

¶ 67 Upon meeting Defendant Barrett, Defendant Clark's behavior within his marriage and toward his wife changed. Ultimately, Plaintiff and Defendant Clark separated, and Defendant Clark now resides with Defendant Barrett on the property he purchased with Plaintiff. Thus, Plaintiff presented a scintilla of evidence regarding causation.

D. Damages

¶ 68 **[6]** Defendant Barrett further contends the trial court erred in denying her motion for JNOV because "[t]he damages awarded to Plaintiff were improper and the evidence insufficient."

¶ 69 The trial court has discretion to grant a new trial where the jury awards "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C. R. Civ. P. 59(a)(6). However,

> our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Worthington v. Bynum, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). "Consequently, an appellate court should not disturb a Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.*

¶ 70 In the context of alienation of affection,

> the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by her through the defendant's wrong. In addition thereto, she may also recover for the wrong and injury done to her health, feelings, or reputation.

Hutelmyer v. Cox, 133 N.C. App. 364, 373, 514 S.E.2d 554, 561 (1999) (quoting *Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E.2d 104, 115 (1969)). "[T]he gravamen of damages in [heartbalm] torts is mental distress, a fact that gives juries considerable freedom in their determinations." *Id.* (quoting 1 Suzanne Reynolds, Lee's North Carolina Family Law § 5.48(A) (5th ed. 1993)).

¶ 71 In *Hayes*, the trial court denied the defendant's Rule 59 motion and determined the plaintiff presented sufficient evidence in that he lost the emotional and financial support of his wife and the marital home; suffered a diminished household income; and "was 'devastated' emotionally." 246 N.C. App. at 452, 784 S.E.2d at 618. Here, Plaintiff testified she cried frequently, and her friend reported Plaintiff experienced anxiety. Due to the discovery of Defendants Clark and Barrett's relationship, Plaintiff was hospitalized for "stroke-like symptoms." Plaintiff is employed as a bartender/server, whereas Defendant Clark holds the rank of Major in the U.S. Army and, accordingly, has a higher earning potential. Plaintiff assumed half of the marital debt and cares for the couple's two minor children, one of whom has special needs. Plaintiff further presented evidence of the loss of benefits provided to her as a spouse of an active duty servicemember, including medical and life insurance, and Defendant Clark's pension. Accordingly, the trial court did not abuse its discretion in concluding $450,000 in compensatory damages was not excessive.

¶ 72 Defendant Barrett further contends the trial court erred in denying her post-trial motion where the trial court declined to instruct the jury on punitive damages for the alienation of affection claim. The trial court, here, instructed the jury regarding punitive damages for Plaintiff's IIED claim. The trial court did not instruct the jury on punitive damages in connection with alienation of affection, because, under *Oddo v. Presser*, 358 N.C. 128, 592 S.E.2d 195 (2004), there must be proof of sexual relations before the date of physical separation for punitive damages. Contrary to Defendant Barrett's contention, there is no

requirement of pre-separation sexual intercourse to recover punitive damages for IIED.

¶ 73 Defendant Barrett also argues that the trial court failed to make findings of fact regarding all the factors enumerated in N.C. Gen. Stat. § 1D-35(2). However, the jury is not mandated to consider all factors enumerated in Section 1D-35. The plain language of the statute allows the trier of fact to consider the factors, but it is not a requirement. Accordingly, we hold the trial court did not err in denying Defendant Barrett's post-trial motion regarding damages.

III. Conclusion

¶ 74 After careful review of the record and applicable law, we hold the trial court properly exercised subject matter jurisdiction over Plaintiff's alienation of affection claim and did not err in either the admission of Ellington's testimony or denial of Defendant Barrett's motion for JNOV.

NO ERROR AND AFFIRMED.

Judges TYSON and HAMPSON concur.

IN THE MATTER OF R.B.

No. COA21-285

Filed 7 December 2021

1. Child Abuse, Dependency, and Neglect—neglect adjudication —impairment or substantial risk—ultimate findings required

A neglect adjudication was reversed and remanded where the trial court failed to enter ultimate findings of fact stating that the child had suffered an impairment or was at substantial risk of such impairment under respondent-mother's care, there was no evidence to support such findings, and the adjudication order merely recited the allegations in the juvenile petition filed by the department of social services (DSS). Further, the court improperly adopted DSS's allegation that respondent-mother "made threats of harm toward the child" where, although respondent-mother did send text messages to a friend indicating that she was "going to kill" the child, the record showed the friend did not take the messages literally; respondent-mother was only venting and did not actually intend

to kill her child; and that when respondent-mother made the statements, she was suffering from sleep deprivation, anxiety, and depression, all of which she was actively addressing through therapy.

2. Child Abuse, Dependency, and Neglect—dependency adjudication—alternative child care arrangement—findings required

An adjudication of dependency was reversed where the trial court did not enter findings of fact addressing whether respondent-mother lacked an appropriate alternative care arrangement for her child.

Judge CARPENTER concurring in part and concurring in result only in part by separate opinion.

Appeal by Respondent from order entered 1 February 2021 by Judge Erica S. Brandon in Rockingham County District Court. Heard in the Court of Appeals 6 October 2021.

Lisa Anne Wagner for Respondent-Appellant-Mother.

Stam Law Firm, PLLC, by R. Daniel Gibson, for Guardian ad Litem.

No brief filed on behalf of Rockingham County Department of Social Services, Petitioner-Appellee.

WOOD, Judge.

¶ 1 Respondent-Mother appeals an order adjudicating her minor child, Riley,[1] neglected and dependent and continuing non-secure custody with Rockingham County Department of Social Services ("DSS"). On appeal, Respondent-Mother contends the trial court erred in adjudicating Riley neglected and dependent and abused its discretion in continuing non-secure custody with DSS. After careful review of the record and applicable law, we reverse the adjudication order.

I. Factual and Procedural Background

¶ 2 Respondent-Mother has one child, Riley, born on August 15, 2017. Respondent-Mother has a history of depression and anxiety. In December 2019, Respondent-Mother was having difficulty getting Riley

1. A pseudonym is used to protect the identity of the juvenile(s). *See* N.C. R. App. P. 42.

to sleep independently and called several friends and a parenting hotline for support. Respondent-Mother felt overwhelmed and exhausted and believed it would be best for another adult to be in the home until she rested. Ultimately, Respondent-Mother called 9-1-1 due to her exhaustion.[2] Law enforcement arrived to Respondent-Mother's residence, and "didn't see a problem in the home."

¶ 3 Thereafter, one of Respondent-Mother's friends picked Riley up and kept him for a few days. During this time, Respondent-Mother voluntarily underwent a mental health evaluation and began therapy. Another friend of Respondent-Mother's traveled from Baltimore to stay with Respondent-Mother "in the event that it was determined" Respondent-Mother needed supervision. Shortly thereafter, Riley returned to Respondent-Mother's care.

¶ 4 Also in December 2019, Respondent-Mother befriended Ms. D. Ms. D and her four-year-old daughter resided with Respondent-Mother for approximately one month during the Covid-19 pandemic. After Ms. D moved out of Respondent-Mother's residence, Respondent-Mother had additional difficulty getting Riley to sleep independently. Respondent-Mother attempted to arrange respite care for Riley but these arrangements fell through for various reasons.

¶ 5 On June 7, 2020, Respondent-Mother was suffering from exhaustion and depression.[3] Respondent-Mother texted Ms. D, "I have two black eyes[4] from him kicking me in the head. He has been screaming and banging on the door all night and I have not slept in 22 hours and I swear to God I think I'm going to kill him." Respondent-Mother further texted that she "want[ed] to strangle the [expletive omitted] lights out of him"; she"[expletive omitted] hate[d] his guts [she] hated the [expletive omitted] guts and [she] hope[d] he [expletive omitted] chokes a [expletive omitted] hate every never lets me sleep"; she "hate[d] being a mom it's the worst"; and Riley "could fend for himseld [sic] and [she] wil sray [sic] in [her] room." Respondent-Mother expressed her frustration to Ms. D and her feeling that no one understood the difficulty she was experiencing. Specifically, Respondent-Mother sent a text message to Ms. D stating, "Everyone keeps just telling me that it's normal and I'm [sic]

---

2. Respondent-Mother testified she called 9-1-1 "out of an abundance of caution," and that law enforcement officers "were confused as to why [she] called them." Respondent-Mother further testified that law enforcement officers did not see a problem in the home.

3. Respondent-Mother testified she was "deeply-depressed and sleep-deprived."

4. Respondent-Mother did not have two black eyes on June 7, 2020.

keep telling everybody that I literally had my hands around his throat because I can't [expletive omitted] take it anymore but nobody wants to hear it."[5]

¶ 6 Ms. D testified that she "didn't take [Respondent-Mother's messages] literally,"[6] and did not believe Respondent-Mother would harm Riley or herself at the time she received the text messages. Respondent-Mother testified these messages were "hyperbole and blowing off steam." After Respondent-Mother sent Ms. D these messages, Riley went to stay with Ms. D for approximately one week. Respondent-Mother periodically messaged Ms. D throughout the week to inquire about Riley's well-being and picked Riley up on June 14, 2020. Ms. D later testified that she had some reservations about returning Riley to Respondent-Mother's care, "not because [Ms. D] didn't think that she could do it. [Ms. D] just didn't think she could do it at that time" due to her mental state. Nonetheless, she ultimately returned Riley to the care of Respondent-Mother, because "she's the mother. And ultimately, [Ms. D is] just another human being. It's not for [her] to say. [She] can only have an opinion and that doesn't make [her] the person who can make the decision."

¶ 7 Shortly after Riley returned to Respondent-Mother's care, Respondent-Mother and Ms. D got into an argument unrelated to Riley's care. Around this same time, Ms. D was contacted by DSS, and she provided DSS with screenshots of Respondent-Mother's text messages from June 7, 2020.

¶ 8 On June 17, 2020, social workers visited Respondent-Mother's home. Respondent-Mother did not allow the social worker into her home, but allowed Ms. N, a community behavioral health counselor, into the residence. Ms. N spent approximately thirty minutes in Respondent-Mother's residence talking to her before determining Respondent-Mother did not need to be involuntarily committed.

¶ 9 After Ms. N exited the residence, she, the social worker, and law enforcement remained in Respondent-Mother's driveway discussing the visit. Ms. N, the social worker, and law enforcement sat in their vehicles for approximately two and a half hours before the social worker took non-secure custody of Riley. Riley was temporarily placed in

---

5. Additional text messages included hyperbolic language, including that Riley "ripped the door off the hinges."

6. When asked, "[Y]ou didn't take [Respondent-Mother] seriously about what she said?", Ms. D testified "I mean, obviously, I took it as she was frustrated." Ms. D further testified, "Oh no. God, no. I didn't take it literally," when asked if she believed Respondent-Mother stated she would kill Riley.

foster care before returning to Respondent-Mother's residence with Respondent-Mother under the supervision of his maternal grandmother.

¶ 10 After Riley was temporarily removed from Respondent-Mother's care, she contacted her therapist and voluntarily underwent a psychological evaluation. Her therapist recommended she continue therapy and comply with all of DSS's recommendations. In response to her therapist's recommendations, Respondent-Mother continued therapy throughout the adjudication.

¶ 11 On June 17, 2020, more than a week after Respondent-Mother sent Ms. D the text messages, DSS filed a juvenile petition alleging Riley was a neglected and dependent juvenile. The adjudication hearing occurred over three days: October 12, 2020, November 5, 2020, and December 3, 2020. On November 5, 2020, Respondent-Mother moved to dismiss the juvenile petition, but the court denied her motion. Riley's appointed Guardian *ad litem* submitted a report recommending Riley be returned to Respondent-Mother's care. Specifically, the Guardian *ad litem* reported

> In my short time as a GAL, I have not encountered another parent like [Respondent-Mother]. She uses appropriate language with her son, has displayed age-appropriate discipline, and overall, appears to be a very good mother. She repeats regularly that she wants what is best for her son, always. I think that extenuating circumstances of excessive isolation during the pandemic must be taken into consideration in this case.
>
> In every call I have with the family, [Respondent-Mother's] behavior with her son is exemplary. This was also true during what had to be a very stressful time from the audio recording I listened to that was recorded by [Respondent-Mother] on the day that DSS removed [Riley] from the home. [Respondent-Mother] remained a present and engaged parent even as her mental health was in question by the DSS staff member, [Ms. N]. [Respondent-Mother] has stated time and time again that [Riley] comes first. When she feels like depression might overtake her, she seeks care of [Riley.] . . .
>
> . . .
>
> [Respondent-Mother] appears to be directly dealing with her known and acknowledged mental health

> issues and HAS dealt with those issues without harm to her child and of her own volition, without outside intervention, [f]rom her history and from her dogged determination to clear her name in this case, she appears to have a firm grasp on what being a parent means. In every single interaction I have had with the family, the mother is directly engaged with her son, pays attention to his requests, disciplines appropriately when necessary, and interacts positively with him no matter what is going on.

Included in the record on appeal are several letters drafted by Respondent-Mother's friends advocating for Riley's return to Respondent-Mother's care. These letters were drafted in June 2020 and include the following language: "The way [Respondent-Mother] is with [Riley] is beautiful and heartwarming. . . . She would bend over backwards if there was any possible threat to [Riley]"; Riley "is [Respondent-Mother's] world. I know firsthand that [Respondent-Mother] is a BRILLIANT mother"; "I could never imagine [Respondent-Mother's] love and ability to care for [Riley] would ever be argued"; and "[Respondent-Mother] is a remarkable mother: doting affectionate, and emotionally intuitive to her son's needs."

¶ 12 The trial court orally adjudicated Riley a neglected and dependent juvenile and proceeded to disposition on December 3, 2020. On February 1, 2021, the trial court entered its written adjudication and disposition order, in which it adjudicated Riley a neglected and dependent juvenile and found "the juvenile's return to his/her own home would be contrary to the juvenile's best interests." The trial court continued non-secure custody with DSS, but placed Riley "in the home of his mother, . . . under constant supervision of the maternal grandmother." Respondent-Mother timely filed a written notice of appeal on February 11, 2021.

II. Discussion

¶ 13 Respondent-Mother appeals from the adjudication and disposition order.

> In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code. 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. 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. The first stage in such proceedings is the adjudicatory hearing. . . . If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in DSS custody, returns the juvenile to the parents.

In re A.K., 360 N.C. 449, 454-55, 628 S.E.2d 753, 756-57 (2006) (citations omitted). "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). "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2020). "Immediately following adjudication, the trial court must conduct a dispositional hearing." *In re A.K.*, 360 N.C. at 455, 628 S.E.2d at 757 (citing N.C. Gen. Stat. § 7B-901 (2005)).

¶ 14 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.

> [W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

In re Whisnant, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (internal quotation marks omitted). Given the deference we give to our trial courts in non-jury proceedings, we do not reweigh the evidence; "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) (citation omitted) (emphasis added). "Clear and convincing evidence 'is greater than the preponderance of the evidence standard required in most civil cases.' " *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation omitted). "It is defined as evidence which should fully convince." *Id.* (citation and internal quotation marks omitted).

¶ 15 "Unchallenged findings are binding on appeal." *In re C.B.*, 245 N.C. App. at 199, 783 S.E.2d at 208 (citing *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd*, 361 N.C. 345, 643 S.E.2d 587 (2007)). The 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 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).

¶ 16 The Juvenile Code provides that adjudication orders "shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2020). Rule 52 of our rules of civil procedure mandates that 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)).

¶ 17 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. . . . [T]his 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) (citation omitted). "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 (citation omitted); *see also In re H.J.A.*, 223 N.C. App. 413, 418, 735 S.E.2d 359, 363 (2012) (citation omitted).

A. Adjudication of Neglect

¶ 18 **[1]** Respondent-Mother first argues the trial court erred in adjudicating Riley a neglected juvenile. We agree.

> The purpose of the adjudication hearing is to determine the existence of the juvenile's conditions as alleged in the petition. *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006); N.C. Gen. Stat. § 7B-802 (2015). At this stage, the court's decisions must often be 'predictive in nature, as the trial court must assess

> whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.'

In re E.P.-L.M., 272 N.C. App. 585, 593, 847 S.E.2d 427, 434 (2020) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)). Section 7B-101(15) of our general statutes defines a "neglected juvenile" as "[a]ny 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 the 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) (citation and internal quotation marks omitted); *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (citation omitted); *In re E.P.-L.M.*, 272 N.C. App. at 596, 847 S.E.2d at 436 (citation omitted). "Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (citation omitted). In adjudicating a child neglected, "the circumstances and conditions surrounding the child," not "the fault or culpability of the parent," are "what matters." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748-49 (2020) (citation omitted).

¶ 19 Here, the trial court's order is in a "check box" format, in which the trial court "checked" the following findings of fact:

> 12. After receiving evidence, the Court finds: facts as alleged in the Juvenile Petition which was filed by [DSS] and which appears in the juvenile's court file. Said copy of the Juvenile Petition is incorporated herein by reference and its allegations are found as fact by the Court. These facts are also set out in the attached page or pages (entitled "Additional Findings of Fact").
>
> . . .
>
> 13. The juvenile, [Riley,] is neglected, in that the juvenile . . . lives in an environment injurious to the juvenile's welfare. . . . The juvenile is at risk of future abuse, neglect or dependency.

In the trial court's "Additional Findings of Fact," the court recites, verbatim, the allegations of the juvenile petition. Respondent-Mother challenges the following facts contained therein:

> On or about June 14, 2020, [DSS] received a neglect report on the minor child based on injurious environment. Specifically, the reporter was concerned over the safety of the minor child based on the mother's mental health. The child was placed in the care of [Ms. D] by the mother because the mother was having a mental health crisis. After a couple of days, [Ms. D] attempted to return the child to the mother, but the mother refused to take the child. . . . The mother asked a friend for help in trying to find the child an adoptive home. The mother finally picked the child up from [Ms. D] on Sunday.
>
> . . . The mother is refusing to cooperate with the [social worker]. The mother would only speak to [the social worker] through the screen door. The [social worker] could see the minor child inside the home. The mother did willingly let [Ms. N] into the home so that [Ms. N] could assess the mother's mental health. The mother is refusing to make a plan of care for the minor child as the mother states the child is safe. The mother advised the [social worker] that the mother is not cooperating because the [social worker] is a bully and a liar.
>
> The mother has CPS history based on her mental health issues. . . .

¶ 20 The trial court's findings of fact regarding the alleged "injurious environment" are limited to those regarding Respondent-Mother's mental health. The trial court made no factual findings regarding any prior harm Riley suffered, nor did it make any findings regarding a substantial risk of harm. *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518. (citation omitted). "Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (citation omitted); *see also In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518 ("A trial court's failure to make specific findings regarding a child's impairment or risk of harm will not require reversal where the evidence supports such findings." (citation omitted)).

¶ 21 Although the trial court made findings regarding Respondent-Mother's mental health and Ms. D's fear for Riley's wellbeing, many of these findings are unsupported by competent evidence. For example, the trial court found that Respondent-Mother refused to make a plan of care for Riley, but the evidence showed that Respondent-Mother had an established Temporary Safety Plan ("TSP") that she did not feel she needed to activate. The court further found Ms. D attempted to return Riley to Respondent-Mother's care and Respondent-Mother refused; however, Ms. D testified she did not tell DSS that she attempted to return Riley to Respondent-Mother's care prior to June 14, 2020.

¶ 22 Finding of fact 12 merely incorporates the allegations contained in Exhibit A as factual findings. Although it is "not *per se* error for a trial court's fact findings to mirror the wording of a petition," the trial court is mandated to find "the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. at 48-49, 772 S.E.2d at 253 (citation omitted). As the evidence presented tended to contradict the allegations in the petition, we hold the trial court's findings of fact regarding the alleged neglect are unsupported by competent evidence. *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) (citation omitted). Further, the trial court's fact findings also include, "See Exhibit B which is incorporated by reference." "Exhibit B" is not attached to the order. It is clear the trial court's findings are no "more than a recitation of the allegations" contained in Exhibit A, as the language is identical. The trial court failed to make its own ultimate findings of facts.

¶ 23 Moreover, the trial court did not make any factual findings regarding the injurious environment in which it believed Riley resided. The evidence tends to show that the only alleged "threats of harm to the child" made by Respondent-Mother were in the text messages she sent to Ms. D; however, both the sender and the receiver of the texts testified that they neither meant nor took the texts literally. Although not required to do so, the trial court did not address the approximately ten-day long time frame between Respondent-Mother's text messages and DSS intervention. We emphasize, "in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided *has resulted in harm* to the child or a *substantial risk* of harm." *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518 (citation omitted) (emphasis added). There is no evidence in the record before us that Riley suffered prior harm while in the care of Respondent-Mother. The trial court made no factual findings regarding

substantial risk of future harm to Riley; rather it impermissibly adopted DSS's allegation that Respondent-Mother "made threats of harm toward the child." Where both parties testified at trial that the texts were not meant literally when sent nor taken literally when received, we decline to hold that the text messages Respondent-Mother sent to Ms. D standing alone, constitute clear and convincing evidence of a substantial risk of harm toward Riley. While we agree the trial court is in a better position to determine the credibility of the witnesses than the appellate court is based on the cold record, *see In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435, when, as here, the trial court fails to make the ultimate findings of fact necessary to dispose of the case or support the conclusion that Riley is a neglected juvenile, we must reverse the adjudication order and remand to the trial court.

¶ 24 This Court reversed an adjudication of neglect and abuse where the mother sent a friend "Yahoo" messages about killing her children. *See In re L.L.*, No. COA11-1460, 220 N.C. App. 416, 2012 WL 1514870, at *1, 4 (unpublished). Specifically, the mother sent messages stating, "i need a break from it all"; "im about to fukn lose it"; and "ima fukn kill em both." *Id.* at *1. During her psychiatric evaluation, the mother "told the physician she made the threatening statements because she was 'severely stressed' and thought she could 'vent' to her best friend." *Id.* In reversing the adjudication order, this Court reasoned, "[t]he evidence does show that the mental health professional who examined [the mother] for involuntary commitment found that [the mother] displayed no evidence of a desire to harm herself or her children," and the messages were "written three weeks earlier while [the mother] was 'venting' to a friend." *Id.* at *4.

¶ 25 Likewise, in *In re A.O.T.*, No. COA19-168, 268 N.C. App. 323, 2019 WL 5726809, this Court vacated an adjudication of neglect where the mother "shook the bassinet in which the baby was contained" and feared "she was going to hurt the child"; the mother admitted she "scream[ed] and curs[ed] at the child"; and the mother sent text messages to the child's father in which she stated, "I shook him again cause he's being [expletive omitted] annoying" and "I [expletive omitted] hate him . . . I'm about to throw him/ I will [expletive omitted] kill him." *Id.* at *3. There, the trial court made further findings regarding the mother's post-partum depression and messages that she hit the baby and "threw him off" her. *Id.* Although the mother "did not actually" harm the child, "she wanted the . . . father to think that she actually had shaken the baby." *Id.* This Court vacated the adjudication order, stating, "[T]he [trial] court made no finding of any 'physical, mental, or emotional impairment of the juvenile or a

substantial risk of such impairment' as required by our case law." *Id.* (citations omitted). In vacating the adjudication, this Court reasoned that, "in light of [the] [m]other's testimony that her text messages to [the] [f]ather were not true and merely an attempt to get his attention, we cannot say 'all the evidence supports . . . a finding' that [the juvenile] was either harmed or at a substantial risk of harm in his mother's care." *Id.* at *4 (citation omitted). We find the reasoning in *In re L.L.*, and *In re A.O.T.*, persuasive and adopt it herein.

¶ 26 In the present appeal, Respondent-Mother sent text messages to a close friend, messages which Ms. D testified she "didn't take literally." Respondent-Mother testified she was "venting," "blowing off steam," and that the messages were hyperbole and exaggeration. Respondent-Mother had a history of anxiety and depression, and stated she was "deeply-depressed and sleep-deprived" at the time the messages were sent. More than a week passed from the time Respondent-Mother sent the text messages until DSS arrived at the residence to evaluate Respondent-Mother for involuntary commitment. Ms. N, the community behavioral health counselor who questioned Respondent-Mother about her mental health, did not believe Respondent-Mother should be involuntarily committed. If Ms. N had determined that Respondent-Mother posed a danger to herself or others, she would have presumably recommended Respondent-Mother be involuntarily committed. Other evidence presented showed that Respondent-Mother was aware of her mental health needs and sought assistance and respite care for her child when she believed it to be necessary. The trial court made no factual findings regarding whether Riley was harmed in his mother's care or whether there was a substantial risk that he would be harmed. Accordingly, we "cannot say 'all the evidence supports a finding that [Riley] was either harmed or at a substantial risk of harm in his mother's care." ' *See id.*; *see also In re L.L.*, 2012 WL 1514870, at *4; *In re T.X.W.*, No. COA 17-855, 258 N.C. App. 204, 2018 WL 944766 (reversing an adjudication of neglect and dependency where the mother was diagnosed with mental illness and believed her friend was plotting to have DSS take the children away where "there was no evidence that [the minor children] were actually harmed or faced a substantial risk of harm while in [the mother's] care."). Based on the review of the cold record, we are not persuaded that the evidence presented at the hearing rises to the level of such evidence that would "fully convince" a fact finder that Riley suffered harm or a substantial risk of harm in his mother's care. However, we recognize that the trial court is in a better position to determine the credibility of the witnesses and to resolve the inconsistencies in the evidence. Because the trial court did not make the ultimate findings of fact

regarding the risk of harm Riley faced, we remand to the trial court for the court to make any additional findings of fact which may support its conclusion that Riley is a neglected juvenile or for the trial court to dismiss the petition in absence of such findings.

B. Adjudication of Dependency

¶ 27 **[2]** Respondent-Mother further contends the trial court erred in adjudicating Riley dependent. We agree.

¶ 28 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) (citation omitted); *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

¶ 29 Regarding dependency, the trial court made the following findings of fact:

> 12. After receiving evidence, the Court finds: facts as alleged in the Juvenile Petition which was filed by [DSS] and which appears in the juvenile's court file. Said copy of the Juvenile Petition is incorporated herein by reference and its allegations are found as fact by the Court. These facts are also set out in the attached page or pages (entitled "Additional Findings of Fact").
>
> . . .
>
> 13. . . . The juvenile, [Riley], is dependent, in that the juvenile needs assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision. [T]he juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

In the trial court's additional findings, the court found that "[t]he child is dependent in that he does not have a parent who is capable of providing safe care or supervision to the child."

¶ 30 After careful review, we hold finding of fact 13 is more appropriately classified as a conclusion of law. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 ("As a general rule, . . . any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law." (citations omitted)). Accordingly, the only finding of fact regarding Riley's alleged dependency is the trial court's additional finding that Riley "does not have a parent who is capable of providing safe care or supervision." This finding, however, does not address the second prong of a dependency determination. The trial court's order is devoid of factual findings regarding an alternative child care arrangement. We note, however, that there is evidence in the record from multiple sources that Respondent-Mother sought respite care for the minor child as she believed necessary. Consequently, we reverse the adjudication of dependency for the trial court's failure to consider the second prong.

III. Conclusion

¶ 31 After careful review, we reverse the adjudication order finding the juvenile to be a neglected and dependent juvenile. We remand to the trial court for additional findings of fact to support the trial court's finding of neglect or for the trial court to dismiss the petition in the absence of such findings. Because we reverse the adjudication order, we need not address the dispositional order.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge CARPENTER concurs in part and concurs in result only in part by separate opinion.

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

¶ 32 I fully concur with the majority's conclusion with respect to the issue of adjudication of dependency. I respectfully concur in result only on the issue of neglect adjudication, and I write separately to differentiate my reasoning from that of the majority in reaching the decision

to reverse and remand. Regarding the trial court's adjudication of neglect, I agree with the majority's holding that "[t]he trial court made no factual findings regarding whether Riley was harmed in his mother's care or whether there was a substantial risk that he would be harmed." *See In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) ("[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm.") (citation omitted). I further agree the trial court failed to "f[ind] the ultimate facts necessary to dispose of the case" "through processes of logical reasoning." *See In re J.W.*, 241 N.C. App. 44, 48–49, 772 S.E.2d 249, 253, *disc. rev. denied*, 368 N.C. 290, 776 S.E.2d 202 (2015) (citation omitted). Instead, the trial court simply recited verbatim the allegations from DSS's petition. *See In re M.K.*, 241 N.C. App. 467, 470–71, 773 S.E.2d 535, 538–39 (2015). However, for the following reasons, I disagree with the analysis of the majority opinion with respect to whether there is sufficient evidence in the record for the trial court to find Riley resided in an injurious environment.

¶ 33 This Court reviews a trial court's adjudicatory decision "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372, N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation omitted). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citation omitted).

¶ 34 As an initial matter, I note the trial court was not required to making findings of fact regarding the credibility of witnesses or resolve inconsistences in the evidence—the trial court *was* required to "find the ultimate facts essential to support the conclusions of law." *See In re J.W.*, 241 N.C. App. at 48, 772 S.E.2d at 253.

¶ 35 The majority appears to decline to hold there is sufficient evidence in the record that would permit the trial judge to find the child suffered a substantial risk of harm in his mother's care by weighing the evidence and assessing the credibility of the witnesses presented at trial. It is not this Court's role to weigh evidence and determine the credibility of witnesses. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[I]t is [within the trial court] judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.") (citing *Knutton v. Cofield*, 273 N.C. 355, 160

S.E.2d 29 (1968)). By doing so, it appears this Court is stepping into the shoes of the trial court judge.

¶ 36 Seemingly disregarded by the majority is record evidence and the plain language of text messages that were received in evidence in which Respondent-Mother admits to taking a step toward harming the child—which was consistent with her threats. In her text messages, Respondent-Mother stated, *inter alia*, she: "*want[ed] to strangle the [expletive omitted] lights out of [her child]*," was "going to have to abandon him," was "going to hurt him," was "going to kill him" and "*literally had [her] hands around his throat*." (Emphasis added). The majority declines to conclude these text messages could be found by the trial judge to be clear and convincing evidence that Riley was at a substantial risk of harm based on the Respondent-Mother's and Ms. D's testimony. Rather, the majority appears to re-weigh evidence and determine witness credibility, as evidenced by the majority's description of Respondent-Mother's text messages as including "hyperbolic language" and its presumption that Respondent-Mother did not pose a substantial risk of harm to Riley because Respondent-Mother was not involuntarily committed following DSS's evaluation.

¶ 37 I note the record also includes testimony of Ms. D on 12 October 2020 that she "absolutely" had reservations about returning Riley to the care of his mother after Respondent-Mother agreed to place Riley in a "safe home" through a foster care program. Ms. D was hesitant to return the child to Respondent-Mother "because [she] didn't think that [Respondent-Mother] could [care for the child]" based on "all the stuff she said and texted [her] and telling [her] that [she] was trying to find [Riley a home]." The majority focuses its attention on testimony provided by Ms. D at the second adjudication hearing, held over three weeks later, on 5 November 2020. At the 5 November hearing, Ms. D testified she "didn't take [Respondent-Mother's text message in which she stated she was going to kill Riley] literally." However, the majority notes on multiple instances Ms. D "didn't take literally" Respondent-Mother's text messages. This statement by the majority takes Ms. D's testimony out of context since her response at the hearing only pertained to the text messages in which Respondent-Mother stated she was going to *kill* Riley—not to the text message string in general. Also, the majority's emphasis on Ms. D's testimony in which she testified she did not take Respondent-Mother's text messages "literally," conflicts with the other evidence of record, including Ms. D's earlier testimony. The majority's emphasis on certain evidence, while being dismissive of other evidence, necessarily demonstrates its undertaking of determining witness credibility and the weight to be given to the evidence—a role reserved for the

trial judge and not this Court. *See In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 38 Similarly, the majority appears to hold that the text messages could not be clear and convincing evidence of a substantial risk of harm toward Riley based in part on Respondent-Mother's own testimony at the adjudication hearing in which she testified she was only "venting" in her "hyperbolic" text messages to Ms. D. This reasoning again involves determining witness credibility and evidence weight, which was solely within the province of the trial court. *See In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 39 Finally, the majority relies heavily on unpublished opinions of this Court in considering whether the trial court's neglect adjudication was based on sufficient findings of fact or sufficient evidence. As this Court has previously noted, "a parent's conduct in a neglect determination must be viewed on a case-by-case basis considering the totality of the evidence." *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 128 (2007). In the instant case, the evidence included, *inter alia*, testimony by Respondent-Mother in which she describes calling 911 "to make sure that there would be another adult [at her home]," testimony by witnesses including Ms. D, and multiple text messages sent by Respondent-Mother to Ms. D in which Respondent-Mother threatened to harm Riley. Accordingly, I would hold there was sufficient evidence in the record for the trial court to make a finding Respondent-Mother posed a "substantial risk of [physical] impairment" to Riley "as a consequence of [her] failure to provide proper care . . . ." *See In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993). Since the trial court failed to make such a finding, I would conclude the trial court's findings were insufficient under N.C. Gen. Stat. § 7B-101(15) (2019) to support a conclusion of law that Riley was a neglected juvenile. Therefore, I agree with the majority's decision to reverse the trial court's adjudication of neglect and remand to the trial court to make additional findings of fact regarding "the existence or nonexistence of any of the conditions alleged in [DSS's] petition." *See In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 869–70 (2015); *In re H.J.A.*, 223 N.C. App. 413, 419, 735 S.E.2d 359, 363 (2012) (stating our Court "must reverse the trial court's order" where there is sufficient evidence in the record to support a finding, yet the trial court failed to make such a finding).

¶ 40 For the reasons stated above, I fully concur with the majority opinion on the issue of the dependency adjudication. I disagree with the majority's reasoning with respect to the issue of the neglect adjudication, and therefore, I respectfully concur in result only with the majority's opinion on this issue.

IN RE Z.P.

[280 N.C. App. 442, 2021-NCCOA-655]

IN THE MATTER OF Z.P.

No. COA21-184

Filed 7 December 2021

1. Appeal and Error—preservation of issues—juvenile delinquency—sufficiency of evidence—no statutory mandate—Rule 2

In an appeal from an order adjudicating a juvenile delinquent for communicating threats, the juvenile could not preserve for appellate review her challenge to the sufficiency of the evidence by arguing that N.C.G.S. § 7B-2405(6) (requiring the court in an adjudicatory hearing to protect the juvenile's rights) contained a statutory mandate that the trial court had violated. Nevertheless, the Court of Appeals invoked Appellate Rule 2 to review the juvenile's sufficiency argument, noting that the State was not prejudiced at the adjudication hearing where the juvenile's counsel did not move to dismiss at the close of all the evidence, since it was obvious from the transcript that the juvenile's defense rested largely on the insufficiency of the State's evidence.

2. Threats—mass violence on educational property—sufficiency of evidence—true threat—juvenile delinquency

The portion of an order adjudicating a juvenile delinquent for communicating a threat of mass violence on educational property (N.C.G.S. § 14-277.6) was reversed where the juvenile had told four of her classmates she was going to blow up their school but where the State failed to meet its burden of showing that a reasonable hearer would have objectively construed her statement as a true threat. At the adjudication hearing, three classmates testified that they did not believe she was serious when she made the statement, and the fourth classmate's equivocal testimony that the statement was either "a joke or it could be serious" was insufficient to satisfy the State's burden.

3. Threats—to physically injure a classmate—sufficiency of evidence—juvenile delinquency

The portion of an order adjudicating a juvenile delinquent for communicating a threat (N.C.G.S. § 14-277.1) was affirmed where, based on the State's evidence, the juvenile threatened to kill her classmate with a crowbar and "bury him in a shallow grave," the classmate testified that he was scared of the juvenile and believed

she could carry out the threat, and the classmate's fear was reasonable given that the juvenile was larger than him and had physically threatened him on other occasions.

Appeal by Juvenile from orders entered 30 July 2020 and 27 August 2020 by Judge Carole Hicks in Iredell County District Court. Heard in the Court of Appeals 22 September 2021.

Attorney General Joshua H. Stein, by Deputy General Counsel Tiffany Lucas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for the Juvenile-Appellant.

DILLON, Judge.

¶ 1 Z.P. ("Sophie")[1] appeals from the trial court's 30 July 2020 order adjudicating her delinquent ("Adjudication Order") and the 27 August 2020 order sentencing her to a Level 1 Disposition ("Disposition Order").

I. Background

¶ 2 This matter involves two petitions filed against Sophie for statements she made in September 2019 at her school to fellow students when she was eleven years old.

¶ 3 One petition alleged a felony, specifically that she communicated a threat of mass violence on educational property by stating that she was going to blow up her school. The other petition alleged a misdemeanor, specifically that she communicated a threat of physical violence towards another student, Cameron.

¶ 4 The trial court adjudicated Sophie delinquent, finding that she committed both offenses and imposed a Level One disposition. Sophie appealed to our Court, essentially contending that the State failed to present sufficient evidence to prove the allegations contained in either petition.

II. Preservation of Arguments

¶ 5 **[1]** The State contends that Sophie's counsel did not preserve her arguments regarding the sufficiency of the State's evidence.

---

1. Pseudonyms are used to protect the identity of the juveniles in this case. *See* N.C. R. App. P. 42(b)(1).

¶ 6 Sophie argues that our Court should address her sufficiency arguments (1) by considering N.C. Gen. Stat. § 7B-2405(6) (2019) a statutory mandate or (2) by invoking Rule 2 of our Rules of Appellate Procedure. Section 7B-2405(6) states that "[i]n [an] adjudicatory hearing, the court shall protect [a juvenile's rights, including a]ll rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury." We conclude that Section 7B-2405(6) does not preserve Sophie's argument on appeal. Notwithstanding, we exercise our discretion to invoke Rule 2 of our Rules of Appellate Procedure to review Sophie's arguments. In doing so, we note that the State was not prejudiced by the failure of Sophie's counsel to formally move to dismiss at the close of all the evidence and that it is obvious from the transcript that Sophie's defense rested largely on the insufficiency of the State's evidence.

III. Analysis

¶ 7 At the juvenile hearing, the State called as witnesses four of Sophie's classmates who heard one or more of Sophie's statements. The State also called the assistant principal and resource officer, both of whom investigated the matter. On appeal, Sophie argues that the State failed to present sufficient evidence to support the allegations in each of the two petitions. As in other types of cases, our Supreme Court has held that in a case where a petition is filed alleging that a juvenile has committed a criminal act, the standard of review is as follows:

> This Court reviews de novo a trial court's denial of a motion to dismiss for insufficiency of the evidence to determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.
>
> Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.
>
> All evidence is viewed in the light most favorable to the State and the State receives the benefit of every reasonable inference supported by that evidence.

In re J.D., 376 N.C. 148, 155, 852 S.E.2d 36, 42 (2020) (internal citations and quotation marks omitted). We address Sophie's sufficiency argument separately as to each petition.

A. Threat of Mass Violence to Educational Property

¶ 8 **[2]** The State filed a juvenile petition alleging that Sophie violated Section 14-277.6 of our General Statutes by "willfully and feloniously [ ] threaten[ing] to commit an act of mass violence on an educational property by stating that she was going to blow up the school [in the presence of four of her classmates.]" As set forth below, the evidence is uncontradicted that Sophie did make a statement to the effect that she was going to blow up the school. However, Sophie argues that there was insufficient evidence that her threat was a "true threat," something that must be proven under Section 14-277.6.

¶ 9 The United States Supreme Court has concluded that an anti-threat statute requires the government to prove a "true threat." *Watts v. United States*, 394 U.S. 705, 708 (1969). That Court has explained that a true threat, for purposes of *criminal* liability, depends on *both* how a reasonable hearer would objectively construe the statement *and* how the perpetrator subjectively intended her statement to be construed. *Elonis v. United States*, 575 U.S. 723, 737-38 (2015).

¶ 10 However, there seems to be a split in cases construing criminal anti-threat statutes concerning exactly what the State must prove regarding the perpetrator's subjective intent to be. For instance, in an unpublished 2012 case, we held that, to satisfy the subjective intent prong, the State must merely prove that the perpetrator subjectively intended to communicate a statement to a hearer, irrespective of whether the perpetrator intended the communication to be construed as a threat:

> Defendant's testimony showed that he knew about the history of the WANTED posters and was aware that they could be "threatening." While defendant testified that he did not intend to make [the victim] fearful, his testimony showed that by handing out the posters, defendant intended to communicate with [the victim] and that communication caused [the victim] to fear for his own safety. Therefore, the WANTED posters distributed by defendant fall under the definition of a true threat, an unprotected category of speech.

State v. Benham, 222 N.C. App. 635, 731 S.E.2d 275, 2012 N.C. App. LEXIS 979, *27 (2012) (unpublished) (construing a misdemeanor stalking statute).

¶ 11 More recently, though, in a case that is currently pending at our Supreme Court, we held that the State must show that the perpetrator's

"subjective intent [was] to threaten a person or group of persons by communicating the alleged threat." *State v. Taylor*, 270 N.C. App. 514, 561, 841 S.E.2d 776, 816 (2019).

¶ 12 In any event, we need not decide in this case whether the State's burden here was to show Sophie subjectively intended to make a threat, or merely that she subjectively intended to make a statement that constituted what others thought was a threat.

¶ 13 For the reasoning below, we conclude that the State's evidence failed the objective portion of the "true threat" test. In other words, the State did not meet its burden of showing that an objectively reasonable hearer would have construed Sophie's statement about bombing the school as a true threat.

¶ 14 The State's evidence essentially showed as follows:

¶ 15 Three of Sophie's classmates (Madison, Tyler, and Caleb) each testified to hearing Sophie threaten to blow up the school, though none of them testified that they thought she was serious when she made the threat.

¶ 16 Madison testified that Sophie talked about bombing the school. Madison testified that she did not think Sophie was serious when making the statement, and Madison did not report the threat to any adult.

¶ 17 Tyler testified that Sophie "said something about a bomb" and said "she was going to blow up the school." Tyler offered in a joking manner to help her build the bomb and stated that he "thought it was just a joke."

¶ 18 Caleb also heard Sophie's threat about blowing up the school but was equivocal about his perception of Sophie's seriousness, stating that her statement was "either [ ] a joke or it could be serious."

¶ 19 The State's evidence may create a *suspicion* that it would be objectively reasonable for Sophie's classmates to think Sophie was serious in making her threat. But we do not believe that the evidence is enough to create an *inference* to satisfy the State's burden. Indeed, none of Sophie's classmates who heard her statement believed that Sophie was serious, with most of them convinced that she was joking. She had made outlandish threats before, never carrying out any of them. *See Watts*, 394 U.S. at 707-08 (stating that the "context" in which the alleged threat was made must be considered); *see also Taylor*, 270 N.C. App. at 562, 841 S.E.2d at 816-17 (holding that the context in which the statement is made must be considered to evaluate whether the hearers would think the statement was a "serious expression of an intent to kill or injure [others]").

¶ 20 We note that there was evidence that Sophie told her fellow students that there may be a school shooting and that they could protect themselves from the shooter if they wore a certain color. However, the State's petition only makes allegations about a threat to "blow up" the school, and we only evaluate the sufficiency of the evidence as to that allegation.

¶ 21 Accordingly, we reverse the trial court's judgment with respect to this petition.

B. Communicating a Threat to Harm a Fellow Student

¶ 22 **[3]** In the other petition, the State alleged that Sophie "unlawfully and willfully threaten[ed] to physically injure the person or damage the property of [Cameron]" by stating that "she was going to kill him with a crowbar and bury him in a shallow grave." Again, there is overwhelming evidence that Sophie made this statement.

¶ 23 The State alleged that Sophie violated Section 14-277.1 of our General Statutes which states that a person is guilty of a misdemeanor if:

1. She "willfully threatens to physically injure" another;
2. She communicates the threat orally to the other person;
3. A reasonable hearer would "believe that the threat is likely to be carried out;" and
4. The hearer actually believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1(a) (2019).

¶ 24 Here, the State's evidence showed that Sophie told another student that she was going to physically injure Cameron when Cameron was in earshot. Specifically, the State's evidence was as follows:

¶ 25 Cameron testified that Sophie had physically threatened him previously; that he heard Sophie make the statement that she was going to hit him with a crowbar; and that Sophie is larger and stronger than he is. Cameron did testify that Sophie may have been joking but also that he believed that Sophie could hit him with a crowbar. He also testified that he was scared of Sophie because of her past threats.

¶ 26 Madison testified that she heard Sophie threaten to hit Cameron with a crowbar and bury him in a shallow grave.

¶ 27 The assistant principal testified that Cameron seemed very fearful of Sophie and that Sophie admitted to not liking Cameron and wishing he were dead.

¶ 28 The trial court found that Sophie made the statement "in a manner that was intended for [Cameron] to hear it" and that Cameron believed Sophie could carry out the threat regarding the crowbar.

¶ 29 We conclude the evidence, in the light most favorable to the State, was sufficient to sustain the trial court's finding that Sophie violated Section 14-277.1. Taken in this light, Cameron took her threat about hitting him with a crowbar and burying him in a shallow grave seriously. Further, it would be reasonable for a person in his position to take the threat seriously, in that Cameron is a person who is smaller in stature than Sophie and had been physically threatened by her on other occasions.

¶ 30 We, therefore, affirm the trial court's judgment regarding the petition alleging a violation of Section 14-277.1.

IV. Conclusion

¶ 31 Regarding the Adjudication Order, we affirm as to the finding that Sophie violated Section 14-277.1 (communicating a threat). However, we reverse as to the finding that Sophie violated Section 14-277.6 (communicating a threat of mass violence on educational property).

¶ 32 Accordingly, we vacate the trial court's Disposition Order and remand to allow the trial court to reconsider the disposition in light of our reversal of its finding that Sophie violated Section 14-277.6. On remand, the trial court may enter a disposition up to a Level 1, as it previously did.

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

Judges COLLINS and WOOD concur.

MALONE-PASS v. SCHULTZ

[280 N.C. App. 449, 2021-NCCOA-656]

KELLY MALONE-PASS, PLAINTIFF
v.
DAVID SCHULTZ, DEFENDANT

No. COA20-911

Filed 7 December 2021

1. Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—jurisdiction—home state—allegations of unjustifiable conduct

The trial court had jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify an out-of-state child custody order where the children had lived with the father in North Carolina for more than six consecutive months immediately preceding the filing and where the out-of-state custody order relinquished that state's jurisdiction and required the parties to register the order in North Carolina within seven days. Further, the trial court fully considered the mother's allegations that the father had committed fraud and properly concluded that jurisdiction was not barred by N.C.G.S. § 50A-208(a); in any event, the court would have had jurisdiction under the exceptions to N.C.G.S. § 50A-208(a) because both parents had acquiesced to the court's jurisdiction and the out-of-state court had determined that North Carolina was the more appropriate forum.

2. Child Custody and Support—best interests of the child—no visitation for parent—support by unchallenged findings

In a child custody matter, the unchallenged findings supported the ultimate findings and conclusions that it was in the children's best interests for their father to have sole legal and physical custody and for their mother not to have visitation, where the teenage boys were doing well with their father, were angry with their mother for "essentially kidnapping" them, and did not want to see their mother.

Appeal by plaintiff from order entered on or about 4 November 2019 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Court of Appeals 25 May 2021.

Culbertson & Associations, by K.E. Krispen Culbertson, for plaintiff-appellant.

No brief filed by defendant-appellee.

STROUD, Chief Judge.

¶ 1 Kelly Malone-Pass ("Mother") appeals from an amended order granting David Schultz ("Father") sole legal and physical custody of their two minor children and denying Mother visitation with the children. Mother first argues the trial court lacked subject matter jurisdiction or should have declined to exercise it under North Carolina General Statute § 50A-208(a). N.C. Gen. Stat. § 50A-208(a) (2019). Mother then challenges Findings of Fact and Conclusions of Law that she acted inconsistently with her constitutionally protected status as a parent, that Father was a fit and proper person to have sole legal and physical custody, that granted Father sole legal and physical custody, and that determined it was not in the children's best interest to have visitation with Mother. After *de novo* review, we hold the trial court had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and that North Carolina General Statute § 50A-208(a)'s jurisdictional bar does not apply here. In addition, we hold that the trial court's Findings of Fact support its ultimate Findings and Conclusions of Law that it was in the children's best interest for Father to have sole legal and physical custody and for Mother to have no visitation, and the trial court did not abuse its discretion by entering this order. Therefore, we affirm.

I. Background

¶ 2 The uncontested Findings of Fact in this case show the proceedings in North Carolina started when Mother filed a petition to register a foreign child custody order from New York in late 2017.[1] The New York custody order granted Mother and Father joint custody, with the children, D.S. and A.S.,[2] living primarily with Father, and set out visitation schedules. The New York order also required the parties to register the order in North Carolina within seven days and stated that "New York State is relinquishing jurisdiction." The North Carolina trial court "asserted and assumed jurisdiction from New York over the minor children and the parties," finding at the time "both parties and the children resided in North Carolina."

¶ 3 Later, "both parties filed subsequent motions and countermotions for North Carolina to assert jurisdiction, civil contempt, and motions to

1. The record in this case was filed by Mother as the "Proposed Record on Appeal." Father did not file any "notices of approval or objections, amendments, or proposed alternative records on appeal," so Mother's "proposed record on appeal thereupon constitutes the record on appeal." N.C. R. App. P. Rule 11(b).

2. We use the children's initials to shield their identity.

modify child custody due to a substantial change in circumstances affecting the welfare of the minor children." Mother's motion alleged she was a resident of both New York and of North Carolina. Over the course of 2018 and into early 2019, the trial court entered a number of orders that granted Father temporary custody of the children and set various visitation schedules for Mother. Mother failed to appear at one of these hearings. Also during 2018, both parents moved, Father to Summerville, South Carolina and Mother to Massachusetts.

¶ 4 In March 2019, Mother, claiming residence in Massachusetts, filed a domestic violence action against Father in Massachusetts and obtained a domestic violence protective order from the Massachusetts court; this order also granted her emergency temporary custody of the children. Pursuant to the Massachusetts order, Mother traveled to South Carolina, took custody of the children, and brought them to Massachusetts with her. In response, Father filed before the North Carolina trial court an emergency motion to suspend Mother's visitation, alleging that Mother had made fraudulent claims before the Massachusetts court. The Massachusetts court then dismissed the action and dissolved its orders nunc pro tunc. The same day as the Massachusetts court's action, the North Carolina trial court held a hearing on the issue. The North Carolina court ordered the children be returned to Father's custody in compliance with its previous orders and notwithstanding the Massachusetts action because North Carolina was the only state with subject matter jurisdiction regarding child custody.

¶ 5 Following the Massachusetts incident, the trial court held multiple hearings over the course of April 2019, culminating in the May 2019 order and amended order. On 3 April 2019, the trial court held an in-chambers discussion with the children about the Massachusetts incident and found the children:

> are very upset with . . . Mother for taking them from South Carolina. The anger had not subsided; however, during the course of the conversation, the court determined that they still loved their [M]other. The minor children did not want to visit with their [M]other, however, they understood the court was likely to order visitation. It was clear that they wanted the visits to be in South Carolina if there was going to be visitation. They did not want to travel to Massachusetts. The minor children gave no indication that . . . Father had influenced them in any way or talked negatively about . . . [M]other.

The court also barred Mother and Father from asking the children about the in-chambers conversation between the court and the children. Following the hearing, the court allowed Mother to take the children to lunch. At the lunch, among other events, Mother asked the children about the in-chambers conversation they had with the court, thereby violating the court's order. The trial court made an unchallenged Finding of Fact that the lunch "added further toxicity to the relationship" between the children and Mother. Following that lunch, Father filed a motion to suspend Mother's visitation, and the court held a hearing on that motion on 11 April 2019. The April hearings culminated in an amended order on 9 May 2019 granting temporary joint custody to Mother and Father with Father having temporary legal and physical custody of the children. The trial court set a visitation schedule for Mother, but it also stated: "***The minor children will not be forced to visit with [Mother] if they choose not [to] do so and they must inform . . . [Mother] of their desire not to visit with [Mother]***." (Bold and italics in original.)

¶ 6 The court held a final hearing on the motions for modification of the New York custody order on 14–16 August 2019. The day before the hearing, Mother filed a motion to dismiss alleging the court lacked subject matter jurisdiction, and she then renewed that motion in court at the beginning of the hearing. Mother argued that New York had subject matter jurisdiction, not North Carolina, that Father had committed fraud by telling the New York court he would live permanently in North Carolina with the children, and that the New York court would be the best place to address the fraud issue. In Findings of Fact and a Conclusion of Law which Mother challenges on appeal, the trial court found North Carolina had subject matter jurisdiction to modify the New York custody order and therefore denied Mother's motion to dismiss. The trial court's ruling was based on unchallenged Findings of Fact that Father and the children moved to North Carolina in March 2017 and lived there continuously for more than six months before the action was filed, that Mother previously acknowledged and averred to those facts, and that the New York order specifically stated the parties were required to register the order in North Carolina within seven days and that New York was relinquishing jurisdiction.

¶ 7 Following the hearing in mid-August 2019, the trial court appointed a Guardian Ad Litem ("GAL") so that the children's "voices could be heard." The GAL spoke with both parties and the children and prepared a report for the court. The court held a hearing about the GAL's report in September 2019 where it received her report into evidence, heard

testimony about it, and allowed the parties the opportunity to question the GAL. Mother was not present at the hearing without explanation, and Father had his attorney present although the attorney did not ask the GAL any questions.

¶ 8 The August and September 2019 hearings led to the trial court's order now on appeal, the "Order on Motions to Modify Custody/Contempt," in November 2019. (Capitalization altered.) The order granted Father sole legal and physical custody of the children, denied Mother visitation because it was not in the best interest and welfare of the children, and dismissed the contempt issues as moot. To support those orders, the trial court made numerous unchallenged Findings of Fact. Beyond the issues discussed above, the trial court made the following unchallenged Findings of Fact by "clear, cogent and convincing evidence." (Underline in original.)

¶ 9 First, the trial court made Findings about the children's living arrangements with Father. The children lived with Father from the start of the case, and Father and the children moved to North Carolina with the previous family therapist's approval. The trial court further found the children were doing well with Father. The court noted that prior to the Massachusetts incident, "The children were not in any danger. They were very happy in the home of . . . [F]ather. They were doing well in school." The children also continued to do well in their Father's care following the time their Mother took them to Massachusetts, with the court finding at the time of the order:

> 174. The minor children are doing well in their [F]ather's care. They are both doing well in school and are happy in the home of their [F]ather and step-mother.
>
> 175. [A.S.] developed encopresis which had been treated following the removal and placement in foster care in Colorado.[3] It recurred and he had a few incidents after . . . [M]other removed him from South Carolina with the Massachusetts order which was subsequently dismissed. It is stress related and he is having less stress since the visitation [with Mother] had stopped.

---

3. Prior to living in New York, Mother and the children had resided in Colorado, where there was an investigation by child protective services that resulted in the children being removed from Mother's care and being placed in foster care.

> 176. They are doing much better now in therapy. They enjoy the sessions as it is now totally focused on them. They enjoy school and they have good grades.
>
> 177. They attend [redacted] High School. [D.S.] is playing football and running track. His grades last year were all A's except a B in Spanish.

¶ 10 The trial court also considered and ultimately rejected Mother's evidence that Father was harming her and the children. Mother introduced evidence from the children's therapist with accusations that Father had "heavily coached" the children to "alienate[]" them from Mother and that Father was "fixated about making accusations against" Mother. After reviewing and evaluating the evidence, the trial court made unchallenged Findings the therapist's accusations were "without a valid basis" and based on "assumptions he was not in a position to make." The trial court also made further Findings about the Massachusetts incident, concluding in line with the Massachusetts court that Mother had falsely alleged domestic violence:

> 127. On or about March, 2019, she went to the Massachusetts court and obtained a DVPO [domestic violence protection order] with custody provisions by making false statements and testimony to the Massachusetts court.
>
> . . .
>
> 129. She alleged domestic violence which was not true.
>
> . . .
>
> 132. She lied to the Judge in Massachusetts to the point that the matter was not just dismissed but vacated nunc pro tunc.
>
> 133. The Judge was clearly disgusted with the whole process as she had questioned . . . [M]other extensively at the ex-parte hearing as she felt she did not have jurisdiction.
>
> 134. The Court determined . . . [M]other made false statements. She uprooted the children and took them to a state in which they had never lived.
>
> 135. She told the Judge at the Ex-parte hearing that she and the children had lived there since September, 2018. That she had to have surgery so she took the children to . . . [F]ather to stay. She further alleged

> domestic violence including harm to the children, all of which was untrue.

¶ 11 Beyond the unchallenged Findings about Father, the trial court also made unchallenged Findings about Mother's actions and relationship with the children. First, the trial court noted the negative impact the Massachusetts incident had on the children. The trial court found the incident "was a very traumatic experience for both boys" that "is having a lasting impact upon them emotionally." Mother "disrupted their education in that she took them without warning, did not enroll them in school and cut off their contact with their [F]ather and stepmother as well as their friends. (This lasted for approximately two (2) weeks.)." The trial court found the children viewed the situation as Mother having "essentially kidnapped them." As a result, the children were "angry" with Mother and "no longer want[ed] to have contact with" Mother because of Mother's actions. At the time, Mother had not realized the impact of the Massachusetts incident, and the trial court also found she still did not "demonstrate an appreciation for the trauma she caused."

¶ 12 The trial court also made unchallenged Findings beyond the Massachusetts incident. It found Mother hindered the children's therapy by "dominat[ing] the sessions" such that they "obtained little if any benefit." Once the children transitioned to individual therapy without Mother, they started "doing much better in therapy." Further, the trial court made an unchallenged Finding that it is "very likely" that Mother "suffers from mental or emotional issues of unknown etiology."

¶ 13 Finally, the trial court made several unchallenged Findings of Fact about the children's resistance to continued visitation with Mother. Even before the trial court got involved, the children were "resistant to visiting" with Mother, although under a therapist's supervision they initially graduated from supervised visitation to unsupervised visitation. Following the Massachusetts incident, the children told the court at the in-chambers meeting they "did not want to visit with" Mother. Following that time, "[t]he children have become increasingly resistant to visiting with" Mother. Ultimately, by the time the order was entered, the trial court found the children "do not want to visit with or even talk to" Mother. The children even "declined to have dinner or otherwise visit with" Mother during the trial. The trial court further found Mother had "disrupt[ed] the peace and tranquility of the minor children's lives in her effort to force visitation on them." The stress of visitation was so great that it caused one of the children to suffer a reoccurrence of a stress-related ailment that has improved since visitation stopped, which decreased the children's stress levels.

¶ 14 Based upon all these Findings, the trial court granted Father sole legal and physical custody of the children and denied Mother visitation, finding it was not in the best interest and welfare of the children. This Court allowed Mother's petition for writ of certiorari "for purposes of reviewing the 'Order on Motions to Modify Custody/ Contempt' " and the amended order.

II. Subject Matter Jurisdiction

¶ 15 **[1]** Mother first argues the trial court lacked subject matter jurisdiction. The argument takes two forms. First, Mother lists a number of "[e]xception[s]," all of which relate to the trial court's denial of Mother's motion to dismiss based on lack of subject matter jurisdiction or the trial court's Findings of Fact and Conclusions of Law on subject matter jurisdiction. We note that exceptions were eliminated in changes to the Rules of Appellate Procedure effective as of October 2009. *See* 363 N.C. at 901, 935–38 (enacting new Rules of Appellate Procedure and listing new Rule 10 as well as history of changes, including "delet[ion of] former 10(a)"); 324 N.C. at 638 (laying out old Rule of Appellate Procedure 10(a), requiring assignments of error); 287 N.C. at 698–99 (recounting Rule of Appellate Procedure 10(a) as originally enacted, which includes the term "exceptions" in the places where Rule 10(a) before 2009 used the term "assignments of error" and requires "exceptions" to be the basis of assignments of error).[4] Although this method is not in compliance with the Rules of Appellate Procedure, we will treat Mother's "exceptions" as challenges to the noted Findings of Fact and Conclusions of Law.

¶ 16 Mother's other arguments on subject matter jurisdiction are more specific. First, Mother argues the trial court should have declined to exercise jurisdiction pursuant to North Carolina General Statute § 50A-208(a) because "any subject matter jurisdiction" the trial court "might have obtained was the result of fraud." (Capitalization altered.) Specifically, Mother argues she had evidence that Father "falsely represented to her and the New York court that he planned to live in North Carolina at least until the children graduated from high school." As part of this argument under § 50A-208(a), Mother would have to demonstrate that the New York court, as a "court of the state otherwise having jurisdiction," did not determine "that this State [North Carolina] is a more appropriate forum." N.C. Gen. Stat. § 50A-208(a)(2) (citations omitted). Mother's response to this exception to § 50A-208(a)'s requirement for a

4. This citation sentence cites to appendices in the hardcopy versions of the North Carolina Reporter. A citation to the hardcopy is required because the online versions of the North Carolina Reporter on Westlaw and Lexis do not include the appendices nor historical versions of the North Carolina Rules of Appellate Procedure.

trial court to decline jurisdiction in certain situations is that, "it would be up to the New York court to make the determination that North Carolina would be the more appropriate forum." The crux of these arguments is again that "the trial court erred in finding and concluding that North Carolina had subject matter jurisdiction and had jurisdiction to modify the New York custody order" and denying Mother's motion to dismiss on those grounds. (Capitalization altered.)

A. Standard of Review

¶ 17 Oddly, Mother filed the "Petition for Registration of Foreign Child Custody Order" and the "Motion for Modification of Parenting Time Schedule" that led to the order from which Mother appeals. (Capitalization altered.) *See Booker v. Strege*, 256 N.C. App 172, 174, 807 S.E.2d 597, 599 (2017) ("Oddly, it was defendant who filed for modification of custody in North Carolina[.]"). "[N]onetheless, a party cannot confer subject matter jurisdiction on a court merely by requesting relief in it." *Id.* (citing *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial. Because litigants cannot consent to jurisdiction not authorized by law, they may challenge jurisdiction over the subject matter at any stage of the proceedings, even after judgment." (noting alterations))). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010); *see also Matter of T.R.*, 250 N.C. App. 386, 389, 792 S.E.2d 197, 200 (2016) ("The issue of whether a trial court possesses jurisdiction under the UCCJEA is a question of law that we review *de novo*.") (citing *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015)).

B. Analysis

¶ 18 As explained above, Mother challenges both the general Findings of Fact and Conclusions of Law determining the trial court had subject matter jurisdiction by listing exceptions and makes a specific challenge to such jurisdiction via North Carolina General Statute § 50A-208(a). We first address the general argument that the trial court lacked subject matter jurisdiction and then turn to the specific argument pursuant to § 50A-208(a).

1. Subject Matter Jurisdiction Generally

¶ 19 Since the original child custody order in this case is from New York, the applicable provision of the UCCJEA is North Carolina General

Statute § 50A-203, which addresses when North Carolina courts can modify a "child-custody determination made by a court of another state." N.C. Gen. Stat. § 50A-203 (2019).

> Under the applicable provisions of N.C. Gen. Stat. § 50A–203, a North Carolina court may modify an out-of-state child custody determination if both (1) North Carolina "has jurisdiction to make an initial determination under G.S. 50A–201(a)(1) or G.S. 50A–201(a)(2)" *and* (2) "[t]he court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A–202 *or* that a court of this State would be a more convenient forum under G.S. 50A–207[.]" N.C. Gen. Stat. § 50A–203(1) (emphasis added).

Matter of T.R., 250 N.C. App. at 389, 792 S.E.2d at 200 (footnote omitted) (all alterations and emphasis in original).

¶ 20 The first part of § 50A-203's test imports the requirements from § 50A-201(a). The latter section states:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

N.C. Gen. Stat. § 50A-201(a) (2019). The term "home state" is defined as:

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

N.C. Gen. Stat. § 50A-102(7) (2019).

¶ 21 Here, North Carolina was the home state for the children when the child custody proceeding commenced. The uncontested Findings of Fact found: "The children and . . . [F]ather resided in North Carolina for more than six consecutive months immediately preceding the filing of the matter. (March, 2017 until the registration in December, 2017 and the filings beginning in January, 2018)." This Finding of Fact was based on Mother's own original Motion for Modification of Parenting Time Schedule that indicated both children lived with Father in North Carolina for the past six months. Thus our *de novo* review does not find anything different from the trial court. Because a parent, Father, and the children lived in North Carolina for at least six months before proceedings began, North Carolina is the home state. N.C. Gen. Stat. § 50A-102(7). Because North Carolina is the home state, its courts, including the trial court, had jurisdiction under § 50A-201(a)(1).

¶ 22 Turning to the second requirement to modify an out-of-state child custody order, § 50A-203 requires "[t]he court of the other state [to] determine[] it no longer has exclusive, continuing jurisdiction under G.S. 50A–202 or that a court of this State would be a more convenient forum under G.S. 50A–207[.]" *Matter of T.R.*, 250 N.C. App. at 389, 792 S.E.2d at 200 (citing N.C. Gen. Stat. § 50A-203(1)) (first and last alterations in original). Here, as the trial court found, the New York child custody order specifically stated it was "relinquishing [j]urisdiction," once as a freestanding statement and once when it ordered the parents to register the order in North Carolina within seven days. Thus, the second jurisdictional requirement to modify an out-of-state child custody order is also met. Because both requirements of § 50A-203 are met, we conclude after *de novo* review that the trial court had subject matter jurisdiction.

2. Jurisdiction and § 50A-208(a)

¶ 23 Turning to Mother's second argument, we must address whether the trial court should have declined to exercise jurisdiction under North Carolina General Statute § 50A-208(a). That section provides: "Except as otherwise provided in G.S. 50A-204 or by other law of this State, if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless" one of its exceptions applies. N.C. Gen. Stat. § 50A-208(a). The exceptions[5] that allow the court to still exercise jurisdiction are:

> (1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
>
> (2) A court of the state otherwise having jurisdiction under G.S. 50A-201 through G.S. 50A-203 determines that this State is a more appropriate forum under G.S. 50A-207; or
>
> (3) No court of any other state would have jurisdiction under the criteria specified in G.S. 50A-201 through G.S. 50A-203.

N.C. Gen. Stat. § 50A-208(a)(1)–(3).

¶ 24 Here, the trial court's undisputed Findings of Fact show that the lower court fully considered Mother's allegations of Father's fraud and simply did not find them credible. The trial court heard from Mother and reviewed both the New York order and court file. The trial court found the necessary facts to support subject matter jurisdiction. A review of the transcript from the trial court hearing further supports that the trial court fully considered the alleged fraud issue; it asked questions of Mother and took time to review the papers throughout. At one point, the trial court even said, "I'm just going to let her [Mother] argue at this point," after Father's attorney made repeated motions to strike Mother's arguments and the trial court had previously sustained Father's objections.

¶ 25 We further note that the "fraud" alleged by Mother was Father's representation that he "planned to live in North Carolina at least until the children graduated from high school" but he later moved to South Carolina. There is no question that he and the children did live in North

---

5. This specifically refers to the exceptions in § 50A-208(a)(1)–(3) because the opening clause's references to § 50A-204 or other law in North Carolina do not apply.

Carolina for one year and three months (March 2017 to June 2018) and he later moved to South Carolina. Normally, fraud is a misrepresentation of a past or existing fact. *See Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 91, 261 S.E.2d 99, 103 (1980) (requiring for a prima facie case of fraud that a plaintiff show "(a) that the defendant made a representation relating to some material *past or existing fact* . . . ." (Emphasis added.)), *overruled on other grounds Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Mother does not allege that Father misrepresented his actual residence in North Carolina. Home state jurisdiction under the UCCJEA is based upon the actual residence of the parent and children for a period of at least six months, N.C. Gen. Stat. § 50A-102(7), and there is no question that Father and the children did reside in North Carolina for this time, even if they later moved. The UCCJEA does not base jurisdiction on where a parent plans or intends to reside in the future, but on the actual residence. Thus, we do not find support for invoking § 50A-208(a)'s jurisdictional bar based on unjustifiable conduct.

¶ 26 But even if we assume Father made some misrepresentation of his future intent, this case would fall within the exceptions in § 50A-208(a)(1)–(3). First, the parents acquiesced in the exercise of jurisdiction, meeting the requirement of § 50A-208(a)(1). Parents can acquiesce to jurisdiction by registering an out-of-state child custody order here or by filing a child custody action in the state. *Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 411, 820 S.E.2d 817, 833 (2018). While Father does not challenge jurisdiction, we note he acquiesced in jurisdiction when he filed a motion to modify custody in the case. As with the plaintiff in *Quevedo-Woolf*, Mother here acquiesced to the exercise of jurisdiction both by registering the New York custody order here and by filing her own motion to modify child custody here. *Id.* Mother argues she only arguably acquiesced to jurisdiction in North Carolina "on the basis of [Mother]'s reasonable reliance upon [Father]'s false representations that he intended to remain in North Carolina with the children."

¶ 27 Beyond Mother's acquiescence to jurisdiction, the exception in § 50A-208(a)(2) also applies. Under that exception, when a state otherwise having jurisdiction determines that North Carolina is the more appropriate forum, North Carolina courts will have jurisdiction even when there has been unjustifiable conduct. N.C. Gen. Stat. § 50A-208(a)(2). Here, New York determined North Carolina was the more appropriate forum at the end of the child custody order Mother sought to register and then modify. The New York order specifically stated New York was relinquishing jurisdiction and ordered the parties to register the

order in North Carolina within seven days. Mother argues in response that "it would be up to the New York court to make the determination that North Carolina would be the more appropriate forum." This argument overlooks that the New York court did just that in its order, as laid out above. Thus, even if Father engaged in unjustifiable conduct, the North Carolina courts would still have jurisdiction under the exception in § 50A-208(a)(2).

¶ 28 While Mother alleges Father committed fraud, the trial court made undisputed Findings of Fact that she had engaged in fraud in Massachusetts. The trial court recounted how Mother "gave false statements to the Court in Massachusetts in order to obtain a DVPO [domestic violence protection order] against . . . [F]ather with custody provisions," how Mother falsely told the Massachusetts court that the children lived in Massachusetts, and how Mother "alleged domestic violence including harm to the children, all of which was untrue." Mother's misconduct in Massachusetts was so bad "that the matter was not just dismissed but vacated nunc pro tunc," a mechanism which exists, *inter alia*, "*to prevent a failure of justice* resulting, directly or indirectly from delay in court proceedings subsequent to a time when a judgment, order or decree ought to and would have been entered, save that the cause was pending under advisement." *Perkins v. Perkins*, 114 N.E. 713, 714 (Mass. 1917) (emphasis added).

¶ 29 Beyond Mother's fraud in the Massachusetts action, Mother's allegations regarding jurisdiction have also been inconsistent. Mother has alleged at various times throughout this litigation that her residence was North Carolina, Massachusetts, or New York. Mother's residence status was so confusing that rather than definitively stating where she resided in the order being appealed, the trial court could only state Mother "is *currently believed* to be residing in the state of Massachusetts." (Emphasis added.) Thus, while Mother alleges Father committed fraud to manipulate jurisdiction, the trial court found she had engaged in that behavior herself as well as other inconsistencies as to her residence.

¶ 30 After *de novo* review, we reject Mother's § 50A-208(a) argument as well and determine the trial court correctly determined North Carolina courts had subject matter jurisdiction under the UCCJEA.

III. Challenges to Specific Findings of Fact and Conclusions of Law

¶ 31 **[2]** Following her jurisdictional argument, Mother challenges numerous Findings of Fact and Conclusions of Law. As with the jurisdictional challenge, Mother's argument includes a list of exceptions, and

we again treat them as challenges to the specified Findings of Fact or Conclusions of Law. This time, the exceptions align with Mother's arguments more precisely.

¶ 32 Mother's challenges can be broken down into specific subjects. First, Mother argues the trial court erred in finding and concluding she "acted inconsistently with her constitutionally protected status as a parent." (Capitalization altered.) Further, Mother alleges the trial court erred in finding and concluding that "[Father] is a fit and proper person to have sole legal and physical custody" and in granting him such custody. (Capitalization altered.) These challenges are only made in the exceptions and the remainder of the brief does not expand upon them.

¶ 33 In contrast, Mother's final argument includes both exceptions and further discussion in her brief. Mother argues the trial court erred by finding and concluding, "it is not in the best interest of the minor children to force visitation on them." (Capitalization altered.) In a similar vein, Mother contends the trial court erred in "not allowing [Mother] any visitation with the minor children in that the circumstances of the case do not give rise to complete denial of access to the minor children." (Capitalization altered.) Specifically, Mother argues the trial court erred by denying all visitation because there were no findings "of physical or sexual abuse or severe neglect of the children." Mother further contends we should consider that the trial court's May 2019 order came after Mother took the children from South Carolina to Massachusetts and even then the trial court allowed Mother to have "full weekend visitation (to be exercised in South Carolina) and summer visitation (which could be exercised in Massachusetts)." After addressing the standard of review, we address each subject in turn.

A. Standard of Review

¶ 34 "When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation and citation omitted). Trial courts are given "broad discretion" in child custody matters:

> This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate

> judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

Id., 357 N.C. at 474–75, 586 S.E.2d at 253–54 (citations and quotations omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 35 In addition to evaluating whether findings of fact are supported by substantial evidence, the reviewing court "must determine if the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. We review whether the findings of fact support the conclusions of law *de novo*. *Respess v. Respess*, 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014) (citing *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 268 (2003)) (other citation omitted). "If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Id.*, 232 N.C. App. at 614–15, 754 S.E.2d at 695 (citing *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)).

B. Analysis

¶ 36 We now address in turn each of the subjects in Mother's challenges to the Findings of Fact and Conclusions of Law, as laid out above. We briefly note a common issue across the areas. Mother challenged only the ultimate Findings of Fact, not Findings as to specific events and actions upon which the ultimate Findings are based. Because unchallenged Findings of Fact are binding, *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, we merely need to assess whether the unchallenged Findings of Fact that describe Mother's conduct support the ultimate Findings of Fact. In other words, we are assessing the challenged Findings of Fact in essentially the same way we would review disputed Conclusions of Law. That the challenged Findings of Fact mirror the challenged Conclusions of Law further supports this approach. As this Court has previously stated, findings of fact and conclusions of law that "say the same thing . . . are best characterized as conclusions of law." *Walsh v. Jones*, 263 N.C. App. 582, 589, 824 S.E.2d 129, 134 (2019). Thus, as to each of the challenged categories, we will assess whether the unchallenged Findings of Fact support the challenged Conclusions of Law. If they do, then, by definition, the mirroring ultimate Findings of Fact are supported by substantial evidence. *See Shipman*, 357 N.C. at 474,

586 S.E.2d at 253 ("Substantial evidence is such relevant evidence as a reasonable mind might accept as *adequate to support a conclusion*.") (citation and quotations omitted) (emphasis added).

1. Findings and Conclusions on Mother's Constitutionally Protected Status as a Parent

¶ 37 Mother's first set of exceptions takes issue with the trial court's Findings of Fact and Conclusions of Law that she acted inconsistently with her constitutionally protected status as a parent. Mother makes no argument beyond listing the exceptions, and it is not clear to us, absent any argument to the contrary, that these Findings and Conclusions are even relevant. As our Supreme Court recently reiterated in *Routten v. Routten*, the constitutionally protected status right of parents "*is irrelevant in a custody proceeding between two natural parents* . . . . In such instances, the trial court must determine custody using the 'best interest of the child' test." *See* 374 N.C. 571, 577–78, 843 S.E.2d 154, 158–59 (2020) (reiterating support for the quoted language from past cases and "expressly overrul[ing]" cases from this Court that applied the constitutionally protected status right to disputes between two parents) (quoting *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267) (emphasis in original). Since this is a dispute between two natural parents, these Findings and Conclusions are irrelevant to the custody modification order, so we do not address them.

¶ 38 Beyond Mother expressly challenging the constitutionally protected status Finding, one of the relevant exceptions extends the challenge to the trial court's Finding that she was not "a fit and proper person for care, custody, and control of the minor children." Fitness, or lack thereof, is part of the same constitutionally protected status of a parent framework that does not apply to child custody disputes between two parents, except as relevant to the denial of visitation under North Carolina General Statute § 50-13.5(i) as discussed below. *See Owenby*, 357 N.C. at 145, 579 S.E.2d at 266–67 (explaining "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" before then stating that right is irrelevant in a custody proceeding between natural parents) (quoting *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994)). While we discuss the Finding that Mother was unfit below in the statutory context, we note that in the constitutional context, it is irrelevant, so we do not address it further.

2. *Findings and Conclusions on Father's Sole Legal and Physical Custody*

¶ 39 Mother's next set of exceptions, which also contain no separate argument, challenge the trial court's Findings of Fact and Conclusions of Law that Father is a fit and proper person to have legal custody and that it is in the best interest of the children that Father have sole custody. Mother likewise listed exceptions to the trial court's order, which was subsequently amended, granting Father "sole legal and physical custody." (Emphasis omitted.) We address the Findings and Conclusions on Father being a fit and proper person to have legal and physical custody and then review the best interest of the child analysis.

¶ 40 As with the Findings and Conclusions on Mother's constitutionally protected status as a parent above, the parts of the custody modification order concerning Father's fitness are irrelevant. As explained above, fitness is part of the same constitutionally protected status of a parent framework that does not apply to child custody disputes between two parents, except as relevant to the statutory denial of visitation scheme. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266–67. Rather, in child custody disputes between two parents, the trial court determines custody solely using the "best interest of the child" test. *Routten*, 374 N.C. at 578, 843 S.E.2d at 159 (citing *Adams v. Tessener*, 354 N.C 57, 61, 550 S.E.2d 499, 502 (2001)).

¶ 41 "The welfare or best interest of the child, in light of all the circumstances, is the paramount consideration which guides the court in awarding the custody of the minor child[ren]. It is the polar star by which the discretion of the court is guided." *Phelps v. Phelps*, 337 N.C. 344, 354, 446 S.E.2d 17, 23 (1994) (internal citations and quotations omitted). "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child[ren]." *Id.*, 337 N.C. at 352, 446 S.E.2d at 22. "Since the trial court had the opportunity to see the parties in person and to hear the witnesses and determine credibility," appellate review "is confined to whether the court abused its discretion." *Cox v. Cox*, 133 N.C. App. 221, 228–29, 515 S.E.2d 61, 67 (1999).

¶ 42 Here, the trial court made extensive, unchallenged Findings of Fact to support its ultimate Finding of Fact, similar Conclusion of Law, and order that "[i]t is in the best interest and welfare of the minor children that . . . Father be awarded sole custody of the minor children." First, the trial court made numerous unchallenged Findings of Fact indicating the children have been and are doing well living with Father. The trial court noted the children lived primarily with Father at the start of this

case and the children's previous therapist in New York approved that setup. Prior to the incident when Mother took them to Massachusetts, the children were doing well with Father, with the trial court specifically finding they were happy in Father's home and doing well in school. Further, the trial court found at the time of its ruling: "The minor children are doing well in their [F]ather's care. They are both doing well in school and are happy in the home of their [F]ather and step-mother."

¶ 43 The trial court also made unchallenged Findings about the harm Mother's actions have caused the children. It specifically found the children are "angry" with Mother and "no longer want[] to have contact with her" because of her own actions. The trial court also recounted Mother's actions in taking the children to Massachusetts, which the children viewed as Mother having "essentially kidnapped them." Further, the trial court found the Massachusetts incident "was a very traumatic experience for both boys" that "is having a lasting impact upon them emotionally." Mother also "does not demonstrate an appreciation for the trauma she caused" by that incident nor the negative impacts taking the children to Massachusetts had on them: "She disrupted their education in that she took them without warning, did not enroll them in school and cut off their contact with their [F]ather and stepmother as well as their friends. (This lasted for approximately two (2) weeks.)." Lastly, as to Mother, the trial court made an unchallenged Finding that it is "very likely" that Mother "suffers from mental or emotional issues of unknown etiology."

¶ 44 Finally, in addition to its Findings about the benefits of staying with Father and the harm Mother had caused, the trial court considered Mother's evidence that Father was harming her and the children. Mother introduced via the children's therapist accusations that Father had "heavily coached" the children in order to "alienate[]" them from Mother as part of his "fixat[ion] about making accusations against" Mother. While the trial court extensively reviewed that evidence, the trial court found the therapist had no "valid basis" to make the statements he did because he made "assumptions he was not in a position to make." The trial court also considered Mother's previous allegations that Father had committed domestic violence against her and the children, but again it rejected those allegations.

¶ 45 Given the unchallenged Findings of Fact, it is clear the trial court had substantial support for its ultimate Findings of Fact, the Conclusions of Law, and its determination that it was in the best interest of the children for Father to have sole legal and physical custody of the children. We

conclude the trial court did not abuse its discretion, and Mother's exceptions suggesting otherwise are unfounded.

3. Findings and Conclusions on Visitation with Mother

¶ 46 Mother's final arguments center on the trial court's Findings, Conclusions, and order that it is not in the best interest of the children for Mother to have visitation. In addition to the exceptions she lists, Mother argues the trial court erred in denying her all visitation because: (1) there were no findings of physical or sexual abuse or severe neglect as she alleges are required and (2) the May 2019 order still granted Mother full weekend and summer visitation, even though it came after many relevant events. We address the general argument via the exceptions first before turning to Mother's specific arguments about the lack of abuse or neglect and the visitation provisions of the May 2019 order.

¶ 47 Visitation, like custody, employs the best interests of the child test, and that test can lead to denying a parent all visitation:

> Our courts have long recognized that sometimes, a custody order denying a parent all visitation or contact with a child may be in the child's best interest:
>
> > "Although courts seldom deny visitation rights to a noncustodial parent, a trial court may do so if it is in the best interests of the child:
> >
> > > 'The welfare of a child is always to be treated as the paramount consideration. Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.'
> >
> > This principle is codified in N.C. Gen. Stat. § 50–13.5(i), which provides that:
> >
> > > 'In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.' "

Huml v. Huml, 264 N.C. App. 376, 399–400, 826 S.E.2d 532, 548 (2019) (quoting *Respess*, 232 N.C. App. at 615–16, 754 S.E.2d at 696) (alterations from original, citations, and quotations omitted).

¶ 48 Here, the trial court made extensive, detailed Findings as to Mother's actions and the effect those actions had on her children. As part of gathering evidence to make these Findings, the trial court appointed a GAL for the children to provide additional information. The GAL spoke with Mother, Father, and both children and then prepared a report.

¶ 49 Many of these Findings focused on the fallout from the incident when Mother took the children to Massachusetts, which we have already discussed above. The trial court's findings also went beyond that incident. First, the trial court recounted how it allowed Mother to take the children to lunch shortly after the Massachusetts incident only to have the lunch dominated by Mother asking the children about what they had told the court in chambers, in violation of a court order, which "added further toxicity to the relationship" between Mother and the children. The trial court also recounted how when the children were in therapy, Mother "dominated the sessions and they obtained little if any benefit." Finally, the trial court documented how the children did not want to see Mother as the case was being tried, which was in part due to one of the children being forced to spend his sixteenth birthday in court. This culminated in a situation where the children no longer want to see Mother at all because of how she acts during visits. The stress she causes is so extreme that one of her children suffered a reoccurrence of a stress-related physical ailment that subsided once visitation stopped and he was having less stress.

¶ 50 As the children were ages 14 and 16 by the time the trial court's order came out, they were old enough for the trial court to give their wishes to no longer see Mother considerable weight. *See Falls v. Falls*, 52 N.C. App. 203, 209–10, 278 S.E.2d 546, 551 (1981) ("[T]he wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between the parents, but is not controlling." (quoting *Hinkle v. Hinkle*, 266 N.C. 189, 197, 146 S.E.2d 73, 79 (1966))); *see also Clark v. Clark*, 294 N.C. 554, 555, 576–77, 243 S.E.2d 129, 130, 142 (1978) (reversing and remanding case in part because the children were all older than eleven at the time of remand and thus it was "appropriate and desirable for the judge to ascertain and consider their wishes in respect to their custody"). The trial court took the children's wishes into account when it ordered that no visitation schedule be set.

¶ 51 Mother acknowledges that the children's wishes should be taken into account, relying on *Clark*. However, she argues the children's wishes "should not be the sole determining factor." That is an accurate statement of law. *See Falls*, 52 N.C. App. at 209–10, 278 S.E.2d at 551 (recounting how wishes of children are not controlling). But it is not an accurate statement of the trial court's actions here. As discussed above, the trial court made extensive Findings about the negative impacts Mother had on the children, including the harm visitation was causing them. While those negative impacts may have underlay the children's wishes to no longer have visitation with Mother, they are also separate facts supporting the trial court's order denying Mother visitation. As such, the trial court did not make its decision solely based on the children's wishes.

¶ 52 Adding extra weight to the Findings, the trial court made them all by "clear, cogent and convincing evidence," higher than the required preponderance standard. (Emphasis omitted); *Walsh*, 263 N.C. at 590 n.3, 824 S.E.2d at 134–35 n.3 (citing *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001) ("[T]he applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence." (alteration in original))). Further, all these Findings are unchallenged; Mother only challenges the ultimate Finding, Conclusion of Law, and order denying her visitation. Mother further recognized the weighty evidence in support of the trial court's Findings. Her brief includes many of the same Findings we discussed above in stating "there are evidentiary findings adverse to [Mother]."

¶ 53 Despite the significant unchallenged Findings on which the trial court relied in determining it was in the best interest of the children to not have visitation with Mother, she still argues the evidence was insufficient for two reasons. First, Mother argues the trial court erred in denying all visitation because there was not "any finding of physical or sexual abuse or severe neglect of the children." Contrary to that argument, which Mother makes without citation to authority, the trial court does not have to find a parent has physically or sexually abused the children or "severely neglected" them before ceasing visitation. Under North Carolina General Statute § 50-13.5(i):

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the

> child or that such visitation rights are not in the best interest of the child.

As we have already discussed, the trial court made extensive Findings of Fact regarding its reasons for the custody order and the denial of visitation, including both a Finding of Mother's unfitness and a Finding that visitation rights are not in the best interest of the children. Section 50-13.5(i) requires specific findings to support the denial of visitation and the best interests of the children but does not require findings of physical or sexual abuse or severe neglect. The trial court correctly applied the best interest of the child standard, and the extensive unchallenged Findings of Fact support its determination. *See Huml*, 264 N.C. App. at 399–400, 826 S.E.2d at 548 (noting courts use the best interest of the child standard on questions about visitation). While Mother cites cases in which all visitation was denied because of sexual or physical abuse, that argument misses the point. While sexual or physical abuse could support the denial of visitation in the appropriate case, such abuse is not necessary to make that decision.

¶ 54 Mother also argues the trial court erred in denying her any visitation because its May 2019 orders, which came after the Massachusetts incident and court inquiry into it, "nevertheless granted [Mother] full weekend visitation . . . and summer visitation." This argument fails both in theory and on the evidence before us. First, Mother's argument would upend a basic tenet of family law, that courts have the power to make changes to even permanent orders in response to a substantial change in circumstances. *E.g. Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974); *see also In re Marlowe*, 268 N.C. 197, 199, 150 S.E.2d 204, 206 (1966) ("Changed conditions will *always* justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify." (emphasis added)). We therefore reject Mother's argument that a past grant of visitation on a temporary custody order bars the court from denying visitation in the future.

¶ 55 Beyond the legal issues, Mother's argument does not align with the trial court's actions and the evidence it had available to it. While Mother says the May 2019 order granted her visitation, she fails to include the part of the order stating, "***The minor children will not be forced to visit with [Mother] if they choose not [to] do so and they must inform . . . [Mother] of their desire not to visit with [Mother]***." (Bold and italics in original.) Thus, the trial court's May 2019 order envisioned the possibility of Mother having no visitation because the children would not be forced to visit. Further, in changing the order to not set any visitation, the trial court relied on additional, unchallenged

Findings from the period after May 2019, such as the additional information from the GAL, which further detailed the children's feelings, the fact that the children did not want to see Mother during trial, and the decrease in stress and resulting health improvement one of the children had after visitation stopped. Given these additional facts as well as the court's authority to change even permanent orders in certain circumstances, Mother's argument about the May 2019 order's visitation provision does not convince us.

¶ 56 The trial court's unchallenged Findings of Fact provide ample support for its ultimate Finding, Conclusion of Law, and order that it is in the children's best interests for Mother to not have visitation. As a result, the trial court did not abuse its discretion. The trial court in this case went above and beyond the call of duty in documenting each of many in-chambers conferences and in explaining its rulings as to each and every request Mother made. The trial court also accommodated Mother's pro se filings and her failures to appear on several occasions. The trial court took its role of protecting the best interests of the children very seriously, and this is evident in the orders. We find no issue with its analysis.

IV. Conclusion

¶ 57 After *de novo* review, we find the trial court had subject matter jurisdiction under the UCCJEA and that no unjustifiable conduct under North Carolina General Statute § 50A-208(a) otherwise interferes with the jurisdiction, especially given that section's exceptions. We do not address Mother's challenges to the Findings of Fact and Conclusions of Law that she did not act consistently with her constitutionally protected status as a parent and that Father was a fit and proper person to have custody because those are not relevant in a custody dispute between two parents, except as to the visitation issue. Finally, we find the uncontested Findings support the ultimate Findings, Conclusions, and the order provisions granting Father sole legal and physical custody and denying Mother visitation based on the best interest of the children, so the trial court did not abuse its discretion on those matters. Therefore, we affirm the trial court's order.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

McAULEY v. N.C. A&T STATE UNIV.

[280 N.C. App. 473, 2021-NCCOA-657]

ANGELA McAULEY, Widow of STEVEN L. McAULEY,
Deceased employee, Plaintiff-Appellant
v.
NORTH CAROLINA A&T STATE UNIVERSITY, Employer, and
SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator),
Defendant-Appellee

No. COA20-923

Filed 7 December 2021

Workers' Compensation—death benefits—timeliness of claim—statutory deadline

Where an injured state university employee died 10 days after he filed a Form 18 (Notice of Accident to Employer and Claim of Employee) and his widow filed a Form 33 (Request that Claim be Assigned for Hearing) seeking death benefits nearly three years after his death, the Industrial Commission correctly concluded that it lacked jurisdiction to hear the widow's claim because it was untimely filed. The deceased husband's Form 18 filing could not serve to invoke the Commission's jurisdiction over the widow's death benefits claim for purposes of meeting the two-year filing deadline set forth in N.C.G.S. § 97-24.

Judge ARROWOOD dissenting.

Appeal by Plaintiff-Appellant from Opinion and Award entered 28 August 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 September 2021.

Daggett Shuler, by Griffis C. Shuler, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission concluding that it lacked jurisdiction to hear Plaintiff's claim on its merits. For the following reasons, we affirm the North Carolina Industrial Commission lacks jurisdiction to hear Plaintiff's claim on the merits.

I. Factual and Procedural Background

¶ 2 On 30 January 2015, Mr. Steven McAuley ("Decedent") suffered an injury to his back while employed by North Carolina A&T State University ("Defendant"). On 11 February 2015, Decedent filed a Form 18, Notice of Accident to Employer and Claim of Employee. On 21 February 2015, Decedent passed away, leaving behind a dependent widow, Mrs. Angela McAuley ("Plaintiff"). On 16 March 2015, Defendant filed a Form 63 and thereafter paid temporary total disability compensation and medical compensation to Decedent. "Within a couple of weeks" of Decedent's death, Plaintiff attended a meeting with representatives from Defendant's human resources department to sign papers related to insurance policies and an accidental death insurance policy. Plaintiff testified that at the time, she believed she was signing all the paperwork related to Decedent's death and the benefits she was entitled to.

¶ 3 On 18 January 2018, almost three years after the death of Decedent, Plaintiff filed a Form 33 Request that Claim be Assigned for Hearing with the North Carolina Industrial Commission ("Industrial Commission") seeking death benefits. On 15 May 2018, Defendant filed a Form 33R Response to Request that Claim be Assigned for Hearing, asserting the Industrial Commission "lack[ed] jurisdiction to hear any death claim brought by the next of kin as the same was not timely filed under [N.C. Gen. Stat.] § 97-24." Defendant also filed a motion to dismiss Plaintiff's death claim as time barred under N.C. Gen. Stat. § 97-24 (2017) and § 97-22 (2017).

¶ 4 On 30 July 2018, Deputy Commissioner Tyler Younts entered an order holding Defendant's motion to dismiss in abeyance. The order also bifurcated the parties' hearing, separating the issue of the Industrial Commission's jurisdiction in the case from the issue of the proximate cause of Decedent's death. On 31 October 2018, Deputy Commissioner Younts filed an Opinion and Award denying Plaintiff's claim for death benefits with prejudice, concluding as a matter of law the Industrial Commission did not acquire jurisdiction of Plaintiff's death claim, as Plaintiff had not timely filed.

¶ 5 On 13 November 2018, Plaintiff appealed the 31 October 2018 Opinion and Award. On 28 August 2020, the Full Commission[1] of the Industrial Commission filed its Opinion and Award again denying Plaintiff's claim and dismissing the claim with prejudice. Industrial Commission Chair

1. A party disputing the decision of the Commission may appeal to the Full Commission. N.C. Gen. Stat. § 97-87(c)(5) (2019).

Phillip A. Baddour, III dissented from the Opinion and Award of the Full Commission in a separate opinion. On 23 September 2020, Plaintiff filed her notice of appeal to this Court.

II. Jurisdiction

¶ 6 Jurisdiction lies in this Court as a matter of right over a final judgment from the North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2019).

III. Issues

¶ 7 The issue on appeal is whether a deceased employee's filed claim qualifies as a dependent's "filing" for purposes of N.C. Gen. Stat. § 97-24.

IV. Standard of Review

¶ 8 The standard for appellate review of an opinion and award of the Industrial Commission is limited to "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). "The findings of fact by the Industrial Commission are conclusive on appeal if supported by . . . competent evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Industrial Commission's conclusions of law are reviewed *de novo*. *Allen v. Roberts Elec. Contrs.*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001).

V. Analysis

¶ 9 Our Courts have explained that "the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991).

¶ 10 N.C. Gen. Stat. § 97-24 states, in relevant part:

> Right to compensation barred after two years; destruction of records.
>
> (a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in [N.C. Gen. Stat. §] 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in [N.C. Gen. Stat.

> §] 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a).

¶ 11 While death benefits are not specifically mentioned in N.C. Gen. Stat. § 97-24(a), the text of the statute refers to "compensation," a term defined in N.C. Gen. Stat. § 97-2 as encompassing "the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein." N.C. Gen. Stat. § 97-2(11) (2019). We therefore agree with the Full Commission in its conclusion the timeliness of death claims is contemplated and governed by N.C. Gen. Stat. § 97-24(a).

¶ 12 Plaintiff contends the Industrial Commission initially obtained jurisdiction of this matter when Decedent filed his Form 18 on 11 February 2015, within the two-year deadline prescribed by N.C. Gen. Stat. § 97-24. If this Court were to agree with Plaintiff, the Industrial Commission would have jurisdiction to hear Plaintiff's claim on its merits. However, for the following reasons, we hold Plaintiff did not assert a claim for compensation until her filing of a Form 33 on 18 January 2018, more than two years after her cause of action arose, and Decedent's filing of a Form 18 within the two-year deadline cannot qualify as a filing for the purposes of Plaintiff's separate cause of action.

¶ 13 Our case law points to the conclusion Plaintiff's claim for death and funeral benefits arose only upon Decedent's death, not concurrent with Decedent's own, separate filing of a Form 18 for workers' compensation benefits. Death and funeral benefits were not at issue at the time of the filing of the Form 18 and could not have been raised during Decedent's lifetime. Plaintiff's pursuit of benefits as Decedent's widow and sole dependent is a separate claim from that filed originally by Decedent prior to his death. *See, e.g.*, *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466, 256 S.E.2d 189, 195 (1979) (A claim under the Workers' Compensation Act originates when the cause of action arises.); *Brown v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 374, 378, 802 S.E.2d 776, 780 (2017) (A dependent's right to compensation is separate and distinct from the rights of the injured employee and that right only arises upon the death of the injured employee.); *Pait v. Se. Gen. Hosp.*, 219 N.C. App. 403, 414, 724 S.E.2d 618, 627 (2012) (A death benefits claim under the Workers' Compensation Act is a distinct claim to those beneficiaries upon the death of the

injured worker.). We agree with the majority of the Full Commission that Decedent's filing of a Form 18 for workers' compensation benefits had no effect on when Plaintiff's cause of action arose.

¶ 14 Our dissenting colleague considers this matter in the context of a civil wrongful death claim by analogy. We agree the civil wrongful death analysis is not controlling in the worker's compensation context. Our dissenting colleague notes the Official Comment to N.C. R. Civ. P. Rule 15(c) (2019) provides in part: "[t]he amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved." *Id.* (citation and quotation marks omitted). Rule 15(c), however, does not allow for the relation back of a different cause of action, carried by a separate plaintiff, when said cause of action is still time-barred.

¶ 15 In *Williams v. Advance Auto Parts, Inc.*, this Court clarified "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." *Id.*, 251 N.C. App. 712, 713, 795 S.E.2d 647, 649 (2017).

> Under the North Carolina Rules of Civil Procedure, a party may amend a pleading "once as a matter of course at any time before a responsive pleading is served[.]" N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). Amendment to substitute a party is within the scope of the rule, although doing so represents the creation of "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." If the statute of limitations has expired in the interim between the filing and the amendment, a plaintiff may preserve his claim only if the amendment can be said to relate back to the date of the original claim under Rule 15(c) . . ..

Williams, 251 N.C. App. at 717-18, 795 S.E.2d at 651-52 (internal citations omitted). As we previously iterated, our case law points to the conclusion Plaintiff's pursuit of benefits as Decedent's dependent is a separate cause of action from Decedent's. Our case law does not provide for the conclusion Plaintiff's cause of action can be said to relate back to the date of Decedent's separate cause of action where Plaintiff's cause of did not exist at the time of the filing of Decedent's cause of action, and the statute of limitations has otherwise expired as to Plaintiff's cause of action.

¶ 16 Plaintiff further contends a dependent's right to receive death benefits under the Workers' Compensation Act after a claim has been timely filed under N.C. Gen. Stat. § 97-24 is governed by N.C. Gen. Stat. § 97-38 (2019), which provides in relevant part:

> If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation . . . .

N.C. Gen. Stat. § 97-38.

¶ 17 Plaintiff contends the language of N.C. Gen. Stat. § 97-38 does not require a dependent to file a separate claim or request a hearing within two years of an employee's death. Because Decedent's death occurred within the six years cited in N.C. Gen. Stat. § 97-38, Plaintiff argues the Industrial Commission has jurisdiction to hear Plaintiff's claim for death benefits on the merits. However, this Court has no reason to interpret N.C. Gen. Stat. § 97-24 and N.C. Gen. Stat. § 97-38 as mutually exclusive provisions. Rather, N.C. Gen. Stat. § 97-38 provides for a statute of limitations for payments to a dependent when death results proximately from a compensable injury. N.C. Gen. Stat. § 97-38 (emphasis added). Because timely filing is a condition precedent to compensation under N.C. Gen. Stat. § 97-24, a *compensable* injury would not be at issue prior to a timely filing of a claim for workers' compensation benefits. Therefore, the condition precedent specified in N.C. Gen. Stat. § 97-24 still applies to Plaintiff's filing.

VI. Conclusion

¶ 18 Because an employee's death is a condition precedent for the filing of a dependent's claim for death benefits under N.C. Gen. Stat. § 97-24, a deceased employee's claim filed for workers' compensation benefits cannot serve as the dependent's "filing of a claim" for purposes of meeting the condition precedent prescribed by N.C. Gen. Stat. § 97-24 to obtain death benefits. Plaintiff did not file her own claim for compensation under the Workers' Compensation Act until 18 January 2018, more than two years after Plaintiff's cause of action arose. Plaintiff's claim is therefore time-barred, and the North Carolina Industrial Commission lacks jurisdiction to hear it.

AFFIRM.

Judge GRIFFIN concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

¶ 19 I respectfully dissent from the majority's holding that the Industrial Commission lacks jurisdiction. In what appears to be an issue of first impression for our Courts, I would hold that under N.C. Gen. Stat. § 97-24(a), a dependent is not required to file a separate and distinct claim within the two-year statutory period, so long as an initial claim satisfies the limitation period.

¶ 20 "Where 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." *Matter of Redmond by & through Nichols*, 369 N.C. 490, 495, 797 S.E.2d 275, 279 (2017) (citation and quotation marks omitted; alterations in original). "When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Purcell v. Friday Staffing*, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) (citation and quotation marks omitted).

¶ 21 N.C. Gen. Stat. § 97-24(a) addresses statutory limitations for the right to compensation under the Workers' Compensation Act:

> The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a) (2019). Additionally, under N.C. Gen. Stat. § 97-38,

> [i]f death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final

> determination of disability, whichever is later, the employer shall pay or cause to be paid . . . weekly payments of compensation equal to sixty-six and two-thirds percent . . . of the average weekly wages of the deceased employee at the time of the accident . . . and burial expenses not exceeding ten thousand dollars . . . to the person or persons entitled thereto . . . .

N.C. Gen. Stat. § 97-38 (2019).

¶ 22 Pursuant to the plain language of N.C. Gen. Stat. § 97-24(a), the Commission may obtain jurisdiction where: (1) a claim or memorandum of agreement as provided in N.C. Gen. Stat. § 97-82 is filed with the Commission within two years after an accident; (2) an employee is paid compensation as provided under the Article within two years after an accident; or (3) a claim or memorandum of agreement is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under the Article.

¶ 23 The statute requires that "a claim" is filed "within two years after the accident." N.C. Gen. Stat. § 97-24(a). Decedent complied with statutory requirements by filing a Form 18 within two years of his injury. The plain language of the statute does not require plaintiff to file a separate claim for benefits. On these grounds, I would hold that the Full Commission erred in dismissing plaintiff's claim for death benefits.

¶ 24 Although I believe it is unnecessary in this case to engage in judicial construction to ascertain legislative intent, I disagree with the majority's application of caselaw and failure to address legislative actions that are informative of legislative intent. The majority applies the definition of "compensation" found in N.C. Gen. Stat. § 97-2 to reach the conclusion that "the timeliness of death claims is contemplated and governed by N.C. Gen. Stat. § 97-24(a)." I do not see how this definition serves to bar plaintiff's claim and override the additional timing requirements for death benefits specifically set out in N.C. Gen. Stat. § 97-38.

¶ 25 "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history," to assess " 'the spirit of the act and what the act seeks to accomplish.' " *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation and some quotation marks omitted). Traditional principles of statutory construction provide that " '[i]n construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the

meaning of it.' " *Nello L. Teer Co. v. N.C. Dep't of Transp.*, 175 N.C. App. 705, 710, 625 S.E.2d 135, 138 (2006) (some quotation marks omitted) (quoting *Spruill v. Lake Phelps Volunteer Fire Dep't, Inc.*, 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000)). "While the presumption is that the legislature intended to change the law through its amendments, where the language of the original statute is ambiguous such amendments may be deemed, not as a change in the law, but as a clarification in the language expressing that law." *N.C. Elec. Membership Corp. v. N.C. Dep't of Econ. & Cmty. Dev.*, 108 N.C. App. 711, 720, 425 S.E.2d 440, 446 (1993) (citation omitted). Where the language of the original statute is unambiguous and "the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law." *Nello L. Teer Co.*, 175 N.C. App. at 710, 625 S.E.2d at 138 (citation omitted).

¶ 26 In this case, the statute originally stated "[t]he right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter." *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782, 783, 172 S.E. 487, 488 (1934) (quotation marks omitted) (quoting Pub. Laws 1929, c. 120, § 24). In 1955, the statute was modified to allow two years to file a claim following an accident, while the requirement to file a separate claim for death benefits within one year of the date of death was maintained. S.L. 1955-1026, § 12. In 1973, the General Assembly again amended N.C. Gen. Stat. § 97-24(a) by removing the language requiring that a separate claim be filed for death benefits. S.L. 1973-1060, § 1.

¶ 27 By deleting the words "if death results from the accident, unless a claim be filed with the Commission within one year thereafter," I believe the General Assembly expressed its clear intent that a separate claim for death benefits is not required and that an employee's filing of a claim within two years after the accident is sufficient for the Industrial Commission to acquire jurisdiction over a subsequent claim for death benefits. If the General Assembly intended to maintain a separate filing requirement for death benefit claims, it would have maintained the language requiring the filing of a separate death benefit claim and increased the limitation period from one to two years. The majority's analysis relies on the definition of "compensation" found in N.C. Gen. Stat. § 97-2 and several cases addressing claims under the Workers' Compensation Act but fails to address the legislative history of the operative statute itself. Accordingly, in applying traditional principles of

statutory construction, I would hold that the General Assembly intended to remove the requirement to file a separate death benefits claim within a specified period.

¶ 28 In addition to my analysis of the plain language and judicial construction of the statute, I find it appropriate to consider the context of a civil wrongful death claim. While this analysis is not controlling in the worker's compensation context, I believe how we treat those claims is instructive in how we should view this situation. Prior to our State's amendment of the Rules of Civil Procedure in 1967, it was "a familiar principle that if a wrongful death action was brought by a foreign personal representative who had not qualified locally within the period permitted for bringing the action, the complaint could not be amended to show that after the expiration of such period the plaintiff had locally qualified[,]" and was instead "dismissed as not having been timely filed." *Burcl v. N.C. Baptist Hosp., Inc.*, 306 N.C. 214, 218, 293 S.E.2d 85, 88 (1982) (citation omitted). The *Burcl* Court held that "[w]hether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives 'notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' " *Id.* at 224, 293 S.E.2d at 91 (citation omitted). The Court also noted the Official Comment to North Carolina Rule 15(c), which provides in part: "[t]he amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved." *Id.* (citation and quotation marks omitted).

¶ 29 Wrongful death claims, while creatures of a different statutory scheme than is at issue in this case, address similar subject matter and are bound by similar principles. Although I believe the plain language and legislative history of the Workers' Compensation Act are sufficient grounds for reversal, the principles contained within our wrongful death jurisprudence are instructive, and support a holding that is in line with those principles.

STATE v. BOWMAN

[280 N.C. App. 483, 2021-NCCOA-658]

STATE OF NORTH CAROLINA
v.
TRAVIS WAYNE BOWMAN

No. COA21-170

Filed 7 December 2021

1. Criminal Law—defenses—voluntary intoxication—jury instruction

The trial court properly denied defendant's request for a jury instruction on voluntary intoxication where defendant failed to show he was so intoxicated from using methamphetamine that he could not form the specific intent to commit first-degree murder and first-degree kidnapping. In support of defendant's murder conviction based on malice, premeditation, and deliberation, the evidence showed that he brandished a gun while declaring he "smelled death," ordered his girlfriend to shoot and kill the victim, orchestrated the disposal of the victim's body, retained the spent bullet as a "trophy," and fled the state to avoid arrest. With regard to kidnapping—the underlying felony for defendant's felony murder conviction—evidence showed defendant confined the victim over successive days, thwarted the victim's escape attempt, offered freedom if the victim would kill his own mother, and tried to make the victim hang himself.

2. Homicide—murder by torture—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge for first-degree murder by torture where substantial evidence showed that defendant had detained, humiliated, and beaten the victim over a period of days, during which he shot the victim in the leg, polled others to vote on whether the victim should live or die, demanded that a "hot shot" of poison and methamphetamine be mixed and injected into the victim, tried to make the victim hang himself, ordered the victim's beating with a rock, and then ordered his girlfriend—under threats to her and her family's lives—to fire the gunshot that ultimately killed the victim.

Appeal by defendant from judgments entered 14 February 2020 by Judge Gary M. Gavenus in Mitchell County Superior Court. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Leslie Rawls for defendant-appellant.

TYSON, Judge.

¶ 1 Travis Wayne Bowman ("Defendant") appeals from a jury's verdicts finding him guilty of first-degree murder under three separate bases, possession of a firearm by a convicted felon, conspiracy to commit first-degree murder, and first-degree kidnapping. We find no error.

I. Background

¶ 2 Joshua Emmanuel Buchanan ("Buchanan") had allowed Defendant to borrow his Ford Mustang vehicle. Defendant was driving the Mustang and was pulled over by law enforcement. Buchanan's Mustang was impounded. Defendant concluded he was stopped by law enforcement because Buchanan had told law enforcement about his trafficking and dealing in methamphetamine. Defendant presumed Buchanan had provided names of individuals involved in methamphetamine distribution to law enforcement. Defendant's girlfriend, Felicia Fox, was present in the Mustang during the traffic stop. She stated that she had no reason to believe Buchanan had provided any names to law enforcement.

¶ 3 Defendant went to a residence located on Valley View Road in Bakersville, which Buchanan shared with his mother, Regina Pittman, and Fox, after Buchanan's Mustang was impounded. Buchanan, Pittman, and Fox all suffered from substance abuse and drug addictions and abused methamphetamine and other controlled substances. Defendant had been selling methamphetamine to Buchanan, Fox, and Pittman for around three months. Defendant brandished a gun and told Fox "I smell death."

¶ 4 Several days after the Mustang was impounded, Defendant took Buchanan and Fox to Kevin Buchanan's ("Kevin") residence where they smoked marijuana with William Guttendorf. Defendant asked Guttendorf and Buchanan to drive to town to buy cigarettes, bottles of Mountain Dew soft drink, and 9mm ammunition. Defendant sent Guttendorf and Buchanan to the store because the license tag on his Jeep was not valid.

¶ 5 When Guttendorf and Buchanan returned with a couple packs of cigarettes, a bottle of Mountain Dew, and 9mm ammunition, Defendant accused Buchanan of "snitching" about his methamphetamine dealing. Defendant grabbed Buchanan by the collar of his shirt and continued to question Buchanan about "snitching." Defendant fired two rounds from a pistol into the ground near Buchanan's feet.

¶ 6 Defendant had Buchanan to call several of Defendant's family members and asked them to vote on whether Buchanan should live or die. Defendant struck Buchanan and briefly held him in a chokehold.

¶ 7 Defendant had Buchanan, Guttendorf, and Fox to accompany him to Clayton Speaks' residence to transact a methamphetamine sale. While at Speaks' house, Defendant told Speaks that Buchanan had "snitched" and asked if Buchanan should live or die. Speaks told Defendant not to hurt Buchanan.

¶ 8 Defendant left Speaks and drove himself, Buchanan, Guttendorf, and Fox to Matthew Ledford's house. On the way to Matthew's house, Defendant struck Buchanan and stated if he killed Buchanan, he would have to "figure out" what to do with Guttendorf and Fox.

¶ 9 At Matthew's house, Defendant told him that Buchanan had given law enforcement a list of people who were involved in methamphetamine distribution. At some point, Matthew's brother, Chad Ledford, who lived across the street, arrived. Defendant insisted that the group smoke methamphetamine, which he claimed contained "truth serum." Defendant struck Buchanan demanding to know "why he had snitched." While holding a gun, Defendant filmed Buchanan's "admission" to cooperating with law enforcement on his cell phone. Defendant asked Matthew and Chad what he should do with Buchanan.

¶ 10 Members of the group smoked methamphetamine twice from two bags. After dark, Defendant claimed "people . . . from Georgia" had arrived to "take care of [Buchanan]." Defendant took Buchanan outside the house and a green laser was focused on Buchanan. The source of the green laser was unknown. Defendant asked Buchanan "if he was ready to die." Buchanan tried to hide behind Fox, then attempted to run away. Defendant tackled him and dragged him back towards Matthew's house. Once Buchanan was back under his control, Defendant used his cellphone and recorded him pleading for his life. Buchanan urinated on himself. Defendant did not allow Buchanan to leave, and Defendant, Buchanan, Guttendorf, and Fox spent the night at either Chad or Matthew's house.

¶ 11 The next morning, Defendant, Buchanan, Guttendorf, and Fox used methamphetamine twice. Defendant returned the group back to the home which Buchanan and Fox shared with Pittman. After arrival, Defendant, Buchanan, Guttendorf, Fox, and Pittman used more methamphetamine. In the home, Defendant threatened to keep Buchanan as a hostage unless Buchanan's grandmother gave Defendant $3,000.

Defendant stopped requesting a ransom. He began accusing Buchanan of molesting two unnamed minor girls and Buchanan's sister.

¶ 12 Defendant took the group to one of the Ledford brothers' houses. Defendant showed Buchanan a website showing young girls dancing in their underwear he claimed he had "created . . . to catch people who are being perverted to little girls." Defendant prohibited Buchanan from being able to "walk around by himself."

¶ 13 The group slept for a period before they went to Kevin's house for Guttendorf to retrieve his pickup truck. Defendant, Buchanan, Guttendorf, Fox, and Kevin returned to the home Buchanan, Fox, and Pittman shared. Defendant hit Buchanan a couple of times in the car.

¶ 14 The group began injecting methamphetamine intravenously. Defendant asked Kevin if he had anything to make a "hot shot," a mixture for injection of some kind of poison and methamphetamine, so Defendant could make Buchanan, Fox, and maybe Pittman "kill [them] selves." Kevin found something he called "rat poison" which he loaded into a syringe, which no one injected.

¶ 15 Defendant offered to release Buchanan if he would kill his mother, Pittman. Defendant then changed his mind and revoked the offer to Buchanan. Defendant ordered Fox to beat up Pittman, which she did.

¶ 16 Defendant seized Buchanan by his shirt and hit him in the back of the head with the butt of the gun, while asking Guttendorf if he thought "this shit's a game?" Defendant ordered Buchanan to sit on the floor, telling him "he wouldn't make it far" if he ran because he "had people staked out." Defendant, Buchanan, Fox, Guttendorf, and Pittman went to Guttendorf's apartment where they got high "a couple of times" on methamphetamine. Defendant, Buchanan, Guttendorf, and Fox spent the night at Guttendorf's apartment and continued to use methamphetamine.

¶ 17 The next morning Defendant, Buchanan, Guttendorf, and Fox used more methamphetamine. Defendant had Guttendorf to take Fox and Pittman back to their home and told him to pick up cigarettes and drinks. Defendant told Guttendorf to return to the apartment so they could "kick [Buchanan's] ass and then let him go."

¶ 18 During the drive to the home, which Pittman, Fox, and Buchanan shared, Guttendorf told Fox "the best thing [Pittman and Fox] could do was just keep their mouths shut." Once Guttendorf dropped Pittman and Fox off, he stopped at a Texaco gas station and purchased two packs of cigarettes and two bottles of soft drink. Guttendorf also stopped to pick

up a friend, Melissa Thompson, because he "didn't want to be alone with [Defendant] and [Buchanan]."

¶ 19 Defendant bound Buchanan's hands with duct tape and filmed an eight-minute video on his cell phone of him "interrogating" Buchannan and his "confessing" to various acts of child molestation. The video depicts Buchanan trembling and admitting to all accusations Defendant made.

¶ 20 Defendant pistol whipped and hit Buchanan. Defendant shot Buchanan in the left shin, shattering his tibia. Another video depicts Buchanan bleeding profusely from the gunshot wound and attempting to use towels to control the bleeding and stabilize his broken leg.

¶ 21 Law enforcement later interviewed Guttendorf and Fox, who were not aware of any evidence that Buchanan had ever molested children. Law enforcement also interviewed the purported victims, which revealed no evidence of child molestation or any other crime warranting further investigation.

¶ 22 Defendant returned Buchanan to the home he shared with Fox and Pittman. When Guttendorf arrived at his apartment he saw a bloody footprint on the front steps. Guttendorf went inside to investigate, while Thompson remained inside the truck. Inside his apartment, Guttendorf found "blood all over the place" in his living room. Defendant called Guttendorf and told him to come to Buchanan's home.

¶ 23 When Guttendorf and Thompson pulled into the driveway, Guttendorf saw Defendant armed with a gun. Buchanan had a "homemade bandage" around his leg. Guttendorf attempted to leave and began to pull the truck out of the driveway. He stopped and put his hands up after Defendant approached the truck with the gun. Guttendorf and Thompson exited the vehicle and entered the house. Defendant showed Guttendorf, Fox, and Thompson the cell phone videos taken at Guttendorf's apartment of Buchanan's "confessions" of child molestation, of Defendant hitting Buchanan in the head, pistol whipping Buchanan, and Defendant shooting Buchanan in the leg.

¶ 24 At some point Pittman said she was "not gonna have a pedophile in [her] house." Buchanan limped out onto the porch and fell down. Defendant then kicked Buchanan. Guttendorf went inside the home, a few minutes later, Defendant came inside looking for a rope or cord to "make [Buchanan] hang himself." Defendant found a telephone cord and went back outside.

¶ 25 When Guttendorf and Fox went outside a few minutes later, they saw the cord draped over a tree branch and wrapped around Buchanan's neck. Buchanan was almost on his knees and his face was turning blue. Buchanan's feet could touch the ground, if he could have stood up. Fox determined Buchanan "was just [too] tired." Defendant told Fox not to call 911.

¶ 26 The telephone cord broke, and Buchanan fell onto the ground. Buchanan attempted to crawl under Guttendorf's truck, but Defendant "pulled him backout (sic)" and told him "he wasn't going nowhere."

¶ 27 Buchanan limped into the home, but Pittman told Defendant "to get [Buchanan] out of the house and . . . [to] do whatever he needed to do." Defendant forcefully took Buchanan out of the house and threw him down in a patch of weeds in the yard. Buchanan began to scream. Defendant held out the gun and told Thompson, Guttendorf, and Fox they could either "get involved or [they] could be next." Defendant ordered Thompson or Fox to get a large rock and hit Buchanan. Buchanan was hit at least twice in the head with a large rock approximately ten inches in diameter. Defendant told Buchanan to go "lay somewhere and die." Buchanan stumbled approximately fifteen to twenty feet before collapsing.

¶ 28 Defendant told Fox she could either kill Buchanan or that he would hurt her younger sister and family. Fox initially refused, but Defendant reiterated she would either shoot Buchanan or he was "gonna hurt [them] all." Fox took the gun from Defendant, shot Buchanan once in the side of the head killing him. Fox handed the gun back to Defendant. Defendant acted surprised Fox had shot Buchanan as instructed. Guttendorf testified Defendant remarked: "I can't believe she did it, she f[–]king did it, she shot him."

¶ 29 Defendant told the group "none of [them] could leave" because they were "a part of it now." Defendant instructed Guttendorf and Thompson to move Buchanan's body and directed the others to begin mixing bleach and water to pour over the areas where they had dragged Buchanan's body.

¶ 30 Defendant left and picked up Kevin. When they returned, Buchanan's body was wrapped in a blanket and they left with the body in the bed of Guttendorf's truck. Defendant and Kevin initially left Buchanan's body beside Cane Creek. Defendant later decided this spot was not satisfactory. Defendant had Guttendorf follow him back to retrieve Buchanan's body. Defendant and Guttendorf loaded Buchanan's body in the back of Guttendorf's truck and went to Chad's house to borrow a wheelbarrow.

¶ 31 Defendant, Fox, Thompson, Kevin and Guttendorf went to Guttendorf's apartment. Defendant retrieved the spent bullet from the couch from when he had shot Buchanan in the leg. Thompson and Guttendorf cleaned up the blood from the floor. Defendant kept the spent bullet "as a trophy." Defendant later put a string through the bullet and "showed" it to people.

¶ 32 Behind a shed at Guttendorf's apartment, Defendant, Guttendorf, and Kevin dug a hole and placed Buchanan's body in it, poured a chemical on the body, filled the hole with dirt, and placed a wooden pallet on top of the ground. Fox cleaned Defendant's Jeep and threw items off an embankment along the road.

¶ 33 Thompson, Guttendorf, Defendant, and Fox separated into two groups. Thompson and Guttendorf did not contact law enforcement because Defendant had "threatened [their] families" and threatened they would "end up like" Buchanan. Defendant and Fox went to Georgia to stay with Defendant's family. Guttendorf testified Buchanan's body was buried around 27 September 2016. Buchanan's sister and cousin reported him missing on 2 October 2016. Law enforcement officers located and exhumed Buchanan's body on 7 October 2016.

¶ 34 Defendant was arrested by the Bartow County (Georgia) Sherriff's Office on 10 October 2016. Defendant was indicted for possession of a firearm by a convicted felon, conspiracy to commit first-degree murder, first-degree kidnapping, and first-degree murder on 14 November 2016.

¶ 35 Defendant was tried capitally. The jury found Defendant guilty of all charges including first-degree murder on three bases of malice, premeditation, and deliberation; by torture; and, under the felony-murder rule. The jury deadlocked on imposing the death sentence.

¶ 36 Defendant was sentenced to life imprisonment without the possibility of parole for the first-degree murder. Defendant was also sentenced to serve consecutive active sentences of 17 to 30 months for the possession of a firearm by a felon conviction, 207 to 261 months for the conspiracy to commit first-degree murder conviction, and 96 to 128 months for first-degree kidnapping conviction, all to run consecutively to Defendant's life imprisonment without parole. Defendant appeals.

II. Jurisdiction

¶ 37 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

¶ 38 Defendant argues the trial court erred by denying his request for a jury instruction on voluntary intoxication and by denying his motion to dismiss the first-degree murder charge on the basis of torture.

IV. Voluntary Intoxication

¶ 39 **[1]** Defendant argues the trial court erred by denying his request for a jury instruction on voluntary intoxication. He asserts his voluntary intoxication of methamphetamine defeated his ability to form the specific intent necessary to support first-degree murder, based on malice, premeditation, and deliberation and the felony-murder rule, and for first-degree kidnapping.

A. Standard of Review

¶ 40 Arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

B. Analysis

¶ 41 Over a century ago, our Supreme Court warned "the doctrine [of voluntary intoxication] should be applied with great caution." *State v. Murphy*, 157 N.C. 614, 617-18, 72 S.E. 1075, 1076-77 (1911). A defendant is not entitled to a jury instruction on voluntary intoxication "in every case in which a defendant . . . consum[es] . . . controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992).

¶ 42 A defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Id.* Defendant's intent to kill can be inferred by his actions "before, during, and after a crime." *State v. Phillips*, 365 N.C. 103, 141, 711 S.E.2d 122, 149 (2011).

¶ 43 "The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and

premeditated purpose to kill." *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (citation omitted); *see State v. Cureton*, 218 N.C. 491, 495, 11 S.E.2d 469, 471 (1940) ("[T]here must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of . . . intoxicants that he had temporarily, at least, lost the capacity to think and plan."). If a defendant does not produce "evidence of intoxication to such degree, the court is not required to charge the jury thereon." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (citation omitted). Voluntary intoxication is only a defense to specific intent crimes. *See State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980).

¶ 44 Defendant argues his specific intent convictions: first-degree murder based on malice, premeditation, and deliberation and the felony-murder rule and first-degree kidnapping must be reversed because he lacked the requisite intent due to intoxication from methamphetamine. Defendant and the others present before and after Buchanan's killing were smoking and injecting methamphetamine. Defendant asserts the inconsistencies in locations and time spans in the State's witnesses' testimony stem from their use of methamphetamine. Witnesses testified to experiencing symptoms of methamphetamine intoxication: lack of sleep, confusion as to the timeline of events, paranoia, and agitation.

¶ 45 Defendant further asserts Fox's testimony, stating that Defendant that was becoming paranoid and "wigging," during the events mandates the trial court should have issued the voluntary intoxication instruction. Fox defined these phrases as "paranoia in my book would be seeing things and stuff like that. But wigging out is like what I would consider them actually believing that stuff's there."

¶ 46 Contrary to Defendant's assertion, Fox's testimony was only evidence of his intoxication. Defendant has failed to show his "mind and reason were so completely intoxicated and overthrown [from methamphetamine use] as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (citation omitted).

¶ 47 Ample evidence of Defendant's specific intent supports the first-degree murder conviction based on malice, premeditation, and deliberation. Defendant's actions showing he "intended for his action[s] to result" in Buchanan's death are that he brandished the gun while declaring he "smell[ed] death," pondered having to "figure out" what to do with the witnesses if he killed Buchanan, ordered Fox or Thompson to hit Buchanan with a large rock, told Fox to kill Buchanan, orchestrated

the disposal of Buchanan's body, retained the spent bullet as a "trophy," fled to Georgia to avoid arrest after the killing, described his actions to family in Georgia, and showed videos he filmed of Buchanan on his cellphone. *Phillips*, 365 N.C. at 141, 711 S.E.2d at 149 (citation omitted).

¶ 48 Ample evidence of Defendant's specific intent to kill supports the first-degree murder conviction based on the felony-murder rule. The underlying crime for the felony-murder rule was first-degree kidnapping. "[T]he actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required." *State v. Jones*, 353 N.C. 159, 167, 538 S.E.2d 917, 924 (2000). Defendant's actions show his specific intent to unlawfully restrain or confine over successive days, stating he was doing this in retribution for Buchanan's "snitching," binding Buchanan's hands behind his back, retrieving Buchanan when he tried to escape on foot, offering freedom if Buchanan killed his mother, Pittman, threatening to kill Buchanan by a "hot shot," and orchestrating the attempted hanging of Buchanan.

¶ 49 Defendant possessed and demonstrated the requisite intent to commit the underlying felony, first-degree kidnapping, to support the felony murder conviction. Defendant's argument is without merit and overruled.

V. First-Degree Murder by Torture

¶ 50 **[2]** Defendant argues the trial court erred by denying his motion to dismiss the first-degree murder charge on the basis of torture.

A. Standard of Review

¶ 51 "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

¶ 52 "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citation omitted).

B. Analysis

¶ 53 Defendant asserts the trial court erred by denying his motion to dismiss the first-degree murder on a basis of torture. He argues the State's medical expert, Jerri Lynn McLemore, MD testified Buchanan died from Fox's gunshot.

¶ 54 "First-degree murder by torture requires the State to prove that the accused intentionally tortured the victim and that such torture was a proximate cause of the victim's death." *State v. Pierce*, 346 N.C. 471, 492, 488 S.E.2d 576, 588 (1997) (citations and internal quotation marks omitted). Torture is defined as "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997) (citation omitted). Our Supreme Court defines the course of conduct to constitute torture as "the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another." *Id.* (citation omitted).

¶ 55 The Court upheld a first-degree murder by torture conviction in *State v. Lee*, 348 N.C. 474, 489-90, 501 S.E.2d 334, 344 (1998). In *Lee*, the defendant participated in repeated physical abuse of the victim for a three-day period and then left the residence six days before the victim was killed. *Id.*

¶ 56 Defendant's actions "to inflict cruel suffering" intended to punish Buchanan for purportedly "snitching." Defendant's course of conduct occurred over the period of days while Buchanan was detained, humiliated, beaten, and tortured. *Id.* Contrary to Defendant's assertions, the torture of Buchanan did not just occur when he shot him in the leg, but began before when he struck Buchanan, polled others to vote if Buchanan should live or die, demanded a "hot shot" be mixed to inject Buchanan, set up and attempted to hang Buchanan by the telephone cord, ordered Buchanan's beating with a rock, and concluded with Defendant ordering Fox, under threats to her and her familiy's lives, to shoot and kill Buchanan. The trial court properly denied Defendant's motion to dismiss the first-degree murder charge under a theory of torture. Defendant's argument is overruled.

VI. Conclusion

¶ 57 Defendant failed to show his "mind and reason were so completely intoxicated and overthrown [from methamphetamine use so] as to

render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Strickland*, 321 N.C. at 41, 361 S.E.2d at 888 (citation omitted). The trial court properly denied Defendant's request for an instruction on voluntary intoxication.

¶ 58 Viewing the evidence in the light most favorable to the State, sufficient evidence exists to infer Defendant intended to terrorize or injure Buchanan during the period of confinement. Sufficient evidence exists to show acts of "grievous pain and suffering" were inflicted by Defendant for punishment. *Anderson*, 346 N.C. at 161, 484 S.E.2d at 545 (citation omitted).

¶ 59 The trial court did not err in denying Defendant's motion to dismiss the first-degree murder by torture charge. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges DIETZ and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
KEITH AARON BUCKLEW, DEFENDANT

No. COA20-556

Filed 7 December 2021

1. Motor Vehicles—impaired driving—felony serious injury by motor vehicle—warrantless blood draw—probable cause—exigent circumstances

In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and impaired driving, competent evidence supported a determination that probable cause existed to justify a warrantless blood draw of defendant after he was taken to a hospital with serious injuries from the accident he caused. An eyewitness observed defendant's erratic driving just prior to the accident, defendant admitted to having taken several impairing substances that day, he appeared lethargic and had slow speech, and, where his injuries were so severe that he subsequently had to be taken by helicopter to another hospital, exigent

circumstances existed to take a blood sample without obtaining a warrant so that medical treatment including pain medication could be administered.

2. Evidence—car accident—judicial notice of weather report

In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, the trial court did not abuse its discretion by declining to take judicial notice of a weather report of the conditions that existed on the day that defendant caused a collision where there was sufficient evidence from multiple witnesses about the weather conditions from which the jury could make its own conclusion. Further, where the issue was how much rain fell at the time of the crash, the report did not meet the standard for judicial notice under Evidence Rule 201(b) because the precise amount of rain is not a generally known fact, and the report was not a document of indisputable accuracy because its data stopped several hours prior to when the crash occurred.

3. Constitutional Law—Confrontation Clause—lab report—blood sample test not conducted by testifying expert—chain of custody

In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, there was no violation of defendant's constitutional rights under the Confrontation Clause and no error in the admission of a lab report regarding defendant's blood sample because the report constituted an independent expert opinion created and analyzed by the testifying expert—who related his experience and training as a forensic toxicologist—based on the results of data generated by lab analysts. Further, the trial court did not abuse its discretion by admitting the chain of custody report for defendant's blood sample where the arresting officer and the expert testified about how the sample was handled, and defendant provided no reason to believe that the sample had been altered.

4. Motor Vehicles—impaired driving—felony serious injury by motor vehicle—assault with deadly weapon—sufficiency of evidence

The State presented substantial evidence of each element of assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired—based on a car crash caused by defendant—to send the charges to the jury.

Witnesses observed defendant's erratic and reckless driving just prior to the accident, defendant admitted to having taken several medications earlier that day, the collision caused serious injuries to both the victim and defendant, there were no skid marks to show any attempt by defendant to slow his vehicle before he swerved into oncoming traffic and hit two vehicles, defendant appeared lethargic and had slow speech, and his blood sample revealed the presence of impairing substances, including benzodiazepines and opiates.

Appeal by Defendant from judgment entered 11 December 2019 by Judge Leonard L. Wiggins in Martin County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Keith Bucklew ("Defendant") appeals from judgments from the superior court finding Defendant guilty of assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired. We hold the trial court committed no error.

I. Background

¶ 2 The appeal arises from the convictions of Defendant, a retired Marine with twenty years of service. On November 26, 2014, Defendant was driving himself and his ten year old son in a white Land Rover. An eyewitness reported Defendant was speeding, drifting within his lane toward the center line, crossing the center line, and driving erratically and aggressively. Around dusk, Defendant's Land Rover swerved into oncoming traffic and hit a white Cadillac Escalade driven by Tina Wasinger ("Wasinger"), with her two minor sons as passengers, and a Hyundai Sante Fe driven by Richard Sermon ("Sermon"), with his wife and four children as passengers. Trooper Mark Peaden ("Trooper Peaden") of the North Carolina State Highway Patrol responded to the call. Trooper Peaden observed that Defendant and Wasinger's vehicles had heavy front end damage and Sermon's vehicle appeared to have been sideswiped. As a result of the collision, Wasinger suffered both significant, long-term, physical injuries and the loss of her job. At the scene of the

accident, Trooper Peaden observed that there were no apparent skid marks indicating an attempt to stop the vehicle.

¶ 3 Trooper Peaden located Defendant at the scene and noted Defendant appeared impaired; acted loopy, apathetic, and lethargic; had slurred speech; and was very tired. Due to Defendant's injuries, Defendant was transported to the hospital. Defendant had sustained substantial injuries, including a fractured femur and broken hand.

¶ 4 At the hospital, Defendant was described as having "droopy eyelids, a blank stare, slurred speech and [was] lethargic"; but also having a few coherent moments where he could answer questions. In response to Trooper Peaden's inquiry about whether Defendant was taking any medication or drinking alcohol, Defendant responded he was on oxycodone, valium, and morphine which he reported he last took at 4:00 o'clock that morning. Trooper Peaden performed an alcosensor breath test on Defendant which indicated Defendant had not consumed alcohol prior to the collision.

¶ 5 Trooper Peaden found Defendant to be at-fault in the collision and impaired to the extent he was unable to appreciate the danger of the collision. Trooper Peaden placed Defendant under arrest for driving while impaired ("DWI"), notified Defendant of his rights to a chemical analysis test, and requested Defendant to submit to a chemical analysis test. Defendant's blood sample revealed the presence of oxycodone, diazepam, nordiazepam, and morphine. A urine screen conducted at the hospital was positive for benzodiazepines, opiates, and tricyclic antidepressants.[1] Defendant was transported by helicopter to another hospital to receive a higher level of care after the blood draw was complete. On November 26, 2014, Defendant was indicted for assault with a deadly weapon inflicting serious injury, DWI, misdemeanor child abuse, and felony serious injury by vehicle.

¶ 6 Defendant filed a pretrial motion to suppress the seizure and analysis of his blood. The trial court denied Defendant's motion to suppress, explaining that based upon testimony from Trooper Peaden; the eyewitness's, a hospital nurse's, Defendant's and Sermon's statements; the emergent medical care needed by Defendant; and the results of Defendant's blood draw, there was sufficient probable cause to charge Defendant with the offense of DWI and there was sufficient exigent and articulable basis to conduct a warrantless blood draw for a

1. Benzodiazepines work to sedate or calm a person and includes medication such as Valium. Nat'l Institute on Drug Abuse, https://www.drugabuse.gov/drug-topics/opioids/benzodiazepines-opioids, (last visited Oct. 15, 2021).

chemical analysis. The trial court also denied Defendant's motion for judicial notice of the National Weather Service's weather report ("Weather Report"), motions to dismiss, objection to the lab and chain of custody report, and objection to the analyst's testimony regarding Defendant's blood sample. On December 11, 2019, Defendant was found guilty of assault with a deadly weapon inflicting serious injury, DWI, and felonious serious injury by a motor vehicle. On appeal, Defendant contends the trial court erred by denying Defendant's motion for judicial notice, motion to suppress the blood draw, and motion to dismiss, and by admitting, over Defendant's objection, the lab result and chain of custody report and analyst's testimony.

II. Discussion

A. Motion to Suppress Defendant's Blood Draw

1. Competent Evidence Existed

¶ 7 **[1]** We turn first to Defendant's contention the trial court's findings of fact in the order denying Defendant's motion to suppress the blood draw (the "Denial Order") were not supported by competent evidence. We note at the outset the standard of review for a motion to suppress is not substantial competent evidence, but rather a lower threshold of competent evidence. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by *competent evidence*, and whether these findings of fact support the [trial] court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000) (citation omitted and emphasis added)). The trial court's findings of fact which are supported by competent evidence are "conclusive on appeal . . . even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2010) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). "[T]he trial court's conclusions of law are reviewed de novo and must be legally correct." *State v. Scruggs*, 209 N.C. App. 725, 727, 706 S.E.2d 836, 838 (2011) (citation omitted).

¶ 8 Here, the findings of fact in the Denial Order support the conclusion probable cause and exigent circumstances existed to initiate a warrantless blood draw. Probable cause is the "facts and circumstances within an officer's knowledge and of which he had reasonably trust-worthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted). Whether exigent circumstances exist as to justify a

warrantless blood draw, though yet to be precisely defined, depends on the totality of the circumstances. *Missouri v. McNeely*, 569 U.S. 141, 156, 133 S. Ct. 1552, 1563, 185 L. Ed. 2d 696, 709 (2013); *State v. McCrary*, 237 N.C. App. 48, 53, 764 S.E.2d 477, 481 (2014).

¶ 9 We are not persuaded by Defendant's argument the Denial Order's findings of fact were not supported by competent evidence. The evidence in the record tends to show the eyewitness reported that Defendant, prior to collision, crossed the center line, drifted within his lane, and drove aggressively and erratically. Sermon testified Defendant's vehicle swerved from oncoming traffic and "almost made like a left turn directly into [Wasinger's vehicle] . . . ." Once Trooper Peaden arrived at the scene, he noted there were no skid marks indicating any attempt to stop. After Defendant was transported to the hospital due to his injuries, a breath alcosensor test revealed no presence of alcohol, but Defendant admitted to taking oxycodone, valium, and morphine that morning. When Trooper Peaden spoke with Defendant at the hospital, he noticed Defendant had slurred speech, a loopy demeanor, was lethargic and slow to answer questions. At one point Defendant told Trooper Peaden he did not remember what happened while, at another point, he told Trooper Peaden he was hit by a car. Nurse Warren, a nurse at the first hospital to which Defendant was taken, testified Defendant had a significant injury to his femur, injury to his neck, a contusion, a fracture, swelling, and enlarged pupils, and that he was falling asleep between questions.

¶ 10 Based off his observations, Trooper Peaden formed the opinion Defendant had consumed a "sufficient quantity of impairing substances so that his mental and physical facilities were appreciably impaired." However, Trooper Peaden did not have time to leave the hospital to acquire a search warrant because Defendant was "very, very badly injured" and the hospital does not administer pain medication until after a blood draw is performed. Defendant's injuries, moreover, were so severe as to warrant air-lifting Defendant to another hospital for a higher level of care after the blood draw was complete. Based on the evidence presented at trial, there was competent evidence to support the findings of fact in the Denial Order.

¶ 11 In addition to a general challenge to the findings of fact in the Denial Order, Defendant specifically challenges findings of fact twelve, fourteen, seventeen, and twenty-three.

a. No Error as to Finding of Fact Number 12

¶ 12 Finding of fact number twelve states, "Stacy Toppin, RN, described the defendant as alert and able to answer questions. She described his

speech as slow and thick tongued. He was further described as neurologically intact with no visible head injuries. She described his pupils as appearing pinpoint." Competent evidence exists to support fact number twelve through Stacy Toppin's testimony where she stated Defendant "had slurred speech at the time, [was a] little thick tongue, [and had a] little bit of confusion[,]" and his pupils were "pinpoint looking." On voir dire, Stacy Toppin explained that Defendant had no apparent head injuries, was stable, and was able to answer questions. The testimony provided by Stacy Toppin provided competent evidence to support finding of fact number twelve.

b. No Error as to Findings of Fact Number 14 and 17

¶ 13 Findings of fact fourteen and seventeen state:

> (14) [i]n addition to defendant's statement and disclosures, Trooper Peaden also administered a portable breath test in an effort to rule out the presence of alcohol. Due to the acute nature of the defendant's injuries, the court finds that it was not appropriate to administer or attempt to administer the Horizontal Gaze Nystagmus, the Walk and Turn or One-legged stand test standard field sobriety tests due to the acute nature of the defendant's injuries and the dynamic and emergent medical nature of the environs and surroundings of a medical facility.
>
> . . .
>
> (17) [a]fter stabilizing treatment was administered at Martin General Hospital, the defendant was subsequently transferred to Vidant Greenville for further and more advanced trauma care, which further demonstrated the dynamic and emergent medical care needed by the defendant which further underscores the necessity and exigency for a blood draw."

¶ 14 At trial, the evidence showed Defendant sustained substantial injuries including a broken hand and fractured femur. Defendant's injuries were so severe he ultimately had to be transported by helicopter to another hospital for more advanced care. Despite the existence of conflicting evidence which may refute finding of fact number fourteen, conflicting evidence does not affect a finding of fact which is supported by competent evidence. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. Based on the severity of Defendant's injuries, findings of fact numbers fourteen and seventeen were supported by competent evidence.

c. No Error as to Finding of Fact 23

¶ 15 Finding of fact number twenty-three states, "[n]o search warrant was obtained or necessary based on the facts and totality of the circumstances presented." The evidence tends to show Trooper Peaden found probable cause existed Defendant had committed the offense of DWI based on Defendant's admission to taking multiple medications, the lack of skid marks indicating any attempt to stop, eye witness reports of Defendant's erratic driving, and Defendant's lethargic and loopy behavior. Moreover, per our analysis above, Defendant's injuries were substantial and required immediate medical care, including the administration of pain-relieving medication. Because of the evidence presented, finding of fact number twenty-three is based upon competent evidence.

2. Warrantless Blood Draw was Justified

¶ 16 Next, Defendant argues the findings of fact do not support the conclusion that exigent circumstances and probable cause existed to support a warrantless blood test. Both the Fourth Amendment to the United States Constitution and Article I Section 20 of the North Carolina Constitution protect a person from unreasonable searches and seizures. U.S. Const. Amend. IV; N.C. Const. art. I, § 20. Blood tests "plainly constitute searches of persons" and thus are considered seizures under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 918 (1996) (internal quotation marks omitted); *see also State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988) (holding "[t]he withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution"). A blood test may only be performed after a warrant or valid consent is obtained or under exigent circumstances with probable cause "unless probable cause and exigent circumstances exist that would justify a warrantless search." *State v. Welch*, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986). *See State v. Romano*, 369 N.C. 678, 692, 800 S.E.2d 644, 653 (2017).

¶ 17 First we must determine whether probable cause existed. Probable cause is defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Smith*, 222 N.C. App. 253, 255, 729 S.E.2d 120, 123 (2012) (citation omitted)." *See Carroll v. United States*, 267 U.S. 132, 161, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925) (citation omitted). Here, the circumstances provided Trooper Peaden with reasonable grounds to suspect Defendant had committed the offense of a DWI. Prior to the accident, an eyewitness placed a 911-call to report to the police Defendant was driving erratically,

Defendant's vehicle was "weaving about the road[,]" and Defendant ultimately struck two vehicles. Upon arriving to the scene of the accident, Trooper Peaden discovered further evidence which indicated Defendant was responsible for the crash. Trooper Peaden observed vehicle debris were "everywhere", three heavily damaged vehicles were present including Defendant's car, and no brake skid marks were present to indicate anyone attempted to stop their vehicles prior to the collision. All three vehicles rested outside of and to the left of Defendant's lane of travel. Trooper Peaden did not detect alcohol on Defendant, but Defendant voluntarily admitted to taking his medications that morning. Defendant held valid prescriptions for oxycodone, valium, and morphine and voluntarily stated to Trooper Peaden he had last taken his medications that morning at 4 a.m. Trooper Peaden described Defendant as lethargic, and having slurred speech, droopy eyelids, and a blank stare. However, Defendant's injuries were of such severity that he was classified as a trauma patient and was rapidly deteriorating. Based on these findings of fact, the trial court properly concluded probable cause existed to perform a warrantless blood test. Accordingly, this Court is compelled to hold the trial court did not err when it determined probable cause existed for Trooper Peaden to form the opinion that Defendant had committed the offense of DWI so as to justify a warrantless blood test.

¶ 18 Turning our analysis to whether the findings of fact supported the conclusion exigent circumstances were present, the underlying question as to whether exigent circumstances exist is whether "there is a compelling need for official action and no time to secure a warrant." *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696, 705 (2013) (citation omitted). In the case of a DWI, the reasonableness of a warrantless blood test "must be determined case by case based on the totality of the circumstances." *Id.* at 156, 133 S. Ct. at 1563, 185 L. Ed. 2d at 709 (2013). *See State v. Dahlquist*, 231 N.C. App. 100, 103, 752 S.E.2d 665, 667 (2013). Though the natural dissipation of a substance within a person's blood stream is a factor to consider, it is not a *per se* exception to the totality of the circumstances test. *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563, 185 L. Ed. 2d at 709. In *State v. Granger*, we held a totality of the circumstances illustrated exigent circumstances when sufficient probable cause had already been established, the officer could not thoroughly investigate due to the extent of defendant's injuries, delays in the warrant application process, and the potential of imminent administration of pain medication. *State v. Granger*, 235 N.C. App. 157, 165, 761 S.E.2d 923, 928 (2014).

¶ 19 In this case, like *Granger*, a totality of the circumstances show exigent circumstances existed to justify a warrantless blood draw. First,

sufficient probable cause existed to establish Defendant was driving while impaired prior to the initiation of the blood draw. Next, the officer was not able to thoroughly question Defendant at the scene of the accident because Defendant was "pinned in his vehicle" and subsequently taken to the hospital as a trauma patient due to the extent of Defendant's injuries. Indeed, Defendant's own affidavit confirmed Defendant's injuries caused "acute blood loss." Moreover, Defendant's "condition was deteriorating" due to his injuries. In light of these circumstances, the officer did not have the time necessary to acquire a search warrant due to the extent of Defendant's injuries and the fact that pain medication in par with stabilizing treatment was administered immediately after a blood drawn was taken. Defendant was transferred to another hospital for advanced trauma care due to the severity of his injuries and his deteriorating medical condition. Although we question the efficacy of reading Defendant his Notice of Rights when he was in such critical condition, the totality of the circumstances in the instant case shows the lack of time to acquire a warrant in light of the compelling need to perform a blood test on Defendant once the officer formed the opinion that Defendant had driven while impaired. Thus, we must hold the trial court did not err when finding sufficient exigent circumstances existed to justify a warrantless blood draw.

B. Judicial Notice of Weather Conditions

¶ 20 **[2]** Defendant next argues the trial court erred by not taking judicial notice of the Weather Report. We also conclude the trial court did not err by denying to take judicial notice of the National Weather Station's weather conditions on the date of the collision. Under N.C. Gen. Stat. § 8C-1 Rule 201(b) "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2021). An indisputable fact is one that is "so well established as to be a matter of common knowledge." *In re L.G.A.*, 277 N.C. App. 46, 2021-NCCOA-137, ¶ 24 (citation omitted). A trial court has discretion when deciding whether or not to take judicial notice, and this Court reviews for abuse of discretion. *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E.2d 72, 77 (1978). However, a court "cannot take judicial notice of a disputed question of fact," *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 458 (1998) (citation omitted), and "any subject that is open to reasonable debate is not appropriate for judicial notice." *In re R.D.*, 376 N.C. 244, 264, 852 S.E.2d 117, 132 (2020) (citation and internal ellipses omitted).

¶ 21 This Court's opinion in *State v. McDougald* describes an applicable example of when the trial court did not abuse its discretion by denying a defendant's motion to take judicial notice. In *McDougald*, the defendant appealed the trial court's denial to take judicial notice of news broadcasts concerning the case. *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E.2d 72, 77 (1978). The *McDougald* Court rejected the defendant's assignment of error, writing, "[s]uch facts could have been easily proven by witnesses ordinarily available. There was no showing of abuse of discretion by the trial court. Therefore, the trial court did not err in failing to take judicial notice that the case was the subject of radio and television broadcasts." *Id.* *McDougald* held a trial court does not abuse its discretion when denying to take judicial notice of a fact if there exists an opportunity to otherwise prove the fact at trial.

¶ 22 This concept has direct application to the trial court's decision not to take judicial notice of the Weather Report in this case. The trial court denied Defendant's motion for judicial notice as multiple witnesses testified to the weather conditions on the date of the collision. Thus the trial court had the right to conclude sufficient evidence existed from the witnesses' testimonies to allow the jury to form their own conclusion on the state of the weather. Following the reasoning in *McDougald*, the trial court did not abuse its discretion when it declined to take judicial notice of the National Weather Service weather conditions report on the date of collision.

¶ 23 Against this conclusion, Defendant argues his motion for judicial notice should have been granted under N.C. Gen. Stat. § 8C-1, Rule 201(d). Rule 201(d) states "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." § 8C-1, Rule 201(d). The implication, Defendant argues, is that "the trial court has no discretion when supplied with the information prescribed by Rule 201." Of course Rule 201(d) is only a portion of Rule 201 as a whole, and thus we must view section (d) in light of the entirety of Rule 201. *See Pilos-Narron v. Narron*, 239 N.C. App. 573, 771 S.E.2d. 633 (2015) (viewing the portion of Rule 56(e) quoted by plaintiff in its entirety).

¶ 24 Section (d) of Rule 201 is predicated upon the two-part test of Rule 201's Section (b) which states a judicially noticed fact is one that cannot be reasonably disputed because it is either 1) general knowledge or 2) "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." § 8C-1, Rule 201(b). The issue in contention here is the level of rain fall at the time of the collision, thus why, not unreasonably, Defendant wanted the trial court to take judicial notice of the Weather Report. However, the contentious

issue, the level of rainfall fails the first prong of Section (b)'s test because though individuals may know if it is raining, the precise amount of rain is not a generally known fact. Under the second prong of the test, sources as used in Section (b) must be "a document of such indisputable accuracy as [to] justif[y] judicial reliance." *State v. Dancy*, 297 N.C. 40, 42, 252 S.E.2d 514, 515 (1979). The amount of rain is generally a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2021). In *State v. Canaday*, this Court held a document of indisputable accuracy "contemplates material from a primary source in whose hands the gathering of such information rests." 110 N.C. App. 763, 766, 431 S.E.2d 500, 501 (1993). Flowing from our reasoning in *Canaday*, weather reports from the National Weather Service are a result of data gathered by the National Weather Service and thus typically are documents of indisputable accuracy.[2] *See Bain Enters., LLC v. Mountain States Mutality Casualty Co.*, 267 F. Supp. 3d 796, 819 (W.D. Tex. 2016); *Kovera v. Envirite of Ill., Inc.*, 2015 IL App (1st) 133049, ¶28.

¶ 25 However, this proffered Weather Report from the National Weather Service is not a document of indisputable accuracy for the purpose of illustrating the amount of rain on the date of the collision. The Weather Report for the date of the crash does not state the level of rain that was occurring at the time of the crash. An examination of the Weather Report reveals the level of rain stopped being reported for the day up to three hours prior to the collision. The party moving for judicial notice has the responsibility to "supply [the trial judge] with appropriate data" as the "trial judge is not required to make an independent search for data of which he may take judicial notice." *Dancy*, 297 N.C. at 42, 252 S.E.2d at 515. Because the proffered weather report did not contain the necessary data showing the level of rain at the time of the collision, the Weather Report fails under the second prong of Rule 201(b). The trial court was not required under Rule 201(d) to take judicial notice but was free to use its discretion pursuant to Rule 201(c). Accordingly, we

---

2. Forecast from the National Weather service is the product of observations from scientists "using technology such as radar, satellite and data from an assortment of ground-based and airborne instruments to get a complete picture of current conditions. Forecasters often rely on computer programs to create what's called an 'analysis,' which is simply a graphical representation of current conditions. Once this assessment is complete and the analysis is created, forecasters use a wide variety of numerical models, statistical and conceptual models, and years of local experience to determine how the current conditions will change with time. Numerical modeling is fully ingrained in the forecast process, and our forecasters review the output of these models daily." NATIONAL WEATHER SERVICE, https://www.weather.gov/about/forecast-process (last visited Sept. 21, 2021).

are compelled to hold the trial court did not abuse its discretion by not taking judicial notice of the Weather Report.

C. Lab and Chain of Custody Report

¶ 26 **[3]** We next turn to Defendant's assignment of error to the trial court's admission of the lab and chain of custody report (the "Report") of Defendant's blood and Evan Lowery's ("Lowery") testimony regarding Defendant's blood sample. Defendant argues his right to confrontation and cross-examination were violated because only Lowery, the State's independent expert, testified at trial, not the people who actually conducted the analysis of his blood and urine samples. We disagree and conclude the trial court did not err in admitting the Report.

¶ 27 First, Lowery's testimony was properly admitted by the trial court. The United States Constitution's Confrontation Clause prohibits expert testimony that is predicated only on the reports of an analyst who is not testifying. *State v. Locklear*, 363 N.C. 438, 452-53, 681 S.E.2d 293, 304-05 (2009). An expert's testimony is nonetheless admissible "when the expert testifies not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts tests, and her own expert opinion based on a comparison of the original data." *State v. Hartley*, 212 N.C. App. 1, 12-13, 710 S.E.2d 385, 396 (2011) (citation and internal quotations omitted). The crucial question here is whether Lowery's testimony was merely a recitation of the analysts' Report or was his independent expert opinion derived from the proper methods.

¶ 28 A review of the record reveals Lowery's expert testimony was admissible. Lowery was admitted as an expert in forensic toxicology and utilized his "training, education, and experience" in conducting his analysis of the data. Though Lowery received data from the analysis done at the crime lab, Lowery analyzed and reviewed the data, analyzed Defendant's blood sample in accordance with the North Carolina State Crime Laboratory and Department of Health and Human Services, crafted with his own opinion as to the results of the data, and finally produced the Report utilized at trial. In other words, the Report introduced at trial was created by Lowery, not the analysts who did not testify. Although the data used by Lowery originated from other analysts, the Report was an independent expert opinion analyzed and created by Lowery, and, accordingly, the trial court did not err in admitting Lowery's testimony.

¶ 29 Second, Defendant argues the State failed to establish the chain of custody and the trial court erred in admitting the chain of custody report. Our Supreme Court requires a two-prong test to be satisfied prior

to the admission of evidence: the "item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 423-24 (1992) (quoting *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984)). The State does not need to establish a detailed chain of custody unless "the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392. Even if the chain of custody does have points of weakness, this only goes to the "weight to be given the evidence and not to its admissibility." *Id.* (citation omitted).

¶ 30 In light of these principles, we hold the trial court did not abuse its discretion by finding the State established an adequate chain of custody. Trooper Peaden testified after Defendant's blood was taken by the nurse, the blood was then transferred to the officer. The blood vial contained a security seal which identifies Defendant, the person who drew the blood, and the date and time. The subsequent signatories to the chain of custody revealed Defendant's blood sample was received by the State crime lab. Lowery testified to the chain of custody of Defendant's blood from the date it was received by the State crime lab until the date the blood was analyzed. The testimonies from both Trooper Peaden and Lowery satisfy both prongs required for admission of evidence by our Supreme Court. The security seal upon the vial and the chain of custody report tend to prove the sample at all times contained Defendant's blood and no material change occurred throughout the transfers and testing of the blood. *See Taylor*, 332 N.C. at 388, 420 S.E.2d at 423-24. In summation, the testimony presented effectively established the chain of custody and the trial court committed no error by admitting the chain of custody report.

¶ 31 Defendant raises questions about the circumstances surrounding his blood sample in order to undermine the admissibility of the chain of custody report. These purported points of weakness only go to the "weight to be given the chain of custody not its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392. Under *Campbell*, the evidence presented must not only be susceptible to alteration or not readily identifiable, but also there must be a reason to believe the evidence was altered. *Id.* Here, Defendant offered no reason to believe the blood sample was altered and thus his attempt to present questionable circumstances surrounding the blood sample fails under *Campbell*. The conclusion follows that the trial court did not abuse its discretion by admitting the chain of custody report.

D. Defendant's Motion to Dismiss

¶ 32 **[4]** Finally, we look to Defendant's argument the trial court erred in denying Defendant's motion to dismiss first at the close of the State's evidence and then at the close of all evidence. We review a motion to dismiss *de novo*. *Locklear v. Cummings*, 262 N.C. App. 588, 592, 822 S.E.2d 587, 590 (2018). In a criminal trial, the law is well settled as follows, "upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). A motion to dismiss should be allowed if the evidence only raises a "suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it." *Id*. (citations omitted). Evidence is to be viewed in "the light most favorable to the State" and tested only to determine if a "*reasonable* inference of the defendant's guilt of the crime charged may be drawn from the evidence." *Id*. at 99, 261 S.E.2d. at 117 (citations omitted and emphasis in original).

¶ 33 Defendant alleges there was no substantial evidence for the offenses of impaired driving, assault with a deadly weapon inflicting serious injury, and felonious serious injury by vehicle. First, Defendant was charged with driving while impaired under N.C. Gen. Stat. § 20-138.1 which provides, in relevant parts, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1(a) (2021). The State showed a white Land Rover was reported to be driving erratically upon a public road in North Carolina; a crash later occurred caused by the Land Rover; and when Trooper Peaden arrived at the scene, Defendant was trapped inside the Land Rover in the driver's seat. As analyzed above, probable cause existed to charge Defendant with the offense of DWI based upon eyewitness reports of Defendant's erratic driving, the severity of the crash, Defendant's admission of taking his medications that morning, Defendant's impaired behavior, and the result of Defendant's blood test. As such, we are obligated to hold substantial evidence exists to support each element of driving while impaired and that Defendant was the one who committed the DWI.

¶ 34 Next, Defendant was charged with assault with a deadly weapon inflicting serious injury to Tina Wasinger pursuant to N.C. Gen. Stat. 14-32(b) which states, "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class

E felon." N.C. Gen. Stat. § 14-32(b) (2021). The elements of a Statute 14-32(b) are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). An assault is "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citation omitted). A deadly weapon is "any article, instrument or substance which is *likely* to produce death or great bodily harm." *Id.* (citation omitted and emphasis in original).

¶ 35 In North Carolina, an automobile "can be a deadly weapon if it is driven in a reckless or dangerous manner." *Id.* One who "operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of AWDWISI provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied." *Id.* at 164-65, 538 S.E.2d at 922-23. Culpable or criminal negligence is defined as "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.* at 165, 538 S.E.2d at 923 (quoting *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968)).

¶ 36 Particularly, culpable negligence exists when a safety statute is unintentionally violated and is "accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable [foreseeability], amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others." *Id.* (quoting *State v. Hancock*, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958)). A safety statue is one that is "designed for the protection of human life or limb." *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985) (citation omitted). We note as well, N.C. Gen. Stat. § 20-138.1 is a safety statute created to protect human life or limb by prohibiting driving impaired. *See Jones*, 353 N.C. at 165, 538 S.E.2d at 923.

¶ 37 In the case before us, Defendant assaulted Wasinger by hitting her vehicle with his vehicle, a white Land Rover. According to eyewitness reports and the lack of skid marks to indicate an attempt to stop his vehicle, Defendant was driving his vehicle in an erratic and reckless manner. Thus, Defendant's vehicle may be considered a deadly weapon. As a matter of law, Defendant's culpable negligence was established when Defendant proceeded to operate a vehicle while under the influence of impairing substances. Such negligence was further shown by reports

of Defendant's driving from both Sermon and another eyewitness. Though Wasinger survived the crash, she suffered serious injury, including weeks in the hospital, two months in a wheelchair, and extremely restricted movement of her hand and legs. Due to her injuries, Wasinger lost her job and is now enrolled in disability with Social Security. In sum, the elements of assault with a deadly weapon inflicting serious injury were satisfied, and we affirm the judgment of the trial court.

¶ 38 Defendant was also convicted of felony serious injury by motor vehicle under N.C. Gen. Stat. § 20-141.4(a3) which provides,

> A person commits the offense of felony serious injury by vehicle if:
>
> (1) The person unintentionally causes serious injury to another person,
>
> (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and
>
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury.

N.C. Gen. Stat. § 20-141.4(a3) (2021). Because we have already explained that substantial evidence exists to illustrate Defendant caused serious injury to Wasinger due to his driving while impaired, the elements of felony serious injury by motor vehicle were met. Thus, the trial court did not err in denying Defendant's motion to dismiss.

III. Conclusion

¶ 39 As a result of the foregoing analysis, we are compelled to hold there was no error when the trial court denied Defendant's motion to suppress the blood draw, declined to take judicial notice of the Weather Report, admitted the Report and Lowery's testimony, and denied Defendant's motion to dismiss. While we sympathize with Defendant in that he was operating his vehicle while under the influence of only prescribed medications and not under the influence of alcohol and was also seriously injured in the resulting collision, we hold that the Defendant received a fair trial free from error.

NO ERROR.

Judges DIETZ and INMAN concur.

STATE v. JONAS

[280 N.C. App. 511, 2021-NCCOA-660]

STATE OF NORTH CAROLINA
v.
DANIEL RAYMOND JONAS, DEFENDANT

No. COA20-712

Filed 7 December 2021

1. Appeal and Error—right to appeal—guilty plea—not part of plea arrangement—notice to State not required

Where defendant's plea of guilty to possession of a controlled substance was not made as part of a plea arrangement with the State, he was not required to give notice to the State of his intent to appeal the denial of his motion to suppress pursuant to *State v. Reynolds*, 298 N.C. 380 (1979) (interpreting N.C.G.S. § 15A-979(b)).

2. Search and Seizure—traffic stop—articulable suspicion of criminal activity—officer's mistake of law—reasonableness

The trial court erred by denying defendant's motion to suppress evidence seized from his car during a traffic stop where the officer's mistaken belief that the car's transporter plate could only be used on trucks was not objectively reasonable because the statute enumerating the circumstances in which both trucks and motor vehicles could have transporter plates was clear and unambiguous. Further, the totality of the circumstances was not sufficient to support a reasonable articulable suspicion to conduct the traffic stop where defendant's vehicle was exiting the parking lot of a closed business that had no other cars present in an area that had recently had a trailer theft, and where there were no findings regarding what actions of defendant warranted suspicion.

Appeal by Defendant from judgment entered 3 March 2020 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 21 September 2021.

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

Sigler Law, PLLC, by Kerri L. Sigler, for defendant-appellant.

MURPHY, Judge.

¶ 1 When a defendant pleads guilty but does not plead guilty pursuant to a plea arrangement with the State, he is not required to give the State notice of his intent to appeal before plea negotiations are finalized to pursue his statutory right to appeal a final order denying a motion to suppress pursuant to N.C.G.S. § 15A-979(b). We have jurisdiction to hear the merits of Defendant's appeal of his *Motion to Suppress*.

¶ 2 A traffic stop made without reasonable articulable suspicion is unconstitutional as it violates the Fourth Amendment. Evidence illegally obtained as a result of an unconstitutional traffic stop must be suppressed. Reviewing the totality of the circumstances, law enforcement did not have reasonable articulable suspicion to stop Defendant and, as such, the traffic stop was unconstitutional. The trial court erred by denying Defendant's *Motion to Suppress*.

BACKGROUND

¶ 3 On 28 June 2019, around 10:00 p.m., Officer Andrew Berry of the Concord Police Department was on routine patrol of Highway 49 South when he noticed a vehicle with three occupants pull out ahead of him from a trucking company parking lot. Due to the empty parking lot, the fact the gate was closed, and that there was only one light on in the parking lot, Officer Berry believed the business was closed, which "kind of raised [his] suspicion on why the vehicle [was] pulling out of there." Officer Berry followed the vehicle and, when he was close enough behind it, he noticed the vehicle displayed a transporter plate, which he had "never seen . . . on a car." Officer Berry ran the plate through his computer system, and the plate came back as "not assigned to [a] vehicle."

¶ 4 Defendant Daniel Raymond Jonas was a passenger in the vehicle as well as its registered owner. "[B]ased on the fact that the vehicle was displaying [what Officer Berry believed to be] a fictitious tag, and [he was] attempting to determine what tag was supposed to be on the vehicle[,]" Officer Berry initiated a traffic stop. During the stop, the Concord Police Department canine unit arrived and conducted an open-air sniff around the vehicle. Law enforcement located 0.1 grams of methamphetamine in a backpack in the trunk of the vehicle.

¶ 5 Defendant was subsequently indicted for possession of a Schedule II controlled substance. Prior to trial, Defendant filed a *Motion to Suppress*, requesting any evidence seized in connection with Officer Berry's traffic stop on 28 June 2019 be suppressed as fruit of the poisonous tree because Officer Berry lacked a reasonable articulable suspicion to stop the vehicle. After a hearing on the motion, the trial court entered

an order denying Defendant's *Motion to Suppress* ("Order"), which contained the following findings of fact:

> 1. [Defendant] is charged with [p]ossession of a Schedule II [c]ontrolled [s]ubstance as a result of an interaction he had with Officer Andrew Berry of the Concord Police Department on [28 June 2019] in Concord, North Carolina.
>
> 2. That on [28 June 2019], at approximately 10:00 PM, Officer Berry was on duty within his jurisdiction driving on NC Highway 49 when a vehicle displaying a transporter registration plate pulled onto Highway 49 in front of him from [] a trucking company. Officer Berry believed the business was closed because the business's office was dark and there were no other vehicles in the office parking lot.
>
> 3. Even though [Defendant's] vehicle did not have a trailer attached to it, Officer Berry was aware of a recent trailer theft in the area.
>
> 4. Officer Berry ran the transporter registration plate and the plate came back as not assigned to a vehicle.
>
> 5. Officer Berry initiated a traffic stop on the vehicle.
>
> 6. The [trial court] is considering [] Defendant's motion to suppress filed on [31 October 2019].

The Order contained the following relevant conclusions of law:

> 3. The vehicle was exiting from a closed business with no lights visible to the [roadway].[1]
>
> 4. [N.C.G.S. §] 20-79.2 provides: "The Division of Motor Vehicles may issue a transporter plate authorizing the limited operation of a motor vehicle in the circumstances listed in this subsection. A person who received a transporter plate must have proof of financial responsibility that meets the requirements

1. We note Conclusion of Law 3 is more properly characterized as a finding of fact. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and marks omitted) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact."). However, this distinction is not relevant to our analysis.

> of Article 9A of this Chapter." The statute goes on to list ten (10) limited circumstances in which a person to whom a transporter plate and the vehicle bearing the plate may be operated.
>
> 5. The officer had reasonable articulable suspicion to stop the vehicle in question to ensure its compliance with N.C.G.S. § 20-79.2.

¶ 6 Following the denial of the *Motion to Suppress*, Defendant pled guilty[2] to possession of a Schedule II controlled substance and received a suspended sentence of 6 to 17 months. After the trial court announced its judgment, through counsel, Defendant orally gave notice of appeal of the Order. In open court, following the trial court's acceptance of his guilty plea, counsel stated: "Your Honor, [Defendant] would enter notice of appeal. I filed written notice[3] with regard to the motion to suppress. I just wanted to put it on the record now, and I'll be filing a notice." Defendant has also filed a petition for writ of certiorari with this Court, "should [we] find that trial counsel failed to give proper notice of appeal following the denial of [Defendant's] suppression motion as required by *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979)[.]" This matter was calendared before us on 21 September 2021; however, on 22 September 2021, we invited the parties to file supplemental briefs addressing

> whether our Supreme Court's holding in State v. Reynolds-'when a defendant intends to appeal from a suppression motion denial pursuant to N.C.G.S. [§] 15A-979(b), he must give notice of his intention to the prosecutor and the trial court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute'-applies in a situation where, as here, Defendant's plea of guilty is not 'part of a plea arrangement.' State v. Reynolds, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), cert. denied, 446 U.S. 941, 64 L. Ed. 2d 795 (1980)[.]

We further cited to *State v. Tew*, 326 N.C. 732, 734-35, 392 S.E.2d 603, 604-05 (1990); *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996); Form

---

2. Defendant did not plead guilty pursuant to a plea arrangement with the State. *See* Part A, *infra* at ¶ 9.

3. A written notice of appeal does not appear anywhere in the Record on appeal.

AOC-CR-300 paragraph 20 (Rev. 5/18); Record page 17 at paragraph 20; and page 7 lines 4-10 of the plea transcript.

ANALYSIS

A. Appellate Jurisdiction

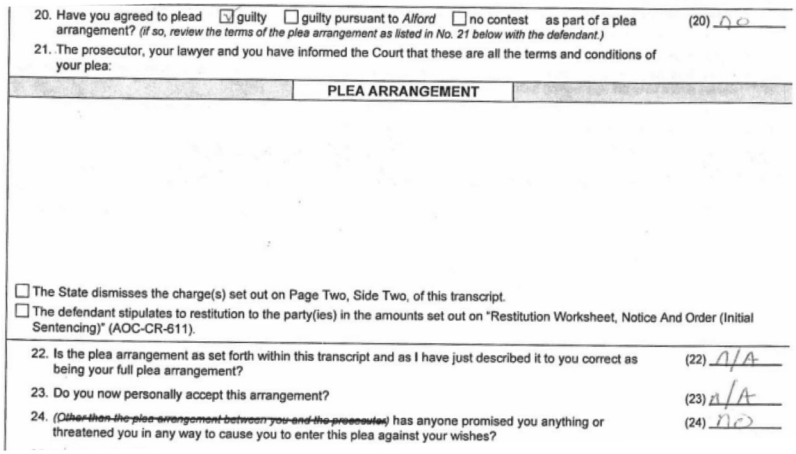
¶ 7 **[1]** "In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute." *McBride*, 120 N.C. App. at 624, 463 S.E.2d at 404. Generally, a defendant who pleads guilty does not have a right to appeal. *See* N.C.G.S. § 15A-1444(e) (2019). However, N.C.G.S. § 15A-979(b) provides an exception for defendants appealing a final order denying a motion to suppress. *See* N.C.G.S. § 15A-979(b) (2019) (emphasis added) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, *including a judgment entered upon a plea of guilty.*").

¶ 8 In *Reynolds*, our Supreme Court interpreted this exception and held that "when a defendant intends to appeal from a suppression motion denial pursuant to [N.C.G.S. §] 15A-979(b), he must give notice of his intention to the prosecutor and the [trial] court *before plea negotiations are finalized* or he will waive the appeal of right provisions of the statute." *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853 (emphasis added). Our Supreme Court reasoned:

> We do not believe that [N.C.G.S. § 15A-979(b)] . . . contemplates a factual pattern . . . which would cause the State to be trapped into agreeing to a plea bargain . . . and then have the defendant contest that bargain.
>
> As stated by the United States Supreme Court, "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained."
>
> The plea bargaining table does not encircle a high stakes poker game. It is the nearest thing to arm's length bargaining the criminal justice system confronts. As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction.

Id. (quoting *Lefkowitz v. Newsome*, 420 U.S. 283, 289, 43 L. Ed. 2d 196, 202 (1975)).

¶ 9 The State argues Defendant did not comply with the *Reynolds* notice requirement because his "intent to appeal came after the entry of the plea" and "notice of the intention to appeal is required before the conclusion of plea negotiations." (Emphasis omitted). However, Defendant did not agree to plead guilty as part of a plea arrangement, as indicated on the *Transcript of Plea*, reproduced below:



20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(If so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) No

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) N/A

23. Do you now personally accept this arrangement? (23) N/A

24. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) No

Defendant also testified during his plea colloquy that he did not plead guilty pursuant to a plea arrangement with the State:

> THE COURT: Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT]: Yes, sir. Oh. No, sir.
>
> THE COURT: No. There's not one listed here.

As Defendant did not plead guilty pursuant to a plea arrangement with the State, he was not required to comply with the *Reynolds* notice requirement in order to invoke his statutory right to appeal.

¶ 10 The concerns that were present in *Reynolds* are not present here. Defendant neither received nor accepted the benefits of a plea offer from the State. The State was not "trapped into agreeing to a plea bargain" only to later "have [] [D]efendant contest that bargain." *Id.* Defendant was not required to give the State and the trial court notice of his intent to appeal before plea negotiations were finalized because there were no plea negotiations. Defendant has a statutory right to appeal the Order pursuant to N.C.G.S. § 15A-979(b), and we dismiss his petition for writ of certiorari as moot.

B. Motion to Suppress

¶ 11 **[2]** Having established that this Court has proper appellate jurisdiction, we turn to the merits of Defendant's appeal. Defendant's sole argument on appeal is that the trial court erred by denying his *Motion to Suppress* because Officer Berry did not have a reasonable articulable suspicion to conduct the traffic stop.

¶ 12 Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court'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 [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. Miller*, 243 N.C. App. 660, 663, 777 S.E.2d 337, 340 (2015). "While the trial court's factual findings are binding [on appeal] if sustained by the evidence, the [trial] court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

¶ 13 Defendant does not challenge any of the Order's findings of facts, and they are deemed to be supported by competent evidence and binding on appeal. *See Miller*, 243 N.C. App. at 663, 777 S.E.2d at 340. Rather, Defendant challenges Conclusion of Law 5, and argues "the trial court erred by denying [his] motion to suppress because there was no reasonable articulable suspicion for the traffic stop." Conclusion of Law 5 states:

> The officer had reasonable articulable suspicion to stop the vehicle in question to ensure its compliance with N.C.G.S. § 20-79.2.

¶ 14 The Fourth Amendment of the United States Constitution protects individuals "against unreasonable searches and seizures[.]" U.S. Const. amend. IV. The North Carolina Constitution provides the same protection. N.C. Const. art. I, § 20; *State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 53 (2015) ("Though Article I, Section 20 of the North Carolina Constitution contains different language, it provides the same protection against unreasonable searches and seizures [as the Fourth Amendment]."). A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). Consistent with the Fourth Amendment, "an officer may . . . conduct a brief, investigatory stop when

the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000); *see also State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999).

¶ 15 "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (marks omitted), *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008).

> [Our Supreme Court] has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances–the whole picture in determining whether a reasonable suspicion exists.

Id. (citation and marks omitted).

¶ 16 During the *Motion to Suppress* hearing, Officer Berry testified to the following:

> [DEFENSE COUNSEL:] Can you tell us about what led up to you encountering [Defendant].
>
> [OFFICER BERRY:] . . . . I noticed a car pull out in front of me coming from a parking lot to the left. . . . .
>
> And [as] soon as I saw him pull out, I remember looking to the left, and I know that's the [trucking company] building which I knew it was late. There's -- I mean, there's no cars. I know the office hours are closed, and it's a trucking company. So that kind of raised my suspicion on why the vehicle is pulling out of there. . . . .
>
> And then I got behind [the vehicle]. I actually had to slow down a little bit and my lights were on the tag, so I was able to type it in on NCIC. But before I typed it in, I noticed, I've never seen a plate like that on a car. I mean, I had seen it on trucks. It was TP-664 and so on, like 66462. And when I ran it, it came back to plates not assigned to vehicle.

[DEFENSE COUNSEL:] And what does the TP mean in the TP66462?

[OFFICER BERRY:] At the time I was not -- I didn't know if TP meant anything special or -- but I just -- my thought, theory through it was just came from a trucking company, I've seen those on trucks. I mean, it just raised my suspicion for it to be pulling out of there and the tag to be on that vehicle.

[DEFENSE COUNSEL:] And you said the tags came back unassigned?

[OFFICER BERRY:] Correct, yes, sir.

[DEFENSE COUNSEL:] Meaning that it was not assigned, the tag was not assigned to a particular vehicle?

[OFFICER BERRY:] Correct.

[DEFENSE COUNSEL:] The tag was not invalid?

[OFFICER BERRY:] It came back on my computer, and if it comes back not assigned, I'm under the impression it's not valid, it's . . .

[DEFENSE COUNSEL:] You're under the impression that it's not valid?

[OFFICER BERRY:] Well, I'm saying like what I'm looking at on my computer is what it's telling; do you know what I'm saying?

[DEFENSE COUNSEL:] So does your computer tell you that it was an invalid tag?

[OFFICER BERRY:] No, no, sir, no. It just said, plates not assigned to vehicle. I'm sorry, maybe I misunderstood.

[DEFENSE COUNSEL:] And so the tag was not canceled?

[OFFICER BERRY:] It just said, plates not assigned to vehicle. That's the only thing it told me. It didn't say canceled, revoked, or anything of that, no, sir.

[DEFENSE COUNSEL:] Okay, it didn't say revoked?

[OFFICER BERRY:] No. The transport plate did not, no, sir.

[DEFENSE COUNSEL:] And your computer would normally tell you if a tag is cancelled or –

[OFFICER BERRY:] Correct, if that tag was, yes, sir, correct.

[DEFENSE COUNSEL:] It wasn't expired?

[OFFICER BERRY:] No, sir, not the plate, no. . . . .

[DEFENSE COUNSEL:] The tag wasn't altered in any way?

[OFFICER BERRY:] No, sir.

[DEFENSE COUNSEL:] The tag didn't show suspended?

[OFFICER BERRY:] No, sir.

[DEFENSE COUNSEL:] And it wasn't canceled?

[OFFICER BERRY:] No. Just plates not assigned to [a] vehicle.

. . . .

[DEFENSE COUNSEL:] And it was a valid North Carolina plate?

[OFFICER BERRY:] Like I said, sir, I've seen those tags on trucks. I've never seen them on a car, that's why it brought my attention to it. When I ran it, it just came back plates not assigned to vehicle.

. . . .

[DEFENSE COUNSEL:] And so, because the tag came back unassigned, you stopped the vehicle?

[OFFICER BERRY:] No, sir. It was included in my reasonable suspicion.

[DEFENSE COUNSEL:] Well, what else was included in your reasonable suspicion?

> [OFFICER BERRY:] Well, when [the vehicle] pulled out of the closed business, like I said, [the vehicle] pulled out in front of me, and I noticed that I've seen those [transporter] tags on trucks before and [the vehicle] just pulled out of a trucking company, a business that I know to be closed at that time, okay. And we've had -- actually, it was exactly a month ago there was a stolen trailer on [Highway] 49.[4] I mean, I'm just including all of this into the fact that I thought that plate should not have been on that vehicle. Closed business.

¶ 17 This testimony demonstrates Officer Berry's purported reasonable articulable suspicion of criminal activity was based on, *inter alia*, the fact that Officer Berry had never seen a transporter plate on a motor vehicle other than a truck before and believed transporter plates could not be used on regular motor vehicles.

¶ 18 A transporter plate may be issued under the following circumstances:

> The Division may issue a transporter plate authorizing the limited operation of a motor vehicle in the circumstances listed in this subsection. A person who receives a transporter plate must have proof of financial responsibility that meets the requirements of Article 9A of this Chapter. The person to whom a transporter plate may be issued and the circumstances in which the vehicle bearing the plate may be operated are as follows:
>
> (1) To a business or a dealer to facilitate the manufacture, construction, rebuilding, or delivery of new or used truck cabs or bodies between manufacturer, dealer, seller, or purchaser.
>
> (2) To a financial institution that has a recorded lien on a motor vehicle to repossess the motor vehicle.
>
> (3) To a dealer or repair facility to pick up and deliver a motor vehicle that is to be repaired, is to undergo a safety or emissions inspection, or is to otherwise be

4. As Defendant does not challenge the trial court's determination in Finding of Fact 3 that the theft was "recent," we do not address any issue related to the validity of such a characterization.

prepared for sale by a dealer, to road-test the vehicle, if it is repaired or inspected within a 20-mile radius of the place where it is repaired or inspected, and to deliver the vehicle to the dealer. A repair facility may not receive more than two transporter plates for this purpose.

(4) To a business that has at least 10 registered vehicles to move a motor vehicle that is owned by the business and is a replaced vehicle offered for sale.

(5) To a dealer or a business that contracts with a dealer and has a business privilege license to take a motor vehicle either to or from a motor vehicle auction where the vehicle will be or was offered for sale. The title to the vehicle, a bill of sale, or written authorization from the dealer or auction must be inside the vehicle when the vehicle is operated with a transporter plate.

(6) To a business or dealer to road-test a repaired truck whose GVWR is at least 15,000 pounds when the test is performed within a 10-mile radius of the place where the truck was repaired and the truck is owned by a person who has a fleet of at least five trucks whose GVWRs are at least 15,000 pounds and who maintains the place where the truck was repaired.

(7) To a business or dealer to move a mobile office, a mobile classroom, or a mobile or manufactured home, or to transport a newly manufactured travel trailer, fifth-wheel trailer, or camping trailer between a manufacturer and a dealer. Any transporter plate used under this subdivision may not be used on the power unit.

(8) To a business to drive a motor vehicle that is registered in this State and is at least 35 years old to and from a parade or another public event and to drive the motor vehicle in that event. A person who owns one of these motor vehicles is considered to be in the business of collecting those vehicles.

(9) To a dealer to drive a motor vehicle that is part of the inventory of a dealer to and from a motor vehicle

> trade show or exhibition or to, during, and from a parade in which the motor vehicle is used.
>
> (10) To drive special mobile equipment in any of the following circumstances:
>
> a. From the manufacturer of the equipment to a facility of a dealer.
>
> b. From one facility of a dealer to another facility of a dealer.
>
> c. From a dealer to the person who buys the equipment from the dealer.

N.C.G.S. § 20-79.2(a) (2019). Contrary to Officer Berry's belief at the time of the traffic stop, the plain language of the statute indicates that transporter plates can be used on both trucks and motor vehicles. *See id.* We must decide whether Officer Berry's genuine, but mistaken, belief that transporter plates could not be displayed on motor vehicles was reasonable and thus could be considered part of his reasonable articulable suspicion for the traffic stop.

¶ 19 In *Heien v. North Carolina*, the United States Supreme Court distinguished between reasonable and unreasonable mistakes of law: "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes–whether of fact or of law–must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved." *Heien v. North Carolina*, 574 U.S. 54, 66, 190 L. Ed. 2d 475, 486 (2014). In *State v. Eldridge*, we had the opportunity to apply *Heien*. *See State v. Eldridge*, 249 N.C. App. 493, 497-500, 790 S.E.2d 740, 743-44 (2016). We held that "in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous." *Id.* at 499, 740 S.E.2d at 743.

¶ 20 The text of N.C.G.S. § 20-79.2(a) is clear and unambiguous. Transporter plates can be displayed on both cars and trucks, as the statute uses the phrase "motor vehicle" in the general sense. N.C.G.S. § 20-79.2(a) (2019). The requirements of the statute clearly apply to both cars and trucks and does not calculate into our reasonable suspicion analysis of this traffic stop merely because the transporter plate was displayed on a car.

¶ 21 The additional facts that the trucking company was closed and there was a recent trailer theft in the area are insufficient to support reasonable articulable suspicion, even when considered in totality. While

similar factors have historically been cited in the totality of the circumstances analysis to help support establishment of reasonable articulable suspicion, they are insufficient in this context given the lack of other circumstances in this case. *See Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 (marks omitted) (noting the United States Supreme Court has "previously noted the fact that the stop occurred in a high crime area among the relevant contextual considerations" in a reasonable suspicion analysis, and holding "it was not merely [the] respondent's presence in [a high crime area] that aroused the officers' suspicion, but his unprovoked flight upon noticing the police"); *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (emphasis added) ("When determining if reasonable suspicion exists under the totality of the circumstances, a police officer may also evaluate factors such as *traveling at an unusual hour* . . . ."), *disc. rev. denied*, 363 N.C. 376, 679 S.E.2d 390 (2009); *State v. Watkins*, 337 N.C. 437, 442-43, 446 S.E.2d 67, 70-71 (1994) (citing the business where the defendant's vehicle was located being closed as one factor to support reasonable articulable suspicion, in addition to the fact it was 3:00 a.m. and there was an anonymous tip that "a suspicious vehicle" was at the location). The totality of the circumstances indicates the vehicle was exiting the parking lot of a closed building where there were no other cars present, in an area where there was a recent trailer theft. These circumstances are insufficient to support the reasonable articulable suspicion necessary to allow a lawful traffic stop. *See State v. Horton*, 264 N.C. App. 711, 716, 723, 826 S.E.2d 770, 774, 779 (2019) (holding the fact that a defendant was in front of a closed building where there were no other cars present in an area where a business across the street experienced prior break-ins was insufficient to support an officer's reasonable articulable suspicion).

¶ 22 The Order states that Defendant's vehicle displayed a transporter registration plate that came back as not assigned to any vehicle; the trucking company appeared to be closed as the office was dark and there were no other vehicles in the parking lot; and Officer Berry was aware of a recent trailer theft in the area. However, the trial court made no findings as to what activity by Defendant warranted Officer Berry's suspicion. These circumstances, taken in their totality, were insufficient to support a reasonable articulable suspicion necessary to allow a lawful traffic stop. When coupled with the fact that the vehicle did not commit any traffic violations prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, criminal activity. *See Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576 (emphasis added) ("[A]n officer may . . . conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that

criminal activity is afoot."). We hold the totality of the circumstances provided Officer Berry with nothing more than an "inchoate and unparticularized suspicion or hunch."[5] *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (marks omitted).

¶ 23 As Officer Berry's mistake of law was not objectively reasonable under the standard set out in *Heien* and *Eldridge*, no reasonable articulable suspicion existed to support the stop of Defendant's vehicle. Accordingly, the trial court erred in denying Defendant's *Motion to Suppress*. We reverse the trial court's order denying the *Motion to Suppress* and remand to the trial court for entry of an order vacating Defendant's guilty plea. *See State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014) ("Because [the] defendant's consent to search his car was the product of an unconstitutional seizure, the trial court erred in denying [the] defendant's motion to suppress. Accordingly, we reverse and remand to the trial court for entry of an order vacating [the] defendant's guilty pleas.").

CONCLUSION

¶ 24 We have jurisdiction to hear the merits of Defendant's appeal of his *Motion to Suppress*. Officer Berry's mistake of law was not objectively reasonable because N.C.G.S. § 20-79.2 is unambiguous. The traffic stop was unconstitutional, and all evidence seized from the traffic stop must be suppressed. We reverse the Order and remand to the trial court for entry of an order vacating Defendant's guilty plea.

REVERSED AND REMANDED.

Judges INMAN and HAMPSON concur.

---

5. We further note the trial court's fifth conclusion, to the extent it suggests Officer Berry could stop the vehicle to ascertain whether there was a statutory violation or not, is not compatible with our Fourth Amendment jurisprudence. Our caselaw establishes that an officer may stop a vehicle when there is a reasonable articulable suspicion that criminal activity, such as violating a statute, has occurred or is about to occur. The officer could not initiate a traffic stop without any reasonable articulable suspicion "to ensure its compliance" with a statute.

THOMAS v. OXENDINE

[280 N.C. App. 526, 2021-NCCOA-661]

TRINA THOMAS AND SCOTTY THOMAS, PLAINTIFFS
v.
KIMBERLY OXENDINE AND BRIAN A. THOMAS, DEFENDANTS

No. COA21-31

Filed 7 December 2021

1. Child Custody and Support—standing—grandparents—allegations in complaint

The paternal grandparents of a child had standing to bring a custody action under N.C.G.S. § 50-13.1(a) where their complaint alleged that they were the child's grandparents and that the child's mother had acted inconsistently with her constitutionally protected status as a parent by repeatedly and willfully failing to protect the child from her stepfather.

2. Child Custody and Support—constitutionally protected status as parent—findings of fact—failure to protect child—relinquishment of exclusive parental authority

In a custody action, the trial court's unchallenged findings of fact—showing that the mother had failed to protect her daughter from the stepfather's abusive behavior and that the mother had relinquished otherwise exclusive parental authority to the grandparents—supported the conclusion that the mother had acted inconsistently with her constitutionally protected status as a parent.

3. Child Custody and Support—best interests of the child—findings of fact—abusive stepfather

In a custody action, the trial court's unchallenged findings of fact—including that the mother had failed to protect her daughter from the stepfather's abusive behavior, that the daughter had said she would kill herself if she had to continue living with her stepfather, and that the mother had no intention to separate from the stepfather—supported the conclusion that it was in the best interests of the daughter for her grandparents to have sole legal and physical custody of her.

4. Child Custody and Support—order concerning parent—psychiatric evaluation and treatment—psychological issues

The trial court did not abuse its discretion in a child custody matter by ordering a mother to undergo a psychiatric evaluation and comply with all recommended treatments, where there were

ongoing abuse issues in the household and the mother had been diagnosed with PTSD, Borderline Personality Disorder, and mania.

5. Child Custody and Support—order concerning third party—completion of classes and evaluations—contact with child

The trial court did not abuse its discretion in a child custody matter by ordering the child's stepfather to complete parenting classes, anger management evaluations, and substance abuse evaluations, where the stepfather's ability to have contact with the child was conditioned on his compliance with the order because of the stepfather's past abuse of the child.

Appeal by Defendant Kimberly Oxendine from orders entered 26 March 2019, 10 April 2019, 11 June 2019, and 17 April 2020 by Judge Juanita Boger-Allen in Cabarrus County District Court. Heard in the Court of Appeals 22 September 2021.

Kathleen Arundell Jackson for Plaintiff-Appellees.

Ferguson, Hayes, Hawkins, & DeMay, PLLC, by James R. DeMay, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Kimberly Oxendine[1] appeals the trial court's orders which culminated in sole legal and physical custody of her minor child being awarded to Plaintiffs, Trina and Scotty Thomas. We affirm the orders of the trial court.

I. Factual and Procedural History

¶ 2 Defendants Kimberly Oxendine ("Mother") and Brian A. Thomas ("Father") are the biological parents of Josie,[2] born in 2005. Plaintiffs Trina Thomas ("Grandmother") and Scotty Thomas ("Grandfather") (together, "Grandparents") are Josie's paternal grandparents. Mother, Father, Josie, and Skylar–Mother's child from a previous relationship–lived in Grandparents' home from 2006 to 2007. Father left Grandparents' home in 2007 while Mother, Josie, and Skylar remained in the home until 2008.

1. Defendant Brian A. Thomas is not a party to this appeal.

2. We use pseudonyms in this case to protect the identity of the minor children.

¶ 3 Mother met Stephen Oxendine ("Chip") in 2009. Mother, Josie, and Skylar moved into Chip's home in 2010, and Mother and Chip married in 2014. The couple had two children together, Carson and Diane.

¶ 4 After Mother, Josie, and Skylar moved out of Grandparents' home in 2008, Josie spent most weekends, parts of each summer, and every spring break with Grandparents. Grandparents picked Josie up from school when she was ill, took her to therapy appointments, and paid for and attended her school sporting events. They also provided her with clothing, school supplies, and other essentials on a regular basis, and had recently purchased her a laptop. Grandparents also paid most child support payments on Father's behalf. Josie has a strong bond with Grandparents. Grandmother has been a "constant emotional resource" for Josie, and Mother relied on Grandmother's guidance and support in parenting Josie.

¶ 5 Josie's relationship with Chip was strained. Chip used unusually harsh punishment methods to discipline Josie, including forcing her to stay in an unairconditioned, unvented upstairs room during the summer, which "was far too hot for healthy living conditions." Chip yelled at her and called her names. He would yell in her face, getting so close he would spew spit on her. Mother and Chip sometimes refused to let Josie stay with Grandparents as punishment. Chip had also threatened to kick Josie out of the house, telling her to "pack her things and leave." Mother did not get involved when Chip was aggressive towards Josie. Josie is afraid of Chip and does not believe that Mother tries to protect her.

¶ 6 After bruises were found on Skylar's buttocks in 2011, Cabarrus County social services[3] investigated the Oxendine home. Social services closed the case, instructing Mother and Chip on proper discipline and recommending that they receive parenting and counseling services.

¶ 7 In May 2016, Josie wrote a letter stating she'd "rather kill herself" than live in the home with Chip. Mother had Josie admitted to Brynn Mar Hospital for treatment. Josie was admitted for depression and suicidal ideation and stayed in the hospital for nine days.

¶ 8 While Josie was being treated at Brynn Mar, Grandmother stayed with Josie. Mother visited but did not spend nights at the hospital as she feared Chip would be "mad" at her for leaving the other children.

---

3. Although documents bearing the names Cabarrus County Department of Social Services (CCDSS) and Cabarrus County Department of Human Services (CCDHS) are provided in the Record, these names refer to the same entity. We use "Cabarrus County social services" for consistency and to avoid confusion.

Mother told Grandmother that because of the strained relationship between Josie and Chip, she "knew it would come to this," and that she had tried to talk to Chip but he would not listen.

¶ 9 Upon release from the hospital, Josie was prescribed anti-depressant medication and recommended for outpatient therapy. Mother enrolled Josie in therapy with Daymark Recovery Services and Turning Point Family Services. Josie reported to Daymark that she didn't "feel safe around Chip" and that she was scared Chip would "get mad and hit her mother." Daymark recommended the entire family enroll in in-home, teamwork therapy. No evidence was presented that the family followed through with Daymark's recommendation. Josie only attended one session at Daymark and then stopped; Mother testified that this was due to Medicaid eligibility. Mother testified that Josie was in counseling with Turning Point for "quite a while" and then no longer needed treatment, but did not provide evidence to support her assertion.

¶ 10 On 19 February 2019, Chip discovered that Josie was using a cell phone that she was not permitted to have and confronted her. Chip "grabbed [Josie] by her shoulders, flinging her to the ground." The following day, when Josie arrived home from school, Chip confronted her again and the situation escalated. That day, Mother called Grandmother and asked if Josie could stay with Grandparents because things were "not working with [Josie] and Chip." Grandparents agreed to have Josie stay with them. Josie stayed with Grandparents for about a week.

¶ 11 Following this incident, Cabarrus County social services received a report about the family. Mother suspected the report had been filed by Grandparents and demanded that Josie return home on 24 February 2019. Subsequently, Cabarrus County social services investigated the report, but closed the case with a recommendation that the Oxendine family obtain individual and family counseling services to address any discord present in the home.

¶ 12 Grandparents filed a Complaint for Child Custody and Motion for Emergency Custody on 26 March 2019. The trial court entered an Order for Emergency Custody on that date, awarding temporary emergency custody of Josie to Grandparents and setting the matter for a temporary custody hearing on 3 April 2019. Following the temporary custody hearing, the trial court continued temporary custody of Josie with Grandparents and determined that Mother should have contact with Josie, but that Chip should not. The trial court entered a written Temporary Custody Order on 10 April 2019.

¶ 13 On 9 April 2019, Mother filed an Answer and Motion in the Cause. Mother moved to dismiss Grandparents' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted, arguing that Grandparents' complaint "does not list even one specific fact or allegation regarding [Mother], or her parenting abilities to properly meet their burden under N.C. [Gen. Stat. §] 50-13.1(a) to show [Mother] has either acted inconsistently with her constitutionally protected right to parent, or that she is an unfit [] parent" and that Grandparents "do not have standing to seek custody of the minor child at issue pursuant to N.C. [Gen. Stat. §] 50-13.1(a)" because Grandparents did not "allege an in loco parentis relationship with the minor child."

¶ 14 The trial court held a hearing on Mother's motion to dismiss on 6 May 2019. By order entered 12 June 2019 ("Order Denying Motion to Dismiss"), it denied Mother's motion, finding and concluding that Grandparents had standing to bring the custody action and that Mother "engaged in conduct inconsistent with her protected status as a parent as demonstrated by clear and convincing evidence."

¶ 15 A hearing was held on 2 December 2019 to address Josie's best interests and determine permanent custody. The trial court entered an Amended Permanent Custody Order on 17 April 2020 wherein it concluded, in relevant part, that "[i]t is in the best interest of the minor child that the [Grandparents] have sole legal and physical custody of the minor child" and that Mother be granted visitation as outlined in the order.

¶ 16 Mother appealed the Order for Emergency Custody, the Temporary Custody Order, the Order Denying Motion to Dismiss, and the Amended Permanent Custody Order. On appeal, Mother's arguments are directed only to the Order Denying Motion to Dismiss and the Amended Permanent Custody Order.

II. Discussion

A. Standing

¶ 17 **[1]** Mother first argues that the trial court erred by denying her motion to dismiss Grandparents' complaint for custody because the trial court erroneously determined that Grandparents have standing to bring a custody action under N.C. Gen. Stat. § 50-13.1(a).

¶ 18 Standing is required to confer subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013). "A [trial] court's subject matter jurisdiction over a particular matter is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). At the motion to dismiss stage, all factual allegations in the

pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. *Grindstaff v. Byers*, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002). We review de novo whether a plaintiff has standing to bring a claim. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

¶ 19 N.C. Gen. Stat. § 50-13.1(a) provides that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." N.C. Gen. Stat. § 50-13.1(a) (2019). The statute "grants grandparents the broad privilege to institute an action for custody . . . ." *Eakett v. Eakett*, 157 N.C. App. 550, 552, 579 S.E.2d 486, 488 (2003). "Although grandparents have the right to bring an initial suit for custody, they must still overcome" the parents' constitutionally protected rights. *Sharp v. Sharp*, 124 N.C. App. 357, 361, 477 S.E.2d 258, 260 (1996).

¶ 20 To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. *See*, *e.g.*, *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("[The] plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that [the] defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("[G]randparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody[.]").

¶ 21 Here, Grandparents alleged in their complaint, in relevant part, the following:

> 4. . . . Trina Thomas and Scotty Thomas are the child's paternal grandparents.
>
> . . . .
>
> 6. [Grandparents] have standing pursuant to [N.C. Gen. Stat.] § 50-13.l(a) to file this action for child custody in that they have [] had a substantial and material contact with the child throughout her life in the nature of a parent and child.
>
> . . . .
>
> 8. [Mother] has acted inconsistent with her constitutionally protected status as a parent. She has

repeatedly and willfully failed to protect the child from her husband [Chip].

. . . .

b. Shortly after [Carson]'s birth, [Mother] called the Plaintiffs to report that she had left Chip because of his poor treatment of her and [Josie] who was about four years old. However, she returned shortly thereafter because [Chip] refused to let her take the infant [Carson] with her.

c. When [Josie] was four, she cut her hair with a pair of scissors. As punishment, [Chip] shaved the child's head to "teach her a lesson."

d. Throughout the time [Josie] has been in the home with [Chip], he has singled her out for hostile treatment. He is easily agitated and frequently yells at [Josie] calling her names. At times he gets so close to [Josie]'s face, the force of his screaming has caused him to spit on the child.

e. When [Josie] was eight years old, she developed chronic constipation. [Chip] belittled her and called her names. He refused to allow [Mother] to follow [Josie]'s doctor's recommendations for treatment, saying, "She can s*** on her own. I do it every morning."

f. Frequently [Josie] is the victim of [Chip]'s unfair punishment. In the Spring of 2016, [Josie] stated that she would rather kill herself than live with [Chip]. As a result, she was hospitalized for mental health treatment.

g. On February 19, 2019, [Chip] assaulted [Josie]. Although he did not hit the child, he grabbed her and caused her to fall on the ground. [Mother] called [Grandparents] to the home. When [they] arrived at the Oxendine home, [Chip] stated, "All I got to say is you better be glad your grandparents are here."

> h. On February 20, 2019, [Mother] called [Grandmother], crying and asked her to come pick up [Josie], saying, "I need you to meet me to get [Josie]. Things are not working with her and Chip." [Mother] admitted that Chip had told [Josie] to get her things and prepare to leave the home. [Mother] stated that she wanted to leave [Chip] but she had her other children to consider.
>
> i. By February 24, 2019, [Mother] was demanding that [Josie] return to her home. She accused [Grandparents] of calling [Cabarrus County social services] regarding [Chip]'s domestic violence incident on February 19, 2019. According to [Mother], the Department is investigating her home.
>
> j. Since that time, [Mother] has refused to allow [Josie] to visit [Grandparents'] home. They have had limited telephone contact with her. The substance of the calls leads them question [Josie]'s safety in the Oxendine home. [Mother] stated that she was not going to allow [Josie] to visit her grandparents until the [social services'] investigation was over.
>
> k. [Social services] investigated the Oxendine home after [Chip] left bruises on the minor child [Skylar].

¶ 22 Viewed in the light most favorable to Grandparents, and granting Grandparents the benefit of every reasonable inference, Grandparents have alleged both that they are Josie's grandparents and that Mother acted inconsistently with her constitutionally protected status as a parent by repeatedly and willfully failing to protect Josie from danger and harm caused by Chip. Accordingly, Grandparents had standing to proceed in an action for custody of Josie pursuant to N.C. Gen. Stat. § 50-13.1(a).

¶ 23 Mother asserts that "the trial court must find that a parent has acted inconsistent with his or her constitutionally protected status as a parent by clear and convincing evidence for grandparents to have standing to seek custody of a minor child." (Original in all capital letters). Mother argues that Grandparents lacked standing to bring this action because the trial court's determination that Mother acted inconsistent with her

constitutionally protected status as a parent was not supported by the evidence.

¶ 24 Mother confuses

> two distinct but related stages in a custody dispute between a parent and non-parent, namely: (1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them.

¶ 25 *Gray v. Holliday*, 2021-NCCOA-178, ¶19 (unpublished). Where, as here, the pleading alleges sufficient facts to show that plaintiffs are the grandparents of the minor child and that the parent is unfit or has engaged in conduct inconsistent with their parental status, Grandparents had standing, and the trial court had subject matter jurisdiction to hear the case.

B. Conduct Inconsistent with Parental Status

¶ 26 **[2]** Mother argues that the trial court erred by denying Mother's motion to dismiss Grandparents' custody action because the trial court's determination that Mother "engaged in conduct inconsistent with her protected status as a parent" was not supported by clear and convincing evidence.

¶ 27 "A trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). In custody actions, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). Findings of fact are likewise conclusive on appeal if they are unchallenged. *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). We review whether the findings of fact support the conclusions of law de novo. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

¶ 28 Even when grandparents have standing to bring a custody action, to gain custody they must still overcome a parent's "constitutionally-protected paramount right . . . to custody, care, and control of [the child]." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). "When grandparents initiate custody lawsuits under [N.C. Gen. Stat.] § 50-13.1(a), . . . the grandparent[s] must show that the parent is

unfit or has taken action inconsistent with her parental status in order to gain custody of the child." *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489. If, however, the grandparents are not able to show that the parent has lost their protected status, the custody claim against the parent must be dismissed. *See*, *e.g.*, *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268 (reinstating the trial court's order dismissing grandparent's custody action where grandparent "failed to carry her burden of demonstrating that defendant forfeited his protected status").

¶ 29 Here, Mother challenges the following nine of the trial court's 66 findings of fact in its Order Denying Motion to Dismiss as not supported by competent evidence:

> 12. The minor child views [Grandfather] as the only father she has ever known and considers both [Grandmother] and [Mother] as her mother figures.
>
> . . . .
>
> 30. [Grandparents] exercised a significant amount of parental responsibility for the minor child, which was formed and perpetuated by [Mother].
>
> . . . .
>
> 42. [Mother] has failed to protect the minor child.
>
> . . . .
>
> 51. That after the February 2019 incident, [Chip] demanded that the minor child pack her things and leave the Oxendine home.
>
> . . . .
>
> 53. Based on her actions, [Mother] believed that there was a substantial risk of harm to the minor child if the minor child remained in the Oxendine home.
>
> . . . .
>
> 55. [Mother] did not indicate that the placement would be temporary. [Grandparents] cared for the minor child as they had on numerous other occasions. [Mother] abdicated her parental responsibilities while [Grandparents] often cared for the daily needs of the minor child.

. . . .

60. That [Mother]'s decision to demand that [Grandparents] return the minor child to the Oxendine home was adverse to the minor child.

61. [Mother] unilaterally altered the established relationship between [Grandparents] and the minor child by ceasing all contact between the minor child and [Grandparents] upon being contacted by [social services]. That this act by [Mother] was adverse to the minor child.

. . . .

63. There is a substantial risk of harm to the minor child while in the Oxendine home.

¶ 30 Our review of the record reveals clear and convincing evidence to support each of the nine challenged findings. Moreover, even in the absence of every contested finding, the unchallenged findings support the trial court's conclusion that Mother "engaged in conduct inconsistent with her protected status as a parent[.]" *See Hall*, 188 N.C. App. at 532, 655 S.E.2d at 905 (affirming a modification of custody on the unchallenged findings).

¶ 31 The unchallenged findings include, in relevant part:

14. [Grandparents] have played an integral part in rearing the minor child. [Mother] and the minor child moved in with [Grandparents] in 2006 when the minor child was [one] year old.

. . . .

16. [Grandparents] provided housing, clothing, transportation[,] and financial assistance for the minor child while the minor child resided in the home.

. . . .

18. [Grandparents] continued to have ongoing and consistent contact with the minor child after moving from [Grandparents'] home and continued to provide financially for the minor child. [Grandparents] purchased clothing and other essential items for the minor child.

19. The minor child stayed with [Grandparents] on weekends, every Spring Break, holidays and every summer, with the exception of summer 2016 when the minor child was hospitalized. The minor child was in the home of [Grandparents] every weekend unless prevented by [Chip]. Friends and neighbors of [Grandparents] were accustomed to seeing the minor child with [Grandparents] during the times mentioned above.

20. [Grandparents] have been involved in the minor child's education by assisting with homework and school projects. [Grandparents] purchased school clothing and supplies each year for the minor child. In February 2019, [Grandparents] purchased a computer for the minor child.

21. [Grandparents] supported the minor child in her extracurricular activities and paid the fees for the minor child to play sports. The minor child also attended social and family gatherings events with [Grandparents].

. . . .

31. [Mother] relied on [Grandparents] in a parental capacity for the minor child and intended for [Grandparents] to shoulder the parental responsibility.

32. [Grandmother] has been a constant emotional resource for the minor child and [Mother], especially with matters relating to the minor child and the dynamics in [Mother]'s household.

. . . .

34. [Mother] benefitted by sharing the decision-making, caretaking, and financial responsibility for the minor child with [Grandparents]. . . .

. . . .

37. The minor child is in fear of [Chip] and does not believe that [Mother] makes an effort to protect her.

38. During the summer of 2016, the minor child was hospitalized for mental health treatment after the

minor child stated that she would rather kill herself [] than live with [Chip].

39. During the minor child's hospital stay, [Grandmother] was at the hospital each day with the minor child. [Mother] told [Grandmother] that she was unable to be at the hospital daily because [Chip] stated that [Mother] did not need to be there because she had other children at home. . . .

40. An incident occurred in the Oxendine home in February 2019 where the minor child ended up on the floor after being confronted by [Chip].

41. [Mother] was in the home, but did not intervene.

. . . .

43. [Mother] admits that [Chip] and the minor child have had arguments that have been inappropriate.

. . . .

45. The minor child does not feel welcome in the Oxendine home, suffers from constant anxiety and feels that she is treated differently from her other siblings who reside in the Oxendine home.

. . . .

48. That [Mother], [Chip] nor the minor child have demonstrated the ability to deescalate conflicts.

49. The minor child's presence in the Oxendine home has created a hostile environment for the minor child.

50. The minor child has been unable to cope in the Oxendine home.

. . . .

52. [That after the February 2019 incident], [Mother] called [Grandmother] and asked her to immediately meet and keep the minor child due to things not working out between [Chip] and the minor child.

. . . .

> 54. [Mother] voluntarily placed the minor child with [Grandparents] and provided no definitive timeframe, oversight or instructions.
>
> . . . .
>
> 64. [Mother] has engaged in conduct inconsistent with her protected status as a parent as demonstrated by clear and convincing evidence.

¶ 32 These unchallenged findings show that Mother failed to protect Josie from Chip's abusive behavior and inappropriate discipline. This failure alone is conduct inconsistent with Mother's protected status as a parent. *See Sharp*, 124 N.C. App. at 361, 477 S.E.2d at 260 (allegations in complaint sufficient to survive motion to dismiss where grandparents alleged that parent's actions put her children at a "substantial risk of harm"); *Grindstaff*, 152 N.C. App. at 293, 567 S.E.2d at 432 (allegations in complaint sufficient to survive motion to dismiss where grandmother alleged parents had "not shown they are capable of meeting the needs of the children for care and supervision"). The unchallenged findings also show that, by her volitional acts, Mother "relinquish[ed] otherwise exclusive parental authority to" Grandparents. *See Rodriguez*, 211 N.C. App. at 277, 710 S.E.2d at 242 (quotation marks and citation omitted). Such voluntary relinquishment is the "gravamen" of inconsistent conduct. *Id.*

¶ 33 Mother additionally argues that, by finding that she "had little or no income," the trial court improperly relied on her socioeconomic status in its determination that she acted inconsistent with her parental rights.

¶ 34 It is true that a parent's socioeconomic status is not relevant to a determination of a parent's unfitness or acts inconsistent with a parent's constitutionally protected status. *Dunn v. Covington*, 272 N.C. App. 252, 265, 846 S.E.2d 557, 567 (2020) (citing *Raynor v. Odom*, 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996)). However, where the remaining findings are sufficient to support the court's conclusion that Mother acted inconsistently with her parental status, any potential error was harmless. *See In re S.R.F.*, 376 N.C. 647, 2021-NCSC-5, ¶15. In summary, the challenged findings of fact are supported by clear and convincing evidence. The unchallenged findings of fact, by themselves and together with the challenged findings, support the trial court's conclusion that Mother "engaged in conduct inconsistent with her protected status as a parent[.]"

C. Best Interests Determination

¶ 35 **[3]** Mother argues the trial court abused its discretion by concluding, "it is in the best interest of the minor child that [Grandparents] have sole legal and physical custody of the minor child."

¶ 36 Where a parent's conduct is determined to be inconsistent with their constitutionally protected status, the trial court will determine custody using the "best interest of the child" standard. *Tessener*, 354 N.C. at 62, 550 S.E.2d at 502. "Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.' " *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C. Gen. Stat. § 50-13.2(a)).

¶ 37 The standard of review for a best interests determination in a custody dispute is well-established:

> [T]he 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.

Peters, 210 N.C. App. at 12-13, 707 S.E.2d at 733 (quotation marks and citations omitted).

¶ 38 Mother challenges the following 13 of the trial court's 75 findings of fact in its Amended Permanent Custody Order as not supported by the evidence:

> 8. . . . [Mother]'s [other] children [i.e. Skylar, Carson, and Diane] considered the Plaintiffs [Trina and Scotty Thomas] as grandparents prior to the initiation of this action.
>
> . . . .
>
> 11. . . . [Mother] stated that [Chip] overstepped her and punished [Josie] inappropriately. [Grandparents]

asked [Mother] if they could talk with [Chip] and [Mother] stated that it would not help to do so.

12. [Chip] and the minor child have had arguments and interactions that have been inappropriate. [Mother] has not appropriately intervened.

. . . .

15. . . . [Mother] has not received the necessary psychological education and treatment to help her cope within the Oxendine family dynamics.

. . . .

30. [Mother] has not shown any interest in visiting or knowing anything about [Josie]'s school. [Grandmother] has provided updates and sent pictures to [Mother] regarding [Josie] even though [Mother] rarely responds.

31. [Mother] does not effectively co-parent and demonstrates an unwillingness to do so. [Mother]'s actions demonstrate that she is bitter towards [Josie] and [Grandmother].

32. . . . [Mother]'s actions appear to be punitive in nature and are passive aggressive.

. . . .

40. . . . It was inappropriate and against [Josie]'s best interest for the Oxendines to isolate [Josie] from [Grandparents] as a punishment.

. . . .

44. Over time, [Josie] was shunned by her family. . . .

. . . .

54. [Mother] has not taken advantage of the services offered to her and her family and failed to comply with the recommendations made to help her effectively parent [Josie] and provide [Josie] with a safe and healthy home environment.

55. [Mother] has failed to protect the minor child while in her care. [Mother] has failed to participate

> and/or demonstrate skills on how to deescalate conflicts within her household and with [Josie].
>
> 56. During various points of her life, [Josie] has been withheld from people who have been caregivers to her. [Josie] has had significant routine experience to events such as hitting, choking, pushing, shaking, yelling, and punishment to a point where bruising occurred.
>
> . . . .
>
> 60. . . . [Mother] shared with [Grandmother] that [Chip] told her that he can't be around [Josie] and presented [Mother] with an ultimatum. . . .

¶ 39 Our review of the record reveals clear and convincing evidence to support each of the challenged findings. Moreover, even in the absence of every contested finding, the unchallenged findings support the trial court's conclusion that "it is in the best interest of the minor child that [Grandparents] have sole legal and physical custody of the minor child." These unchallenged findings include:

> 14. On November 28, 2010, a report was made to the Department of Social Services alleging that [Chip] bruised [Skylar]. [Skylar]'s paternal grandparents observed bruising on [Skylar] and took her to the hospital. . . . [Mother] indicated that she did not know about the bruising until after [Skylar] was taken to the hospital. [Mother] confirmed that [Chip] caused the bruising on [Skylar]. . . . [Chip] admitted that he hit [Skylar] out of anger by pulling her pants down and spanking her with his hand. . . .
>
> . . . .
>
> 16. The social worker involved with the Oxendine family described [Mother] as being nonchalant in her disciplining and allowed [Chip] to take on this responsibility although he didn't have any experience. . . . The social worker also noted that [Mother] told her she would start counseling for [Josie]. . . . No evidence was presented to show that [Mother] followed through with obtaining counseling for [Josie] or herself at this time. . . .

. . . .

23. [Josie] needs consistency and structure. [Grandparents] have [Josie] on a schedule.

. . . .

27. . . . [Since living with Grandparents], [Josie]'s grades have improved and [she] is progressing in therapy. [Josie]'s self-esteem has improved.

. . . .

38. [Chip] and [Josie] have a tumultuous relationship. From the onset of the relationship between [Mother] and [Chip], [Grandparents] noticed that Chip was overly harsh in punishing [Josie]. [Grandparents] witnessed [Chip] calling [Josie] names in front of [Mother], but [Mother] would not do anything.

. . . .

40. [Chip] would often tell [Josie] to pack her things and leave. There were other times when [Chip] would withhold [Josie]'s visits with [Grandparents]. The Oxendines believe that [Josie]'s visiting with [Grandparents] was the "only thing" that [Josie] seemed to like. . . . It was inappropriate and against [Josie]'s best interest for the Oxendines to isolate [Josie] from [Grandparents] as punishment.

. . . .

46. In May 2016, [Josie] threw a note downstairs stating that she wanted to kill herself if she had to continue living with [Chip]. [Josie] was hospitalized on May 13, 2016 at Atrium Health until a bed became available at Brynn Marr Hospital. [Grandmother] stayed with [Josie] while hospitalized. [Mother] was unable to stay because [Chip] relayed that [Mother] had other kids at home to care for.

. . . .

48. . . . [Josie] received an Admissions Assessment and reported that she will kill herself if she must go back to live with her stepfather. [Josie] reported that

her stepfather is abusive and physically punishes her leaving whip marks. [Josie] also reported having nightmares about her stepfather. . . .

49. . . . [Josie] reported that she and her mother "go at it" and "yell at each other." [Josie] expressed that she did not feel safe around [Chip] and was scared [Chip] would get mad and hit her mother. [Josie] also expressed that "about every day" she (Josie) and [Chip] would "get into arguments." . . .

. . . .

53. [Josie] has consistently cried out for help for years. [Mother] failed to ensure that [Josie]'s psychological and emotional needs were met.

. . . .

57. An altercation occurred between [Josie] and [Chip] on February 19, 2019. Prior to said altercation, [Josie] and [Skylar] were arguing about a cellphone while they both were in the bathroom . . . [Chip] got out of bed and headed towards the bathroom to get the phone. . . .

58. [Josie] ended up on the floor after being confronted by [Chip]. [Chip] yelled at [Josie] causing his spit to come in contact with [Josie]'s face. [Chip] demanded that [Josie] pack her things and leave the Oxendine home. The next day, [Mother] called [Grandmother] and asked her to meet her and keep [Josie] due to things not working out between Chip and [Josie].

. . . .

60. . . . [Josie] reported that [Chip] grabbed her by her shoulders, "flinging her to the ground." When talking about this event [Mother] told [Grandparents] that [Chip] "bowled her (Josie) over." [Mother] called [Grandmother] and indicated that [she] would need to meet her to pick up [Josie] because "things weren't working out with [Josie] and Chip." . . . [Josie] shared that she heard [Mother] and [Chip] fighting and [Chip] kept saying that [Josie] is the problem. [Mother]

subsequently sided with [Chip]. [Josie] shared, "I can't take it anymore. I hate this family."

. . . .

62. The April 25, 2019 assessment from Creative Counseling and Learning Solutions found that [Josie] has experienced a threat of serious harm by her stepfather [Chip] on numerous occasions from ages 6-12. [Josie] has heard about the Oxendines physically fighting, hitting, slapping, kicking and pushing each other. . . . [Josie] has repeatedly been told that she is no good, been yelled at in scary ways, and has received threats of abandonment, and removal by her stepfather. This conduct has worsened throughout [Josie]'s life. [Josie] does not feel safe in the Oxendine home. The court adopts these findings.

. . . .

64. The court adopts the findings of the April 25, 2019 assessment that [Josie] has not experienced a singular traumatic experience, [but] rather years of events which are leading to both behavioral and emotional responses to which [Josie] feels she has no control. [Josie] has directly experienced violent acts, both toward her as well as her mother. This includes violence to her in the form of harsh punishments, punishments resulting in bruises to her sister, and violence toward her mother. She has also learned about events occurring to others. [Josie] experiences excessive worry that something else is going to happen and is always "walking on egg shells." [Josie] has experienced intrusion symptoms including recurring distressing dreams in which the content and effect of the dream are related to the trauma events, dissociative reactions in which she reports feeling as if the trauma events are occurring in the present, intense and prolonged psychological distress at exposure to internal and external cues that resemble an aspect of the trauma events, such as fighting and heat. . . . [She experiences] persistent and distorted cognitions about the cause of the traumatic event, negative emotional state, including

> horror, fear, guilt, shame, anger, and vindictiveness. [Josie] experiences diminished interest in significant activities and will often provoke problems in what was a pleasant experience. [Josie] feels estranged from others. She additionally is experiencing reactivity symptoms including irritable behavior and anger responses, hypervigilance, exaggerated startle response, and poor concentration problems.
>
> 65. The family dynamics are such that [Josie] is exposed to physical and emotional abuse while in the care of [Mother].
>
> 66. [Josie] has a need to reside in a safe environment. [She] needs emotionally healthy caretakers who are actively involved in her life. . . .
>
> . . . .
>
> 68. . . . [Mother] expressed no intent of separating from [Chip].

¶ 40 The challenged findings of fact are supported by competent evidence and the unchallenged findings, by themselves and together with the challenged findings, support the trial court's conclusion that "it is in the best interest of [Josie] that [Grandparents] have sole legal and physical custody of the minor child." The trial court did not abuse its discretion in granting Grandparents custody. *See Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 67 (1999) ("A trial court is given broad discretion in determining the custodial setting that will advance the welfare and best interest of minor children.").

D. Order that Mother Complete a Psychiatric Evaluation

¶ 41 **[4]** Mother argues that the trial court abused its discretion when it "condition[ed] [her] custodial rights upon undergoing a psychiatric evaluation when there was no evidence that [her] mental health affected her parenting of the minor child, and [ordered her] to take prescription medication."

¶ 42 "In cases involving child custody, the trial court is vested with broad discretion." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000). "The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion." *Id.* (citation omitted). This Court has affirmed the decisions of trial courts ordering a psychological evaluation. *See, e.g.*, *Maxwell v. Maxwell*, 212 N.C. App. 614, 620-21, 713

S.E.2d 489, 493-94 (2011) (affirming the trial court's decision to order a mental health evaluation as a condition of father's visitation rights); *Pass v. Beck*, 156 N.C. App. 597, 601, 577 S.E.2d 180, 182 (2003) (holding that "the trial court did not abuse its discretion in delaying determination of the best interests of the child regarding visitation pending a recommendation from a psychologist"); *Rawls v. Rawls*, 94 N.C. App. 670, 676-77, 381 S.E.2d 179, 183 (1989) (holding that the trial court did not abuse its discretion by requiring a defendant to consult a psychiatrist or a psychologist before awarding specific visitation rights).

¶ 43 Here, the court ordered:

> 19. [Mother] shall undergo a psychological evaluation and comply with all recommended education and treatment. [Mother] shall reveal to the treatment evaluator/ provider her prior diagnosis and suicide attempt and the name and contact information of her past and current treatment provider(s). [Mother] shall provide any documentation requested by the treatment evaluator/ provider including a release of medical records. In addition [Mother] shall provide the treatment evaluator/provider with a copy of this Order and the April 10, 2019 temporary custody order. [Mother] shall also request to be evaluated to determine the necessity for her to be prescribed any medication. [Mother] shall keep all medical appointments and follow the treatment plan of her medical providers. [Mother] shall comply with taking her medication as prescribed by her medical provider.

¶ 44 Contrary to Mother's assertion, the trial court did not "condition her custodial rights upon undergoing a psychiatric evaluation." Nonetheless, such a condition is permissible and ordering Mother to undergo a psychiatric evaluation was within the broad discretion of the trial court. *See Maxwell*, 212 N.C. App. at 621, 713 S.E.2d at 494.

¶ 45 The following findings of fact support the trial court's order:

> 15. During the [2011 social services investigation], [Mother] told the social worker that she had been diagnosed with PTSD and Borderline Personality Disorder. She also stated that she was diagnosed as manic and had a prior suicide attempt. [Mother] stated that she attended Daymark and was taking medication but stopped because it made her sleep

> a lot. [Mother] has not received the necessary psychological education and treatment to help her cope within the Oxendine family dynamics.
>
> 16. The social worker involved with the Oxendine family described [Mother] as being nonchalant in her disciplining and allowed [Chip] to take on this responsibility although he didn't have any experience. . . . The social worker also noted that [Mother] told her she would start counseling for [Josie]. . . . No evidence was presented to show that [Mother] followed through with obtaining counseling for [Josie] or herself at this time. . . .
>
> . . . .
>
> 67. [Mother] . . . need[s] parenting classes, coping skills, individual therapy and family therapy.

¶ 46 Mother challenges the portion of finding of fact 15 that states she "has not received the necessary psychological education and treatment to help her cope within the Oxendine family dynamics." Cabarrus County social services' records indicate that Mother was diagnosed with PTSD and Borderline Personality Disorder in 2008 and stopped taking her medication. She was diagnosed as manic and had a prior suicide attempt. Further, there was no evidence before the trial court that Mother and Chip engaged in therapy or services offered to help them effectively parent, including the recommended course of in-home, family therapy and training.

¶ 47 This evidence was competent to support the challenged finding. Based on a review of the findings, it is apparent that the trial court's decision to require Plaintiff to undergo a psychological evaluation and comply with all recommendations did not represent an abuse of discretion. *See id.*

E. Order that Chip Complete Programming

¶ 48 **[5]** Mother finally argues that the trial court abused its discretion when it ordered Chip to complete, and provide the court with proof of completion, a series of parenting classes and trainings, and anger management and substance abuse evaluations. Mother asserts that a trial court may not condition a parent's custodial and visitation rights on the actions of a third-party. Mother mischaracterizes the court's order, and her argument is without merit.

¶ 49 The challenged portion of the Amended Permanent Custody Order does not condition Mother's visitation with Josie on Chip's compliance with the order; rather, the order conditions Chip's ability to have contact with Josie on his compliance with the order. Mother argues that these conditions violate Chip's constitutional due process rights. We decline to address this argument as Mother does not have standing to assert Chip's constitutional rights. *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 247, 511 S.E.2d 671, 678 (1999) ("Ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party.") (citation omitted).

¶ 50 The order does state that Mother's "visitation shall occur at the Oxendine home so long as Chip . . . is not present in the home at any time during the weekend of [Mother's] visitation. [Mother's] visitation shall immediately cease if Chip . . . is/has been in the home during the visitation period."

¶ 51 Trial courts possess broad discretion to fashion visitation arrangements appropriate to the situations before them, and trial courts are always guided by the best interests of the child. *Burger v. Smith*, 243 N.C. App. 233, 239, 776 S.E.2d 886, 891 (2015). To that end, a trial court has the discretion to prohibit the exercise of visitation rights by a non-custodial parent in the presence of a specified person if the evidence demonstrates that exposure to the prohibited person would adversely affect the child. *See Harris v. Harris*, 56 N.C. App. 122, 125, 286 S.E.2d 859, 860 (1982); *cf. Mongerson v. Mongerson*, 285 Ga. 554, 555-56, 678 S.E.2d 891, 894 (2009).

¶ 52 Here, there was ample competent evidence that exposure to and contact with Chip adversely affected Josie's welfare. Accordingly, the trial court did not abuse its discretion and this argument is overruled.

III. Conclusion

¶ 53 For the reasons stated above, we affirm the orders of the trial court.

AFFIRMED.

Judges DILLON and WOOD concur.

WING v. GOLDMAN SACHS TR. CO.

[280 N.C. App. 550, 2021-NCCOA-662]

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

RALPH L. FALLS III, ET AL., PLAINTIFFS
v.
LOUISE FALLS CONE, ET AL., DEFENDANTS

RALPH L. FALLS III, ET AL., PLAINTIFFS
v.
JOHN T. BODE, DEFENDANT

IN RE ESTATE OF RALPH L. FALLS, JR., DECEASED

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

No. COA21-133

Filed 7 December 2021

1. Appeal and Error—interlocutory order—substantial right—order compelling discovery—privileged information

Plaintiff's appeal from an interlocutory order compelling her to produce documents she received by subpoena—including communications between her and her counsel regarding the litigation—was immediately appealable where the order affected plaintiff's substantial right to protect documents from discovery under the attorney-client privilege and work product doctrine.

2. Discovery—request for production—subpoenaed documents—irrelevant and privileged—Rules 45 and 26

Defendants in an estate dispute were not entitled to automatic production of documents that plaintiff had received from her ex-husband by subpoena, where plaintiff had informed defendants of the subpoenaed documents within five days after she received them, pursuant to Civil Procedure Rule 45(d1), and took the steps required under Rule 26(b)(5)(a) to object to defendants' discovery request on grounds that the documents were either irrelevant or protected by attorney-client privilege and the work product doctrine. Although Rule 45(d1) requires parties who obtain subpoenaed materials to afford other parties a reasonable opportunity to inspect those materials, the interplay between Rules 45 and 26 shows the General Assembly's intent to limit access to subpoenaed documents that are privileged or non-responsive to discovery requests.

WING v. GOLDMAN SACHS TR. CO.

[280 N.C. App. 550, 2021-NCCOA-662]

Appeal by plaintiff Mary Cooper Falls Wing from order entered 26 October 2020 by Judge Edwin G. Wilson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 3 November 2021.

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

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

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

TYSON, Judge.

¶ 1 Mary Cooper Falls Wing ("Plaintiff") appeals from a superior court order compelling her to produce all documents for review by Dianne Sellers and Louise Cone (together "Defendants"). We vacate and remand.

I. Background

¶ 2 In the underlying litigation, Plaintiff seeks to invalidate certain testamentary instruments concerning her late father Ralph L. Falls, Jr. ("Decedent"). Plaintiff alleges Decedent lacked legal and testamentary capacity and was suffering from undue influence in the years before his death. The challenged instruments purport to disinherit Plaintiff and her brother in favor of Defendants.

¶ 3 On 20 May 2019, the trial court entered an order requiring the Trustee (Goldman Sachs) to continue making distributions from the trust to Defendants for them to pay for their legal fees during the pendency of the litigation. This Court unanimously reversed that order on 20 October 2020. *Wing v. Goldman Sachs Trust Co.*, 274 N.C. App. 144, 156, 851 S.E.2d 398, 400 (2020). Goldman Sachs filed petitions for discretionary review to the Supreme Court of North Carolina. Those petitions remain pending. This Court's opinion and order has not been stayed.

¶ 4 Plaintiff and her husband, Mike Wing, divorced during the pendency of the events above. In November 2019, Defendants served Plaintiff with discovery requests. Plaintiff believed some of the information and documents Defendants requested remained in her former home in the possession of her ex-husband.

¶ 5 After unsuccessful attempts to recover her personal papers through counsel, Plaintiff sought a North Carolina subpoena to recover documents she believed to be necessary to respond to the discovery and for prosecution of the underlying cases. The North Carolina subpoena was submitted to a court in Maine. The court in Maine issued a subpoena pursuant to the Uniform Interstate Depositions and Discovery Act. ME. R. CIV. P. 14 § 403 (2019). The Maine Court's subpoena, with a copy of the North Carolina subpoena attached, was served upon Mike Wing, with notice to all parties.

¶ 6 Plaintiff's counsel received multiple productions of Plaintiff's personal papers from Mike Wing in May and June 2020 via electronic thumb drive. The papers produced and recovered included many documents not responsive to the subpoena nor any discovery requests in the case.

¶ 7 Plaintiff's sworn affidavit states:

> The vast majority of the documents have nothing to do with this case. Almost the entire production consists of documents like recipes, personal notes between me and my then-husband, insurance policies, homework assignments, lesson plans, resumes, personal and draft correspondence unrelated to this litigation, tax returns, retirement planning documents, expense trackers, usernames/ passwords, garbage collection schedules, images saved from websites, and similar documents that I have accumulated in my day-to-day life.

¶ 8 Also included with these documents were dozens of written communications between Plaintiff and her counsel in the underlying litigation, asserted work product materials prepared by counsel as part of the litigation, and documents that are responsive to Defendants' discovery requests.

¶ 9 On 15 June 2020, two business days after receiving the final production of documents from Mike Wing, Plaintiff's counsel informed counsel for all parties that Plaintiff had received a complete response to the subpoena. Plaintiff objected to Defendants' informal request for her to produce all of the personal papers she had recovered and received from Mike Wing, noting the request sought irrelevant and privileged material, and such materials and documents were not reasonably calculated to lead to the discovery of admissible evidence.

¶ 10 Subject to this objection, Plaintiff supplemented her prior discovery responses by producing all non-privileged personal papers on 26 June

2020 assertedly responsive to Defendants' prior discovery requests. Plaintiff also provided a log of the personal papers withheld on the basis of privilege. She noted that the personal and privileged papers received from Mike Wing pursuant to the subpoena that were neither relevant to the case nor responsive to any discovery request had not been produced.

¶ 11 Defendants filed a "Joint Motion to Compel Mary Cooper Falls Wing to Produce Documents Received Pursuant to Subpoena." The motion was heard in August 2020. Defendants argued because Plaintiff had served a subpoena, she had prospectively waived all objections to every document Mike Wing had produced in response to the subpoena.

¶ 12 On 26 October 2020, the trial court entered an order ("Production Order") compelling Plaintiff to produce all of the documents to the Defendants she had received pursuant to the subpoena, including documents claimed to be attorney-client privileged and protected by the work product doctrine. Plaintiff filed a notice of appeal of the Production Order on 30 October 2020.

II. Jurisdiction

¶ 13 This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) (2019).

III. Interlocutory Appeal

¶ 14 **[1]** A party may appeal from any interlocutory order that affects a substantial right. N.C. Gen. Stat. §§ 1-277(a); 7A-27(b)(3)(a) (2019). "A substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment." *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 112, 332 S.E.2d 90, 92 (1985) (citation omitted).

¶ 15 Plaintiff argues the Production Order affects her substantial rights and this Court has jurisdiction to hear this appeal. "[W]here a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001) (citation and internal quotation marks omitted). When a party "asserts the common law attorney-client privilege," on appeal, this claim "affects a substantial right which would be lost if not reviewed before the entry of final judgment." *Id.*

¶ 16 Plaintiff argues her right to maintain privileged and confidential communications with her attorney will be infringed if she is forced to

produce the documents. We agree this is a substantial right and allow this interlocutory appeal.

IV. Issue

¶ 17 **[2]** The issue is whether Rule 45 of the Rules of Civil Procedure permits an adverse party to request production of documents a party received by subpoena even if those documents would have been protected by attorney-client privilege, work product, or are non-responsive to discovery requests when the requesting party appropriately objected. N.C. Gen. Stat. § 1A-1, Rule 45 and Rule 26 (2019).

V. Standard of Review

¶ 18 "Discovery orders compelling production and applying the attorney-client privilege and work-product immunity are subject to an abuse of discretion analysis." *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 435, 832 S.E.2d 223, 233 (2019) (citation omitted).

¶ 19 "[T]he determination of privilege is a question of law. Questions of law are reviewed *de novo*." *State v. Matsoake*, 243 N.C. App. 651, 656, 777 S.E.2d 810, 813 (2015) (alterations, citations and internal quotation marks omitted).

VI. Argument

¶ 20 Defendants argue because Plaintiff subpoenaed documents from her ex-husband, Rule 45 of the Rules of Civil Procedure automatically entitles them to review all documents produced upon their request. Rule 45 provides in relevant part:

> A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of *material produced in compliance with the subpoena*, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, *shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.*

N.C. Gen. Stat. § 1A-1, Rule 45(d1) (2019) (emphasis supplied).

¶ 21 "In resolving issues of statutory construction, we look first to the language of the statute itself." *Fid. Bank v. N. C. Dep't of Revenue*, 370 N.C. 10, 18, 803 S.E.2d 142, 148 (2017) (citation omitted). "When the

language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc.* Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006); *see Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish."). Our Supreme Court has repeatedly held: "Statutes dealing with the same subject matter must be construed in *pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjustment of Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993).

¶ 22 Rule 26 of the North Carolina Rules of Civil Procedure has been in effect for more than 50 years, and Rule 45 was modified within the last decade. "A presumption exists that the legislature was fully cognizant of prior and existing law within the subject matter of its enactment." *Biddix v. Henredon Furniture Indus., Inc.*, 76 N.C. App. 30, 34, 331 S.E.2d 717, 720 (1985) (citation omitted).

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(5)(a) (2019).

¶ 23 It follows if the General Assembly intended to protect the subpoenaed party from being forced to produce privileged or non-responsive documents, those same protections would extend to a party who has received privileged or non-responsive documents as a result of the subpoena, at no fault of their own.

> Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, *largely related to discovery of electronically stored information*. In addition, in a number of places, words identifying parts of the rule have been changed *to make this rule consistent with the language of*

> *other Rules of Civil Procedure, without an intention to change substance.*

N.C. Gen. Stat. § 1A-1, Rule 45, cmt. (2011 Amendment) (emphasis supplied).

¶ 24 This Court has dealt with the interplay of Rule 45 and Rule 26 many times before. "[T]he trial court, in granting a motion to compel under Rule 45(c)(6), is required to protect the party producing documents from 'significant expense.' " *Kelley v. Agnoli*, 205 N.C. App. 84, 96, 695 S.E.2d 137, 145 (2010). *Kelley* requires the trial court to bear the burden of ensuring Rule 26(b)(1a) is complied with, even if Rule 45 does not explicitly require it. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1a) ("the discovery methods set forth in section (a) *shall be limited by the court if it determines that*: (i) the discovery sought is unreasonably cumulative or duplicative . . . less burdensome, or less *expensive* . . . (iii) the discovery is unduly burdensome or expensive[.]") (emphasis supplied). The trial court's authority to read Rule 45 and Rule 26 together is further highlighted in *Hall v. Cumberland County Hospital System, Inc.*, 121 N.C. App. 425, 430, 466 S.E.2d 317, 320 (1996) ("The trial court shall quash, upon motion of the objecting party, any subpoena for the production of documents that seeks discovery of materials protected by Rule 26(b)"). With regard to electronically stored information, our courts have consistently held Rule 45 is expressly subject "the limitations of Rule 26(b)(1a)." N.C. Gen. Stat. § 1A-1, Rule 45(d)(4).

¶ 25 Defendants argue Plaintiff failed to object prior to required compliance and Plaintiff can no longer challenge the subpoena. Defendant mis-states the standard set forth in *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 649, 531 S.E.2d 883, 888 (2000), which held a subpoena *duces tecum* "must be raised before the time of compliance."

¶ 26 Here, Plaintiff sought to comply with the original and intended discovery requests and collected those documents from her ex-husband via subpoena after her documents and papers were not voluntarily produced. Mike Wing produced substantially more material and documents than the responsive documents had requested. Plaintiff's counsel informed opposing counsel of the complete response to the subpoena within two days of completion as is required by Rule 45. Plaintiff expressly objected to Defendants' request for both non-reasonable, irrelevant, and privileged documents and asserted privilege.

¶ 27 Plaintiff complied with the statutes by producing all non-privileged personal papers responsive to Defendants' prior discovery requests. Plaintiff provided a log of the personal papers she had withheld from

production on the basis of privilege, and asserted the personal papers received from Mike Wing pursuant to the subpoena were neither relevant to the case nor responsive to any discovery request. Plaintiff undertook and complied with the statutorily required steps to protect her privileged and non-responsive and irrelevant documents from disclosure.

VII. N.C. Gen. Stat. § 1A-1, Rule 45(d1)

¶ 28 Both parties argue the General Assembly intended their desired result. Defendants argue Rule 45 allows them unbridled access to subpoenaed documents upon their request. Plaintiff contends the addition of subsection (d1) to Rule 45 "expressly reaffirmed the federal process." Federal Rule 45 has no counterpart to subsection (d1) specifying the party issuing the subpoena must provide notice of receipt of subpoenaed materials and a reasonable opportunity to copy and inspect such materials. *See* Fed. R. Civ. P. 45.

¶ 29 A review of the Rule 45 history provides further guidance. Under the Federal Rules, upon which the North Carolina Rules were modeled, there is no provision for automatic discovery of all subpoenaed materials. A party is required to produce documents it has received pursuant to subpoena only if it receives a discovery demand for those documents from the other party. *See* Fed. R. Civ. P. 45 Advisory Comm. Note (1991) (recognizing notice of a subpoena is required in order to "afford other parties an opportunity to object to the production or inspection, or to *serve a demand* for additional documents or things" and to allow the other parties to "*pursue* access to any information that may or should be produced [pursuant to the subpoena]") (emphasis supplied).

¶ 30 Before 2003, Rule 45 "did not permit the issuance of a subpoena separately from a trial, hearing, or deposition." N.C. State Bar Ethics Op. 4 (2008). Prior to 2003, all parties would be present when the third party produced the requested materials at the trial, hearing, or deposition and would have equal access to review and obtain copies of those materials. This equal access was jeopardized when the 2003 amendments permitted a stand-alone subpoena *duces tecum* for the first time. *See* N.C. Gen. Stat. § 1A-1, Rule 45(a)(2). In 2007, subsection (d1) was added to Rule 45 as a remedy. It required the party issuing the subpoena to provide notice of receipt of subpoenaed materials and allow all other parties the opportunity to copy and inspect those materials.

¶ 31 In 2007, the General Assembly adopted the current text of Rule 45(d1), which requires: (1) the party serving the subpoena to provide notice of receipt; and, (2) any other parties desiring the documents to make a request to the receiving party. N.C. Gen. Stat. § 1A-1, Rule 45(d1).

In codifying the notice-and-request procedure, the General Assembly expressly reaffirmed the federal process and left the questions about the propriety of interparty requests for documents to be governed by the existing discovery rules.

¶ 32 It is clear that the purpose of amending Rule 45(d1) in 2007 was to ensure the opposing party is given notice and the opportunity to request to see documents that comply with the subpoena and are responsive to discovery requests. *See N.C. State Bar v. Barrett*, 219 N.C. App. 481, 487, 724 S.E.2d 126, 130 (2012) (holding "a party [does not] waive[] her due process rights by failing to request documents which the opposing party has implied do not exist and will not be part of the case against her").

¶ 33 Defendants' interpretation would make a Rule 45(d1) demand inconsistent with the otherwise harmonious rules governing discovery. If the trial court's hyper-technical reading of Rule 45(d1) is upheld, a Rule 45(d1) request would become the only discovery device not subject to assertions of privilege and limitations. A party would never be able to use a subpoena to recover her own confidential and privileged documents, and a subpoena recipient would be free to harass the requesting party by producing sensitive, embarrassing, irrelevant and privileged documents that are not responsive to the discovery request.

¶ 34 Our General Assembly could not have reasonably intended that result by amending Rule 45, while also maintaining the longer standing limitations contained in Rule 26 and other statutory and common law privileges. *See* N.C. Gen. Stat. § 1A-1, Rule 45, cmt. (2011 Amendment). Rule 45 is meant to be limited by adequate compliance with Rule 26. Plaintiff fully complied with Rule 26(5)(a) and thus garners the protections inherent in Rule 26.

VIII. Content of Subpoena

¶ 35 Defendants argue they would have been entitled to all of the subpoenaed information upon deposition of Mr. Wing.

> Parties may obtain discovery regarding any matter, *not privileged*, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2019) (emphasis supplied). This assertion is not supported by our statutes. *See* N.C. Gen. Stat. § 1A-1, Rule 30 (giving the court authority to limit a deposition to the confines

of Rule 26(c) from "unreasonable annoyance, embarrassment, oppression, or undue burden or expense" based upon "certain matters not to be inquired into, or that the scope of the discovery be limited to certain matter"). Communications between Plaintiff and her attorney are privileged. The recipes, schedules, documents pertaining to home renovations are not relevant to the subject matter involved in the pending action, involving Decedent's capacity and the rightful beneficiaries of his estate. *See id.*

IX. Conclusion

¶ 36 This interlocutory appeal affects Plaintiff's substantial right. Plaintiff's substantial right to preserve privileged communication with her counsel and litigation work product is infringed upon by the trial court's production order. Defendants' contention that Rule 45 circumvents the long-established principles of attorney-client privilege and Rule 26 is without merit.

¶ 37 The conflict between Rule 45 and Rule 26 is a question of law reviewed *de novo*. Upon *de novo* review, we hold our General Assembly intended Rule 26 to limit Defendant's access to Plaintiff's subpoenaed privileged documents. We vacate the production order and remand for an order, to require Plaintiff to provide only non-privileged and relevant documents for Defendant's review, which are responsive to Defendant's discovery request. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 DECEMBER 2021)

ADDISON v. MANNING 2021-NCCOA-663 No. 21-42	Wake (16CVD11994) (17CVD6558)	Dismissed
ASLUND v. OSLUND 2021-NCCOA-664 No. 21-300	Mecklenburg (20CVD12409)	Vacated
ASSURE RE INTERMEDIARIES, INC. v. PYRTLE 2021-NCCOA-665 No. 21-132	Alamance (19CVS2170)	Affirmed
CAIN v. CAIN 2021-NCCOA-666 No. 20-387	Bladen (18CVD241)	Affirmed
EUBANKS v. BUCK 2021-NCCOA-667 No. 20-668	Pitt (14CVD2771)	Affirmed
FLOWERS PLANTATION FOUND., INC. v. CARE OF CLAYTON, LLC 2021-NCCOA-668 No. 21-147	Johnston (20CVD2479)	Affirmed
GREENLEAF CONDO. HOMEOWNERS ASS'N v. FOREST LEAF, LLC 2021-NCCOA-669 No. 20-413	Mecklenburg (18CVS20330)	Dismissed.
HARRINGTON v. HARRINGTON 2021-NCCOA-670 No. 21-142	Mecklenburg (10CVD4758)	Vacated and Remanded
IN RE K.R. 2021-NCCOA-671 No. 21-338	Cumberland (20JA205)	Affirmed
IN RE S.S. 2021-NCCOA-672 No. 21-125	Durham (20SPC1599)	Affirmed
IN RE T.S. 2021-NCCOA-673 No. 20-821	Mecklenburg (17SPC4673)	Affirmed

IN RE V.W.-J. 2021-NCCOA-674 No. 21-363	Wake (19JB592)	Vacated and Remanded
KANDARAS v. JONES 2021-NCCOA-675 No. 20-788	Alleghany (19CVD108)	REVERSED IN PART AND AFFIRMED IN PART.
MONTI v. ADELSTEIN 2021-NCCOA-676 No. 21-50	Wake (19CVS2878)	Appeal Dismissed.
NEAL v. PRESTWICK HOMEOWNERS ASS'N OF UNION CNTY., INC. 2021-NCCOA-677 No. 20-920	Union (17CVS3185)	Dismissed
NESBETH v. FLYNN 2021-NCCOA-678 No. 20-404	Wake (17CVD9670)	Affirmed
PRESTON v. PRESTON 2021-NCCOA-679 No. 20-901	Mecklenburg (18CVD19752)	Dismissed
SALVADORE v. SALVADORE 2021-NCCOA-680 No. 20-741	Mecklenburg (18CVD8603)	Affirmed
STATE v. BROWN 2021-NCCOA-681 No. 21-47	Forsyth (17CRS52401) (17CRS52702) (19CRS54463)	REVERSED AND REMANDED TO THE TRIAL COURT FOR A NEW BATSON HEARING.
STATE v. BURCH 2021-NCCOA-682 No. 20-753	Mecklenburg (17CRS244216-17) (17CRS244225-33) (17CRS244235)	No Error
STATE v. HENRY 2021-NCCOA-683 No. 20-567	Mecklenburg (17CRS217292) (17CRS217294-95)	No Error
STATE v. JOYNER 2021-NCCOA-684 No. 21-5	Nash (18CRS53101) (18CRS53102)	No Error
STATE v. PARKER 2021-NCCOA-685 No. 21-191	Cherokee (17CRS536)	No Error

STATE v. WHISENANT 2021-NCCOA-686 No. 21-114	Caldwell (17CRS53916) (18CRS1529-30)	NO ERROR AT TRIAL, JUDGMENT VACATED AND REMANDED FOR HEARING AND RESENTENCING.
STEVENSON v. ANC HIGHLANDS CASHIERS HOSP., INC. 2021-NCCOA-687 No. 20-905	Macon (20CVS2)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

or safety before removing reunification with respondent-father as a concurrent plan, where the primary permanent plan of guardianship had already been achieved. Nevertheless, the court's permanency planning order awarding guardianship to the child's foster parents was vacated and remanded because the court failed to make the required findings of fact regarding the statutory factors under section 7B-906.2(d) to support ceasing reunification efforts. **In re A.C., 301.**

Permanency planning—cessation of reunification efforts—insufficient findings—In a neglect and dependency case, the trial court's order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the court failed to make adequate findings to support ceasing reunification efforts. The court made no finding that respondents had failed to make adequate progress in their family case plans, and all evidence showed the contrary, especially where respondents had fully participated in services to address past domestic violence, they had bonded well with the child during visits, and the department of social services (DSS) had dismissed a juvenile neglect petition as to respondents' infant son after monitoring him and allowing him to remain in respondents' care since birth. Further, the court made no finding that respondents refused to cooperate with DSS or the guardian ad litem (GAL) program, and its finding that respondents had not made themselves readily available to DSS or the GAL was not supported by the evidence. **In re A.W., 162.**

Permanency planning—guardianship to nonparents—constitutionally protected parental status—evidentiary standard—A permanency planning order awarding guardianship to the child's foster parents in a neglect and dependency case was vacated and remanded because the trial court failed to apply the proper evidentiary standard when concluding that respondent-father acted inconsistently with his constitutionally protected status as a parent, stating that the supporting findings of fact were based on "sufficient and competent evidence" rather than "clear and convincing evidence." **In re A.C., 301.**

Permanency planning—guardianship to nonparents—fitness of parents—constitutionally protected parental status—insufficient findings—In a neglect and dependency case, a permanency planning order awarding guardianship of respondents' daughter to her foster parents was vacated and remanded where the trial court made insufficient findings of fact supporting its conclusion that respondents were unfit or had acted inconsistently with their constitutionally protected status as parents. The court's findings focused on respondents' history of domestic violence, but there was no clear, cogent, and convincing evidence that respondents were presently unfit, especially where they had fully participated in services to address domestic violence, there had been no new incidents of domestic violence in the home since the juvenile petition's filing, and the child had a positive bond with respondents. Further, where a juvenile neglect petition regarding respondents' younger child was dismissed before the court entered the permanency planning order, the order failed to address why respondents were unfit to parent one child but not the other. **In re A.W., 162.**

Steps toward reunification—proof of income—mental health treatment—reasonably related to risk factors in home—In a dispositional hearing after three children were adjudicated neglected and dependent and one of the three was also adjudicated abused, the trial court did not err by requiring a mother to show proof of a sufficient source of income and to "refrain from allowing mental health to impact parenting" (by, in part, participating in mental health treatment) as part of the

EMOTIONAL DISTRESS—Continued

do everything he could to make her life miserable, humiliating plaintiff by posting her personal information and photographs of her online, and creating a fake social media profile announcing plaintiff's supposed availability for "no strings attached" sexual intercourse. **Clark v. Clark, 384.**

EVIDENCE

Car accident—judicial notice of weather report—In a prosecution for assault with a deadly weapon inflicting serious injury, felony serious injury by a motor vehicle, and driving while impaired, the trial court did not abuse its discretion by declining to take judicial notice of a weather report of the conditions that existed on the day that defendant caused a collision where there was sufficient evidence from multiple witnesses about the weather conditions from which the jury could make its own conclusion. Further, where the issue was how much rain fell at the time of the crash, the report did not meet the standard for judicial notice under Evidence Rule 201(b) because the precise amount of rain is not a generally known fact, and the report was not a document of indisputable accuracy because its data stopped several hours prior to when the crash occurred. **State v. Bucklew, 494.**

Present recollection refreshed testimony—admissibility—not recitation of letter—In a prosecution arising from a shooting into an occupied vehicle, the trial court did not abuse its discretion by allowing a State witness, who was a jailhouse informant, to testify after reviewing a letter he had written to the district attorney with information inculpating defendant. It was not clear that the witness was merely reciting the letter or using it as a testimonial crutch; rather, the witness testified to the subject matter of the letter before he reviewed it to refresh his recollection, and he testified to additional details that were not contained in the letter. **State v. Jones, 241.**

Prior bad acts—prior rape—more probative than prejudicial—In a trial for second-degree forcible rape based on allegations that the victim was physically helpless when defendant engaged in intercourse with her, the trial court did not abuse its discretion by finding more probative than prejudicial a witness's testimony that defendant previously raped her, where the court heard the proposed testimony on voir dire, conducted a balancing test pursuant to Evidence Rule 403, and included the testimony only for the purposes of showing absence of mistake, intent to commit the crime, and lack of consent. **State v. Rodriguez, 272.**

Prior bad acts—prior rape—relevance—force and consent—In a trial for second-degree forcible rape based on allegations that the victim was physically helpless when defendant engaged in intercourse with her, the trial court did not err by admitting testimony—for the limited purposes of showing absence of mistake, intent to commit the crime, and lack of consent—from a witness who stated that defendant previously raped her. The evidence was still relevant to issues of force and consent, even though the force involved in the alleged rape related by the witness was different than the implied force at issue (given the State's theory that the victim was unable to resist or give consent), and to prove defendant did not mistake the victim's actions and inactions as consent. **State v. Rodriguez, 272.**

Prior consistent statement—admissibility—letter written by witness—In a prosecution arising from a shooting into an occupied vehicle, the trial court did not err by admitting into evidence a letter that a jailhouse informant witness used during his testimony to refresh his memory, where the letter was admissible as a prior consistent statement to corroborate the informant's testimony. **State v. Jones, 241.**

PRIVACY—Continued

disclosure of private images (pursuant to N.C.G.S. § 14-190.5A(b)) brought by plaintiff against her husband, defendant was not entitled to relief on his post-trial motion for judgment notwithstanding the verdict on the unlawful disclosure claim where plaintiff presented more than a scintilla of evidence that the images of plaintiff that defendant had posted online—including a topless photo—showed "intimate parts" as defined in section 14-190.5A(a)(3). **Clark v. Clark, 384.**

PUBLIC OFFICERS AND EMPLOYEES

Career employees—dismissal—unacceptable personal conduct—just cause—falsification of records—The administrative law judge's decision upholding a career state employee's (petitioner) dismissal from her job was affirmed where petitioner falsified records in connection with processing a pest control license renewal application and refused to cooperate in the subsequent investigation. Her actions constituted unacceptable personal conduct and conduct unbecoming to a state employee that is detrimental to state service, and her employer had just cause to dismiss her because her violation was severe, it resulted in a company being double billed and reputational harm to petitioner's employer, and she had a history of unacceptable work and conduct. **Locklear v. N.C. Dep't of Agric. & Consumer Servs., 59.**

Career state employee—just cause for dismissal—driving school bus in excess of speed limit—Just cause existed to dismiss petitioner from employment as a school bus driver based upon substantial evidence that she drove in excess of 55 miles per hour when transporting a student in a vehicle that met the definition of "school activity bus" in N.C.G.S. § 20-4.01(27)(m). Petitioner's average rate of speed of over 70 miles per hour along a 90-mile route in violation of state law and state agency regulations constituted grossly inefficient job performance and unacceptable personal conduct. **Sharpe-Johnson v. N.C. Dep't of Pub. Instruction E. N.C. Sch. for the Deaf, 74.**

REAL PROPERTY

Condominium development—walls, roofs, and gutters—limited common elements—responsibility to repair, maintain, and insure—In a legal dispute among owners of single-family units within a residential condominium development, it was held that the outer walls, roofs, and gutters of each unit met the definition of "limited common elements" under the North Carolina Condominium Act (N.C.G.S. § 47C-2-102(4)). Therefore, under the terms of the condominium development's declaration, each unit owner was responsible for repairing and maintaining these elements on their respective units while the unit owners' association was required to insure these elements against fire, lightning, and similar perils. **Alexander v. Becker, 131.**

Sale of home on behalf of incompetent woman—validity of multiple powers of attorney—genuine issues of material fact—In an action brought on behalf of an elderly woman to contest the sale of her home by her daughter, the trial court erred by granting summary judgment in favor of the home's buyer and in cancelling plaintiffs' notice of lis pendens, where genuine issues of material fact existed regarding the validity and scope of powers of attorney (POAs) purportedly held by the daughter and by one of the woman's sons, including whether either POA was durable, and whether any of the parties had authority to act on behalf of the woman after she was declared partially incompetent in a special proceeding before a clerk of court. **Leary v. Anderson, 46.**

SEARCH AND SEIZURE

SEARCH AND SEIZURE—Continued

SENTENCING

THREATS